UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING, INC., CBS STUDIOS INC., NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS, LLC, UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC, and WNJU-TV BROADCASTING LLC, Plaintiffs/Counterclaim Defendants, v. AEREO, INC. Defendant/Counterclaim Plaintiff.	Civil Action No. 12-CV-1540 (AJN)
WNET, THIRTEEN, FOX TELEVISION STATIONS, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WPIX, INC., UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, and PUBLIC BROADCASTING SERVICE, Plaintiffs/Counterclaim Defendants, v. AEREO, INC. Defendant/Counterclaim Plaintiff.	Civil Action No. 12-CV-1543 (AJN)

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Court's Order dated May 18, 2012, Aereo, Inc. ("Aereo") submits the following proposed findings of fact and conclusions of law drawn from the parties' filings and the hearing held May 30-31, 2012.

FINDINGS OF FACT

I. The Aereo System

1. Aereo provides a technology platform. When consumers become members of Aereo, they have access to a remotely located antenna and a remote digital video recorder ("DVR") that they can use to record over-the-air television broadcasts and to watch their own recordings at their own convenience on the device of their choice. Defendant's Hearing Exhibit (hereinafter "Def.'s Ex.") 9 (Kanojia Decl.) at ¶ 5.

2. To use the Aereo system, the Aereo member logs into the Aereo website from an Internet-enabled device and selects a broadcast program from the "Guide" section of the website. She can either press "Watch" or "Record" to record a program that is currently airing, and in doing so, she (i) activates a miniaturized antenna assigned to her and tunes it to receive the station carrying that broadcast, and (ii) makes from that received signal a unique copy of the program she requested, which is stored on a hard drive. In both the "Record" mode and the "Watch" mode, the consumer can play her unique copy of that program back to herself shortly after the recording has begun. The consumer can also use the "Record" mode to schedule a recording of a program that airs in the future. At the time of such future recording, her instruction automatically activates her assigned antenna and records a unique copy of the program to a hard drive. The consumer can then watch a recording at any time after the recording has begun, including while the broadcast is still airing. 5/30/2012 Preliminary Injunction Hearing Transcript (hereinafter "5/30/2012 Tr.") at 102:19-106:24 (Kelly Testimony); 5/30/2012 Tr. at 133:6-139:16 (Kanojia Testimony); 5/31/2012 Preliminary Injunction Hearing Transcript (hereinafter "5/31/2012 Tr.") at 292:1-25 (Horowitz Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶¶ 17-19; Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 56, 64, 79; Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 30, 31, 34; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 35, 50.

3. Essentially, the Aereo system enables a consumer to locate her antenna and DVR remotely. Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 5, 21. Each Aereo antenna can be used and controlled by only one consumer at any given time, and is used to capture only the signal tuned by that consumer. 5/30/2012 Tr. at 104:23-105:1, 105:17-105:25 (Kelly Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶¶ 17, 18, 22; Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 64, 79, 81; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 36-37; 5/30/2012 Tr. at 240:24-241:1 (Lipowski Testimony); Chan Decl. Ex. 1 (Kelly Dep.) at 76:12-21, 77:10-17; Chan Decl. Ex. 4 (Volakis Dep. 5/12/2012) at 201:21-23.

4. Some Aereo members ("static" users), such as those who have annual memberships, are always assigned to the same antenna; other members ("dynamic" users), including monthly members, are assigned to an antenna each time they log onto the Aereo system. 5/30/2012 Tr. at 74:22-76:14 (Kelly Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶ 18 n.8; Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 56; Def.'s Ex. 10 (Lipowski Decl.) at ¶ 27. However, no Aereo antenna is ever used and controlled by more than one member at the same time. 5/30/2012 Tr. at 104:23-105:1 (Kelly Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 27.

5. The recording made by the consumer is made from data from the specific antenna assigned to that consumer. That recording can be accessed for playback only by the consumer who made it. Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 43, 56. Playback occurs via a member-initiated transmission from that consumer's recording to that consumer's display device using the Secure HTTP protocol ("HTTPS"). HTTPS is an industry-standard transmission protocol (used for example by banks and financial institutions) to encrypt and securely transmit content. 5/31/2012 Tr. at 292:10-25 (Horowitz Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 45.

6. The consumer's transmission from her recording to her viewing device is not in the form of a "download" that is saved locally to the user's computer or device. Rather, the transmission streams from the unique recording that the consumer has made on her remote DVR, and the consumer views the playback of that recording through a media player in the user's web-browser. The transmission may include closed caption information if the user selects that information to be displayed in her browser. Def.'s Ex. 10 (Lipowski Decl.) at ¶ 46.

7. The Aereo member's remote DVR operates like a conventional DVR in a consumer's home. All content watched by a consumer using a conventional DVR is recorded by the consumer and the consumer views that recorded programming whether she is watching "live" television or whether she is watching a previously recorded program. In both modes, the consumer's recording enables the consumer to pause, rewind, and perform other typical DVR functions. Like a home DVR, the underlying operation of the Aereo system is essentially the same in both the "Watch" mode and the "Record" mode; the only difference is in the automatic default rules applied by the system in determining the length of time the recordings are maintained, and in whether the recording is automatically played back to the user depending on the user's device. Def.'s Ex. 5 (Horowitz Decl.) at ¶ 17; Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 54-57; Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 33-34; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 6-7 & n.1; 5/30/2012 Tr. at 113:20-114:4, 121:15-22 (Kelly Testimony).

8. The functionality of the "Record" and "Watch" modes is the same in all respects relevant to the analysis of whether a "public performance" occurs. A consumer makes a unique copy of a recording from an individually assigned antenna, and that unique individual copy is available only to that user, and is transmitted only to that user.[1] 5/31/2012 Tr. at 298:24-299:3,

[1] Up until the time of the hearing, Plaintiffs asserted that their motion was limited to the "Watch" function and their submissions were focused on trying to assert some distinctions between "Watch" and "Record." *See* Mem. Of

300:1-9 (Horowitz Testimony); Def.'s Ex. 11 (Aereo Technical Description) at AEREO0000985; Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 57, 63, 79; Def.'s Ex. 10 (Lipowski Decl.) at ¶ 56; 5/30/2012 Tr. at 104:23-105:1, 105:17-106:24 (Kelly Testimony).

9. The technical operation of the Aereo system is not disputed. Although Plaintiffs have repeatedly changed their position as to whether the nature of the technology is "determinative,"[2] Plaintiffs concede that there is no disagreement as to the material facts of this case. 5/30/2012 Tr. at 14:12-13 (Keller Opening); 5/31/2012 Tr. at 416:10-22 (Keller Summation). Whether it is in "Record" mode or "Watch" mode, the consumer is always watching a unique individual recording that she made from an individual antenna. 5/30/2012 Tr. at 106:25-107:8 (Kelly Testimony); 5/31/2012 Tr. at 298:24-300:9 (Horowitz Testimony); 5/30/2012 Tr. at 141:7-13 (Kanojia Testimony); 5/31/2012 Tr. at 415:11 (Keller Summation). Plaintiffs' expert admitted that individual recordings are made and saved to the consumer's remote DVR when the member uses the Aereo system in either "Watch" or "Record" mode and that the playback of those individual recordings functions the same in both the "Record" mode and the "Watch" mode. 5/30/2012 Tr. at 106:6-10, 106:25-107:8, 121:9-22 (Kelly Testimony).

II. Consumers Using Aereo Can Only Watch the Unique Fixed Copies That They Made From the Unique Signal Generated by Their Individual Antennas

10. The Aereo antenna elements are mounted on an antenna board in pairs, and each antenna-pair (also referred to generally as the "antenna") is connected to its own tuner and feed

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Points and Authorities in Support of Plaintiffs' Joint Motion for a Preliminary Injunction, page 5 n.1. Subsequently, at the end of the first day of hearing on Plaintiffs' Motion for Preliminary Injunction, Plaintiffs took the position that they were seeking to enjoin *any* performance of a recording that takes place while any portion of the program that was recorded is still being broadcast live, whether the user is using the "Watch" mode or the "Record" mode. 5/30/2012 Tr. at 258:1-16. This position had not previously been set forth in their briefs or declarations.

[2] *Compare* 3/13/12 Hearing Tr. at 4:20 ("We think this is the type of case where facts matter."), *id.* at 25:1-2 ("It is what goes on behind the scene that makes the difference."), *id.* at 35:21-36:2 ("I believe what everybody needs is to know is how a signal gets into their system, how it works its way through their system, and how it leaves their system . . .") *with* Plaintiffs' Reply Memorandum of Points and Authorities in Support of Plaintiffs' Joint Motion for a Preliminary Injunction (filed May 25, 2012), page 7 n.4 ("Plaintiffs consistently have explained that the particulars of the Aereo technology are not determinative.").

line. Each individual antenna within the Aereo system only receives a broadcast signal when it is tuned by an individual consumer. When an individual antenna is not being used by a consumer, that antenna receives no broadcast signal. 5/31/2012 Tr. at 295:5-18 (Horowitz Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 14, 36, 65; Def.'s Ex. 7 (Pozar Decl.) at ¶ 11 & n.3; Def.'s Ex. 3 (Pozar Expert Report) at ¶ 3a; Def.'s Ex. 49 (Volakis Dep. 5/12/2012) at 201:12-23; Chan Decl. Ex. 1 (Kelly Dep.) at 76:12-21, 77:10-17; 5/30/2012 Tr. at 241:6-242:13 (Lipowski Testimony).

11. From the moment a signal enters the Aereo system via the consumer activating her individual antenna (whether in "Record" or "Watch" mode), that signal is separately identified and identifiable, and is associated with only that one possible recipient. 5/31/2012 Tr. at 300:10-15 (Horowitz Testimony); 5/30/2012 Tr. at 104:23-105:1, 105:17-106:24 (Kelly Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 61; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 40-42, 47.

12. The signal generated from an individual antenna tuned by a consumer (whether in "Record" or "Watch" mode) is unique and will have variations in signal attributes different from the signals recorded from another antenna element (e.g., if a bird flies in front of an antenna in one area of the system, the signal generated from that antenna will be different from the signal generated from a different antenna that is tuned to the same show but located in a slightly different area). 5/31/2012 Tr. at 328:19-24 (Horowitz Testimony); 5/30/2012 Tr. at 106:11-24 (Kelly Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 37; Chan Decl. Ex. 1 (Kelly Dep.) at 78:15-24.

13. The signal generated from an individual antenna tuned by a consumer (whether in "Record" or "Watch" mode) is used by that consumer to record a copy of the program carried by

that signal for only that individual consumer who tuned that antenna element. 5/30/2012 Tr. at 104:23-105:1, 105:17-25 (Kelly Testimony); 5/31/2012 Tr. at 328:7-329:24 (Horowitz Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶¶ 17-19, 22; Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 64, 79; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 37, 47, 50; Chan Decl. Ex. 1 (Kelly Dep.) at 134:14-137:13. As a result of variances in the signal capture and transmission process, the copies that the consumer makes to her hard drive storage (whether in "Record" or "Watch" mode) are unique copies that have their own individual attributes, glitches, and artifacts. 5/31/2012 Tr. at 300:16-304:14 (Horowitz Testimony); 5/30/2012 Tr. at 106:11-24 (Kelly Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 43; Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 55, n.42; Chan Decl. Ex. 1 (Kelly Dep.) at 141:19-142:9.

14. The consumer makes a unique recording on her remote DVR hard drive from the signal generated from the individual antenna that she tuned (whether in "Record" or "Watch" mode). That consumer's recording is written to hard drive disk storage, and is associated solely with and can only be accessed by the individual consumer who tuned that antenna and made the recording. Recording to hard disk DVR storage always takes place before any playback occurs. 5/31/2012 Tr. at 292:1-9, 298:11-300:5 (Horowitz Testimony); 5/30/2012 Tr. at 104:23-105:1, 105:17-25 (Kelly Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶ 19; Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 56-57, 64 and Fig. 11; Chan Decl. Ex. 1 (Kelly Dep.) at 109:23-110:21, 123:10-124:21, 134:20-135:1; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 50, 56.

15. The recording that the consumer makes in "Watch" mode using Aereo is typical of the recording made when a consumer uses any DVR to watch "live" television. A recording is necessary to enable the consumer to pause, rewind and fast forward the transmission of that underlying program. When consumers use any DVR, including the Aereo remote DVR, to

watch "live" television, they are watching a recording. 5/31/2012 Tr. at 297:12-298:23 (Horowitz Testimony); Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 33-34; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 51-52.

16. In "Watch" mode, the unique copy of the signal from a consumer's individual antenna, recorded to the consumer's hard drive disk storage and associated solely with that consumer, is maintained for as long as the consumer continues to watch the recording (including up to a two-hour pause if the consumer so chooses), or longer if the consumer chooses to save the recording in progress. In "Record" mode, the unique copy of the consumer's signal that she records to the hard drive is saved until the consumer chooses to delete it, or until her DVR runs out of space. In both modes, the system operates in the same way to record a copy of the programming to the hard drive, and in both modes, the copy that is recorded to the hard drive is a fixed copy associated solely with the consumer who made it. 5/30/2012 Tr. at 106:25-114:17 (Kelly Testimony); 5/31/2012 Tr. at 309:16-314:4 (Horowitz Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 57, 63, 79; Chan Decl. Ex. 1 (Kelly Dep.) at 103:8-17, 123:16-124:21; Def.'s Ex. 6 (Kelly Decl.) at ¶¶ 42-43; Def.'s Ex. 9 (Kanojia Decl.) at ¶ 32; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 6 n.1, 53, 54.

17. The fixed copy saved to her remote hard drive made by the Aereo consumer using either the "Watch" mode or the "Record" mode is physically and functionally different from the "buffer" utilized in Internet web-streaming. Those buffers generally consist of a small packet of data that is used solely to facilitate the transmission, and is held only as long as necessary to transmit that small portion of the entire work. Those ephemeral buffers are inaccessible to the consumer, and are emptied and refilled with new data as each small portion of the transmission is complete. By contrast, in both the "Watch" mode and the "Record" mode, the Aereo user stores

a fixed copy of the data on the member's remote DVR hard drive. This copy is retained for an extended period of time, is intended to be controlled and managed by the Aereo user, and can be used to store a copy of the entire work. 5/30/2012 Tr. at 107:5-114:17 (Kelly Testimony); 5/31/2012 at 309:16-314:4 (Horowitz Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 53; Def.'s Ex. 6 (Kelly Decl.) at ¶¶ 52-53.

18. The playback of the consumer's copy in both the "Watch" mode and the "Record" mode is time-shifted. In some instances, the time-shift is minor enough (between seven and twenty seconds) for consumers to perceive the experience as watching "live" television; this is the same situation that occurs when watching "live" programming on any traditional set-top DVR. In other instances, including in the "Watch" mode (such as where a consumer pauses or rewinds a program), the time-shift can be a matter of hours. Regardless of the length of the time-shift, the technology and the underlying processes are identical. Each consumer's playback is made from his or her own unique fixed copy, and that copy can be played back only by and to the consumer who made it. 5/30/2012 Tr. at 98:23-99:4, 108:12-114:17 (Kelly Testimony); 5/30/2012 Tr. at 248:18-249:9 (Lipowski Testimony); 5/31/2012 Tr. at 297:12-298:23 (Horowitz Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 57, 80; Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 33-34; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 51-52; Def.'s Ex. 6 (Kelly Decl.) at ¶ 52; Chan Decl. Ex. 1 (Kelly Dep.) at 41:2-13, 51:14-19, 101:18-103:1, 103:8-17, 109:20-110:24.

19. There is no simultaneous "retransmission" of a single broadcast signal to multiple people in either the "Watch" mode or the "Record" mode. In both instances, the signal captured by the member using her individual antenna is unique to that user—different from any other signal captured by another user—as well as uniquely available only to that user. In all cases, whether "Record" or "Watch," the transmission comes from a fixed, recorded copy that is itself

unique and reflects what was uniquely received by the consumer's assigned antenna. 5/30/2012 Tr. at 105:12-114:17 (Kelly Testimony); 5/31/2012 Tr. at 309:16-314:4 (Horowitz Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 55, 57, 63, 79-80; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 53, 56.

20. While accessing an antenna using the Aereo system, the consumer always uses an individual antenna and tuner that is solely available to her for the duration of her access. In other words, no antenna is ever used by more than one user at a time. Although some technology resources in the Aereo system are shared, the individual signal and transmission from antenna to viewing by the consumer is unique to the consumer who activated the antenna and made the recording, and is never shared with any other consumer. 5/30/2012 Tr. at 104:20-106:24 (Kelly Testimony); 5/30/2012 Tr. at 234:3-234:15 (Kanojia Testimony); 5/31/2012 Tr. at 300:6-15 (Horowitz Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶¶ 18, 55; Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 81; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 27, 37, 47; Def.'s Ex. 7 (Pozar Decl.) at ¶¶ 12, n.4, 13, 19; Chan Decl. Ex. 1 (Kelly Dep.) at 134:14-137:13.

21. In all respects, the Aereo system functions automatically, and only in response to the consumer's volitional actions. The Aereo antennas are not tuned to a broadcast frequency unless and until the consumer tunes the antennas to receive a particular channel by choosing "Watch" or "Record" with respect to a specific program at a specific time. It is the consumer, not Aereo, who makes a unique copy which is available only to herself, whether in the "Record" or "Watch" mode. It is the consumer, not Aereo, who transmits such copy to herself for playback in the "Record" or "Watch" mode. 5/30/2012 Tr. at 134:25-135:3, 214:7-14 (Kanojia Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 54 n.40; Def.'s Ex. 9 (Kanojia Decl.) at ¶ 29; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 12, 14, 35-37.

III. Aereo Functions Like Any Other DVR

22. The "Watch" and "Record" functionalities that Plaintiffs challenge are the same as the operation of every DVR, whether it is a TiVo, a set-top box DVR, or a remote DVR. When a consumer uses a DVR to watch a "live" program, she is in fact watching a fixed copy from the DVR hard drive. That is why the consumer can pause and rewind "live" programming whether using Aereo, a DVR located in her home, or any remote DVR. Using Aereo, as with a conventional set-top DVR, the consumer can press "record" to save that entire DVR copy for later viewing. Aereo's "Watch" and "Record" modes merely replicate how a home DVR user watches and records "live" TV. 5/30/2012 Tr. at 107:5-112:21 (Kelly Testimony); 5/31/2012 Tr. at 297:12-300:5, 304:15-306:12 (Horowitz Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶¶ 56-57, 65-76; Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 31-34, 42; Def.'s Ex. 30 (Aereo FAQ); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 7; Def.'s Ex. 6 (Kelly Decl.) at ¶ 42.

23. All television transmission and reception involves the conversion of over-the-air broadcast signals into a format that is viewable by the consumer, for instance, on a television display. 5/31/2012 Tr. at 285:8-286:9 (Horowitz Testimony); Def.'s Ex. 46 (Horowitz PowerPoint Slides). Likewise, all recordings change the received television signal into a different form and medium, whether the recording is analog or digital. The VCR allowed a consumer to record programming carried on over-the-air signals to magnetic tapes and DVRs allow a consumer to make digital recordings on to hard drives. 5/31/2012 Tr. at 286:10-288:15 (Horowitz Testimony); Def.'s Ex. 46 (Horowitz PowerPoint Slides).

24. Any consumer can watch live broadcast television or a DVR recording via the Internet, from a remote location, using a Slingbox attached to an antenna and a DVR. In fact, any consumer can obtain the same functionality as she obtains using the Aereo technology in either the "Record" or "Watch" modes by using an antenna to receive broadcast signals, a DVR

to tune and record the signals, a Slingbox to send the recorded signals remotely over the Internet, and an iPad to select, display, and watch the recordings. 5/31/2012 Tr. at 306:13-308:25 (Horowitz Testimony). In sum, Aereo merely provides its members with use of remotely-located technology that performs the same functionality available to any consumer using purchased home equipment.

IV. Aereo is Available Only in the New York City Media Market

25. Although not relevant to any copyright issue, it is worth noting that for business reasons, Aereo takes several steps to limit the use of its system to users physically present in the New York City media market. First, the Aereo Terms of Use require use only in New York. Second, the consumer's credit card information is cross-checked with a New York physical billing address associated with the card holder. Third, when the consumer accesses the Aereo website, the consumer's Internet Protocol (IP) address is checked using a third-party location database to determine the location of the user. If the consumer fails the first geo-location check by IP address, the consumer is offered a further check using the device browser's geo-location features which may include GPS function, cell tower triangulation, crowd sourced WiFi hotspot and a proprietary browser IP look-up. 5/30/2012 Tr. at 145:2-18, 166:12-169:25 (Kanojia Testimony); Def.'s Ex. 9 (Kanojia Decl.) at ¶ 43; Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 55, n.43; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 9-11; Def.'s Ex. 29 (Aereo Terms of Use).

26. If the consumer fails the geo-location checks or chooses to dis-allow that check, she is then presented with a series of screens on the Aereo website interface that inform the consumer that she is not permitted to access the system unless she is physically located in New York. These screens require affirmation by the consumer that she is in the market if she wishes to continue. The consumer cannot continue and view content on the Aereo system while outside of the New York market unless, at this point, she repeatedly lies and, in doing so, violates the

Aereo Terms of Use. Def.'s Ex. 31; Def.'s Ex. 32; 5/30/2012 Tr. at 166:12-169:25 (Kanojia Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 55, n.43; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 9-11; Def.'s Ex. 29 (Aereo Terms of Use).[3]

V. The Aereo Antennas Function Individually and the Individual Signals from the Antennas Result in a Fixed Unique Copy

27. In light of the fact that a consumer using Aereo is viewing a unique recording that she made and transmitted to herself, review of the consumer's remote antenna is not necessary for a determination of the public performance analysis under *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). However, there is no question that a consumer using Aereo uses an individual remote antenna to access a broadcast signal.

28. Aereo engineers spent months designing an antenna with a particular combination of mechanical design and electronic tuning circuitry that would enable a consumer to use a remote individual antenna to receive a television signal. 5/30/2012 Tr. at 144:16-19 (Kanojia Testimony); 5/30/2012 Tr. at 237:17-25 (Lipowski Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 19. Indeed, Aereo used an individual antenna to test various potential locations for the Aereo New York data center. 5/30/2012 Tr. at 145:19-146:4 (Kanojia Testimony); 5/30/2012 Tr. at 244:21-245:8 (Lipowski Testimony). Because of its design, a single Aereo antenna is capable of receiving a television signal on its own and does, in fact, receive a television signal on its own. Def.'s Ex. 7 (Pozar Decl.) at ¶¶ 8, 10-13; Def.'s Ex. 3 (Pozar Expert Report) at ¶¶ 3b, 5f; Def.'s Ex. 5 (Horowitz Decl.) at ¶ 26; 5/31/2012 Tr. at 319:4-320:24 (Horowitz Testimony).

29. When a consumer instructs the Aereo system to begin a recording (whether in the "Watch" mode or the "Record" mode), the user tunes her individual Aereo antenna to access and

[3] It is worth noting that Slingbox allows consumers to "sling" television signals over the Internet and access them remotely from any location. 5/31/2012 Tr. at 306:13-308:25 (Horowitz Testimony); Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 73 & n.55 ("The SlingPlayer is described this way on the Sling Media website: " . . . Never miss another show or game whether you're in the back yard, out to lunch or on the other side of the world.").

ingest only the channel selected by the consumer, and the unique signal captured by that individual antenna is available only to that consumer. Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 64; Def.'s Ex. 7 (Pozar Decl.) at ¶¶ 13-14; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 35, 37, 65. *See also* 5/30/2012 Tr. at 103:4-22, 105:17-106:10 (Kelly Testimony); Chan Decl. Ex. 1 (Kelly Dep.) at 134:14-137:13.

30. The parties agree that each Aereo antenna is connected to its own tuner and feed lines. Def.'s Ex. 49 (Volakis Dep. 5/12/2012) at 201:12-20. The parties also agree that at any given time a single Aereo antenna on an antenna board may be tuned to one channel and another antenna on that board may be tuned to another channel. *Id.* at 201:21-202:8.

31. Each Aereo antenna used by a consumer is an individual antenna. It is individually tuned by the consumer assigned to that antenna, the signal from that antenna is recorded in a unique copy that is only available to that user, and the only transmission using the Aereo system is from that unique copy only to the user that made it. Def.'s Ex. 49 (Volakis Dep. 5/12/2012) at 201:21-23; Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 64; Def.'s Ex. 10 (Lipowski Decl.) at ¶ 43.

32. These are the critical facts that establish the individual functionality of the antennas.

33. The opinions of Plaintiffs' antenna expert, Dr. Volakis (who did not testify at the hearing), do not in any way alter that conclusion. Dr. Volakis's opinions have been a moving target and are otherwise unsupported in multiple ways. In his first expert report he repeatedly stated that he was making conclusions concerning the Aereo antenna and the necessity of the antenna array for its function. Def.'s Ex. 4 (Volakis Expert Report) at pp. 2, 5, 7. His positions in that report were expressly contradicted by Defendant's experts, Drs. Pozar and Dr. Horowitz

each of whom pointed out multiple errors, including arithmetic errors, in his report. Def.'s Ex. 1 (Horowitz Expert Report) at ¶ 83; Def.'s Ex. 3 (Pozar Expert Report) at ¶¶ 3b-5e, 6. At his first deposition, Dr. Volakis abandoned the position in his initial expert report and testified that he made no conclusions in his Report concerning the Aereo antenna, Def.'s Ex. 48 (Volakis Dep. 4/22/2012) at 48:13-49:11; 50:4-14, and that he had no opinion on whether a single Aereo antenna would work standing alone. *Id*. at 168:15-21.

34. Later, after conducting additional modeling and certain testing on an Aereo antenna board, Dr. Volakis submitted a declaration that opined that the individual Aereo antennas function as a large single antenna. This opinion is clearly contradicted by the evidence that a single Aereo antenna is capable of receiving a signal on its own. Def.'s Ex. 7 (Pozar Decl.) at ¶¶ 8, 10-13; Def.'s Ex. 3 (Pozar Expert Report) at ¶¶ 3b, 5f; Def.'s Ex. 5 (Horowitz Decl.) at ¶ 26; 5/31/2012 Tr. at 319:4-320:24 (Horowitz Testimony). Moreover, as Defendant's experts discuss in their declarations and as Dr. Horowitz explained in his testimony, the modeling and testing upon which Dr. Volakis relied do not support his revised opinion. Def.'s Ex. 7 (Pozar Decl.) at ¶¶ 20-32; Def.'s Ex. 5 (Horowitz Decl.) at ¶¶ 24-50; 5/30/2012 Tr. at 318:1-325:1 (Horowitz Testimony).[4] For some examples, Dr. Volakis's computer simulations omitted critical circuitry in the Aereo antenna; he made no control experiment; and his physical tests were conducted by positioning the antennas to receive the signals in the wrong physical orientation (90 degrees difference) than actually is used by Aereo to receive television signals. *Id.*

35. Importantly, Dr. Volakis also testified at his second deposition that if a single Aereo antenna were located close enough to the source of the transmissions, the Aereo antenna

[4] At a second deposition after his declaration, Dr. Volakis again testified that he has no opinion on whether a single Aereo antenna standing alone would receive an adequate television signal. Def.'s Ex. 49 (Volakis Dep. 5/12/2012) at 205:3-8.

would work adequately. Def.'s Ex. 49 (Volakis Dep. 5/12/2012) at 205:10-23 ("[I]f you rent the building next door to the Empire State Building, or the roof, you'll – you don't need a metal – you don't need any substructure. I – I have no – I have every confidence to believe that it's likely that you will – that – that those tiny inefficient antennas – any inefficient antenna will do perfectly good, you know."). The Aereo antennas are located sufficiently close to the Empire State Building that the signal strength is very high at that location. Def.'s Ex. 10 (Lipowski Decl.) at ¶ 61. There is no serious dispute that the Aereo antennas work independently and are used by a consumer to capture an individual unique signal.

36. Likewise, Aereo's individual antennas do not form a "community antenna." A community antenna uses a single antenna to receive and ingest all over-the-air broadcasts simultaneously, then retransmits that same multi-channel signal in real time to potentially hundreds, often thousands, of users. Here, each Aereo member is assigned to an individual Aereo antenna, which has its own tuner and feed lines, and each individual Aereo antenna only ingests the signal for the single channel selected by the user. 5/31/2012 Tr. at 325:2-326:6 (Horowitz Testimony); Def.'s Ex. 5 (Horowitz Decl.) at ¶¶ 54-55; Def.'s Ex. 7 (Pozar Decl.) at ¶¶ 9, 15-16; Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 64-65; Def.'s Ex. 49 (Volakis Dep. 5/12/2012) 201:12-202:8.

VI. Plaintiffs' Delay in Seeking Injunction

37. With one exception, each Plaintiff learned of both Aereo's existence (then called Bamboom) and the implementation of its Beta testing in April 2011. 5/30/2012 Tr. at 34:12-20 (Franks Testimony); 5/31/2012 Tr. at 369:10-15 (Brennan Testimony); Def.'s Ex. 51 (Brennan Dep.) at 9:7-11:19; Def.'s Ex. 52 (Bond Dep.) at 25:18-26:6, 33:13-22; Def.'s Ex. 53 (Davis Dep.) at 98:15-20, 100:15-20; Chan Decl. Ex. 9 (Franks Dep.) at 10:9-15, 20:23-21:14.

38. Aereo received extensive press coverage in the Spring of 2011, such that Aereo's existence, proposed business plans, and technological basis were open and notorious to all Plaintiffs. 5/30/2012 Tr. at 146:5-149:24, 173:17-25 (Kanojia Testimony); Def.'s Ex. 37 (Aereo Press Release); Def.'s Ex. 38 (April 2011 Aereo Published Articles).

39. Each of these Plaintiffs then engaged in months of internal and external dialogue about Aereo, often including in-house legal counsel, while Aereo continued to move toward a full launch. Chan Decl. Ex. 16 (Davis Dep. Exs. 9-18); Chan Decl. Ex. 14 (Bond Dep. Exs. 3-11); Chan Decl. Ex. 10 (Franks Dep. Exs. 2-4, 7); Chan Decl. Ex. 12 (Brennan Dep. Exs. 2, 3, 6, 8, 12, 17); 5/30/2012 Tr. at 42:13-20 (Franks Testimony); 5/31/2012 Tr. at 364:25-365:6 (Brennan Testimony); Def.'s Ex. 52 (Bond Dep.) at 33:13-22.

40. Plaintiffs sent Aereo no cease and desist letters, and did not inform Aereo about any concerns of copyright infringement, until they filed this action just prior to Aereo's launch in March 2012. 5/30/2012 Tr. at 42:23-43:6 (Franks Testimony); Chan Decl. Ex. 9 (Franks Dep.) at 20:23-21:14; Def.'s Ex. 52 (Bond Dep.) at 25:18-26:6; Def.'s Ex. 51 (Brennan Dep.) at 9:7-11:14.

41. Further, some of the Plaintiffs and their parent companies encouraged Aereo with talk of investment and collaboration. Def.'s Ex. 9 (Kanojia Decl.) at ¶ 18.

42. Aereo made extensive efforts to inform government agencies and the trade association representing the Plaintiffs's interests (the Federal Communications Commission and the National Association of Broadcasters, respectively) about the Aereo technology and Aereo's business plan, so that all concerned parties would have accurate information about Aereo. 5/30/2012 Tr. at 149:25-154:24 (Kanojia Testimony); Def.'s Ex. 9 (Kanojia Decl.) at ¶ 18.

43. Several Plaintiffs engaged in extensive discussions with Aereo, in which they learned about the Aereo system and its current operational status. Plaintiffs' Exhibit from Preliminary Injunction Hearing (hereinafter, "Pls.' Ex.") 78 (Brennan Notes); 5/31/2012 Tr. at 379:10-380:13 (Brennan Testimony); Chan Decl. Ex. 11 (Brennan Dep.) at 9:24-19:3; Chan Decl. Ex. 17 (Dalvi Dep.) at 118:5-120:21; Def.'s Ex. 9 (Kanojia Decl.) at ¶ 18; Def.'s Ex. 54 (Dalvi Dep.) at 49:7-13, 49:22-50:6, 50:16-51:2.

44. At no point in any discussion with Aereo did Plaintiffs' witness, Sherry Brennan, inform Aereo that Fox believed Aereo to be infringing or illegal. 5/31/2012 Tr. at 370:8-12 (Brennan Testimony); Pls.' Ex. 78 (Brennan Notes).

45. Plaintiffs only filed this lawsuit after Aereo publicly announced that it had received an additional round of capital investment from IAC in February 2012, even though neither Aereo's technology nor its business plan had changed as of its public launch announcement on February 14, 2012. 5/30/2012 Tr. at 34:7-20 (Franks Testimony); 5/31/2012 Tr. at 369:10-15; 379:10-380:13 (Brennan Testimony); Pls.' Ex. 78 (Brennan Notes); Def.'s Ex. 51 (Brennan Dep.) at 15:22-19:3; Chan Decl. Ex. 9 (Franks Dep.) at 21:5-14, 46:12-48:19. As reflected in Ms. Brennan's detailed notes, she knew of Barry Diller's (IAC's Chairman and CEO) interest in, and involvement with, Aereo when she first spoke with Mr. Sallon in April 2011. Pls.' Ex. 78 (Brennan Notes). Ms. Brennan was also aware in June 2011 that Aereo had received investment from FirstMark Capital, as well as Highline Ventures, which was also specifically referenced in an April 2011 press release by Aereo. Pls.' Ex. 78 (Brennan Notes); Def.'s Ex. 37 (Aereo Press Release).

VII. Plaintiffs Have Not Demonstrated Irreparable Harm

46. Plaintiffs have not demonstrated any harm, irreparable or otherwise, caused by Aereo. As an initial matter, Plaintiffs are required to provide their broadcast signals to the public

for free in exchange for their license to transmit those signals over the public airwaves. Aereo merely provides consumers with access to a remote antenna and a remote DVR, to allow consumers to capture those signals.[5] Plaintiffs should not be permitted to claim irreparable harm based on consumer access to broadcast programming to which they are entitled. Further, increased consumer usage of antennas to capture over-the-air signals benefits Plaintiffs. 5/30/2012 Tr. at 65:2-4 (Franks Testimony).

47. Plaintiffs assert several potential future harms if Aereo is not enjoined: (i) loss of advertising revenue; (ii) disruption of the market for Plaintiffs' programming; and (iii) competition to Internet streaming ventures controlled by Plaintiffs. Plaintiffs have not proffered any evidence to support these alleged harms, and none of these potential harms is imminent. Plaintiffs admit that they have suffered no actual harm from Aereo. 5/30/2012 Tr. at 53:18-54:16 (Franks Testimony); Def.'s Ex. 52 (Bond Dep.) at 47:14-49:3, 56:4-8; Def.'s Ex. 53 (Davis Dep.) at 157:2-158:5, 191:2-5; Chan Decl. Ex. 9 (Franks Dep.) at 102:19-23; Def.'s Ex. 51 (Brennan Dep.) at 55:20-56:13.

48. Despite having the ability to track and compare changes in advertising revenue over time, Plaintiffs have not identified any real impact that Aereo has had, or will have, on Plaintiffs' advertising revenue. Plaintiffs have experienced no loss of advertising revenue due to Aereo. Chan Decl. Ex. 9 (Franks Dep.) at 102:19-23; Def.'s Ex. 51 (Brennan Dep.) at 55:20-56:13.

49. While Plaintiffs assert that advertisers will negotiate lower advertising rates because of Aereo's existence as an allegedly unmetered source for television, they provide no

[5] Plaintiffs do not dispute the consumer's right to access and record over-the-air programming using a remote antenna and a remote DVR, as Plaintiffs do not challenge consumers' use of the Aereo system to record over-the-air broadcasts and watch them after the underlying broadcast has ended. Plaintiffs' challenge is limited to playback of the recording while the underlying broadcast is still airing.

evidence supporting this assertion. They admit that they have faced the same arguments with regard to DVR functionality, and still successfully negotiated advertising deals. Chan Decl. Ex. 9 (Franks Dep.) at 116:3-17; Chan Decl. Ex. 11 (Brennan Dep.) at 55:20-56:13; Chan Decl. Ex. 13 (Bond Dep.) at 154:20-155:20.

50. Viewership over the Internet and on mobile devices can be and is tracked, and Nielsen offers a product that tracks mobile viewership of live television. Plaintiffs admit that they do not know whether or not Nielsen can or does track Aereo users, and at least one representative of Plaintiffs believes that Nielsen tracks mobile video. Def.'s Ex. 52 (Bond Dep.) at 47:14-49:3; Def.'s Ex. 54 (Dalvi Dep.) at 100:14-101:19; 102:13-103:10. Aereo is willing to work with Nielsen. Def.'s Ex. 9 (Kanojia Decl.) at ¶ 39. At a hearing of the Senate Commerce Committee, a representative of Nielsen noted that Nielsen is capable of tracking video content delivered over the Internet to mobile devices such as tablets and smart phones. 5/30/2012 Tr. at 227:19-228:10 (Kanojia Testimony); *Future of Online Video Content Before the Sen. Comm. On Commerce, Science and Transportation*, 2012 WL 1409033 (Apr. 24, 2012) (written statement of Susan D. Whiting, Vice Chair Nielsen) (describing Nielsen as "a global information and measurement company, measuring what people watch on television, the Internet and mobile devices and what they buy in retail stores and on line."); *see also Future of Online Video Content Before the Sen. Comm. On Commerce, Science and Transportation*, 2012 WL 1424090, at 35-36 (Apr. 24, 2012).

51. Plaintiffs have proffered no evidence of market disruption due to Aereo. 5/31/2012 Tr. at 369:5-8 (Brennan Testimony); Chan Decl. Ex. 11 (Brennan Dep.) at 76:18-77:13; Def.'s Ex. 53 (Davis Dep.) at 157:12-158:5.

52. The CBS Plaintiffs do not have any content carriage agreements up for renewal before 2013. 5/30/2012 Tr. at 62:9-19 (Franks Testimony).

53. Plaintiffs admit that there is unlikely to be any harm to Plaintiffs' relationships with third-party licensees such as Netflix and Amazon because they are in different businesses from Aereo. 5/30/2012 Tr. at 54:8-16 (Franks Testimony).

54. The placement of Plaintiffs' individual content alongside that of any other individual Plaintiff is not itself harmful or disruptive. Chan Decl. Ex. 9 (Franks Dep.) at 64:19-65:8; Def.'s Ex. 51 (Brennan Dep.) at 33:16-34:7.

55. Only two Plaintiffs claim to have even considered entering into the market for mobile broadcast television. Plaintiffs NBC and Fox claim "harm" to a potential future mobile product called "Dyle." Plaintiffs have offered no evidentiary support for their claim that Aereo specifically has impeded the development of Dyle. Dyle is not, and has never been, a functioning product. REDACTED

Def.'s Ex. 51 (Brennan Dep.) at 180:16-181:5; Def.'s Ex. 54 (Dalvi Dep.) at 9:10-22, 21:16-22:3, 37:15-38:2, 38:15-25, 39:5-10, 42:20-24, 44:12-23, 54:12-23, 55:13-23, 56:16-57:16.

56. Plaintiffs admit that Aereo has had no actual effect on Plaintiffs' entrance into the mobile television market. Def.'s Ex. 51 (Brennan Dep.) at 102:24-103:11; Chan Decl. Ex. 17 (Dalvi Dep.) at 9:17-22; 21:16-22:3; 57:7-11; 97:19-23; 153:13-162:11. Nor have Plaintiffs changed any plans or arrangements with new media partners as a result of Aereo's existence. 5/31/2012 Tr. at 372:25-373:7, 373:21-23 (Brennan Testimony).

57. Plaintiffs admit that if consumers increase the use of antennas to capture over-the-air signals, this does not harm, but in fact helps, Plaintiffs. 5/30/2012 Tr. at 65:2-4 (Franks Testimony).

58. Plaintiffs claim that they are unaware of what type of encryption Aereo utilizes. However, Plaintiffs' representative, Sherry Brennan, in fact took extensive notes regarding the type and extent of security utilized by Aereo in June 2011. Pls.' Ex. 78 (Brennan Notes); 5/30/2012 Tr. at 46-6:12 (Franks Testimony). Moreover, Aereo witnesses testified that consumer transmissions of recorded content, in either the "Watch" or "Record" modes, is delivered using the HTTPS secure encrypted protocol. 5/31/2012 Tr. at 292:10-25 (Horowitz Testimony); Def.'s Ex. 10 (Lipowski Decl.) at ¶ 45.

59. Plaintiffs' claimed harms, if any, are economic in nature. Chan Decl. Ex. 15 (Davis Dep.) at 158:11-25; 5/30/2012 Tr. at 48:20-22 (Franks Testimony).

60. Plaintiffs admit that it is their view that economic losses constitute irreparable harm. 5/30/2012 Tr. at 48:20-22 (Franks Testimony).

61. Plaintiffs have used monetary payments to address prior instances of perceived irreparable harm based upon truly unauthorized streaming of the linear broadcast feed. 5/30/2012 Tr. at 52:13-53:8 (Franks Testimony).

VIII. Aereo Will Suffer Devastating Harm If An Injunction Were Allowed

62. Aereo would suffer devastating harm if an injunction were granted. It would lose, among other things, the extraordinary goodwill that it has built with respect to its brand and its business, future business opportunities, the ability to attract new investments at a crucial stage of the company's development, competitive market position, customers, and in all likelihood many of its highly-skilled engineering and software development employees. Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 45-56; 5/30/2012 Tr. at 170:1-172:2 (Kanojia Testimony).

63. Aereo also stands to lose its ability to operate should the Court grant Plaintiffs' motion. Aereo has spent well over a year and its employees have spent thousands of hours of effort to develop and implement Aereo's technology and business plan. It has built infrastructure with millions of dollars of investment in equipment, leases, and people. Def.'s Ex. 9 (Kanojia Decl.) at ¶ 45; 5/30/2012 Tr. at 171:4-16 (Kanojia Testimony).[6]

64. Aereo has engaged in extensive marketing of its technology products and in doing so has generated an extraordinary amount of brand recognition and goodwill for a new company. There were hundreds of articles about Aereo after it launched, including articles by many well-known media outlets, and including a reference to Aereo on the front page of The New York Times. In technology and television circles and within New York, Aereo became well-known overnight and achieved incalculable brand recognition value. It has allowed users to experience Aereo and those users have in turn touted the product. The goodwill built as a result of Aereo's extensive marketing campaign and careful roll-out of its business is entirely dependent upon users actually being able to access the Aereo technology, including the "live" play features. Def.'s Ex. 40 (May 2012 Aereo Published Articles); Def.'s Ex. 9 (Kanojia Decl.) at ¶ 27; 5/30/2012 Tr. at 163:13-22; 170:21-23 (Kanojia Testimony).

65. It took great skill and creativity, as well as countless hours of hard work, for Aereo's engineers to conceive, develop, and implement innovative technology to enable consumers to remotely locate their antennas and DVRs and access television on portable (as well

[6] In response to a question from the Court, Mr. Kanojia indicated that, if the terms of an injunction were limited such that consumers could continue to use the Aereo "Record" functionality in the same way they do currently, any harm to Aereo would be more limited. *See* 5/30/2012 Tr. at 229:5-15 (Kanojia Testimony). Because Plaintiffs have now altered their request for relief to include a request for an injunction that would prevent consumers from watching their recordings at any time before the program broadcast has ended, it is clear that all of the substantial and irreparable harm testified to by Mr. Kanojia will result from the grant of any such injunction. This is because the relief sought by plaintiffs would render the Aereo system fundamentally dissimilar from a home DVR. The entire premise of the Aereo business-a remote antenna and DVR-would be dramatically altered.

as in-home) devices. Def.'s Ex. 10 (Lipowski Decl.) at ¶¶ 16, 19-21; 5/30/2012 Tr. at 144:16-24 (Kanojia Testimony); 5/30/2012 Tr. at 237:17-239:18 (Lipowski Testimony).

66. Aereo is currently offered only in New York, and Aereo has had no actual impact on Plaintiffs' means of revenue generation. Def.'s Ex. 9 (Kanojia Decl.) at ¶ 43; 5/30/2012 Tr. at 53:18-54:16 (Franks Testimony); Def.'s Ex. 52 (Bond Dep.) at 47:14-49:3; Def.'s Ex. 53 (Davis Dep.) at 157:2-158:5; Chan Decl. Ex. 9 (Franks Dep.) at 102:19-23; Def.'s Ex. 51 (Brennan Dep.) at 55:20-56:13, 77:5-13, 102:24-103:11.

67. Aereo's intention has always been to develop innovative technology that complies with the law in every respect. Aereo based its technology in part on the principles espoused in *Cablevision.* Def.'s Ex. 9 (Kanojia Decl.) at ¶¶ 8, 9, 44. Indeed, much of the cloud computing industry has based its technology on principles espoused in *Cablevision*. *See* Brief *Amici Curiae* of NetCoalition and Computer & Communications Industry Association in Support of Neither Party, at 5-6.

68. If an injunction is entered consumers will lose the opportunity to use a compelling new technology to exercise their right to receive, record, and watch broadcast television at their convenience.

CONCLUSIONS OF LAW

1. The only claim made by Plaintiffs in their preliminary injunction motion (identified for the first time in the middle of the May 30-31, 2012 hearing on Plaintiffs' motion) is that a consumer's use of the Aereo technology to play back her own unique recording of broadcast content while the underlying program is still airing constitutes a public performance. For the reasons set forth herein, this claim has no foundation in fact or law. Plaintiffs have chosen not to advance any claim for copying in connection with their injunction motion.

2. Upon a motion for a preliminary injunction: Plaintiffs must show (1) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in Plaintiff s' favor; (2) irreparable injury absent an injunction; (3) that the balance of hardships tips in Plaintiffs' favor; and (4) that the public interest would not be disserved by the issuance of a preliminary injunction. *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010); *see* Plaintiffs' Initial Pre-Hearing Memorandum ("Pl. Initial Br.") at 5-6 (citing same). Plaintiffs can satisfy none of these factors here, and are not entitled to a preliminary injunction.

I. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits

3. Aereo does not engage in any public performance of Plaintiffs' copyrighted works. There is no public performance when consumers use the Aereo technology to make and watch their own unique recordings of broadcast television programming whether consumers do so through the "Watch" function or the "Record" function. The transmissions that consumers make to themselves using Aereo are not "to the public" under the transmit clause of the Copyright Act, because each consumer watches her own unique copy, which is only available to the consumer who made the copy. *See* 17 U.S.C. § 101; *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008) ("*Cablevision*").

4. Consumers have a right to receive over-the-air television broadcasts, and to make copies of those broadcasts for their own personal use. *See Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 454-56 (1984) ("*Sony*").

5. Plaintiffs have not provided any principled legal or factual basis for their position that a consumer's transmission of a unique recording to herself is "public." They have likewise provided no basis whatsoever for their new position that if the transmission is made while any portion of the underlying program is still being broadcast live it is public, and only becomes

"private" once the underlying program has ended. *See* 5/31/2012 Tr. at 418:18-419:4 (Keller Summation). Indeed, this new iteration of their position was not discussed in any brief or declaration submitted by plaintiffs.

A. Transmissions Made Using Aereo's Systems Are Made From Unique Copies to Individual Users.

6. Section 106 of the Copyright Act gives copyright owners, among other rights, the exclusive right to publicly perform their copyrighted works. 17 U.S.C. § 106. The Copyright Act defines "publicly" in pertinent part in the "transmit clause":

> To perform or display a work "publicly" means—
>
> . . .
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101.

7. *Cablevision* established three principles with respect to the definition of a "public performance": first, where only one person is "capable of receiving" a particular performance, the performance is private, not public; second, each communication that originates with a unique copy of a work constitutes a separate "transmission" or "performance"; and third, even if multiple consumers use the system to view different, unique copies of the same underlying work at the same or different times and in separate places, each transmission or performance is still private. 536 F.3d at 136-39.

8. In *Cablevision*, the Second Circuit considered whether a transmission made from an individual, unique copy to only the person who made that copy constitutes a public performance, and held that such a performance is private, not public:

> Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances "to the public," and therefore do not infringe any exclusive right of public performance.

Id. at 139. Even if other consumers use the system to view different, unique copies of the same underlying work, each transmission or performance is still private. *Id*. at 135.

9. The Second Circuit reached this conclusion because the transmit clause "speaks of people capable of receiving a particular 'transmission' or 'performance,' and not of the potential audience of a particular 'work.'" *Id*.

10. The *Cablevision* court concluded that each communication that originates with a unique copy of a work constitutes a separate "transmission." *Id*. at 136-38.

11. In this case, each transmission made by a consumer using the Aereo system is initiated from a unique copy available only to the consumer who made it—whether the playback occurs shortly after the recording begins or after it ends. In all cases, consumers' recordings in the Aereo "Record" and "Watch" functions are fixed "for a period of more than transitory duration." 17 U.S.C. § 101; *see also Cablevision*, 536 F.3d at 127.

12. The copy from which any performance is made by an Aereo consumer is as unique as those copies considered in *Cablevision*, both in the sense that it is separately identifiable to the user who made the copy, and in the sense that it has individual characteristics that are unique to that copy. *See Cablevision*, 536 F.3d at 135-37.

13. Just as in *Cablevision*, "the universe of people capable of receiving" a transmission using the Aereo technology remains, at all times, "the single subscriber whose self-made copy [was] used to create that transmission." *Id*. at 137. As a result, for this reason alone,

under the clear language of *Cablevision*, the transmissions made from copies in the Aereo system cannot be deemed to be performances "to the public."[7]

14. Aereo's system meets each and every element of the *Cablevision* test: a consumer uses the Aereo system to do (1) "the act of playback," (2) "from a unique, user-made copy," (3) "solely to the user who . . . 'made' that copy." Pl. Initial Br. at 15-16 (citing *Cablevision*, 536 F.3d at 137).

15. The fact that other consumers, using the Aereo system, may be transmitting to themselves their own unique copies of the same underlying television program does not turn multiple quintessential private performances into a collective "public performance." *See Cablevision*, 536 F.3d at 135-38.

16. It is of no legal consequence that the Aereo technology is complex—the remote DVR considered in *Cablevision* was complex as well (indeed, a home DVR is complex). *See Cablevision*, 536 F.3d at 125. Similarly, it is of no legal consequence that certain resources in the Aereo system are shared, as the *Cablevision* system also had shared resources. *See id.* at 124-25. Shared resources are irrelevant when, as here, the signal, copy and/or transmission is unique and individual from receipt of the signal to viewing.

B. <u>The *Cablevision* Analysis Did Not Concern, or Even Mention, Time-Shifting.</u>

17. *Cablevision* makes clear that, in considering whether a performance is "to the public," only two factors are considered: (1) the source of the transmission, and (2) the potential recipients of that transmission. *Id.* at 139-40. The case does not include the timing of the playback as a factor relevant to the question of whether a playback is "to the public."

[7] While Plaintiffs have not alleged a reproduction or "copying" claim in connection with their motion for a preliminary injunction, each copy in the Aereo system is made by the user in the same way that the copy was made by the consumer in *Cablevision*. In both cases, the consumer supplies the volitional conduct necessary to begin the specific process by which the copy is made. *Cablevision*, 536 F.3d at 133.

18. Plaintiffs nonetheless argue that *Cablevision* applies only to "time-shifted" content. There is no support for this position in *Cablevision* or in any other case. Indeed, *Cablevision* does not mention time-shifting in relation to any part of its analysis of the transmit clause, and does not define "time-shifting" in any respect. There is certainly no basis in Cablevision to found an arbitrary demarcation for public performance purposes of after the program has aired in full.

19. *Cablevision* dealt with exactly the type of technology at issue in this case. The Second Circuit described the technology in this way:

> To the customer . . . the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR. Using a remote control, the customer can record programming by selecting a program in advance from an on-screen guide, *or by pressing the record button while viewing a given program.*

Cablevision, 536 F.3d at 125 (emphasis added).

20. Thus, trying to found a public performance claim on whether a playback is "fully time-shifted"—that is, whether playback begins while a portion of the underlying programming is still airing—is actually contrary to *Cablevision*. In the Aereo system, regardless of the timing of playback, each transmission is made from a unique fixed copy, and can only be received by the individual who made that copy.

21. Plaintiffs have not been able to cite any language in the transmit clause, in the legislative history, or in Second Circuit jurisprudence that would support the drawing of an arbitrary line at the end of a "live" broadcast as the demarcation that determines whether or not playback from a unique copy falls within *Cablevision*'s analysis. Nor have Plaintiffs provided any principled reasoning for their argument that the playback of a recording is "public" if it is made one minute before the underlying broadcast stops airing but becomes "private" two

minutes later even though in both instances, the playback is made from a unique fixed copy, available only to the user who made it. *See* 5/31/2012 Tr. at 418:18-419:4 (Keller Summation). In essence, Plaintiffs ask this Court to affirmatively make new law in contravention of established Second Circuit precedent.

22. The transmit clause itself makes clear that whether a performance is public depends on the potential audience for that performance, and *not* on the timing of the performance: "To perform or display a work 'publicly' means . . . (2) to transmit . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance receive it . . . *at the same time or at different times*." 17 U.S.C. § 101 (emphasis added).

C. "Space-Shifting" Is Not Relevant To The Public Performance Analysis.

23. Plaintiffs argued in their Reply Brief that the Aereo technology improperly permits a consumer to change the "medium" or device through which she views broadcast television. Plaintiffs' Reply Memorandum of Points and Authorities in Support of Plaintiffs' Joint Motion for a Preliminary Injunction (filed May 25, 2012), pages 8-9. However, Plaintiffs previously took the position that this notion of "space-shifting" was not a part of these proceedings, asserting in a letter to Aereo that, "'Slingbox,' 'place shifting,' 'Boxee' and 'Eyetv' are concepts that have nothing to do with this case." Def.'s Ex. 41 (March 21, 2012 Letter).

24. Courts have consistently held that the use of recording technology to allow for portability of content is not a copyright violation. *See Recording Industry Ass'n of America v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1079 (9th Cir. 1999) ("The Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive." *Cf. Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (holding that 'time-shifting' of copyrighted television shows with VCR's

constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic non-commercial personal use entirely consistent with the purposes of the Act.").

D. Each Transmission Made Using Aereo Is Private Because It Is Made From Individual Unique Signals Acquired by Individual Antennas Tuned by Individual Consumers.

25. Plaintiffs' argument that playback of a unique recording at any time during a "live" broadcast of the underlying programming is a public performance because other members of the public are receiving broadcasts of the same underlying programming runs directly counter to the language of the transmit clause, and was squarely rejected by the Second Circuit in *Cablevision*. *See Cablevision*, 536 F.3d at 136. As the Second Circuit stated, "[t]he implication of this theory is that to determine whether a given transmission of a performance is 'to the public,' we would consider not only the potential audience of that transmission, but also the potential audience of any transmission of the same underlying 'original' performance. Like the district court's interpretation, this view obviates any possibility of a purely private transmission." *Id.*

26. When it adopted the new definition of "public performance" under the 1976 Act, Congress discussed exactly what it meant when it referred to a "performance," noting that:

> [A] singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676-77.

27. Congress went on to note that, even where, as described above, there are successive "performances," each one of those must be treated separately for the purposes of analyzing whether that particular performance is "to the public," and that:

> Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly,' as defined in section 101.

H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

28. Thus, although Congress was expansive in its definition of what constitutes a "performance" under the Copyright Act, Congress was also clear that liability under the Act was limited to *public* performances. *See* H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

29. The transmit clause explains that a transmission may be "to the public" whether the people "capable of receiving the *performance* . . . receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101 (emphasis added).

30. The question in this case is not whether a performance is made, but whether the performance is to the public. The language in the transmit clause which defines whether a performance is public has been interpreted clearly by *Cablevision*. 536 F.3d at 134-37.

31. In considering the multi-step process by which a work makes its way to recipients in television systems, the Second Circuit has noted that each step—each *performance*—must be analyzed separately, and can only be considered a performance "to the public" if the particular signal or copy in question is ultimately received by more than one recipient. *See id.* at 139-40.

32. In the *Cablevision* case, for example, the Second Circuit considered the step by which Cablevision "split" the program stream to get the television signals in question into its RS-DVR system—a step which was unlicensed, and which the plaintiffs specifically challenged as

an unlicensed public performance—and concluded that this was not a "public" performance because "the final transmission in the chain (i.e., the RS-DVR playback transmission)" is not "'to the public.'" *Id.* at 137.

33. Applying *Cablevision*'s careful analysis of the transmit clause, consumers using Aereo's system make only private, not public, performances. Each transmission in the Aereo system is made from a recording of a unique signal received from the consumer's individually-assigned antenna. Neither the signal from the antenna nor the recording is available to any other user. Even if no recording were made, each transmission made by an Aereo user would still be private because the signal from each individual Aereo antenna is available to only one user.

34. The public nature of Plaintiffs' own transmissions of their broadcasts does not render every subsequent transmission of the underlying work a public performance. As the Second Circuit stated, "we believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission. Thus, HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO." *Id.* at 136. The analysis in this case must focus upon the transmissions made by the Aereo consumer, not the transmissions made by Plaintiffs. Regardless of whether Plaintiffs' own over-the-air broadcasts are public, each transmission using the Aereo system is private because it originates from a unique copy made from the signal from an individual antenna, and the potential audience for each transmission is limited to the consumer who tuned the antenna and made the copy.

35. *National Football League v. Primetime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000) ("*NFL*"), reinforces this analysis. In *NFL*, the final transmission in the chain was indisputably "public," made from a single content source—the satellite downlink—to multiple

members of the public, and thus the Second Circuit held that an earlier uplink transmission was public "because it ultimately resulted in an undisputed public performance." *Cablevision*, 536 F.3d at 137. In the case of the Aereo system, however, the final transmissions are private because they are made by the consumer from a unique recording of a unique signal received from an individual antenna tuned by the consumer. As the Second Circuit stated in *Cablevision*, "the *NFL* court did not base its decision on the fact that an upstream transmission by another party (the NFL) might have been to the public. . . . Because *NFL* directs us to look downstream, rather than upstream or laterally, to determine whether any link in a chain of transmissions made by a party constitutes a public performance, we reject plaintiffs' contention that we examine the potential recipients of the content provider's initial transmission to determine who is capable of receiving the RS-DVR playback transmission." *Cablevision*, 536 F.3d at 137.

36. Thus, Plaintiffs' own public performance of their copyrighted works does not change the private nature of the subsequent transmissions by consumers using the Aereo system. Indeed, as the Second Circuit noted in *Cablevision*, if Plaintiffs' original broadcasts were deemed to render all subsequent transmissions public regardless of the source of those later transmissions, "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public." *Id.* at 136.

37. Because each transmission using the Aereo system originates from an individual antenna and an individual recording, and the transmission from each individual antenna and each unique copy is available only to the user who tuned the antenna and made the recording, each performance made in the Aereo system is private. This would be true even if there were no DVR

recording involved in the Aereo platform. The unique signal from each individual antenna is transmitted only to the individual Aereo member.

38. Plaintiffs' entire argument is based on rejection of the Second Circuit's holding in *Cablevision* (and in fact, Plaintiffs, in their closing arguments, urged the Court to disregard that precedent). At oral argument, Plaintiffs suggested that the clear holding in *Cablevision* regarding the nature and meaning of the transmit clause should have no application outside of the exact facts in that case. 5/31/2012 Tr. at 400:14-402:22 (Fabrizio Summation). Plaintiffs argued that such a disregard of the Second Circuit's clear *Cablevision* holdings is permitted under *Barclays Capital, Inc. v. Theflyonthewall.com, Inc*., 650 F.3d 876 (2d Cir. 2011) ("*Theflyonthewall"*). 5/31/2012 Tr. at 400:14-402:22 (Fabrizio Summation).

39. The Second Circuit made no such pronouncement in *Theflyonthewall*. It merely noted that its prior controlling decision in *National Basketball Association v. Motorola, Inc*., 105 F.3d 841 (2d Cir. 2000) ("*NBA*"), had articulated a five-part test in slightly inconsistent terms in different places in the opinion, and construed the specific language in the *NBA* decision in a manner that was most consistent with the preemption principles at issue in the case. *Theflyonthewall*, 650 F.3d at 898-901. The panel then applied the controlling *NBA* holding to the facts in that case. *Theflyonthewall*, 650 F.3d at 902-06. Nothing in the *Flyonthewall* decision would permit a district court to disregard Second Circuit precedent or refuse to apply the *Cablevision* rulings and holdings to the facts of this case, as invited by Plaintiffs.

40. Plaintiffs' argument relies on a misreading if not an outright rejection of the transmit clause, as interpreted by the Second Circuit in *Cablevision*. Plaintiffs' novel theories of liability directly contradict the text of the Copyright Act and established Second Circuit jurisprudence. Therefore, Plaintiffs cannot show a likelihood of success on the merits.

E. Finding These Performances to be "Private" Does Not Limit the Public Performance Right.

41. In limiting the scope of copyright protection to the right of "public performance," Congress specifically exempted "private" performances from liability. *See* H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

42. The right of public performance encompasses numerous categories of activities, from playing a movie in a movie theater, to performing an opera at a music hall, to playing music in a stadium, to broadcasting common television signals to members of the public. *See* 17 U.S.C. § 101 (defining what constitutes performing a work "publicly").

43. The right of public performance also encompasses the transmission of common signals to multiple recipients. However, Congress limited the applicability of the transmit clause to those transmissions that are, themselves, public performances:

> Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly,' as defined in section 101.

H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

44. The Second Circuit in *Cablevision* specifically addressed and dismissed any concern that finding the playback of a fixed unique copy lawful under the Copyright Act would in any way limit the power of the transmit clause, or leave copyright owners without the rights and remedies Congress intended to grant:

> This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any *other* form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement.

Cablevision, 536 F.3d at 139-40. *Cablevision* does not immunize an enterprise that enables private performances of recorded content to which the consumer has no independent right, and neither would a decision here for Aereo.

F. Aereo Does Not Make Any Performances.

45. The transmissions in the Aereo system are not only private, they are also made by the consumer, and not by Aereo. Accordingly, Aereo cannot be directly liable for public performances, even if they did exist.

46. *Cablevision* instructed that volitional conduct is an important element of direct infringement liability, and therefore a court must evaluate whether the allegedly infringing conduct results from the action of the technology supplier or the consumer. The Second Circuit held that Cablevision was "selling access" to an RS-DVR to a consumer who controlled the making of the copy; but because the consumer "made" the copy, Cablevision could not be directly liable for any infringement. *Cablevision*, 536 F.3d at 131-32. Like Cablevision, Aereo's system "automatically obeys commands and engages in no volitional conduct." *Id.* at 131.

47. *Cablevision* reached this conclusion specifically in the context of the § 106(1) reproduction right. While it opined that its conclusion as to the reproduction right does not dictate the result under the § 106(4) public performance right, it did not find it necessary to reach that issue and did not decide it. Nevertheless, the Second Circuit repeatedly cited as persuasive authority for its holding *CoStar Group, Inc. v. LoopNet, Inc.,* 373 F.3d 544 (4th Cir.2004) ("*CosStar*"), and *Religious Tech. Center v. Netcom On-Line Comm. Servs., Inc.,* 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"). In *CoStar*, the Fourth Circuit held that "the automatic copying, storage, *and transmission* of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement under §§ 501 and 106 of the Copyright Act." *CoStar*, 373 F.3d at 555 (emphasis added). Both *Cablevision* and *CoStar* cited *to Netcom*,

which applied the volitional conduct analysis of causation of direct infringement not only to the reproduction right, but also to the rights of distribution *and display under section 106(4)*. *Netcom*, 907 F. Supp. at 1371-72; *cf. Field v. Google, Inc.,* 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (applying volitional conduct test to copying and distribution rights); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs*., 983 F. Supp. 1167, 1178 (N.D. Ill. 1997) (holding defendant Internet service provider Northwest, "[l]ike a copying machine owner," was not liable for direct infringement by merely providing facilities by which consumers engaged in any copying, distribution, or display of plaintiff's works); *Disney Enters., Inc. v. Hotfile Corp*. 798 F. Supp. 2d 1303, 1307-09 (S.D. Fla. 2011) (volitional conduct requirement applies to both reproduction and distribution right). Indeed, in *Arista Records LLC v. Usenet.com, Inc.,* the district court reviewed the case law and agreed that the volitional conduct requirement should apply to direct infringement of any of the exclusive rights, and did apply to the plaintiffs' claim under the section 106(6) digital public performance right in sound recordings. 633 F. Supp. 2d 124, 146-49 (S.D.N.Y. 2009).

48. The Aereo equipment—the antennas that receive the broadcast signals, the remote DVR that copies that signal, and the facilities that playback that recording—perform automatic functions solely in response to the consumer's command and under the consumer's control. Each performance enabled through the Aereo-supplied individual antennas, tuners, DVRs, and related equipment remains under the volitional control of an individual consumer, not Aereo. The antenna becomes capable of receiving a particular program only when activated by the Aereo member, and that member's volitional actions cause a unique stream to be transmitted to that specific member. Thus, it is the consumer, not Aereo, who makes the transmissions that Plaintiffs complain of.

II. The Demonstrated Substantial and Irreparable Harm to Aereo if the Injunction is Allowed Far Outweighs Any Potential Harm to Plaintiffs

49. There is no presumption of irreparable harm in copyright cases; Plaintiffs have the burden to prove that Aereo's conduct will cause them irreparable harm. *See Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010).

50. This Circuit considers delay as a factor in determining whether there is sufficient irreparable harm to support a preliminary injunction. *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Plaintiffs' long delay—and the timing of their lawsuits to impose maximum hardship on Aereo—does not support their claim that any harms require a preliminary injunction.

51. Delay and the immediacy of alleged irreparable harm remain fundamental to this Court's ruling on a preliminary injunction motion. *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009).

52. Plaintiffs' allegations of "harm" are speculative. Plaintiffs have submitted no credible evidence of actual or threatened lost advertising revenue or lost "retransmission" revenue even though Aereo's business model and intentions have been known for over a year. *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995).

53. In order to support a preliminary injunction, any claimed irreparable harm must be imminent. *See Citibank,* 756 F.2d at 276. The Second Circuit has characterized imminent irreparable harm as perhaps the "'single most important prerequisite'" for the issuance of a preliminary injunction. *Id.* at 275 (internal quotation omitted); *see also Shapiro*, 51 F.3d at 332 (in order to establish irreparable harm, movant "must demonstrate 'an injury that is neither remote nor speculative, but actual and imminent'") (internal quotation omitted).

54. The *Citibank* Court recognized that delay in bringing suit demonstrates the lack of imminence—indeed, the Second Circuit has reversed preliminary injunctions based upon less

delay than present here. *Citibank*, 756 F.2d at 276 (reversing grant of preliminary injunction because "[d]elay in seeking enforcement of [plaintiff's] rights . . . tends to indicate at least a reduced need for such drastic, speedy action").

55. Where a movant's knowledge of the potentially infringing activity arose during a pre-launch period, courts have found that plaintiffs cannot lie in wait until the launch of a party's product. *See Hologic, Inc. v. Senorx, Inc.*, No. C-08-00133, 2008 WL 1860035, at *19 (N.D. Cal. Apr. 25, 2008) (where "it appear[ed] that [Plaintiff] waited until it would be most harmful to [Defendant] to seek this injunction," "[s]uch a tactical delay, in addition to tending to weigh against a finding of irreparable harm to [Plaintiff], also provides support that [Defendant] would suffer a greater harm by an injunction than [Plaintiff] would suffer should the requested injunction be denied"); *see also Tiger Direct, Inc. v. Apple Computer, Inc.*, Civ. A. No. 1:05-cv-21136-JAL, 2005 WL 1458046, at *22-23 (S.D. Fla. May 11, 2005).

56. To the extent Plaintiffs argue that Aereo is preventing some other as-yet-unknown entry by Plaintiffs' into the mobile television market, or disrupting the current market for broadcast television, such purported harm is by definition speculative. Plaintiffs offer no evidence that Aereo is a "sub-optimal customer experience" likely to contribute to a "[l]oss of customer goodwill and damage to consumer perceptions about the video on demand market." *Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1014 (C.D. Cal. 2011).

57. Even if Plaintiffs' claims are true, they can be remedied by monetary damages. *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 164 (S.D.N.Y. 2010) ("To be irreparable, the injury must be one that '*cannot be remedied by monetary damages*.'") (emphasis added) (internal quotation omitted); *see also Harrison/Erickson, Inc. v. Chi. Bulls Ltd. P'ship*, Civ. A. No. 1:91-cv-01585-PKL, 1991 WL 51118, at *7 (S.D.N.Y. Apr. 3, 1991) ("in order to be deemed

'irreparable,' so as to warrant the granting of injunctive relief, the harm alleged by the movant 'must be one requiring a remedy of more than mere monetary damages. . . .'") (internal quotation omitted).

58. Plaintiffs' argument that Aereo will diminish Plaintiffs' advertising revenue is purely an economic harm argument. *See Loveridge v. Pendleton Woolen Mills, Inc.*, 788 F.2d 914, 917-18 (2d Cir. 1986) (damage resulting from lost profits is compensable through monetary award).

59. Plaintiffs have not carried their burden to show irreparable harm.

III. The Demonstrated Substantial and Irreparable Harm to Aereo if the Injunction is Allowed Far Outweighs Any Potential Harm to Plaintiffs

60. Plaintiffs have not demonstrated imminent irreparable harm, but Aereo would be severely crippled by an injunction. *See Buffalo Forge Co. v. Ampco–Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981) ("the movant must show that the harm which he would suffer from the denial of his motion is 'decidedly' greater than the harm his opponent would suffer if the motion was granted").

61. Where a non-moving party's loss of substantial investments and customer goodwill decidedly outweigh moving party's loss of prospective business an injunction is inappropriate. *See Funrise Canada (HK) Ltd. v. Zauder Bros., Inc.*, Civ. A. No. 1:99-cv-01519-ARK-RML, 1999 WL 1021810, at *10 (E.D.N.Y. July 2, 1999).

62. Where the hardship faced by one party is nonexistent or *de minimis*, there is a strong likelihood that the balance must tip in favor of the more greatly harmed party. *See, e.g., Grout Shield Distribs., LLC v. Elio E. Salvo, Inc.*, 824 F. Supp. 2d 389, 419 (E.D.N.Y. 2011) (where plaintiff failed to demonstrate any lost sales and defendant had invested a significant

amount of money into its business relationships and product "the balance of hardships [did] not tip decidedly in plaintiff's favor").

63. The balance of harm weighs in favor of Aereo.

IV. The Public Interest Favors Increasing the Availability of Free Over-the-Air Television Broadcasts to be Viewed at the Convenience of the Public

64. Congress has expressed a clear public policy "to make [the broadcast airwaves] available, so far as possible, to all the people of the United States." 47 U.S.C. § 151; *see also Sony*, 464 U.S. at 425 (affirming the District Court's decision and acknowledging that there is a "public interest in increasing access to television programming, an interest that 'is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves.'") (internal citation omitted). Aereo furthers the goals expressed by Congress and the Supreme Court by enabling greater consumer access to television broadcasts for viewing on the devices of their choice in more locations within their home market.

65. Plaintiffs' attempt to stifle Aereo's lawful behavior—and Aereo's users lawful access to over-the-air broadcast television—is antithetical to congressional intent and decidedly against the public interest consumer convenience and access to broadcast network television. *See* 47 U.S.C. §§ 151, 309(a). Aereo furthers the policies enumerated by Congress and provides a lawful solution to practical problems inherent in consumer access to over-the-air broadcasting in New York City.

66. The public interest is strongly served by denial of Plaintiffs' effort to enjoin Aereo.

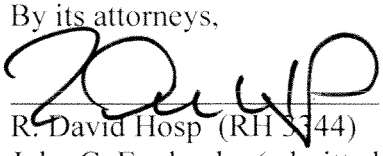
67. Plaintiffs have not demonstrated that they are entitled to a preliminary injunction and their motion is denied.

Dated: June 8, 2012

Respectfully submitted,

AEREO, INC.

By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served by electronic mail upon all counsel of record on June 8, 2012.

R. David Hosp