IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION OF AEREO, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Plaintiffs-Appellees hereby submit their opposition to the motion of Aereo, Inc. for leave to file an *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(b) (Doc. No. 1470127). Aereo's motion should be denied for the simple reason that its proposed amicus brief does not present any perspective not already found in, and essentially duplicates, Appellants' brief. Aereo is itself a defendant in copyright cases involving the same plaintiffs and issues. Its proposed brief is simply an effort to circumvent Appellants' page limits. Accordingly, the motion fails to establish that the proposed brief is "desirable" and that "the matters asserted are relevant to the disposition of the case." FRAP 29(b). In addition, the proposed brief violates Circuit Rule 29(a)'s

prohibition against "repetition of facts or legal argument made in the principal . . . brief[.]"

Defendants-Appellants appeal from a preliminary injunction that enjoins them from retransmitting over the Internet Plaintiffs-Appellees' copyrighted over-the-air television programming. The preliminary injunction was sought and granted on the basis that Appellees were likely to succeed in showing that Appellants infringed Appellees' exclusive public performance rights under the Copyright Act, 17 U.S.C. § 106(4), as further defined by the Transmit Clause, 17 U.S.C. § 101, and that the other requirements for preliminary injunctive relief were met. *See* Appellants' Brief at 5-6 (Dkt. No. 1469249).

Like the Defendants-Appellants, Aereo is a commercial service that retransmits over the Internet Appellees' free over-the-air broadcast television programming to Aereo subscribers. *Compare* Aereo Motion at 2; *with* Appellants' Brief at 13-18. Indeed, Appellants claim that their service is just like Aereo's. *See* Appellants' Brief at 26-27. Moreover, and again like the Defendants-Appellants, Aereo is the defendant in separate lawsuits and appeals litigating the same issues as Appellants here. *See* Aereo Motion at 2-3 (discussing *Am. Broad. Cos., Inc., et al. v. Aereo, Inc.*, Case Nos. 13-461 (U.S.) (cert. petition docketed), 12-2807 (2d Cir.), 12-1540 (S.D.N.Y.) (the "*Aereo* Litigation"), and *Hearst Stations Inc. v. Aereo, Inc.*, Case Nos. 13-2282 (1st

Cir.), 13-11649 (D. Mass.)). Under these circumstances, it is not surprising that Aereo's interests in a particular construction of the Copyright Act's public performance right, including the Transmit Clause as it pertains to retransmission of over-the-air broadcast television programming, are indistinguishable from Appellants' interests.

A cursory review of Aereo's amicus brief makes clear that Aereo advances the identical arguments regarding the matters at issue on this appeal as Appellants make in their opening brief. *Compare* Aereo Proposed Amicus Brief at 6 (contending that affirming the preliminary injunction will "chill" investment in Aereo-like services); *with* Appellants' Brief at 46-47 (arguing that the injunctions "undercut innovators and investors in FilmOn X and its competitor Aereo"). Of course, Appellants have every incentive to present all the arguments advanced by Aereo, and Aereo brings a perspective that is indistinguishable from Appellants.

Aereo makes clear that it intends to make the same arguments as Appellants in defending the Second Circuit's interpretation of the Transmit Clause, as set forth in *Cartoon Network LP v. CSC Holding, Inc.*, 536 F.3d 121 (2d. Cir. 2008) ("*Cablevision*"), and the subsequent application of *Cablevision* in the *Aereo* Litigation. *See* Proposed Amicus Brief at 4 ("Aereo files this amicus brief because of the district court's disagreement with . . .

Cablevision[.]"). Appellants' opening brief devotes substantial space to the same defense of *Cablevision* and the same statutory analysis of the Transmit Clause that Aereo seeks to offer, based on the same perspective of a commercial entity retransmitting over-the-air broadcast programming without authorization. *See, e.g.*, Appellants' Brief at 23-28.

Under these circumstances, Aereo's proposed amicus brief "essentially duplicates" Appellants' brief, and offers nothing more than "a few additional citations not found in the parties' briefs and slightly more analysis on some points." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544, 545 (7th Cir. 2003) (denying motions brought by two potential amici for leave to file amicus briefs); *see also Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (citing *Voices for Choices* with approval for its "susp[icion] that *amicus* briefs are often used as a means of evading the page limitations on a party's briefs"). Appellants have and will make all the arguments the Court will need from the perspective of a commercial retransmission service on the issues presented by this appeal, obviating any need for a duplicative recitation of these same arguments by the identically-situated Aereo.

Accordingly, Plaintiffs-Appellees respectfully submit that this Court should deny Aereo's request for leave to file its proposed amicus brief.

Dated: December 26, 2013 Respectfully submitted

By: s/ Robert Alan Garrett

ARNOLD & PORTER LLP
Robert Alan Garrett
555 12th St. N.W.
Washington, D.C. 20004
Tel. 202-942-5444 / Fax 202-942-5999

Ronald L. Johnston
John C. Ulin
James S. Blackburn
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
Tel. 213-243-4000 / Fax 213-243-4199

Attorneys for Plaintiffs-Appellees NBC Subsidiary (WRC-TV) LLC, NBC Studios LLC, Universal Network Television LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., Allbritton Communications Company, CBS Broadcasting Inc., CBS Studios Inc., and Gannett Co., Inc.

Dated: December 26, 2013

Respectfully submitted

By: s/ Paul M. Smith

JENNER & BLOCK LLP
Paul M. Smith
1099 New York Av. N.W.
Washington, D.C. 20001
Tel. 202-639-6000 / Fax 202-639-6066

Richard L. Stone
Julie A. Shepard
Amy M. Gallegos
633 West 5th Street, Suite 3600
Los Angeles, California 90071
Tel. 213-239-5100 / Fax 213-239-5199

Attorneys for Plaintiffs-Appellees Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, and Fox Broadcasting Company

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2013 I electronically filed the foregoing Opposition to Motion of Aereo, Inc. for Leave to File Brief Amicus Curiae in Support of Neither Party with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 26, 2013

s/ James S. Blackburn
Robert A. Garrett
Attorney for the *NBC Plaintiffs-Appellees*