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High Court Agrees to Decide Scope of Copyright Owners' Exclusive Right of Public Performance

(American Broadcasting Companies, Inc. v. Aereo, Inc.)

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– Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—The U.S. Supreme Court today agreed to review a lower-court ruling that, if allowed to stand, would legitimize a business model based entirely on the unauthorized, for-profit exploitation of others’ copyrighted works. The decision marks a victory for the Washington Legal Foundation (WLF), which filed a brief asking the Court to hear the case and arguing that the U.S. Court of Appeals for the Second Circuit misapplied federal copyright law, contravening both the plain text and legislative history of the Copyright Act of 1976.

The plaintiffs, who comprise leading creators, producers, and distributors of original broadcast television programming, brought a copyright infringement action against defendant Aereo, Inc. Using an elaborate network of thousands of tiny antennae, Aereo captures over-the-air television broadcasts and retransmits them over the internet (for profit and without permission) to its subscribers. WLF’s brief asked the Court to decide whether, under the relevant statute, Aereo “publicly performs” a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the internet.

The exclusive right of “public performance” is among the most critically important and economically significant rights that federal law grants to copyright holders. In its brief urging discretionary review by the Supreme Court, WLF argued that the Second Circuit’s holding in the case threatens to eviscerate the broadcast entertainment industry’s public-performance rights, by holding that the relevant inquiry is the potential audience of a particular *transmission*, rather than the potential audience for any particular *performance* being transmitted.

Following the grant of certiorari, WLF issued the following statement by Senior Litigation Counsel Cory Andrews:

“This case has inestimably far-reaching consequences for the broadcast entertainment industry and its millions upon millions of customers. Now that the Court has granted review, it is vitally important to correct the Second Circuit’s decision, which severely distorts a well-defined marketplace and upends settled expectations among affected stakeholders.”

WLF is a public interest law and policy center that regularly litigates in defense of private property rights, including the rights of intellectual property owners.

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