

No. 13-461

IN THE
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Petitioners,

v.

AEREO, INC., FKA BAMBOOM LABS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF *AMICI CURIAE*
THE CONSUMER FEDERATION OF
AMERICA AND THE CONSUMERS UNION
IN SUPPORT OF RESPONDENT**

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Cited Authorities

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JOYCE ET AL., <i>Copyright Law</i> (9th ed. 2013)	25, 27
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Nielsen Reports, <i>A Look Across Media: The Cross-Platform Report Q3 2013</i> , NIELSEN COMPANY (Dec. 12, 2013)	23
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RICHARD A. ALTICK, <i>Writers, Readers & Occasions</i> (1989)	30, 31

Cited Authorities

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Roger Cheng, <i>Managing Technology --- ‘Cloud Computing’: What Exactly Is It, Anyway? --- Everybody’s talking about it; Here’s what you need to know</i> , WALL ST. J., Feb. 8, 2010	10
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Cited Authorities

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STATEMENT OF INTEREST¹

The Consumer Federation of America (CFA) is a non-profit organization established in 1968 to support consumers' interests through advocacy, research, and education. Currently the largest consumer advocacy organization in the United States, with nearly 300 non-profit member organizations and 50 million consumer members, CFA is a champion of consumer sovereignty, which includes the freedom to choose how to use lawfully acquired content. CFA is also the leading analyst of, and advocate for, digital disintermediation, a powerful process that leverages digital technologies to reduce costs for both producers and consumers.

CFA believes that these two phenomena are connected: digital disintermediation promotes flexibility and choice for consumers. Therefore, the flexibilities in copyright law that promote innovation and consumer sovereignty in the use of information are crucial protections. These flexibilities help free markets in information function properly by removing unnecessary constraints on consumer choice.

Consumers Union (CU) is the policy and advocacy division of Consumer Reports. CU is an expert, independent, non-profit organization working for a fair, just, and safe marketplace for all consumers while working

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. No person, or entity, made a monetary contribution to the preparation and submission of the brief other than the *amici* or their attorneys. Both parties have given blanket consent to the filing of *amicus* briefs.

to empower consumers to protect themselves. Founded in 1936, as advertising was beginning to flood the mass media, CU has grown to more than one million online activists working to protect consumers at both the State and Federal levels. Like CFA, CU seeks to empower consumers through promoting increased competition, and through consumer education and pro-consumer action on communications and media issues involving telecommunications, cable, Internet, and wireless services and equipment, and other markets. Consequently, the shared missions of CFA and CU to protect consumers' interests include advocacy to protect the consumer choice-enabling characteristics of copyright law.

For example, CFA has urged: (1) greater transparency in the negotiation of the Anti-Counterfeiting Trade Agreement, to protect fair use and avoid criminalization of non-commercial copyright infringement; (2) published articles to explain the importance of digital disintermediation for consumer sovereignty in the market for music; and (3) filed an *amicus* brief in support of the legality of the time- and place-shifting technologies of the Dish "Hopper" digital video recorder. In 2005, the two organizations joined in filing an *amicus* brief in this Court in defense of Grokster's peer-to-peer file sharing software.

CFA and CU have participated as *amici* in several of the Circuit Court proceedings regarding Aereo. CFA has also participated in the related cases involving the FilmOn X technology. Consumers have a deep interest in the courts recognizing the legitimacy of these consumer choice-enabling technologies and encouraging their pro-consumer effects on the dysfunctional market for television information and entertainment.

SUMMARY OF ARGUMENT

The public policy of the United States copyright regime strongly favors protecting consumer sovereignty and consumer choice. Aereo's technology empowers consumers with an individual remotely located antenna and digital video recorder (DVR) accessible over the Internet. It is a cloud-computing tool that allows consumers to access and record free over-the-air (OTA) television broadcasts and enables time- and place-shifting of broadcast programming. In offering this technology, Aereo not only provides greater consumer choice in where and how to watch free OTA broadcast programs, but also uses cloud-computing economies of scale to make such flexibility more affordable. These savings allow consumers to participate more fully in the broader economy and help to bridge the digital divide. Without Aereo and similar technologies, the current restrictions on consumer choice imposed by incumbent content providers will continue to unreasonably restrict consumers' control of their locally available arrays of free OTA broadcasts.

In supporting the legality of Aereo's and other similar time- and place- shifting technologies, the Second Circuit's holding below in *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2012) is consistent with the holdings of this Court with respect to earlier copying technology. For the past thirty years, this Court has consistently urged caution in restricting technologies with significant potential for lawful consumer use. Finding Aereo to be a retransmitter, rather than an equipment provider enabling consumers to enjoy lawful private performances, would restrict consumer sovereignty and permit incumbent providers to dictate terms on which significant technological

innovations will be made available to consumers of free OTA broadcasts.

Copyright law emphatically protects consumers' right to choose how and where to make use of lawfully acquired content. From its origins, copyright legislation always has respected consumer sovereignty, as have the courts. The idea-expression distinction, the doctrines of fair use and first sale, and the limitation of significant exclusive rights to "public" activities all serve as vital constraints on the power of copyright owners to control the market for information.

Choice-empowering forms of consumer information technology change over time. Copyright's response should not. The purpose of each new technology remains the same: to advance citizens' participation in culture and society. Scholars have noted the significance of consumers' increased participation, observing that "[p]eople are no longer passive participants in the economy, as they were in the media available in the twentieth century. When offered the opportunity to participate and communicate in the digital information age, people quickly accept."²

2. Mark Cooper, *From Wifi To Wikis And Open Source*, 5 J. TELECOMM. & HIGH TECH. L. 125, 127 (2006); see also Brett M. Frischmann, *Cultural Environment and the Wealth of Networks*, 75 U. CHI. L. REV. 1083, 1088 (2007) (noting the "shift from an industrial information economy to a networked information economy") (citing Yochai Benkler, *Wealth of Networks*, at 3).

ARGUMENT

I. Aereo Promotes Consumer Sovereignty by Providing a Powerful New Option to Consumers Starved for Flexible Use of Broadcast Television.

Consumers are eager for affordable tools that give them control over the way they make personal use of locally broadcast television, and they are embracing Aereo's cloud-based equipment rental service.³ Current means of broadcast access have stymied consumer choice with anemic horizontal competition and increased vertical integration, including economic disincentives to competition between local broadcasters and subscription television services like cable and satellite. At the same time, the initial costs of purchasing equipment that affords the same flexibility that Aereo's technology provides are prohibitively high for many households. These consumer choice-restricting conditions have exacerbated inequality of access to information among consumers of different income levels, sometimes referred to as the "digital divide." But, technologies like Aereo's have already begun to bridge that gap.

3. See, e.g., Shalini Ramachandran & Amol Sharma, *Electricity Use Impedes Aereo's March: Streaming-Video Service Has Other Challenges Besides Broadcasters' Lawsuits*, WALL ST. J., Oct. 29, 2013, at B1 (reporting that Aereo's facility in New York City was handling between 90,000 and 135,000 customers at the time).

A. Cloud-Based Business Models Like Aereo Provide Consumers Greater Access to Beneficial Technologies and Enable Consumer Choice in the Use of Information They Have Legitimately Acquired.

Aereo was designed to meet consumer demand for convenient and reasonably priced tools to manage their private use of free OTA broadcast content. The Aereo rental model is a practical alternative to purchasing and operating an individual digital antenna and home DVR. Subscription retransmission services such as cable and satellite TV offer such capabilities, but only if consumers are willing to pay high prices for bundled services they may not require. When offered the opportunity to pay only \$8 per month for remote access to an individualized OTA antenna, remote personal storage, and DVR functionality,⁴ consumers have enthusiastically embraced Aereo.⁵

Aereo's success is not unprecedented. It is a classic example of the way consumers choose new technologies

4. *See How much does Aereo cost?*, AEREO | SUPPORT CENTER, <http://support.aereo.com/customer/portal/articles/383157-how-much-does-aereo-cost-> (last visited Mar. 26, 2014) (offering new subscribers an eight dollar per month base plan or a twelve dollar per month upgraded plan).

5. *See, e.g.*, Alex Barinka, *Aereo Reopens New York Online-TV Service to New Subscribers*, BLOOMBERG (Feb. 6, 2014, 10:46 AM), <http://www.bloomberg.com/news/2014-02-06/aereo-reopens-new-york-online-tv-service-to-new-subscribers-1.html>; *see* Eriq Gardner, *Aereo CEO Chet Kanojia Says Company Selling Out Capacity in Some Cities*, HOLLYWOOD REPORTER (Dec. 10, 2013, 7:59 AM), <http://www.hollywoodreporter.com/news/aereo-ceo-chet-kanojia-says-664461> (quoting Aereo CEO Chet Kanojia as saying that Detroit and Atlanta have been two of its strongest markets).

that dramatically enhance their welfare by empowering them to make more and better use of existing information and entertainment options. Just as Google’s search engine makes the web more valuable by helping consumers find the information they need, and just as the video-cassette recorder (VCR) made free broadcasts more valuable by allowing consumers to watch their favorite programs after the initial broadcast, Aereo’s technology makes time- and place-shifting recordings of broadcast programs more convenient and less costly.

Each aspect of the Aereo model is carefully designed to ensure not only that its consumers get the benefit of technology as applied to broadcast content they are already free to enjoy, but also that Aereo does not cross the line between adding value as a technology provider and monetizing rightsholders’ content. Aereo provides each user with a “miniaturized, private, remote antenna and DVR” and enough individually portioned storage space to record twenty hours of television (or sixty hours for an additional \$4 per month).⁶ Users are given remote access to their equipment over the Internet through personal devices, including computers, tablets, smartphones, and other television-connected devices.⁷ Users can then

6. *See How does Aereo work?*, AEREO | SUPPORT CENTER, <http://support.aereo.com/customer/portal/articles/580124-how-does-aereo-work-> (last visited Mar. 26, 2014) (explaining the hardware assigned to Aereo subscribers).

7. *See Aereo supported devices and browsers*, AEREO | SUPPORT CENTER, <http://support.aereo.com/customer/portal/articles/359737-aereo-supported-devices-and-browsers-> (last visited Mar. 26, 2014) (listing the devices and browsers that Aereo currently supports).

either watch a program live, or set their private remote DVR to record a future program and watch it later from a supported device.⁸ As technology improves, Aereo upgrades its equipment to take advantage of such quality change.⁹

Aereo subscribers can watch or record only those TV programs that are provided free OTA from local broadcasters.¹⁰ Moreover, users must be physically present within their local broadcast area in order to use their Aereo account.¹¹ Unlike cable and satellite subscription services, Aereo does not import distant broadcast signals into the local area. An Aereo subscriber in New York will not be able to access her Aereo antenna or recorded content outside the New York broadcasting market.

Within local broadcast areas, Aereo has strategically chosen the locations for its data centers and antennas,

8. *See supra* note 5.

9. *See id.* (noting that Aereo is working to expand support for additional technologies); *see also supra* note 4 (outlining Aereo's two available subscription options).

10. *See Available Channels*, AEREO, <https://aereo.com/channels> (last visited Mar. 26, 2014) (explaining which channels are available in each geographical area); *see also What actually happens when I use Aereo?*, AEREO | SUPPORT CENTER, <http://support.aereo.com/customer/portal/articles/1401338-so-what-actually-happens-when-i-use-aereo-> (last visited Mar. 26, 2014) (explaining how Aereo's system operates when a consumer accesses it).

11. *See Where can I watch TV using Aereo?*, AEREO | SUPPORT CENTER, <http://support.aereo.com/customer/portal/articles/384545-where-can-i-watch-tv-using-aereo-> (last visited Mar. 26, 2014).

connecting consumers to a stronger broadcast signal than they might receive in their home without buying an expensive, high-powered antenna.¹² Again, the value added compared to the alternative of an in-home OTA reception system is in the improved technology, not in additional programming.

Aereo's technology exemplifies the cloud computing equipment rental model that has been broadly embraced by information consumers. Rather than selling users physical hardware, cloud computing offers the option to lease and remotely control technology in return for a subscription fee. Dropbox's data storage service, Google Compute Engine's high-performance virtual processor, and Prezi's web-based presentation software are all examples of this successful model.¹³ Such cloud-based technologies allow consumers to benefit from Moore's Law (the roughly geometric growth in computing power over time)¹⁴ without needing to continually purchase new

12. See Jeff John Roberts, *Inside Aereo: new photos of the tech that's changing how we watch TV*, GIGAOM (Feb. 6, 2013, 12:06 PM), <http://gigaom.com/2013/02/06/inside-aereo-new-photos-of-the-tech-thats-changing-how-we-watch-tv/> (describing how Aereo's data center in Brooklyn, New York was chosen for its direct line of sight to the broadcast tower of the Empire State Building).

13. See Dropbox, <https://www.dropbox.com/> (last visited Mar. 28, 2014), Compute Engine — Google Cloud Platform, <https://cloud.google.com/products/compute-engine/> (last visited Mar. 28, 2014), and Prezi, <https://prezi.com> (last visited Mar. 28, 2014).

14. See Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, 86 PROC. OF THE IEEE No. 1, 82, 83 (Jan. 1998) (describing the trend towards geometric growth in transistor capacity, later dubbed "Moore's Law").

hardware. Thus, consumers get more power for less money over time.¹⁵ Cloud technology companies also employ in-house technicians and cover the costs of equipment troubleshooting and repair for their consumers.¹⁶

B. Consumer Choice in How and Where to Access Free Over-the-Air Broadcast Television is Unreasonably Restricted by Lack of Horizontal Competition, Vertical Integration, and Prohibitive Equipment Costs.

This court has described the importance of competition: “[b]asic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market’s impersonal judgment, shall allocate the Nation’s resources and thus direct the course its economic development will take.” *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953). The current television market suffers from anemic competition that leads to significant social and economic waste. Aereo’s technology helps spur a needed correction.

15. See Jon Brodtkin, *Google: Cloud prices should track Moore’s Law, are falling too slowly*, ARSTECHNICA (Mar. 25, 2014, 1:00 PM), <http://arstechnica.com/information-technology/2014/03/google-cloud-prices-should-track-moores-law-are-falling-too-slowly/> (reporting that Google has reduced the price of services like its Google Drive data storage and Google Compute Engine platform by 37-80%).

16. See Roger Cheng, *Managing Technology --- ‘Cloud Computing’: What Exactly Is It, Anyway? --- Everybody’s talking about it; Here’s what you need to know*, WALL ST. J., Feb. 8, 2010, at R2 (explaining the cost-saving benefits of cloud services).

American consumers seeking flexible personal use of their locally available broadcast signals are not experiencing the price reductions, improvements in service, and benefits from technological innovations that normally result from a competitive market. In countries where government has taken more decisive action to encourage competition, consumers pay a fraction of what American consumers do.¹⁷ French consumers pay \$40 per month for a comprehensive package of cable and Internet services, and Koreans in Seoul pay \$15 per month.¹⁸ Here, the personal recording and portability that Aereo's technology offers for \$8 per month is available to Time Warner's New York customers only as part of a package for a minimum of \$79.99 per month.¹⁹

Competition can work in this country, too. In a related example, when Google introduced Google Fiber

17. See John Cassidy, *We Need Real Competition, Not a Cable-Internet Monopoly*, THE NEW YORKER (Feb. 13, 2014), <http://www.newyorker.com/online/blogs/comment/2014/02/comcast-time-warner-acquisition-competition-cable-internet-monopoly.html> (comparing “triple play” packages (phone, television, and Internet) in France, Korea, and the United States).

18. See Hibah Hussein, Danielle Kehl, Patrick Lucey & Nick Russo, *The Cost of Connectivity 2013*, NEW AMERICA FOUNDATION, 1, 4 (Oct. 2013), available at http://newamerica.net/sites/newamerica.net/files/policydocs/Cost_of_Connectivity_2013_Data_Release.pdf

19. See *Digital Cable TV Plans & Packages*, TIMEWARNERCABLE.COM, <http://www.timewarnercable.com/en/residential-home/tv/digital-cable-tv.html> (last visited Mar. 21, 2014). You have to select the most expensive premium package—the “Preferred TV w/Whole House DVR Service”—to get the same technological capacity that Aereo offers.

in the Kansas City market, for example, TWC almost immediately doubled its Internet speeds and offered up to 70% reductions in price.²⁰ These are the kinds of benefits consumers enjoy when they have meaningful choices. Yet, the television market is seeing a consolidation of providers, rather than beneficially disruptive competition.

The market for television programming is broken into local zones, each dominated by monopolies and duopolies, and it is trending toward greater consolidation. The FCC has reported that 83.9 million of the 132.5 million homes it reviewed had access to only a single cable service provider, and *possible* access to the two major satellite providers.²¹ The cable providers themselves acknowledge the lack of competition in major markets. In response to concerns over the anticompetitive effects of a proposed merger between the two largest cable service providers

20. See Lauren K. Ohnesorge, *Will Google Fiber mean lower-cost Time Warner Cable service?*, CHARLOTTE BUS. J., Feb. 21, 2014, <http://www.bizjournals.com/charlotte/blog/morning-edition/2014/02/will-google-fiber-mean-lower-cost-time-warner.html?page=all> (“The entire state of Kansas saw an 86 percent surge in average Internet speeds, the largest jump in the U.S. . . . And in Provo, Utah, the third city to claim a Google Fiber promise, Comcast Corp. followed with an upgrade as well.”). Unfortunately, Google Fiber’s impact on pricing is limited by only being currently available in three cities, only being available to certain residents of those three cities, and by prices that are still substantial for the average consumer.

21. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd. 10496, 10513 (July 22, 2013) [hereinafter *Annual Assessment of Competition*] (noting that 130.7 million homes had access to at one cable provider, but only 46.8 million had access to at least two cable providers).

in America, Comcast and TWC, the companies' main defense has been that Comcast and TWC have never been competitors.²² The status quo is one of little to no competition, and there is little hope for change.

One hopeful prospect came with the entry of telephone companies, such as Verizon FiOS and AT&T U-Verse, into the television market.²³ However, Verizon's 2011 decision to cease expanding FiOS availability, in return for cable providers' abandoning plans to offer wireless phone services, suggests that the pro-competitive effects of this entry will be limited.²⁴

22. See *Comcast and Time Warner Cable Transaction Fact Sheet*, COMCAST.COM (Feb. 13, 2014), <http://corporate.comcast.com/images/Transaction-Fact-Sheet-2-13-14.pdf> (“Comcast and Time Warner Cable *do not compete* to serve customers—either for video, high-speed Internet, or voice services. Instead they serve distinct geographic footprints.”); see also Peter Kafka, *Here's Why the Biggest Cable Company in the Country Thinks It Can Get Bigger*, <RE/CODE> (Feb. 12, 2014, 9:08 PM), <http://recode.net/2014/02/12/heres-why-the-biggest-cable-company-in-the-country-thinks-it-can-get-bigger/>.

23. See *Annual Assessment of Competition*, *supra* note 21, at 10531 (“Since 2005, the entry and extension of video delivery systems by AT&T, Verizon, and CenturyLink may have had the most significant impact on competition.”).

24. See Bob Fernandez, *Comcast, Verizon face critics at Senate hearing*, PHILADELPHIA INQUIRER, Mar. 22, 2012, http://articles.philly.com/2012-03-22/news/31225355_1_verizon-wireless-fios-tv-and-internet-wireless-spectrum (“Because of closer ties with Comcast and cable companies, Verizon won't expand FiOS TV and Internet services that compete directly with cable companies—leaving the landline, pay-TV, and Internet service market to cable.”); see also *Applications of Cellco P'ship*,

The lack of choice among cable and satellite television providers has forced many consumers to obtain service from providers that consistently score at the bottom of the American Consumer Satisfaction Index (ACSI).²⁵ The ACSI rates consumer satisfaction using a model that includes such factors as the reasonableness of pricing, the availability of features, and the quality of customer service.²⁶ Cable providers have earned a reputation for being unresponsive to customer demand and heedless of customer complaints.²⁷ In a healthy market, competitors would offer better prices or service in order to gain

27 FCC Red. 10698, 10750-51, 10769 (Aug. 21, 2012) (approving the “Joint Operating Entity . . . agreement . . . plan to develop ways to integrate wireline and wireless services” between Verizon Wireless, Comcast, TWC, and Bright House).

25. See *Quarterly Update on U.S. Overall Consumer Satisfaction*, 3, 17 (May 2013), available at <http://www.theacsi.org/news-and-resources/customer-satisfaction-reports/customer-satisfaction-reports-2013/acsi-telecommunications-and-information-report-2013/acsi-telecommunications-and-information-report-2013-download> [hereinafter ACSI 2013] (explaining that even with a 3% increase in consumer satisfaction, cable services still have an aggregate score of 68).

26. See *The Science of Consumer Satisfaction*, ACSI, <http://www.theacsi.org/about-acsi/the-science-of-customer-satisfaction> (last visited Mar. 27, 2014) (outlining the methodology used for the consumer satisfaction analysis).

27. See, e.g., Ben Popken, *Five Confessions of a Comcast Customer Service Rep*, THE CONSUMERIST (Sept. 27, 2007), <http://consumerist.com/2007/09/27/5-confessions-of-a-comcast-customer-service-rep/> (“For Comcast, your screams and your cries are not heard anymore. There are so many people screaming that Comcast has become tone deaf.”).

market share, but in this environment,²⁸ the likelihood that subscription retransmission services will provide consumers with new choice-enabling tools at reasonable prices is distant and uncertain.

Aereo does not compete with cable as a programming provider. Rather, consumers use Aereo technology to access content that already is freely available from local OTA broadcasts. Aereo does, however, compete with cable companies as a technology provider, renting consumers Aereo's advanced tools that simplify access to OTA signals with a remote antenna and DVR. Cable and satellite services assert that they offer consumers local broadcast programming at affordable rates, but these packages do not offer a single additional feature beyond the local programming itself.²⁹ Consumers with these "basic service" packages pay low rates mandated by statute,³⁰ but do not have the option to pay a reasonable

28. The FCC has noted that horizontal competition within the television market is nearly nonexistent. *See Annual Assessment of Competition, supra* note 21, at 10512 ("As a general rule, the geographic footprint of a cable [provider] rarely overlaps the geographic footprint of another cable [provider]. As such, cable [providers] rarely compete with one another for the same video subscriber. The situation is similar for telephone [providers].").

29. *See, e.g., Comcast Xfinity TV Service, COMCAST.COM*, <http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html> (last visited Mar. 26, 2014). Comcast's "Limited Basic" option is for basic broadcast content, but you cannot get HD content or DVR capability.

30. *See* 47 U.S.C. § 543(b)(1) The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable."); § 522(3) ("the term 'basic cable service' means any service tier which includes the retransmission of local television broadcast signals.").

additional charge to obtain only the time- and place-shifting technology that Aereo provides. Instead, consumers are forced into costly higher-tier “bundles” of programming and services in order to obtain subscription packages with the other major television providers that include some Aereo-like features cost between \$45.99 and \$85.89 per month.³¹ These prices stand in stark contrast to the \$8 per month that Aereo charges for its choice-enabling technology. Consumers should not be forced to pay inflated costs for channels they do not want in order to use innovative technologies.

Nor are the potential benefits of Aereo’s technology restricted to the individual consumers who choose to subscribe. The technology also has the potential to benefit broadcasters by making their programming more attractive by empowering consumers to manage it on their own terms. This change could dramatically increase the net viewership of OTA broadcasts. Broadcasters would be able to reach viewers they might not otherwise due to the Aereo technology’s time-shifting capabilities.

31. Comcast does not even offer the place-shifting capabilities of Aereo, yet it costs a minimum of \$85.89 per month. *See Comcast Xfinity TV Service*, COMCAST.COM, <http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html> (last visited Mar. 21, 2014) (requiring consumers to select the more expensive “Digital Starter” starter bundle before they can upgrade to HD DVR service). The largest satellite provider, DirectTV, offers one year of service for \$45.99 per month, with a \$99 installation fee. *See English TV Packages*, DIRECTTV.COM, http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?ACM=false&lpos=Header:3 (last visited Mar. 21, 2014) (selecting the least expensive package, then choosing the Genie HD DVR device for two TVs). All of the four major services include a price bump in the second year, generally of around \$25 per month. *See also supra* note 18.

Without competition from Aereo and others, broadcasters are unlikely to promote such technologies themselves. Ordinarily, broadcasters have an incentive to increase viewership,³² as advertising revenue has always been their primary income source.³³ Aereo increases the value and attractiveness of broadcasted shows by attracting viewers who might not have been able to view at the moment of the broadcast.³⁴ However, due to near-exponential increases in fees paid by retransmission services to networks and stations,³⁵ and cable operators'

32. See *Annual Assessment of Competition*, *supra* note 21, at 10571 (“A broadcast station’s advertising revenues depends on viewership of its television programs, regardless of whether consumers receive the station’s signal over the air or via a[] [cable provider]”).

33. See *id.* at 10583 (“Television broadcast stations earn about 88 percent of their revenue through the sale of advertising time during their programs, a slight decline since the last report.”).

34. See Shalini Ramachandran, *Dish to Curb Ad Skipping for ABC Programs*, WALL ST. J., Mar. 4, 2014, at B2 (reporting that ABC and Dish had reached a deal to disable automatic advertising skipping for three days after a program airs to better capture viewer data for advertisers). Aereo has no such software, so it adds viewers, which should be valuable to broadcasters and advertisers. At the same time, Aereo creates competitive pressures, which are so lacking in the video space.

35. See Katerina Eva Matsa, *Time Warner vs. CBS: The high stakes of their fight over fees*, PEW RESEARCH CENTER (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/time-warner-vs-cbs-the-high-stakes-of-their-fight-over-fees/> (reporting that retransmission fees for broadcasters increased from \$11 million in 2001 to \$1.44 billion by 2011).

acquisition of stakes in various broadcast networks,³⁶ broadcasters are no longer reliable competitors in the market for signal access technology. Instead, their incentive structure is aligned with that of cable operators. The Pew Research Center estimates that broadcasters' retransmission fees from cable and satellite will reach \$3.68 billion by 2016.³⁷ Because these fees tie broadcasters to cable's business model by offering a share of its monopoly profits, those broadcasters have little incentive to offer consumers innovative technologies that enable other kinds of access to free OTA broadcast content.

Meanwhile, some cable providers are acquiring broadcast networks and vertically integrating them into existing corporate structures.³⁸ Comcast, for example, recently purchased the remaining stake of NBC that it did not already own.³⁹ Broadcasters cannot be relied on to compete vigorously for viewers when they are literally subsidiaries of cable companies. Consumers who seek to watch television on free OTA broadcasts without the aid of a retransmission service have been left on their own.

36. See *Annual Assessment of Competition*, *supra* note 21, at 10540 (listing the various networks that cable providers Comcast, TWC, and Charter have ownership interests in).

37. See Matsa, *supra* note 35.

38. See *Annual Assessment of Competition*, *supra* note 21, at 10540.

39. See Alex Sherman, *Comcast Will Buy Rest of GE's NBC Stake for \$16.7 Billion*, BLOOMBERG (Feb. 12, 2013, 6:28 PM), <http://www.bloomberg.com/news/2013-02-12/comcast-will-buy-rest-of-ge-s-nbc-stake-for-16-7-billion.html>.

A consumer who wishes to forego a cable or satellite subscription still can access, and time- or place-shift, OTA broadcast content by buying the right equipment for home installation. Indeed, the FCC favors enabling consumer use of free OTA broadcast signals, and offers numerous guides explaining how consumers can most fully achieve that control.⁴⁰ To obtain flexible access to the local array of home broadcast signals, a consumer must purchase her own high-definition OTA antenna, a DVR-type system, an external hard drive, and a Slingbox or similar device to watch shows on multiple devices. This combination most closely replicates the features offered by Aereo's equipment rental service, but with an estimated up-front cost of over \$700.⁴¹ To some, the cost might not

40. See *Installing Consumer-Owned Antennas and Satellite Dishes*, FCC, 1-2 (last reviewed Mar. 11, 2014), available at <http://transition.fcc.gov/cgb/consumerfacts/consumerdish.pdf>. The FCC has also consistently pushed for rules ensuring that consumers can at least attempt to access broadcast television for free; see also *Over-the-Air Reception Devices Rule*, FCC (last reviewed Feb. 7, 2014), <http://www.fcc.gov/guides/over-air-reception-devices-rule> (outlining all of the promulgated rules ensuring that consumers can use over-the-air antennas).

41. See *Channel Master DVR+*, CHANNEL MASTER, http://www.channelmaster.com/Products_s/329.htm#Antennas (last visited Mar. 21, 2014) (displaying the newest DVR+ unit with a price of \$249.99 before tax); *SMARTenna*, CHANNEL MASTER, http://www.channelmasterstore.com/SMARTenna_HD_Antenna_p/cm-3000hd.htm (last visited Mar. 21, 2014) (displaying the indoor/outdoor high-definition antenna price at \$59.99 before tax); *Seagate 1TB External Hard Drive*, CHANNEL MASTER, http://www.channelmasterstore.com/1TB_DVR_Expansion_Drive_160_Hours_HD_Recording_p/stbx1000101.htm (last visited Mar. 21, 2014) (listing the external hard drive price at \$99.99 before tax); *Slingbox 500*, CHANNEL MASTER, http://www.channelmasterstore.com/Slingbox_500_p/slingbox-500.

be a significant burden to access free OTA programming. But to a great many, it is prohibitive.⁴²

Cost is not the only restriction on consumer ability to manage OTA broadcasts using purchased equipment. These in-home systems are relatively complex, and consumers may not possess the technical knowledge required to set them up or control them. Environmental barriers to signal reception may necessitate even more expensive antenna equipment to facilitate access in areas where signals are weak.⁴³ The equipment purchased for an in-home system will certainly experience wear and tear, if not obsolescence, requiring replacement.⁴⁴ Aereo's technology rental model relieves consumers of these burdens associated with accessing OTA broadcasts, and it allows those consumers to manage their use of local broadcast signals at a reasonable cost and risk.⁴⁵

The lack of competition in the market for free OTA broadcast reception technology, in terms of price and

htm (last visited Mar. 21, 2014) (listing the Slingbox 500 price at \$299.99 before tax). This results in a total price, before taxes, of \$709.96.

42. *See infra* Part I.C (noting that Aereo is extremely popular in large urban areas such as Detroit, where the population is not as able to pay an up-front cost of well over \$700).

43. *See Annual Assessment of Competition, supra* note 21, at 10510 n.67 (“We recognize that physical features (e.g., tall buildings, cliffs, trees) can prevent some homes from receiving signals.”).

44. *Cf. supra* Part I.

45. *See Roberts, supra* note 12.

available options, is harmful to consumers and wasteful for society. When American consumers overpay for access to OTA broadcast television, they have less to spend in other parts of the economy. Aereo fills a void and disrupts the dysfunctional market by providing a flexible, easy-to-use, and affordable means for consumers to watch free OTA broadcast programming via an antenna and DVR, on devices of their own choice, and according to their own schedules.

C. Cloud-Based Technologies Like Aereo Are Necessary to Bridge the Digital Divide in the Current Television Market That Perpetuates Inequality of Access to Information.

Consumer choice-enabling technologies can assure the ability to make flexible personal use of information resources without regard to wealth or privilege.⁴⁶ Technologies like Aereo’s allow more Americans to enjoy key elements of their culture and to be currently informed, without being restricted by a broadcast schedule. Broadcasters have been given rights to the public airwaves without charge, contingent upon serving the “public interest, convenience, and necessity.”⁴⁷ Consumers

46. See, e.g., Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 99 (2009) (“While many Americans now enjoy greater access to the national (and multi-national) store of copyrighted works, due to a persistent Digital Divide, other citizens remain isolated from such benefits, and in some cases, their access to copyrighted works has actually *diminished* as digital formats become the dominant medium for creative expression.”).

47. 47 U.S.C. § 309(k); see also *Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd. 21633, 21633 n.3 (1999)

who wish to make flexible personal use of broadcast programming are not attempting to get something for nothing; these individuals and households already pay for these broadcasts indirectly by patronizing the businesses advertised on-air.⁴⁸

Since this Court's landmark decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), consumers have come to expect protection of their fair use right to make use of broadcast television using available technological tools. Consumers can watch local news, football, and other programming even if they go to church on Sunday or work a late shift during the week. As VCRs, and then DVRs, became more affordable, they also became ubiquitous. Petitioners nevertheless assert, in effect, that only consumers who can afford to pay the demands of cable providers' aggressive pricing strategies should enjoy the full benefits of new technology, including the use of a remote antenna and DVR, in exercising their fair use right.⁴⁹

While these pricing strategies restrict choice for all, they are disproportionately harmful to lower-income consumers. There is a reason why Aereo is so popular in large urban areas with depressed local economies, like

("This public interest requirement goes back to the Radio Act of 1927, 44 Stat. 1162, and was carried over by Congress in the Communications Act of 1934, 48 Stat. 1064.").

48. See J.H. Snider, *The Myth of 'Free' TV 13* (New Am. Found. Pub. Assets Program, Spectrum Series Working Paper No. 5, 2002), available at http://www.newamerica.net/files/Pub_File_877_1.pdf.

49. See *supra* Part I.B.

Detroit.⁵⁰ Consumers need access to television in order to fully participate in the common culture.⁵¹ All consumers want and need to make flexible personal use of broadcast content, but there is a significant economic divide between those who can access the technologies that fully enable that use and those who cannot.⁵² In Detroit, where the median home price has fallen below \$10,000,⁵³ signing up for a subscription retransmission service that can cost over \$1000 per year⁵⁴ is a substantial, and frequently insurmountable, barrier.

50. See Gardner, *supra* note 5.

51. See Nielsen Reports, *A Look Across Media: The Cross-Platform Report Q3 2013*, NIELSEN COMPANY (Dec. 12, 2013), <http://www.nielsen.com/us/en/reports/2013/a-look-across-media-the-cross-platform-report-q3-2013.html> (estimating that the average American consumer watches over thirty-five hours of television per week). Television is far-and-away the most widely used and important device from which people receive information and news.

52. See *The Economic Divide: How Consumer Behavior Differs Across the Economic Spectrum*, NIELSEN COMPANY, 5 (Sept. 2012), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/Economic-Divide.pdf> (reporting that 23% of consumers making less than \$30,000 per year have a DVR, while 68% of those making more than \$100,000 per year have a DVR).

53. See Greta Guest, *What kind of house can you buy in Detroit? Median prices below \$10,000*, DETROIT FREE PRESS, June 24, 2012, <http://www.freep.com/article/20120624/BUSINESS04/206240311/What-kind-of-houses-you-can-buy-in-the-city-of-Detroit>.

54. See *supra* note 29 (using the price range of between \$45.99 and \$85.89 per month gives you a yearly cost of between \$551.88 and \$1030.68).

The result Petitioners seek would potentially inhibit consumers' access not only to Aereo-like technologies, but also to other powerful but inexpensive information tools that have the potential to help equalize opportunity among people of different economic status, especially those that represent applications of cloud computing.⁵⁵ Personal information technologies that narrow the digital divide should be enabled, rather than suppressed, unless they are in clear violation of copyright law and policy.

II. The Interest in Protecting Consumer Choice in Information Use Lies at the Heart of the United States Copyright Regime.

Since 1710, copyright law has protected consumer choice from undue encroachment by rightsholders. In the United States, copyright law has protected consumer choice in at least four distinct ways: the proposition that facts are information so important that they need to remain available to everyone, reinforced by this Court in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); the fair use doctrine's protection for technologies that enable private access to and use of copyrighted material, as exemplified in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); the first sale doctrine's recognition of the long-standing consumer freedom to share and sell lawfully acquired copies of copyrighted works to increase consumer choice, recently reaffirmed in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013); and the articulation of a private sphere

55. See *infra* Part I.A (discussing current cloud-computing services that would be in jeopardy if the Petitioner's position were validated).

of information usage in which consumer sovereignty prevails and to which rightsholders' authority should not extend as articulated in the 1976 Copyright Act. The present case tests the vitality of this last principle, which recognizes information consumers' interest in lawful private performances of television broadcasts.

A. Anglo-American Copyright Law is Rooted in the Protection of the Public Interest in Access to Information.

From its inception, copyright law has been designed to promote the public interest, which is coextensive with the interests of information consumers.⁵⁶ The earliest copyright act, the Statute of Anne of 1710, emphasized regulating the active misuse of information technologies (specifically, those associated with the disruptive innovation of movable type), rather than regulating access to such technologies themselves. Parliament's shift from attempting to control technology to the regulation of commercial behavior was one sign that the new copyright regime was not simply about the bookseller or the author, but designed to advance the interests of the public.⁵⁷ Others

56. See JOYCE ET AL., *Copyright Law* 1 (9th ed. 2013); RONAN DEAZLEY, *On the Origin of the Right to Copy* 226 (2004).

57. See RONAN DEAZLEY, *Rethinking Copyright* 13 (2006) ("The Act, however, was not the entirely the legislative panacea which the booksellers had sought... it introduced measures to ensure that no monopolistic abuses could be brought to bear upon [the book] trade."); see also JOHN BREWER, *The Pleasures of the Imagination; English Culture in the Eighteenth Century* 170 (1997) (explaining the importance of reading and access to books in 18th century British society, a trend Parliament recognized in the Statute of Anne).

included the decisions to impose a short, finite duration on authors' and booksellers' monopolies and to introduce a mechanism for the regulation of book prices, ensuring that the reading public could access the information they wanted and—in Parliament's view—needed.⁵⁸

In the United States, the public interest was explicitly recognized in the Intellectual Property Clause of the Constitution. The Framers empowered Congress to “promote the Progress of Science and useful Arts,” thus clearly establishing the public purpose of this grant of authority, and described the means for serving that purpose, namely “by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁹ The Framers intended “to have both the ends and the means parts in the Clause participate in delineating the power conferred and limiting it at the same time.”⁶⁰

This Court has held that the constitutional language serves as a limitation to the exclusive rights granted to the rights holder. In *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966), this Court explained that this interpretation was in the interest of the public to

58. DEAZLEY, *On the Origin of the Right to Copy*, *supra* note 56, at 226 (stating the legislative focus was the broader social goals such as the reading public, the continued production of useful literature, and the advancement and spread of education).

59. U.S. CONST. ART. 1, § 8, cl. 8.

60. See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress' Intellectual Property Power*, 94 GEO. L.J. 1771, 1845 (2006)

support “innovation, advancement, and things which add to the sum of useful knowledge.”⁶¹ In this understanding, consumers are the ultimate beneficiaries of the U.S. intellectual property system.

While content industries and producers have attempted (sometimes successfully) to obscure the public interest focus of copyright law, Congress did not forget the consumer when writing the 1976 Copyright Act.⁶² In resolving the tensions between the interests of rightsholders and users, Congress demonstrated continued support for the public purposes of copyright by declaring various principles that enable consumer choice, including the idea-expression and public-private distinctions and the doctrines of fair use and first sale.⁶³ These principles preserve and protect the information consumer’s ability to exercise significant control over the use of copyrighted content.⁶⁴ Recently, some content owners have attacked these pro-consumer doctrines, seeking to restrict not only consumer choice, but also the availability of technologies that enable consumer choice.⁶⁵ While courts have so far

61. *Id.* at 1782.

62. JOYCE, *supra* note 56, at 28 (noting the “growing economic importance and political influence of ‘copyright industries’”).

63. *See* 17 U.S.C. §§ 102(b), 106, 107, 109(a), 111 (2012).

64. *See infra* Part II.B.

65. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005) (challenging the “staple article of commerce” doctrine of *Sony*); *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1355 (2013) (challenging whether first sale applies to domestic resale of foreign published books); *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (challenging

rejected these challenges, this case represents another assault on traditional pro-consumer copyright policies, and offers an opportunity to affirm the constitutional and legislative recognition of consumer interests in this important domain.

B. The Legislature and the Judiciary Have Consistently Protected the Public Interest in Consumer Sovereignty When Writing and Interpreting Copyright Law.

This Court unanimously upheld information consumers' right to choose how to use facts by declaring them ineligible for copyright protection. In *Feist*, this Court held that the factual content of a telephone book was not entitled to copyright as both a statutory and a constitutional matter.⁶⁶ In concluding that the result was "neither unfair nor unfortunate," this Court stated it was "the means by which copyright advances the progress of science and art."⁶⁷ In other contexts as well, this Court has relied on the idea-expression distinction and the consumer interest in choosing how to use important information, to justify and explain limits on the rights of copyright holders.⁶⁸

fair use of portions of copyrighted books made electronically available to university students *Author's Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (challenging fair use in the context of large-scale digitization of books).

66. 499 U.S. 340, 342 (1991).

67. *Id.* at 350, 363.

68. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) ("17 U.S.C. § 102(b), which makes only expression, not ideas, eligible for

Consumers' freedom of choice in using lawfully acquired copyrighted material and copyrighted works also has been protected by the fair use doctrine, including, but not limited to, when and where such use occurs. Section 107 of the 1976 Copyright Act provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."⁶⁹ The House and Senate reports accompanying the 1976 Act expound upon the list of possible fair uses to include each use "resulting in some added benefit to the public beyond that produced by the first author's work."⁷⁰ In *Sony*, this Court held that Sony's sale of home video tape recorders did not constitute contributory infringement where the devices sold were "capable of substantial noninfringing uses,"⁷¹ notably including fair use by means of private, noncommercial time-shifting.⁷² This Court explained that prohibiting private, noncommercial time-shifting in the home "would merely inhibit access to ideas without any countervailing benefit."⁷³

copyright protection, strikes a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author's expression").

69. 17 U.S.C. § 107 (2006).

70. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984) (Blackmun, J. dissenting) (citing H.R. REP. 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5680. See S. REP. 62 (1975); S. REP. No. 93-983, p. 116 (1974); H.R. REP. No. 83, 90th Cong., 1st Sess., 32 (1967); H.R. REP. No. 2237, 89th Cong., 2d Sess., 61 (1966)).

71. *Id.* at 442.

72. *Id.* at 436-37, 442.

73. *Id.* at 450-51.

Like the fair use doctrine, the first sale doctrine protects the public interest in enabling consumer choice. Congress' codification of the first sale doctrine in § 109(a) affirms the time-honored principle that, when copies of protected works leave the public channels of commerce, the copyright owner's control over those copies ceases and the principle of consumer sovereignty governs with respect to their further distribution.⁷⁴ The first sale doctrine exhausts a copyright owner's ability to exercise downstream control and thus protects the consumer's private choices of how he or she uses lawfully acquired content.

First sale has enabled consumer choice and contributed to cultural progress throughout modern history. In the eighteenth and early nineteenth century, when books were too expensive for most individual consumers to purchase, this effective limit on copyright helped to fuel a dramatic growth of the reading public by enabling consumer choice. Even before the rise of private and public libraries, which themselves owe their existence to the first sale doctrine,⁷⁵ consumers would share copies of purchased texts within families and other social units. Experts note that a work's production figures or copies sold is not indicative of the audience a book reached.⁷⁶

74. See 17 U.S.C. § 109(a) (“the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.”).

75. See Brief for American Library Association et al. as Amici Curiae Supporting Petitioner at 5-8, *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351 (2013) (No. 11-697) (explaining the history of American libraries relying on first sale).

76. See RICHARD A. ALTICK, *Writers, Readers & Occasions*, 114, 116 (1989); see also WILLIAM ST. CLAIR, *The Reading Nation*

For example, “while a total of between 32,000 and 34,000 copies of Parts 1 and 2 of Dickens’ *Dombey & Son* (1848) were printed, it is estimated that roughly 500,000 people actually read (or listened to) the novel from 1846 to 1848.”⁷⁷ The public enjoyed *Dombey & Son* not because they could afford the shilling per month fee for the installments, but because they were able “to receive the story secondhand somehow.”⁷⁸

This Court’s recent application of the first sale doctrine reaffirmed the importance of consumer choice in copyright law. In *Kirtsaeng*, this Court held that the traditional first sale doctrine applied with the same force to copies lawfully made abroad as to domestically produced copies.⁷⁹ Considering the economic and historical value in free trade and competition, this Court determined that it is important to leave “buyers of goods free to compete with each other when reselling or otherwise disposing of those goods.”⁸⁰ This Court further emphasized that the first sale doctrine’s contribution to market competition is important because it is “to the advantage of the consumer.”⁸¹ More

in the Romantic Period, 235-37 (2004) (discussing how numerous people would read a single copy of a book).

77. ALTICK, *supra* note 76, at 116.

78. *Id.*

79. *Kirtsaeng*, 133 S. Ct. at 1358.

80. *Id.* at 1363 (discussing how in the early 17th century, Coke’s refusal to permit restraints on the alienation of chattels was because it would be “against Trade and Traffi[c], and bargaining and contracting.”).

81. *Id.*

specifically, this Court stated a narrow “geographical” reading of Sec. 109(a) would “threaten ordinary scholarly, artistic, commercial, and consumer activities.”⁸²

This Court also acknowledged the risk that such an interpretation would restrict information available to consumers and such a consequence would “fail to further” the goal of “promot[ing] the Progress of Science and useful Arts.”⁸³ Rejecting publishers’ attempt at greater control over consumer choice, this Court again recognized and reaffirmed the interest in consumer choice that the Intellectual Property Clause and the Copyright Act promote.⁸⁴

The Copyright Act’s stipulation that certain exclusive rights of copyright owners apply only to *public* uses similarly recognizes and safeguards consumers’ protected *private* sphere of information use, within which consumers exercise complete control over how, when and where to make relevant uses of content.⁸⁵ The 1976 Act enumerates specific rights that belong exclusively to the copyright holder, including the rights to “distribute copies . . . to the public,” “to perform the copyrighted work *publicly*,” and to “display the copyrighted work *publicly*.”⁸⁶ These

82. *Id.* at 1361.

83. *Id.* at 1364; *see also supra* Part II.A (discussing the purpose of the intellectual property clause of the Constitution).

84. *Id.* at 1364.

85. *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).

86. 17 U.S.C. § 106(4)-(5) (emphasis added).

pro-consumer limitations on owners' rights survived throughout the many iterations of the draft legislation that became the 1976 Act.⁸⁷ Congress anticipated the technological developments of coming years and provided rightsholders with reasonable control over the works they own without unnecessarily diminishing consumer choice or burdening innovation that enables that choice.

C. An Adverse Decision Regarding Aereo's Technology Will Cast Uncertainty on the Legality of Cloud Computing Technology Generally

Consumer choice in the use of cloud-based information technologies, of which Aereo is but one example, should be protected in furtherance of copyright law's policy favoring consumer sovereignty. Aereo should not be liable for offering a cloud-based equipment rental service that merely enables consumer control over how and when to engage in lawful private performances of free OTA broadcast television. Moreover, this Court's analysis of Aereo's technology implicates far more than the fortunes of a single company, or the interests of one subset of information consumers.

Consumers have come to rely on the benefits and features of cloud computing. Whether they are using Google Drive to write collaboratively with colleagues or saving files to Dropbox rather than using a portable physical hard drive, consumers have thoroughly integrated these cloud computing technologies into their lives and information practices.

87. *See, e.g.*, S. 1006, 89th Cong. (1965); H.R. 2512, 90th Cong. (1967); S. 1361, 93d. Cong. (1973).

An adverse decision regarding Aereo’s technology may call the legality of the broad cloud computing model into doubt. In particular, Petitioners’ arguments threaten the viability of many tools that allow for convenient storage of and access to personal information. For example, assume that while at school, a teacher extracts various clips from copyrighted video sources in order to create a compilation for classroom use. She then uploads the clips to Dropbox, intending to work on the lesson at home that evening. All of the steps she has taken so far fall within a specifically recognized educational application of fair use.⁸⁸

However, if this Court were to find that providing a consumer-selected video from a cloud storage source represents a public performance, as Petitioners assert,⁸⁹ the ability of Dropbox to legally provide this teacher with access to her own files would—at the very least— be subject to serious question.⁹⁰ Such a doctrinal environment

88. See 17 U.S.C. § 1201(a)(1); 37 C.F.R. § 201.40 (2013) (“[T]he Librarian has determined that the following classes of works shall be exempt from the prohibition against circumvention of technological measures set forth in section 1201(a)(1)(A). . . . where circumvention is undertaken solely in order to make use of short portions of motion pictures . . . for educational purposes”).

89. See Pet’rs Br. 19.

90. By Petitioner’s reasoning, Dropbox’s transmission of the files to the teacher would constitute a potentially unlawful “public performance,” as to which that for-profit company might well enjoy no fair use protection. See *Princeton Univ. Press v. Mich. Document Serv.* 99 F.3d 1381, 1385-86 (6th Cir. 1996) (holding that a commercial enterprise engaging in unauthorized reproduction of copyright material is liable for copyright infringement regardless of whether the end consumer’s use of that material is permissible under fair use).

would jeopardize myriad cloud technologies, useful to individual consumers and businesses alike.

CONCLUSION

Aereo's technology serves a fundamental public interest by promoting flexible personal use of locally available free OTA broadcasts. By giving consumers a meaningful choice of a cloud-based method for enabling private performances of live or time- and place-shifted OTA television, Aereo's technology promotes consumer sovereignty and bridges the digital divide. Aereo's technology is consistent with the U.S. Constitution, the U.S. copyright regime, and this Court's own copyright jurisprudence. By affirming the Second Circuit's ruling, this Court can reinforce the important protections copyright law provides to consumer sovereignty, preserve technology that enables flexible use of free OTA broadcast television, and protect the important role that cloud computing technologies have assumed in American life.

Respectfully submitted,

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