

No. 13-461

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In the  
Supreme Court of the United States

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

v.

AEREO, INC., F/K/A BAMBOOM LABS, INC.,  
*Respondent*

On Writ of Certiorari to the  
United States Court of Appeals  
For the Second Circuit

**BRIEF *AMICI CURIAE* OF LAW PROFESSORS AND  
SCHOLARS IN SUPPORT OF RESPONDENTS**

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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT .....	3
A. Application of the Charming Betsy canon would be contrary to Congressional intent .....	5
B. The Charming Betsy canon is irrelevant because there is no conflict between Aereo’s position and international copyright agreements.....	12
1. The Berne Convention and WCT do not constrain this Court’s application of the U.S. Copyright Act’s Transmit Clause to Aereo.....	12
2. The provisions of U.S. Free Trade Agreements are inapposite because they regulate only the extension of statutory licenses to Internet re-transmitters.....	18
3. This question is without uniform resolution in the jurisprudence of other countries, further evidencing that there is no binding international standard.....	21
CONCLUSION.....	27
APPENDIX.....	1a

## TABLE OF AUTHORITIES

### CASES

<i>CAPAC v. CTV Television Network Limited et al.</i> , 1968 SCC 89 (CanLII), [1968] S.C.R. 676 .....	22
<i>Cook v. United States</i> , 288 U.S. 102 (1933) .....	10
<i>Corus Staal BV v. Dep't of Commerce</i> , 395 F.3d 1343 (Fed. Cir. 2005), <i>aff'd</i> , 186 F. App'x 997 (Fed. Cir. 2006), <i>cert. denied</i> , 127 S. Ct. 3001 (2007) .....	10
<i>Golan v. Holder</i> , 132 S. Ct. 873 (2012) .....	7
<i>Kirtsaeng v. John Wiley &amp; Sons, Inc.</i> , 133 S. Ct. 1351 (2013) .....	11
<i>Medellin v. Texas</i> , 552 U.S. 491 (2008) .....	12
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804) .....	<i>passim</i>
<i>National Rugby League Investments Pty Ltd v. Singtel Optus Pty Ltd.</i> , FCAFC 59, (2012) 201 F.C.R. 147 (Austl.) .....	23
<i>Quality King Distributors v. L'anza Research International</i> , 523 U.S. 135 (1998) .....	11
<i>Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 35, [2012] 2 S.C.R. 283 (Can.).....	21, 22

*Singtel Optus Pty Ltd v. National Rugby League Investments Pty Ltd (No 2)*,  
 FCA 34 para.95, (2012) 199 F.C.R. 300  
 (Austl.) ..... 23

*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,  
 2004 SCC 45 (CanLII), [2004] 2 SCR 427 ..... 22

*Sony Corp. of America v. Universal City Studios, Inc.*,  
 464 U.S. 417 (1984) ..... 4, 15, 16

*Weinberger v. Rossi*,  
 456 U.S. 25 (1982) ..... 6

*WNET, THIRTEEN v. Aereo, Inc.*,  
 712 F.3d 676 (2d Cir. 2013)..... 3-4

**STATUTES AND OTHER AUTHORITIES**

17 U.S.C § 104(d)..... 7-8

17 U.S.C. § 1201(c) ..... 8

19 U.S.C § 3805 ..... 10

19 U.S.C. § 2503(a)..... 11

19 U.S.C. § 2504(a)..... 11

AUSFTA Art. 17.4(10)(b) ..... 19

AUSFTA Art. 17.4(10)(b), May 18, 2004 ..... 19

AUSFTA Art. 17.6(2)(a) ..... 19

AUSFTA Art. 17.6(5)(b) ..... 19

1 SAM RICKETSON & JANE C. GINSBURG,  
 INTERNATIONAL COPYRIGHT AND  
 NEIGHBORING RIGHTS (2D ED. 2006)..... 7, 13, 18

1 M.B. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.12[A] (2013) .....	5, 7
AUSTRALIAN LAW REFORM COMMISSION, COPYRIGHT AND THE DIGITAL ECONOMY (ALRC REPORT 122) 393 (2013).....	21
Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §2(1), Pub. L. No. 100-568 §2(1) .....	7
Carys J. Craig, Technological Neutrality: (Pre)Serving the Purposes of Copyright Law, in THE COPYRIGHT PENTALOGY 272 (Michael Geist, ed., 2013) .....	22
Christopher Ingraham & Howard Schneider, <i>Industry Voices Dominate the Trade Advisory System</i> , WASH. POST (Feb 27, 2014) .....	9
Curtis A. Bradley, <i>The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law</i> , 86 GEO. L.J. 479 (1997).....	<i>passim</i>
David Brennan, <i>Is IPTV an Internet Service Under Australian Broadcasting and Copyright Law?</i> 60 TELECOMM. J. OF AUSTL. 26.1 (2010) .....	20
David S. Levine, <i>Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law</i> , 30 CARDOZO ARTS & ENT L.J. 105 (2012) .....	9
Harold Hongju Koh, <i>The Fast Track and United States Trade Policy</i> , 18 BROOK. J. INT'L L. 143 (1992).....	9
H. Rep. 89-2237 (1966) .....	16

H. Rep. 94-1476 (1976).....	16
Jean Paul Triaille et al., STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY (THE “INFOSOC DIRECTIVE”) 41 (2013) available at <a href="http://ec.europa.eu/internal_market/copyrig&lt;br/&gt;ht/docs/studies/131216_study_en.pdf">http://ec.europa.eu/internal_market/copyrig ht/docs/studies/131216_study_en.pdf</a> .....	26
Margot E. Kaminski, <i>The Capture of International Intellectual Property Law through the U.S. Trade Regime</i> , S. CAL. L. REV. (forthcoming 2014).....	9
Martin Senftleben, <i>Breathing Space for Cloud- Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions</i> , 4 J. INTELL. PROP. INFO. TECH. & E-COM. L. 87 (2013) .....	26
Oona A. Hathaway et al., <i>Int’l Law at Home: Enforcing Treaties in U.S. Courts</i> , 37 YALE J. INT’L L. 51 (2012).....	6, 10
Pamela Samuelson, <i>The U.S. Digital Agenda at WIPO</i> , 37 VA. J. INT’L L. 369 (1996) .....	15
PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE (3d ed. 2013) .....	7, 13, 14, 17
Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304 (1998) .....	8
Rebecca Crootof, Note, <i>Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon</i> , 120 YALE L.J. 1784 (2011) .....	6

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §114 (1987) .....	5, 12
United States-Korea Free Trade Agreement, U.S.-S.Kor. Art. 18, June 30, 2007, 46 I.L.M. 642 .....	20
WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE .....	14

## STATEMENT OF INTEREST<sup>1</sup>

*Amicus curiae* listed in the Appendix are law professors and scholars who teach, research and write about international and comparative copyright law. Our interest is in clarifying the application of international copyright law to this case. This brief takes no position on the ultimate application of the U.S. Copyright Act to Aereo's technology.

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## SUMMARY OF ARGUMENT

Petitioners imply, and some supporting *amici* argue, that in applying Section 106(4) in this case, the Court should turn to international copyright treaties and free trade agreements as interpretive tools. *Amici's* arguments rely on the *Charming Betsy* canon of statutory interpretation, which requires that, where possible, statutes "be construed so as not to conflict with international law or with an international agreement of the United States." Invocation of the *Charming Betsy* canon in this case is misplaced because it would be contrary to Congressional intent and because international copyright agreements do not mandate any holding in this case.

Application of *Charming Betsy* would be contrary to Congress's intent to leave U.S. Copyright law free from any international constraint not specifically

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



enacted into the Copyright Act. Congress has repeatedly expressed that international copyright agreements are non-self-executing, intending that unaltered provisions of the Copyright Act, including Section 106(4), are not modified by any international obligation. Congress has been emphatic that United States law is “to prevail in conflict” with any Free Trade Agreement (“FTA”) provision, that no provision of an FTA “nor the application of any such provision . . . which is inconsistent with any law of the United States shall have effect,” and that nothing in an FTA may be “construed” to “modify any law of the United States.” This Court has not applied the *Charming Betsy* canon in a case involving provisions of a later-in-time non-self-executing agreement. This Court need not reach how *Charming Betsy* applies here, however, because there would be no conflict between a holding for Aereo and any international agreement.

There would be no conflict between a holding that Aereo does not publicly perform protected works through consumer use of its equipment and the provisions of the Berne Convention for the Protection of Literary and Artistic Works or the World Intellectual Property Organization Copyright Treaty. These agreements require recognition of a right to authorize “communication to the public,” including the “making available to the public” of protected works “in such a way that members of the public may access these works from a place and at a time individually chosen by them.” Enabling on-demand viewing in itself does not trigger the Article 8 right. If it did, every use of a home video recorder to transmit a copy from the recording device to a viewing device would be subject to copyright control. The concept of a “public” communication is not

defined in international copyright conventions, leaving that concept to be defined by domestic law. The agreements envisage that “the mere provision of physical facilities for enabling or making a communication” would not render providers directly liable for the transmissions of users of such infrastructure. These characteristics of the international treaty architecture leave U.S. courts and policy-makers free to define the use of Aereo’s equipment as creating only private performances by Aereo’s customers.

The cited FTA provisions are not relevant to this Court’s consideration. There would be no conflict between a holding for Aereo and the cited FTA provisions, which relate solely to the use of statutory licenses to authorize Internet retransmission.

Foreign law further evidences that no controlling international standard is applicable here. The law cited in the Petitioners’ and *amici* briefs is selective and mischaracterized. The cases cited, and the field viewed as a whole, would not conflict with a holding that Aereo does not publicly perform copyrighted works when its users record and play back content using its equipment. In fact, foreign law, though not controlling, predominantly supports Aereo’s position.

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### ARGUMENT

Respondent Aereo supplies and services equipment that allows a consumer to tune a remotely located antenna to a publicly accessible, free-to-air broadcast television signal; use a remote digital video recorder to make a personal recording from that signal; and then watch that copy via the Internet virtually live or at a later time. *WNET, THIRTEEN v. Aereo, Inc.*, 712 F.3d 676, 680-83 (2d

Cir. 2013). Use of the equipment gives consumers functionality equivalent to that of home recording equipment, including the ability to watch a program at the time of a consumer's choosing and with the ability to pause, fast forward, and rewind programming. *Id.* at 680-81; *cf. Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984) (noting that the Betamax cassette recorder at issue in that case contained a tuner, a recorder, and an adapter for displaying on an attached television). At issue in this case is whether Aereo's provision and support of its equipment constitutes public performance of the programs that home users choose to record and watch through its system. The answer to that question is to be found in the text of the U.S. Copyright Act, not in international or foreign law.

Petitioners make passing reference to international obligations to protect rights to communicate to the public in their brief. Pet.Br. 44-45. But they concede that the scope of such obligations is coextensive with the U.S. public performance right, Pet'r's Br. 45, and do not argue that international law constrains this Court in interpreting the U.S. Copyright Act.

Some *amici* supporting the petitioners go further. They argue that, should the Court find the relevant provisions of the Copyright Act ambiguous, the Court should turn to international copyright treaties and free trade agreements as interpretive tools to resolve ambiguity. *See* Br. *Amici Curiae* International Federation of the Phonographic Industry (IFPI), et. al.; Br. *Amici Curiae* Ralph Oman 15-20; Br. *Amici Curiae* American Soc. of Composers, et. al., 29-35. The fullest exposition of this argument, echoed in the briefs cited above, is in the *amicus* brief filed by the

International Federation of the Phonographic Industry. That brief argues that reference to international agreements is required by the *Charming Betsy* canon of statutory interpretation. Br. *Amici Curiae* IFPI 6-9 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

This Court should reject the appeals in this case to apply the *Charming Betsy* canon. Application of *Charming Betsy* would be contrary to Congress’s intent to leave U.S. copyright law free from any international constraint not specifically enacted into the Copyright Act. See Part A, *infra*. More importantly, invocation of international copyright agreements is unnecessary and inappropriate because such agreements do nothing to resolve the specific issues raised in this case. There would be no conflict between an interpretation of the U.S. Copyright Act favoring Aereo and any international agreement to which the U.S. is a party. See Part B, *infra*.

#### A. APPLICATION OF THE CHARMING BETSY CANON WOULD BE CONTRARY TO CONGRESSIONAL INTENT

International copyright agreements are non-self executing – meaning that they only become judicially cognizable through domestic legislation implementing their mandates. 1 M.B. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.12[A] (2013). Each of the agreements in question is also a later-in-time agreement – ratified after the applicable

provision of the Copyright Act was enacted in 1976. This Court has not applied the *Charming Betsy* canon when the international agreement provisions at issue are contained in later-in-time non-self-executing agreements. Applying the canon to agreements at issue here is particularly problematic in the face of repeated Congressional instructions that entry into such agreements does not modify U.S. law beyond those changes included in implementing statutes.

Congressional intent matters because the *Charming Betsy* canon is a device to preserve separation of powers. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1997). The canon reflects judicial deference to the political branches, and therefore it has no application where Congress has expressed its intent that a given international obligation does not control U.S. law. *See Weinberger v. Rossi*, 456 U.S. 25, 32-35 (1982) (using legislative history to determine Congress's intent in permitting abrogation of U.S. statutory requirement through a "treaty"); *see generally* Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1995-96 (2011) (describing lack of uniformity in applying *Charming Betsy* to non-self executing treaties); Oona A. Hathaway et al., *Int'l Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 87-90 (2012) (describing history and application of the *Charming Betsy* canon).

Any reference to international copyright agreements by this Court must be informed by the long history of Congressional resistance to the incorporation of the Berne Convention and other

international standards into the U.S. Copyright Act. That resistance is animated by the genesis of the Berne Convention in a continental “authors rights” tradition, which, “[i]n principle, . . . rest[s] on sharply differing principles” than the U.S. copyright tradition. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 14 (3d ed. 2013). Congress is cognizant of these differences and has taken explicit efforts to refuse the incorporation of international standards into U.S. law as a response. 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS* 165-69 (2d ed. 2006) (discussing public, scholarly and political ambivalence towards the U.S. joining the Berne Convention, including failed ratification attempts); 1 M.B. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* §1.12[A] n.8-11 and accompanying text (2013).

Reflecting Congress’s reluctance to import international standards into U.S. copyright law, it refused numerous Executive Branch requests to ratify the Berne Convention until 1988 – roughly a century after the Convention’s initial coming into force. When Congress did accept the Convention, its implementation statute evinced a “minimalist approach,” making “only those changes to American copyright law that [were] clearly required under the treaty’s provisions.” *Golan v. Holder*, 132 S. Ct. 873, 879 (2012). “Almost a third of the BCIA’s thirteen sections are designed, in whole or in part, to forestall any claim that the Berne Convention is self-executing under United States law.” 1 M.B. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* §1.12[A] (2013); *see* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §2(1) (declaring Berne Convention provisions “not self-executing”); 17 U.S.C

§104(d) (“(c) Effect of Berne Convention.— No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.”). Congress did not enact any changes to the Section 106(4) public performance right, or to the Section 101 definition of a public performance, to implement the Berne Convention or the later ratified WCT.

Congress evinced similar expressions of intent not to change the U.S. public performance right in its implementation of the WCT. Congress implemented the WCT through the WIPO Treaties Implementation Act contained in Title I of the Digital Millennium Copyright Act of 1998 (“DMCA”). Pub. L. No. 105-304, 112 Stat. 2860 (1998). The WIPO Treaties Implementation Act, like the Berne Convention Implementation Act, did not alter or address the scope of the public performance right in Section 106(4) or Section 101. Congress expressly stated in the WIPO Treaties Implementation Act that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under title 17, United States Code.” Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 112 Stat. 2860, 2865 (Oct. 28, 1998) Section 102(c); codified at 17 U.S.C. § 1201(c) (Other Rights, etc., not Affected); *see* H. Rep. 105-551 at 9 (1998) (“The treaties do not

require any change in the substance of copyright rights or exceptions in U.S. law”).

Statements by Congress rejecting the potential modification of U.S. law by FTAs have been pronounced. As a check on the increased executive discretion that characterizes FTA creation,<sup>2</sup> each FTA Implementation Act abrogates the provisions of the agreement that may come to conflict with U.S. law. For example, the U.S.-Australia FTA Implementation Act Section 102(a) states that:

- (1) United States law to prevail in conflict.—No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

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<sup>2</sup> Congress typically implements FTAs through an expedited legislative procedure known as Fast Track. Under Fast Track, Congress must vote an implementation act up or down within a fixed time period, and cannot amend it. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143, 143 (1992). Congress thus has less of an opportunity to influence the executive branch in the making of such agreements than under the ordinary Article II Treaty implementation process. The curtailed and less transparent process additionally makes it easier for private interest groups to influence the substance of FTAs. Margot E. Kaminski, *The Capture of International Intellectual Property Law through the U.S. Trade Regime*, S. CAL. L. REV. (forthcoming 2014); David S. Levine, *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT L.J. 105, 108-11 (2012). See also Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, WASH. POST (Feb 27, 2014), <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/>.



(2) Construction.—Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States, or

(B) to limit any authority conferred under any law of the United States, unless specifically provided for in this Act.<sup>3</sup>

This section, repeated in all FTA implementation acts, clearly expresses Congress’s intent that FTAs do not amend or modify any law of the United States, including through the “construction” of existing law, and therefore the *Charming Betsy* canon can have no application. *See Cook v. United States*, 288 U.S. 102, 120 (1933) (international commitments do not bind U.S. law where Congress has “clearly expressed” intent to abrogate the international commitment); Oona A. Hathaway et al., *Int’l Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 88 (2012) (discussing *Cook v. United States*, 288 U.S. 102 (1933)).<sup>4</sup>

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<sup>3</sup> United States-Australia Free Trade Agreement Implementation Act, Public Law 108-286, 108th Congress 118 STAT. 919, sec. 102 note, 19 USC 3805 note. *See also* United States-Korea Free Trade Agreement Implementation Act, Public Law 112-41, 112th Congress 125 STAT. 428, sec. 102(a)(Relationship of Agreement to United States Law). United States-Australia Free Trade Agreement Implementation Act, Public Law 108-286, 108th Congress 118 STAT. 919, sec. 102 note, 19 USC 3805 note.

<sup>4</sup> The Federal Circuit has interpreted similar statutory language to find that *Charming Betsy* should not be applied to the General Agreement on Tariffs and Trade (GATT). *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005), *aff’d*, 186 F. App’x 997 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007)(“if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress”). Interpreting

(Continued on Following Page)

This Court has noted the irrelevance of FTA intellectual property provisions in the past. This Court concluded that FTA provisions on international exhaustion were “irrelevant” to its consideration of copyright’s first sale doctrine in *Quality King Distributors v. L’anza Research International*, 523 U.S. 135, 153 (1998); *see, e.g.*, Agreement Between the United States of America and the Kingdom of Cambodia on Trade Relations and Intellectual Property Rights Protection, Art. XIII(2)(A) (signed at Washington Oct. 4, 1996) (“Each Party shall provide to authors and their successors in interest . . . the right to authorize or prohibit: the importation into the Party’s territory of copies of the work, regardless of whether such copies have been placed on the market by the relevant right holder.”). The FTAs “shed no light on the proper interpretation of a statute that was enacted in 1976,” because they were negotiated long after the statute had been enacted. *Id.* at 154. In *Kirtsaeng v. John Wiley & Sons, Inc.*, this Court again refused to consider FTA provisions on international exhaustion as indicating that “the United States now opposes adopting such a regime,” noting that there, as here, “the Solicitor General as amicus has taken no such position in this case.” 133 S. Ct. 1351, 1371 (2013).

Applying *Charming Betsy* in this case would expand the canon, in conflict with the intent of Congress, whose will the canon is meant to

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19 U.S.C. § 2504(a) (“No provision of any trade agreement approved by the Congress under section 2503(a) of this title, nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.”).

implement. However, the Court need not reach the question of whether the *Charming Betsy* canon applies in this case because none of the international commitments cited by Petitioners or *amici* conflict with a holding for Aereo here.

**B. THE CHARMING BETSY CANON IS IRRELEVANT BECAUSE THERE IS NO CONFLICT BETWEEN AEREO'S POSITION AND INTERNATIONAL COPYRIGHT AGREEMENTS**

The *Charming Betsy* canon applies when one resolution of the ambiguity in a domestic statute would violate clear textual expressions in an international treaty. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) citing *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804); *Medellin v. Texas*, 552 U.S. 491, 514 (2008) (explaining the “time honored textual approach” to treaty interpretation). The *Charming Betsy* canon has no application here because there is no clear expression in international copyright agreements of what constitutes a communication “to the public.” *See* Section B.1 *infra*. FTA language on Internet retransmissions is irrelevant because it applies only to the extension of statutory licenses to Internet retransmitters, which are not at issue here. *See* Section B.2, *infra*. Comparative law underscores that this is a question without uniform resolution and that there is no binding international standard that would conflict with a holding for Aereo in this case. *See* Section B.3, *infra*.

- 1. The Berne Convention and WCT do not constrain this Court's application of the U.S. Copyright Act's Transmit Clause to Aereo**

The Berne Convention has been developed over many decades to include a “right of communication to the public.” Berne Convention for the Protection of Literary and Artistic Works, Art. 11, 11*bis*, 11*ter*, Sept. 9, 1886, as last revised at Paris July 24, 1971, *as amended*, Sept. 28, 1979, 828 U.N.T.S. 221.<sup>5</sup> This requirement was adopted and developed over time to respond to the growth of traditional “push” models of broadcast communications, beginning with television and radio and expanding to include cable and satellite broadcasting. 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 741-42 (2d ed. 2006). To respond to the potential growth of “pull” technologies, where consumers could be provided access to works to perform on demand, Article 8 of the 1996 WCT added what may be called the “making available on demand” clause. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 335 (3d ed. 2013) (describing WCT Article 8 as a response to “the question of whether newer technologies enabling

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<sup>5</sup> The right was a latecomer to the international field. Early versions of the Berne Convention did not mandate that copyright protection extend to performances at all. Later versions added, over time, exclusive rights to perform various (but not all) works to a live public audience – reflecting the then dominant means of disseminating a work through intangible means. Responding to the growth of radio and television broadcasting, a right of “communication to the public” was included, covering transmission of various (but not all) works or performances to a remote audience as opposed to one gathered at the place of performance. 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 706-14; 718-29 (2D ED. 2006).

interactive, on-demand transmissions, most notably on the Internet, come with copyright control”); WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty, Art. 8, Dec. 20, 1996, 2186 U.N.T.S. 152. The added clause requires countries to recognize copyright protection for “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” By not defining what specific set of rights the making available protection should come within, Article 8 leaves domestic law substantial freedom in its implementation.<sup>6</sup>

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<sup>6</sup> Both the communication right and the making available on demand right are intended to be loose-fitting garments – able to accommodate the many diverse bodies of domestic law that protect public disseminations by intangible means. *See generally* PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 324 (3d ed. 2013) (describing great diversity in domestic legal systems with respect to protecting a right to exploit works through intangible means). This desire to accommodate diversity in domestic legal systems is prevalent in the making available on demand clause. Article 8 was framed as an abstract “making available” right because there was no agreed way to implement copyright’s exclusive rights in the online environment. WCT Article 8 was designed specifically to allow for the use of any rights – reproduction, distribution, performance, communication – as long as copyright owners got effective online protection where their works were made available for asynchronous communications. *See* WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 271-72 (describing the “umbrella solution” to WCT Article 8 leaving broad discretion in implementation because “there was . . . no agreement concerning the right or rights which should actually be applied” to digital transmissions, and in a desire

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The IFPI brief argues that both the “record” and “watch” functions on Aereo’s equipment fall within the scope of WCT Article 8 because they operate “in such a way that members of the public may access these works from a place and at a time individually chosen by them,” Br. *Amici Curiae* IFPI 17-18. The contrary is true. Because use of Aereo’s equipment requires both a “record” and “watch” function – requiring consumers to dictate both the making available of content for themselves through an individualized reproduction and the transmission of that content back to themselves – Article 8 has no application.

The IFPI argument ignores the first part of the making available on demand clause – which requires that works be made available “to the public.” Enabling on-demand viewing in itself does not trigger the Article 8 right. If it did, every use of an analog video recorder, or a modern DVR, to transmit a copy from the recording device to a viewing device would be subject to copyright control. It would be hard to reconcile such a rule with the outcome in *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417, 468-70 (1984) (Blackmun, J., dissenting on other grounds) (explaining that the case had to be litigated under the reproduction doctrine because consumer playback from Sony’s Betamax recorder constituted a private, not public,

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to permit protection to “differ[ ]to a great extent in national laws”); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 392-96 (1996) (canvassing debates at the 1996 WIPO Diplomatic Conference and the adoption of a solution in WCT Article 8 that rejected “the greater control . . . copyright owners would have” under a more specific clause).

performance under Section 106(4)).<sup>7</sup> U.S negotiators agreed to the language in WCT Article 8, and Congress accepted it, with the *Sony* rule firmly in place and with no intention to alter it. See *supra* Part A.

Article 8 was intended to work a modest clarification of the definition of “public” for a particular class of centralized content-delivery systems, like what would later become Netflix, in which a provider makes available a collection of content for on-demand performances. The key difference between such services and that of Aereo or other cloud computing applications is that the consumer in traditional on-demand service is in charge only of the decision about when to stream and to where. The on-demand service makes particular content available to all of its users. The consumer in

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<sup>7</sup> Professors Menell and Nimmer call the Court’s attention to 1966 committee report language on an earlier bill to the effect that the amendments to the performance clause would be “also applicable . . . in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiation of individual members of the public.” Br. *Amici Curiae* Menell and Nimmer 14-15, discussing H. Rep. 89-2237, at 58 (1966). They fail to note that, perhaps significantly, this language was not included in the otherwise identical passage in the committee report accompanying the final legislation a decade later. H. Rep. 94-1476, at 65 (1976). In any event, the language they quote does not answer the question presented in this case: how properly to characterize a process in which copies stored in an information system are individualized and have been made at the direction of the user rather than the provider. Elsewhere, the 1966 Report affirms, with respect to the display right, that “[n]o provision of the bill would make a purely private display of a work a copyright infringement.” H. Rep. 89-2237, at 56 (1966).

traditional on-demand services is not in charge of a “record” function, which makes specific works available on the provider’s server in the first instance – that decision remains with the provider itself. In the Aereo situation, the consumer operates both the record and watch functions – only streaming a recording to herself that she made, and only that consumer may receive it.

Article 8 of the WCT was never meant to make every provider of tools or services that allow consumers to make and transmit copies of content to themselves directly liable for copyright infringement. This is clear from the Agreed Statement on Article 8 that was adopted by the treaty negotiators contemporaneously with the conclusion of the treaty.<sup>8</sup> That Statement clarifies that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication.” Agreed Statements Concerning the WIPO Copyright Treaty, WIPO Doc. CRNR/DC/96; (Dec. 20, 1996); see PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 336 (3d ed. 2013) (“The right of communication to the public, including making available online, assumes an active role on the part of the ‘communicator.’”).

Neither the Berne Convention nor the WCT define when a transmission of a work should be

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<sup>8</sup> See Vienna Convention on the Law of Treaties, Sec. 3 Art. 31, May 23, 1966, 1155 U.N.T.S. 331 (“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . [a]ny agreement relating to the treaty which was made between all the parties in connexion (*sic*) with the conclusion of the treaty.”).



considered “to the public.” The demarcation between ‘public’ and ‘private’ communications thus “remains a matter for determination by national legislation.” 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS* 705 (2d ed. 2006). It would be consistent with this protection of domestic policy space for this Court to decide that consumers rather than Aereo make the transmissions of works over its system, or that the restrictions inherent in the system that prevent a transmission from being viewed by more than one recipient render the communications “private” rather than public.

Whatever the Court’s decision on whether Aereo can be liable under the Copyright Act, it is not international law that will direct the outcome. Member states are left free to decide this question in their national laws. Accordingly, the *Charming Betsy* canon is irrelevant.

**2. The provisions of U.S. Free Trade Agreements are inapposite because they regulate only the extension of statutory licenses to Internet retransmitters**

As discussed above, Congress has explicitly provided that FTAs do not bind the U.S. in case of any conflict with U.S. law. This makes a conflict between U.S. law and an FTA impossible, in turn rendering the *Charming Betsy* canon inapplicable. Nonetheless, the FTA language cited by *amici* does not apply to technologies like Aereo’s.

Representative FTA language on Internet retransmissions states:

notwithstanding sub-paragraph (a) and Article 17.6.3(b), neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet

without the authorisation of the right holder or right holders, if any, of the content of the signal. United States-Australia Free Trade Agreement, U.S.-Austl. Art. 17.4(10)(b), May 18, 2004, 43 I.L.M. 1248 (hereinafter "AUSFTA"). This provision is not a definition or expansion of the communication to the public right included elsewhere in FTAs. *See* AUSFTA Art. 17.6(2)(a), 17.6(5)(b) (requiring protection of public communication rights). Rather, the Internet retransmission provision is framed as an exception to the preceding "sub-paragraph (a)" which authorizes "limitations or exceptions to exclusive rights" in "certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder." AUSFTA Art. 17.4(10)(b). The Internet retransmission provision is also framed as an exception to Article 17.6.3(b), which provides that that the application of the communication to the public and making available on demand rights included in the FTA "to traditional free over-the-air (i.e., non-interactive) broadcasting, and exceptions or limitations to this right for such broadcasting activity, shall be a matter of each Party's law." Article 17.6.3(b) is specifically intended to recognize and protect the use of statutory or compulsory licenses in relation to the rebroadcast of television signals to meet public policy goals, including ensuring broad public access to free-to-air television. Viewed in its context, the FTA Internet retransmission provision does no more than prohibit

the extension of statutory broadcast licenses to Internet retransmitters, which is not at issue here.<sup>9</sup>

The special attention given to internet retransmissions in FTAs derives from a specific experience with a Canadian Internet broadcaster – iCraveTV – which provided “open-access and web-based” retransmissions of digitized third party broadcast signals, “so as to enable any user, anywhere in the world, who visited the iCraveTV website to access that content.” David Brennan, *Is IPTV an Internet Service Under Australian Broadcasting and Copyright Law?* 60 TELECOMM. J. OF AUSTL. 26.1, 26.7-9 (2010). The fear that the FTA Internet retransmission provision was intended to combat was “the possible consequences of extra-territorial internet retransmission” from a provider

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<sup>9</sup> The focus of the AUSFTA Internet retransmission language on preventing extra-territorial retransmissions is further displayed in the side letter between the parties to the agreement. The side letter envisions renegotiation of the provision if “it is the considered opinion of either party that there has been a significant change in the reliability, robustness, implementability and practical availability of technology to effectively limit the reception of Internet retransmissions to users located in a specific geographical market area.” Letter from Mark Vaile, Minister for Trade, to Robert Zoellick, United States Trade Representative (May 18, 2004) (on file with U.S.T.R.); Letter from Robert Zoellick, United States Trade Representative, to Mark Vaile, Minister for Trade (May 18, 2004) (on file with U.S.T.R.). Footnote 15 in the US-Korea FTA contains a similarly motivated definition that “retransmission within a Party’s territory over a closed, defined, subscriber network that is not accessible from outside the Party’s territory does not constitute retransmission on the Internet.” United States-Korea Free Trade Agreement, U.S.-S.Kor. Art. 18 n. 15, June 30, 2007, 46 I.L.M. 642.

subject to statutory licensing in one country. AUSTRALIAN LAW REFORM COMMISSION, COPYRIGHT AND THE DIGITAL ECONOMY (ALRC REPORT 122) 393 para. 18.102 (2013).

Section 106(4)'s public performance right is unaltered by any language in the FTAs. This case does not involve the extension of U.S. statutory licenses for cable and satellite broadcasts to internet retransmission, and therefore the cited FTA provisions are inapplicable.

**3. This question is without uniform resolution in the jurisprudence of other countries, further evidencing that there is no binding international standard**

This Court is not under any obligation to harmonize U.S. law to that of other countries. Each case cited by Petitioners and in the IFPI *amicus* brief is distinguishable on its facts or on the basis of the law applied. On the whole, a survey of law in the jurisdictions to which IFPI cites indicates that there is no uniform resolution in other countries of the issues before this Court, further evincing that there is no controlling international standard at issue.

The Supreme Court of Canada ("SCC") decision, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, 292, 311-12 (Can.), cited by *amici*, is irrelevant to the issues in this case. *Rogers* involved a traditional on-demand streaming service where the provider curated a catalogue of works made available for viewing on demand. Aereo, again, does not provide a catalogue of works, but enables individual users to privately record works of their choice. As described above, this distinction is crucial to application of both the international and U.S.

rules in this case. *Rogers* provides nothing helpful to this Court's analysis.<sup>10</sup>

Contrary to the IFPI arguments, the principle of technological neutrality recognized by the Supreme Court of Canada is consistent with Aereo's position. In *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, a companion case to *Rogers*, the SCC held that applying a separate "communication to the public" right to the downloading of a video game would violate "the principle of technological neutrality, which requires that the Copyright Act apply equally between traditional and more technologically advanced forms of the same media." 2012 SCC 34 (CanLII), [2012] 2 SCR 231, 232. See generally Carys J. Craig, *Technological Neutrality: (Pre)Serving the Purposes of Copyright Law*, in THE COPYRIGHT PENTALOGY 272 (Michael Geist, ed., 2013). Similarly, Aereo argues that its technology is, in essence, a more technologically advanced form of a Sony Betamax video recorder or DVR. As such, the "technological neutrality" principle would support

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<sup>10</sup> IFPI fails to cite other relevant Canadian cases. See e.g. *CAPAC v. CTV Television Network Limited et al.*, 1968 SCC 89 (CanLII), [1968] S.C.R. 676, 682-83 (holding that the cable or microwave transmission of TV broadcasts from a TV network to its affiliated but independent local stations, including through the facilities of a third party, was 'private' communication); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at 92-97 (CanLII), [2004] 2 SCR 427, 466-67 (holding that, consistent with WCL Article 8, service providers who act as internet intermediaries providing "a conduit" for information communicated by others do not infringe the public performance right).

the non-application of a separate communication right under the *ESA* decision.

Petitioners and *amici* cite the Australian Full Federal Court decision in *National Rugby League Investments Pty Ltd v. Singtel Optus Pty Ltd*. [2012] FCAFC 59, (2012) 201 F.C.R. 147 (Austl.). That case does not address the right to communicate works to the public.<sup>11</sup> The appeal decision addresses only the reproduction right, which is not being litigated against Aereo in this Court. The communication right was addressed by the trial court, which found that, when customers record and play television shows to their devices from individual copies made on Optus servers, Optus was not “communicating” the television shows to the public. *Singtel Optus Pty Ltd v. National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 para.95, (2012) 199 F.C.R. 300, 330 (Austl.) (“Optus does not determine what the user decided to record when he or she later decides to play it on the compatible device he or she is then

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<sup>11</sup> Australian copyright law operates quite differently than US law in the online environment. Australia does not recognize a general distribution right, nor does it apply a ‘performance right’ to online communications. Australia redrafted its broadcast and cable diffusion rights following the WCT to create a technology-neutral right to communicate works to the public. Copyright Act 1968 (Cth) s 31(1)(a)(iv) (Austl.). ‘Communicate’ is defined to mean ‘make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise)’. Copyright Act 1968 (Cth) s10 (Austl.). The Act further specifically provides that a communication “is taken to have been made by the person responsible for determining the content of the communication” -- a provision designed to protect ISPs and other mere conduits from direct liability for infringement.

using to watch the film. Hence, the user, not Optus, is the person responsible for determining the content of the communication within the meaning of s 22(6) when he or she plays a film recorded for him or her on the TV Now service. Thus, the user did the act of electronically transmitting the film within the meaning of ss 86(c) and 87(c).”.

E.U. decisions are not contrary to Aereo’s position in this case. Recently, in *ITV v. Catchup TV*, the Court of Justice of the European Union (CJEU) held that an over-the-Internet broadcast streaming service that lacked a “record” function, and therefore was not transmitting consumers’ own copies back to them, was a communication to the public under EU law. Case C-607/11, *ITV Broad. Ltd. V. TVCatchup Ltd.*, 2013 E.C.R I-\_\_\_\_. What differentiates Aereo’s technology, and Cablevision’s before it, is that consumers direct both the copy and the transmission, even for programming viewed virtually live.

Petitioners and *amici* are selective in the EU case law they are citing. The Petitioners and *Amici* fail to cite or discuss *Nils Svensson et al. v. Retriever Sverige AB*, in which the CJEU held that a website which provided a link to material that was freely available on the copyright owner's own website did not violate the “making available” right because the new link did not make the work available to a “new public” that did not already have access to the work. Case C-466/12, *Nils Svensson et al. v. Retriever Sverige AB* [2014] at paras 22-30; *see id.* at para 26 (“The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.”). Against this background, it is misleading to

give the impression that E.U. case law provides a clear answer to the legal status of technology offered by Aereo. This is even the more true as Aereo operates under technological restrictions that prevent broadcasts from reaching a “new public” not already served by the original transmission. This specific situation has not yet been assessed by the CJEU.

Apart from the scope of the exclusive right of communication to the public, it is moreover important to note that E.U. copyright law contains a specific exemption of acts of digital private copying in Article 5(2)(b) of the Information Society Directive 2001/29/EC. In assessing Aereo's services, the CJEU would thus also have to consider the scope of this exception to copyright. The CJEU, in its ruling in *Football Association Premier League*, underlined with regard to transient copying in the sense of Article 5(1) of the Information Society Directive, the need to guarantee the proper functioning of the exception and the necessity to balance the rights and interests of right holders, on the one hand, and of users of protected works who wish to use new technologies, on the other. C-403/08 and C-429/08, *Football Association Premier League v. QC Leisure*, para. 164. Applying these guidelines to the Aereo case, the CJEU may find that the individual recording and transmission of broadcasts on the initiative of private consumers falls under the exemption of private copying in EU copyright law.

In this vein, the German Federal Court of Justice held in the *Shift.TV* case that the private user of an automated system for recording TV broadcasts was responsible for the making of copies of protected works and that transmissions generated by the system were not “public” because each individual



copy was made available only to the subscriber who had made that copy (German Federal Court of Justice, 22 April 2009, case I ZR 216/06, “Internet-Videorecorder”, published in *Gewerblicher Rechtsschutz und Urheberrecht* 2009, 845, para. 23,26); see Jean Paul Triaille et al., STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY (THE “INFOSOC DIRECTIVE”) 41 (2013) available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/131216\\_study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf).<sup>12</sup>

Petitioners and *Amici* also fail to cite or discuss *Record TV v. Mediacorp TV*, [2010] SGCA 43, in which Singapore’s Court of Appeal held that an “internet digital video recorder” for free-over-the-air content “did not communicate” the plaintiff’s broadcasts to the public. The Singapore Court held that the communication right was not violated “for two reasons: first, we are of the view that there have not been any communications to ‘the public’” because

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<sup>12</sup> The German Federal Court of Justice later found that the transmission of over-the-air TV signals to the online recorders of private subscribers required licensing from broadcasters under a “broadcast organizations” section of German law more analogous to the U.S. Cable Act than to Section 106(4) of the Copyright Act (Id. para. 33, 35). In contrast to Aereo, however, the Shift.TV service was not based on individual antennas for each individual subscriber. Shift.TV used a central antenna to receive broadcasting signals which it then redistributed centrally to the cloud video recorders of those subscribers who wished to watch the broadcast (at a later time). See Martin Senftleben, *Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, 4 J. INTELL. PROP. INFO. TECH. & E-COM. L. 87, 87-103 (2013).

the system only permitted users to view programs they had requested to be recorded; “and second, we do not think that Record TV was the party which made the communications in question,” rather the customer of the service was the one communicating. *Record TV v. Mediacorp TV*, [2010] SGCA 43, para. 23.

It is noteworthy that Singapore is a FTA partner of the United States as well as a WCT member. The decision discussed WCT Article 8 and found it not contrary to the court’s decision. *Record TV v. Mediacorp TV*, [2010] SGCA 43 para. 34-36. The executive branch has not notified Singapore or otherwise stated an opinion that this case violated any international commitment with the U.S, showing that the executive branch does not understand FTA language to control.

#### **CONCLUSION**

For the foregoing reasons, this Court should reject application of the Charming Betsy canon and the judgment of the Court of Appeals should be affirmed.

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