SCOTUSblog (Jun. 26, 2014)
http://www.scotusblog.com/2014/06/symposium-aereo-disruptive-technology-and-statutory-interpretation/

Aereo, Disruptive Technology, and Statutory Interpretation

Peter S. Menell[*] and David Nimmer[**]

The *Aereo* case presented two fundamental showdowns: one between the cable industry and a charismatic disruptive technology and the other between textualists and jurists seeking to vindicate legislative intent. Much of the media attention surrounding the case focused on the former. But it was the latter that proved decisive, and rightfully so.

Under our Constitution, Congress has primacy in enacting laws and the judiciary plays a critical role interpreting those laws. Copyright law poses a particular interpretive challenge in that it comprises a mix of statutory provisions and court-developed doctrines. The interpretive challenge is compounded by the relentless emergence of new technologies. In some cases, such as online service providers, Congress has augmented the Copyright Act to accommodate technological change. In others, courts must apply older statutory provisions to new technologies.

The Supreme Court's majority opinion in *Aereo* grounds its decision in a respectful, balanced effort to vindicate Congress's legislative intent in crafting copyright's public performance right. As chronicled in our brief, the emergence of the cable industry in the mid 1960s exerted a profound influence on copyright history and the drafting of the Copyright Act of 1976. What might well have been the Copyright Act of 19**6**6 was derailed by an impasse over community antenna television (CATV). The Supreme Court grappled with the applicability of the Copyright Act of 1909 to CATV in two controversial decisions – *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974) – holding that such services did not violate the 1909 Copyright Act.

By 1976, the number of cable systems had grown to over 3,000 systems servicing over ten million homes throughout the United States. In legislatively overturning *Fortnightly* and *Teleprompter*, Congress noted that "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs." H. R. Rep. No. 94-1475, at 89 (1976). As a compromise responding to the impracticality of requiring every cable system to negotiate with every copyright owner whose work was retransmitted, Congress crafted a compulsory license for the retransmission of over-the-air broadcasts.

Aereo sought to circumvent that regime through what Judge Denny Chin below characterized as a "Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013)

---

[*] Koret Professor of Law and Director, Berkeley Center for Law & Technology, University of California at Berkeley.
[**] Professor from Practice, UCLA School of Law; Of Counsel, Irell & Manella LLP.

(Chin, J., dissenting). Writing for the majority of the U.S. Supreme Court, Justice Breyer looked to the detailed text of the Copyright Act of 1976 as well as its broader purposes and the circumstances surrounding its passage in ruling that Aereo violates copyright's public performance right.

In applying the Copyright Act's provisions to Aereo's miniature antenna/DVR farms, the Supreme Court's majority gave due regard to the momentous compromise over cable television reflected in Copyright Act of 1976.

> Congress enacted new language that erased the Court's [*Fortnightly*/ *Teleprompter*] line between broadcaster and viewer, in respect to 'perform[ing]' a work. The amended statute clarifies that to 'perform' an audiovisual work means 'to show its images in any sequence or to make the sounds accompanying it audible.' §101. . . . Under this new language, *both* the broadcaster and the viewer of a television program "perform," because they both show the program's images and make audible the program's sounds. See H. R. Rep., at 63 ("[A] broadcasting network is per-forming when it transmits [a singer's performance of a song] . . . and any individual is performing whenever he or she . . . communicates the performance by turning on a receiving set").

Aereo Slip op. at 7 (emphasis in original). The opinion notes the breadth of the Transmit Clause, emphasizing how it was crafted to cover the CATV systems at issue in *Fortnightly* and *Teleprompter*. The creation of the Section 111 compulsory license completed the statutory regime by opening a balanced, low transaction cost pathway for cable television systems to operate within the scope of the Copyright Act.

The majority applied a functional lens to vindicate Congress's intent in crafting what constitutes a public performance, concluding that the legislative "history makes clear that Aereo is not simply an equipment provider [but r]ather 'performs[s]' (or transmit[s]')" copyrighted works. The majority opinion parsed the broad language of the Transmit Clause – expressly providing that an entity may perform publicly "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times" – in concluding that "Aereo 'perform[s]' petitioners' copyrighted works 'publicly,' as those terms are defined by the Transmit Clause."

Justice Scalia's dissent, joined by Justices Thomas and Alito, is remarkable in its reliance upon a non-textual doctrine: that copyright infringement can only occur through *volitional conduct*. Although that doctrine had been invoked in several lower court decisions, the Supreme Court has never adopted it. The doctrine traces its roots to *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), a pre-DMCA Internet case holding that "[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." Although early drafts of the DMCA online service provider safe harbor (Section 512) provision would have codified the volition doctrine, the ultimate statutory formulation took a different path. See 4 NIMMER ON COPYRIGHT § 12B.06[B][2][b].

It is surprising to see Justice Scalia putting so much emphasis on a non-textual doctrine, especially when there is so much text to chew on. His suggestion that the volition requirement "is firmly grounded in the Act's text, which defines 'perform' in active, affirmative terms" reveals the "eye of the beholder" quality behind his textualist jurisprudence. His analysis overlooks the broad statutory definition of "perform" as well as the detailed text of Section 111, which channels those retransmitting over-the-air broadcast signals into a compulsory license regime. He is not even willing to engage the statute's Transmit Clause. The dissent's analogy between a copy shop that rents out photocopiers and Aereo's service rings hollow, especially in view of Congress's clear intention to channel retransmission services into the detailed statutory regime.

Based on active questioning at oral argument about potential ramifications for other Internet services, many commentators speculated that the Supreme Court would focus on the effects of its ruling on cloud-based services. Aereo's response had been to deflect attention from the legislative intention in crafting the Transmit Clause by raising the specter that holding it liable could trigger a parade of horribles for other cloud technologies. The majority opinion wisely steered clear of addressing technologies and services that were not before it.

Does this decision vindicate optimal public policy for the Internet Age? Such a determination would require assessing how consumer demand for entertainment goods and distribution services can most effectively be satisfied in a technologically dynamic marketplace, along with the effects of alternative regimes on the quality and quantity of audiovisual works—complex inquiries that lie beyond the competence of courts to evaluate.

The Constitution appropriately puts Congress in the driver's seat in assessing these policy matters. But as we have witnessed time and time again, Congress faces tremendous structural constraints in updating copyright law. It took nearly two decades for the Copyright Act of 1976 to emerge, with the battle over cable television proving to be the largest stumbling block. That is why it was so difficult for the Supreme Court to ignore the legislative history in addressing Aereo's efforts to circumvent the Copyright Act's public performance right.

Yet no one should be entirely satisfied with where the Supreme Court's resolution of this case leaves the larger policy determination. The Copyright Act of 1976 is indeed creaky. While its drafters enunciated purposes and principles that have guided the evolution of copyright protection, we are nearly half a century beyond those drafting choices. Thus, while we commend the Supreme Court's faithful execution of its Constitutional role, we nonetheless believe that the time is ripe to consider how best to reform the Copyright Act for the current technological age. The Supreme Court's appropriate respect for Congress's 1976 legislative choices should not be seen as magically achieving the best regime today for serving the insatiable demand for Internet access to copyrighted works. Market forces have responded to that demand – as reflected in the growing range of services – but as Aereo's rapid growth has shown, there are reasons to believe that Congress should carefully review the availability of over-the-air signals in the Internet Age. *Aereo* highlights the need to open up better ways of channeling creators and consumers into well-functioning markets for content – just as the compulsory license for cable retransmission accomplished nearly forty years ago.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMERICAN BROADCASTING COS., INC., ET AL. *v.* AEREO, INC., FKA BAMBOOM LABS, INC.

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

No. 13–461. Argued April 22, 2014—Decided June 25, 2014

The Copyright Act of 1976 gives a copyright owner the "exclusive righ[t]" to "perform the copyrighted work publicly." 17 U. S. C. §106(4). The Act's Transmit Clause defines that exclusive right to include the right to "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." §101.

Respondent Aereo, Inc., sells a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air. When a subscriber wants to watch a show that is currently airing, he selects the show from a menu on Aereo's website. Aereo's system, which consists of thousands of small antennas and other equipment housed in a centralized warehouse, responds roughly as follows: A server tunes an antenna, which is dedicated to the use of one subscriber alone, to the broadcast carrying the selected show. A transcoder translates the signals received by the antenna into data that can be transmitted over the Internet. A server saves the data in a subscriber-specific folder on Aereo's hard drive and begins streaming the show to the subscriber's screen once several seconds of programming have been saved. The streaming continues, a few seconds behind the over-the-air broadcast, until the subscriber has received the entire show.

Petitioners, who are television producers, marketers, distributors, and broadcasters that own the copyrights in many of the programs that Aereo streams, sued Aereo for copyright infringement. They sought a preliminary injunction, arguing that Aereo was infringing

Syllabus

their right to "perform" their copyrighted works "publicly." The District Court denied the preliminary injunction, and the Second Circuit affirmed.

Held: Aereo performs petitioners' works publicly within the meaning of the Transmit Clause. Pp. 4–18.

(a) Aereo "perform[s]." It does not merely supply equipment that allows others to do so. Pp. 4–10.

(1) One of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's holdings that the activities of community antenna television (CATV) providers fell outside the Act's scope. In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390, the Court determined that a CATV provider was more like a viewer than a broadcaster, because its system "no more than enhances the viewer's capacity to receive the broadcaster's signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer's television set." *Id.,* at 399. Therefore, the Court concluded, a CATV provider did not perform publicly. The Court reached the same determination in respect to a CATV provider that retransmitted signals from hundreds of miles away in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394. "The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer," the Court said. *Id.,* at 408. Pp. 4–7.

(2) In 1976, Congress amended the Copyright Act in large part to reject the *Fortnightly* and *Teleprompter* holdings. The Act now clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." §101. Thus, *both* the broadcaster *and* the viewer "perform," because they both show a television program's images and make audible the program's sounds. Congress also enacted the Transmit Clause, which specifies that an entity performs when it "transmit[s] . . . a performance . . . to the public." *Ibid.* The Clause makes clear that an entity that acts like a CATV system itself performs, even when it simply enhances viewers' ability to receive broadcast television signals. Congress further created a complex licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts to the public. §111. Congress made all three of these changes to bring cable system activities within the Copyright Act's scope. Pp. 7–8.

(3) Because Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach, Aereo is not simply an equipment provider. Aereo sells a service that allows subscribers to watch television programs, many of which are

copyrighted, virtually as they are being broadcast. Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes. By means of its technology, Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnightly*, *supra,* at 400.

This Court recognizes one particular difference between Aereo's system and the cable systems at issue in *Fortnightly* and *Teleprompter*: The systems in those cases transmitted constantly, whereas Aereo's system remains inert until a subscriber indicates that she wants to watch a program. In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. Pp. 8–10.

(b) Aereo also performs petitioners' works "publicly." Under the Clause, an entity performs a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." §101. What performance, if any, does Aereo transmit? Petitioners say Aereo transmits a *prior* performance of their works, whereas Aereo says the performance it transmits is the *new* performance created by its act of transmitting. This Court assumes *arguendo* that Aereo is correct and thus assumes, for present purposes, that to transmit a performance of an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Under the Court's assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

What about the Clause's further requirement that Aereo transmit a performance "to the public"? Aereo claims that because it transmits from user-specific copies, using individually-assigned antennas, and because each transmission is available to only one subscriber, it does not transmit a performance "to the public." Viewed in terms of Congress' regulatory objectives, these behind-the-scenes technological differences do not distinguish Aereo's system from cable systems, which do perform publicly. Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Under the Clause, an entity may transmit a performance through multiple transmissions, where the performance is of the same work. Thus when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it "transmit[s] . . . a per-

Syllabus

formance" to them, irrespective of the number of discrete communications it makes and irrespective of whether it transmits using a single copy of the work or, as Aereo does, using an individual personal copy for each viewer.

Moreover, the subscribers to whom Aereo transmits constitute "the public" under the Act. This is because Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. In addition, neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. Finally, the statute makes clear that the fact that Aereo's subscribers may receive the same programs at different times and locations is of no consequence. Aereo transmits a performance of petitioners' works "to the public." Pp. 11–15.

(c) Given the limited nature of this holding, the Court does not believe its decision will discourage the emergence or use of different kinds of technologies. Pp. 15–17.

712 F. 3d 676, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–461

AMERICAN BROADCASTING COMPANIES, INC., ET AL., PETITIONERS *v.* AEREO, INC., FKA BAMBOOM LABS, INC.

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

[June 25, 2014]

JUSTICE BREYER delivered the opinion of the Court.

The Copyright Act of 1976 gives a copyright owner the "exclusive righ[t]" to "perform the copyrighted work publicly." 17 U. S. C. §106(4). The Act's Transmit Clause defines that exclusive right as including the right to

> "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." §101.

We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.

I

A

For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast. Much of this programming is made up of copyrighted works. Aereo neither owns the copyright in those works nor holds a license from the copyright owners to perform those works publicly.

Aereo's system is made up of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse. It works roughly as follows: First, when a subscriber wants to watch a show that is currently being broadcast, he visits Aereo's website and selects, from a list of the local programming, the show he wishes to see.

Second, one of Aereo's servers selects an antenna, which it dedicates to the use of that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show. The antenna begins to receive the broadcast, and an Aereo transcoder translates the signals received into data that can be transmitted over the Internet.

Third, rather than directly send the data to the subscriber, a server saves the data in a subscriber-specific folder on Aereo's hard drive. In other words, Aereo's system creates a subscriber-specific copy—that is, a "personal" copy—of the subscriber's program of choice.

Fourth, once several seconds of programming have been saved, Aereo's server begins to stream the saved copy of the show to the subscriber over the Internet. (The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo's service is not before us.) The subscriber can watch the streamed program on the screen of his personal computer, tablet, smart phone, Internet-connected television, or other Internet-connected device. The streaming continues, a mere few seconds

behind the over-the-air broadcast, until the subscriber has received the entire show. See A Dictionary of Computing 494 (6th ed. 2008) (defining "streaming" as "[t]he process of providing a steady flow of audio or video data so that an Internet user is able to access it as it is transmitted").

Aereo emphasizes that the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular antenna allotted to him. Its system does not transmit data saved in one subscriber's folder to any other subscriber. When two subscribers wish to watch the same program, Aereo's system activates two separate antennas and saves two separate copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions—each from the subscriber's personal copy.

B

Petitioners are television producers, marketers, distributors, and broadcasters who own the copyrights in many of the programs that Aereo's system streams to its subscribers. They brought suit against Aereo for copyright infringement in Federal District Court. They sought a preliminary injunction, arguing that Aereo was infringing their right to "perform" their works "publicly," as the Transmit Clause defines those terms.

The District Court denied the preliminary injunction. 874 F. Supp. 2d 373 (SDNY 2012). Relying on prior Circuit precedent, a divided panel of the Second Circuit affirmed. *WNET, Thirteen* v. *Aereo, Inc.*, 712 F. 3d 676 (2013) (citing *Cartoon Network LP, LLLP* v. *CSC Holdings, Inc.*, 536 F. 3d 121 (2008)). In the Second Circuit's view, Aereo does not perform publicly within the meaning of the Transmit Clause because it does not transmit "to the public." Rather, each time Aereo streams a program to a subscriber, it sends a *private* transmission that is avail-

able only to that subscriber. The Second Circuit denied rehearing en banc, over the dissent of two judges. *WNET, Thirteen* v. *Aereo, Inc.*, 722 F. 3d 500 (2013). We granted certiorari.

II

This case requires us to answer two questions: First, in operating in the manner described above, does Aereo "perform" at all? And second, if so, does Aereo do so "publicly"? We address these distinct questions in turn.

Does Aereo "perform"? See §106(4) ("[T]he owner of [a] copyright . . . has the exclusive righ[t] . . . to *perform* the copyrighted work publicly" (emphasis added)); §101 ("To *perform* . . . a work 'publicly' means [among other things] to transmit . . . a performance . . . of the work . . . to the public . . . " (emphasis added)). Phrased another way, does Aereo "transmit . . . a performance" when a subscriber watches a show using Aereo's system, or is it only the subscriber who transmits? In Aereo's view, it does not perform. It does no more than supply equipment that "emulate[s] the operation of a home antenna and [digital video recorder (DVR)]." Brief for Respondent 41. Like a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives. So it is only the subscribers who "perform" when they use Aereo's equipment to stream television programs to themselves.

Considered alone, the language of the Act does not clearly indicate when an entity "perform[s]" (or "transmit[s]") and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo's performs.

A

History makes plain that one of Congress' primary purposes in amending the Copyright Act in 1976 was to

overturn this Court's determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act's scope. In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968), the Court considered a CATV system that carried local television broadcasting, much of which was copyrighted, to its subscribers in two cities. The CATV provider placed antennas on hills above the cities and used coaxial cables to carry the signals received by the antennas to the home television sets of its subscribers. The system amplified and modulated the signals in order to improve their strength and efficiently transmit them to subscribers. A subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." *Id.,* at 392. The CATV provider "neither edited the programs received nor originated any programs of its own." *Ibid.*

Asked to decide whether the CATV provider infringed copyright holders' exclusive right to perform their works publicly, the Court held that the provider did not "perform" at all. See 17 U. S. C. §1(c) (1964 ed.) (granting copyright holder the exclusive right to "perform . . . in public for profit" a nondramatic literary work), §1(d) (granting copyright holder the exclusive right to "perform . . . publicly" a dramatic work). The Court drew a line: "Broadcasters perform. Viewers do not perform." 392 U. S.*,* at 398 (footnote omitted). And a CATV provider "falls on the viewer's side of the line." *Id.,* at 399.

The Court reasoned that CATV providers were unlike broadcasters:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public

> and carry them by private channels to additional viewers." *Id.,* at 400.

Instead, CATV providers were more like viewers, for "the basic function [their] equipment serves is little different from that served by the equipment generally furnished by" viewers. *Id.,* at 399. "Essentially," the Court said, "a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer's television set." *Ibid.* Viewers do not become performers by using "amplifying equipment," and a CATV provider should not be treated differently for providing viewers the same equipment. *Id.*, at 398–400.

In *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), the Court considered the copyright liability of a CATV provider that carried broadcast television programming into subscribers' homes from hundreds of miles away. Although the Court recognized that a viewer might not be able to afford amplifying equipment that would provide access to those distant signals, it nonetheless found that the CATV provider was more like a viewer than a broadcaster. *Id.,* at 408–409. It explained: "The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer." *Id.,* at 408.

The Court also recognized that the CATV system exercised some measure of choice over what to transmit. But that fact did not transform the CATV system into a broadcaster. A broadcaster exercises significant creativity in choosing what to air, the Court reasoned. *Id.,* at 410. In contrast, the CATV provider makes an initial choice about which broadcast stations to retransmit, but then "'simply carr[ies], without editing, whatever programs [it] receive[s].'" *Ibid.* (quoting *Fortnightly*, *supra*, at 400 (altera-

tions in original)).

B

In 1976 Congress amended the Copyright Act in large part to reject the Court's holdings in *Fortnightly* and *Teleprompter*. See H. R. Rep. No. 94–1476, pp. 86–87 (1976) (hereinafter H. R. Rep.) (The 1976 amendments "completely overturned" this Court's narrow construction of the Act in *Fortnightly* and *Teleprompter*). Congress enacted new language that erased the Court's line between broadcaster and viewer, in respect to "perform[ing]" a work. The amended statute clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." §101; see *ibid.* (defining "[a]udiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . , together with accompanying sounds"). Under this new language, *both* the broadcaster *and* the viewer of a television program "perform," because they both show the program's images and make audible the program's sounds. See H. R. Rep., at 63 ("[A] broadcasting network is performing when it transmits [a singer's performance of a song] . . . and any individual is performing whenever he or she . . . communicates the performance by turning on a receiving set").

Congress also enacted the Transmit Clause, which specifies that an entity performs publicly when it "transmit[s] . . . a performance . . . to the public." §101; see *ibid.* (defining "[t]o 'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"). Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this language to cover. See H. R. Rep., at 63 ("[A] cable television system is perform-

ing when it retransmits [a network] broadcast to its subscribers"); see also *ibid.* ("[T]he concep[t] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public"). The Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals.

Congress further created a new section of the Act to regulate cable companies' public performances of copyrighted works. See §111. Section 111 creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts. H. R. Rep., at 88 (Section 111 is primarily "directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works").

Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act.

C

This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, "perform[s]" (or "transmit[s]"). Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. See *id.,* at 89 ("[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material"). Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users'

homes. By means of its technology (antennas, transcoders, and servers), Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnightly*, 392 U. S., at 400. It "carr[ies] . . . whatever programs [it] receive[s]," and it offers "all the programming" of each over-the-air station it carries. *Id.,* at 392, 400.

Aereo's equipment may serve a "viewer function"; it may enhance the viewer's ability to receive a broadcaster's programs. It may even emulate equipment a viewer could use at home. But the same was true of the equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*.

We recognize, and Aereo and the dissent emphasize, one particular difference between Aereo's system and the cable systems at issue in *Fortnightly* and *Teleprompter*. The systems in those cases transmitted constantly; they sent continuous programming to each subscriber's television set. In contrast, Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program.

This is a critical difference, says the dissent. It means that Aereo's subscribers, not Aereo, "selec[t] the copyrighted content" that is "perform[ed]," *post,* at 4 (opinion of SCALIA, J.), and for that reason they, not Aereo, "transmit" the performance. Aereo is thus like "a copy shop that provides its patrons with a library card." *Post,* at 5. A copy shop is not directly liable whenever a patron uses the shop's machines to "reproduce" copyrighted materials found in that library. See §106(1) ("exclusive righ[t] . . . to reproduce the copyrighted work"). And by the same token, Aereo should not be directly liable whenever its patrons use its equipment to "transmit" copyrighted television programs to their screens.

In our view, however, the dissent's copy shop argument, in whatever form, makes too much out of too little. Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. The subscribers of the *Fortnightly* and *Teleprompter* cable systems also selected what programs to display on their receiving sets. Indeed, as we explained in *Fortnightly*, such a subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." 392 U. S., at 392. The same is true of an Aereo subscriber. Of course, in *Fortnightly* the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob. Here the signals pursue their ordinary course of travel through the universe until today's "turn of the knob"—a click on a website—activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet. But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."

In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo "perform[s]."

III

Next, we must consider whether Aereo performs petitioners' works "publicly," within the meaning of the Transmit Clause. Under the Clause, an entity performs a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." §101. Aereo denies that it satisfies this definition. It reasons as follows: First, the "performance" it "transmit[s]" is the performance created by its act of transmitting. And second, because each of these performances is capable of being received by one and only one subscriber, Aereo transmits privately, not publicly. Even assuming Aereo's first argument is correct, its second does not follow.

We begin with Aereo's first argument. What performance does Aereo transmit? Under the Act, "[t]o 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Ibid.* And "[t]o 'perform'" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." *Ibid.*

Petitioners say Aereo transmits a *prior* performance of their works. Thus when Aereo retransmits a network's prior broadcast, the underlying broadcast (itself a performance) is the performance that Aereo transmits. Aereo, as discussed above, says the performance it transmits is the *new* performance created by its act of transmitting. That performance comes into existence when Aereo streams the sounds and images of a broadcast program to a subscriber's screen.

We assume *arguendo* that Aereo's first argument is correct. Thus, for present purposes, to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Cf. *United States* v. *American Soc. of Composers, Authors and Publishers*,

627 F. 3d 64, 73 (CA2 2010) (holding that a download of a work is not a performance because the data transmitted are not "contemporaneously perceptible"). When an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby "communicate[s]" to the subscriber, by means of a "device or process," the work's images and sounds. §101. And those images and sounds are contemporaneously visible and audible on the subscriber's computer (or other Internet-connected device). So under our assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

But what about the Clause's further requirement that Aereo transmit a performance "to the public"? As we have said, an Aereo subscriber receives broadcast television signals with an antenna dedicated to him alone. Aereo's system makes from those signals a personal copy of the selected program. It streams the content of the copy to the same subscriber and to no one else. One and only one subscriber has the ability to see and hear each Aereo transmission. The fact that each transmission is to only one subscriber, in Aereo's view, means that it does not transmit a performance "to the public."

In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform "publicly." Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they

arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Aereo's argument to the contrary relies on the premise that "to transmit . . . a performance" means to make a single transmission. But the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions. That is because one can "transmit" or "communicate" something through a *set* of actions. Thus one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once. So can an elected official communicate an idea, slogan, or speech to her constituents, regardless of whether she communicates that idea, slogan, or speech during individual phone calls to each constituent or in a public square.

The fact that a singular noun ("a performance") follows the words "to transmit" does not suggest the contrary. One can sing a song to his family, whether he sings the same song one-on-one or in front of all together. Similarly, one's colleagues may watch a performance of a particular play—say, this season's modern-dress version of "Measure for Measure"—whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public "whether the members of the public capable of

receiving the performance . . . receive it . . . at the same time or at different times." §101. Were the words "to transmit . . . a performance" limited to a single act of communication, members of the public could not receive the performance communicated "at different times." Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.

We do not see how the fact that Aereo transmits via personal copies of programs could make a difference. The Act applies to transmissions "by means of any device or process." *Ibid.* And retransmitting a television program using user-specific copies is a "process" of transmitting a performance. A "cop[y]" of a work is simply a "material objec[t] . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated." *Ibid.* So whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.

Moreover, the subscribers to whom Aereo transmits television programs constitute "the public." Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. This matters because, although the Act does not define "the public," it specifies that an entity performs publicly when it performs at "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Ibid.* The Act thereby suggests that "the public" consists of a large group of people outside of a family

and friends.

Neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars "to the public." We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cars to the public, for it sells cars to individuals who lack a pre-existing relationship to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to "the public," whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.

Finally, we note that Aereo's subscribers may receive the same programs at different times and locations. This fact does not help Aereo, however, for the Transmit Clause expressly provides that an entity may perform publicly "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *Ibid.* In other words, "the public" need not be situated together, spatially or temporally. For these reasons, we conclude that Aereo transmits a performance of petitioners' copyrighted works to the public, within the meaning of the Transmit Clause.

IV

Aereo and many of its supporting *amici* argue that to apply the Transmit Clause to Aereo's conduct will impose copyright liability on other technologies, including new

technologies, that Congress could not possibly have wanted to reach. We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect.

For one thing, the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo "perform[s]," but it does not determine whether different kinds of providers in different contexts also "perform." For another, an entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work. See Brief for Respondent 31 ("[I]f a distributor . . . sells [multiple copies of a digital video disc] by mail to consumers, . . . [its] distribution of the DVDs merely makes it possible for the recipients to perform the work themselves—it is not a 'device or process' by which the *distributor* publicly performs the work" (emphasis in original)).

Further, we have interpreted the term "the public" to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content. See Brief for United States as *Amicus Curiae* 31 (distinguishing cloud-based storage services because they "offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired" (emphasis in original)). In addition, an entity does not trans-

mit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.

We also note that courts often apply a statute's highly general language in light of the statute's basic purposes. Finally, the doctrine of "fair use" can help to prevent inappropriate or inequitable applications of the Clause. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984).

We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that "[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,' should await a case in which they are squarely presented." Brief for United States as *Amicus Curiae* 34 (quoting *Sony*, *supra*, at 431 (alteration in original)). And we note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress. Cf. Digital Millennium Copyright Act, 17 U. S. C. §512.

* * *

In sum, having considered the details of Aereo's practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act. Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo's activities outside the scope of the Act.

For these reasons, we conclude that Aereo "perform[s]"

petitioners' copyrighted works "publicly," as those terms are defined by the Transmit Clause. We therefore reverse the contrary judgment of the Court of Appeals, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–461

AMERICAN BROADCASTING COMPANIES, INC., ET AL., PETITIONERS *v.* AEREO, INC., FKA BAMBOOM LABS, INC.

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

[June 25, 2014]

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

This case is the latest skirmish in the long-running copyright battle over the delivery of television programming. Petitioners, a collection of television networks and affiliates (Networks), broadcast copyrighted programs on the public airwaves for all to see. Aereo, respondent, operates an automated system that allows subscribers to receive, on Internet-connected devices, programs that they select, including the Networks' copyrighted programs. The Networks sued Aereo for several forms of copyright infringement, but we are here concerned with a single claim: that Aereo violates the Networks' "exclusive righ[t]" to "perform" their programs "publicly." 17 U. S. C. §106(4). That claim fails at the very outset because Aereo does not "perform" at all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard ("looks-like-cable-TV") that will sow confusion for years to come.

I. Legal Standard

There are two types of liability for copyright infringement: direct and secondary. As its name suggests, the

former applies when an actor personally engages in infringing conduct. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 433 (1984). Secondary liability, by contrast, is a means of holding defendants responsible for infringement by third parties, even when the defendants "have not themselves engaged in the infringing activity." *Id.*, at 435. It applies when a defendant "intentionally induc[es] or encourag[es]" infringing acts by others or profits from such acts "while declining to exercise a right to stop or limit [them]." *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U. S. 913, 930 (2005).

Most suits against equipment manufacturers and service providers involve secondary-liability claims. For example, when movie studios sued to block the sale of Sony's Betamax videocassette recorder (VCR), they argued that Sony was liable because *its customers* were making unauthorized copies. See *Sony*, *supra*, at 434–435. Record labels and movie studios relied on a similar theory when they sued Grokster and StreamCast, two providers of peer-to-peer file-sharing software. See *Grokster*, *supra*, at 920–921, 927.

This suit, or rather the portion of it before us here, is fundamentally different. The Networks claim that Aereo *directly* infringes their public-performance right. Accordingly, the Networks must prove that Aereo "perform[s]" copyrighted works, §106(4), when its subscribers log in, select a channel, and push the "watch" button. That process undoubtedly results in a performance; the question is *who* does the performing. See *Cartoon Network LP, LLLP* v. *CSC Holdings, Inc.*, 536 F. 3d 121, 130 (CA2 2008). If Aereo's subscribers perform but Aereo does not, the claim necessarily fails.

The Networks' claim is governed by a simple but profoundly important rule: A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act. See 3 W. Patry, Copyright §9:5.50 (2013).

This requirement is firmly grounded in the Act's text, which defines "perform" in active, affirmative terms: One "perform[s]" a copyrighted "audiovisual work," such as a movie or news broadcast, by "show[ing] its images in any sequence" or "mak[ing] the sounds accompanying it audible." §101. And since the Act makes it unlawful to copy or perform copyrighted works, not to copy or perform in general, see §501(a), the volitional-act requirement demands conduct directed to the plaintiff's copyrighted material, see *Sony, supra,* at 434. Every Court of Appeals to have considered an automated-service provider's direct liability for copyright infringement has adopted that rule. See *Fox Broadcasting Co.* v. *Dish Network LLC*, 747 F. 3d 1060, 1066–1068 (CA9 2014); *Cartoon Network, supra,* at 130–131 (CA2 2008); *CoStar Group, Inc.* v. *LoopNet, Inc.*, 373 F. 3d 544, 549–550 (CA4 2004).[1] Although we have not opined on the issue, our cases are fully consistent with a volitional-conduct requirement. For example, we gave several examples of direct infringement in *Sony*, each of which involved a volitional act directed to the plaintiff's copyrighted material. See 464 U. S., at 437, n. 18.

The volitional-conduct requirement is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant's conduct is infringing (*e.g.,* Does the defendant's design copy the plaintiff's?), rather than whether the defendant has acted at all (*e.g.,* Did this defendant create the infringing design?). But it comes right to the fore when a direct-infringement claim is

---

[1] An unpublished decision of the Third Circuit is to the same effect. *Parker* v. *Google, Inc.*, 242 Fed. Appx. 833, 836–837 (2007) (*per curiam*).

The Networks muster only one case they say stands for a different approach, *New York Times Co.* v. *Tasini*, 533 U. S. 483 (2001). Reply Brief 18. But *Tasini* is clearly inapposite; it dealt with the question whether the defendants' copying was permissible, not whether the defendants were the ones who made the copies. See 533 U. S., at 487–488, 492, 504–506.

lodged against a defendant who does nothing more than operate an automated, user-controlled system. See, *e.g.*, *Fox Broadcasting*, *supra*, at 1067; *Cartoon Network*, *supra*, at 131. Internet-service providers are a prime example. When one user sends data to another, the provider's equipment facilitates the transfer automatically. Does that mean that the provider is directly liable when the transmission happens to result in the "reproduc[tion]," §106(1), of a copyrighted work? It does not. The provider's system is "totally indifferent to the material's content," whereas courts require "some aspect of volition" directed at the copyrighted material before direct liability may be imposed. *CoStar*, 373 F. 3d, at 550–551.[2] The defendant may be held directly liable only if the defendant *itself* "trespassed on the exclusive domain of the copyright owner." *Id.,* at 550. Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers. See *Cartoon Network*, *supra,* at 131–132.

A comparison between copy shops and video-on-demand services illustrates the point. A copy shop rents out photocopiers on a per-use basis. One customer might copy his 10-year-old's drawings—a perfectly lawful thing to do—while another might duplicate a famous artist's copyrighted photographs—a use clearly prohibited by §106(1). Either way, *the customer* chooses the content and activates the copying function; the photocopier does nothing except in response to the customer's commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. See *CoStar*, *supra,* at 550.

---

[2] Congress has enacted several safe-harbor provisions applicable to automated network processes, see, *e.g.,* 17 U. S. C. §512(a)–(b), but those provisions do not foreclose "any other defense," §512(*l*), including a volitional-conduct defense.

Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content*. When a user signs in to Netflix, for example, "thousands of . . . movies [and] TV episodes" carefully curated by Netflix are "available to watch instantly." See How [D]oes Netflix [W]ork?, online at http://help.netflix.com/en/node/412 (as visited June 20, 2014, and available in Clerk of Court's case file). That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.

The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act. See *Cartoon Network*, 536 F. 3d, at 132–133. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track. See Brief for 36 Intellectual Property and Copyright Law Professors as *Amici Curiae* 7. Thus, in the example given above, the fact that the copy shop does not choose the content simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules. See *Sony*, *supra*, at 434–442; *Cartoon Network*, *supra*, at 132–133.

II. Application to Aereo

So which is Aereo: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card. Aereo offers access to an automated system consisting of routers, servers, transcoders, and dime-sized antennae. Like a photocopier or VCR, that system lies dormant until a subscriber activates it. When a subscriber selects a program, Aereo's system picks up the relevant broadcast signal, translates its audio and video components into

digital data, stores the data in a user-specific file, and transmits that file's contents to the subscriber via the Internet—at which point the subscriber's laptop, tablet, or other device displays the broadcast just as an ordinary television would. The result of that process fits the statutory definition of a performance to a tee: The subscriber's device "show[s]" the broadcast's "images" and "make[s] the sounds accompanying" the broadcast "audible." §101. The only question is whether those performances are the product of Aereo's volitional conduct.

They are not. Unlike video-on-demand services, Aereo does not provide a prearranged assortment of movies and television shows. Rather, it assigns each subscriber an antenna that—like a library card—can be used to obtain whatever broadcasts are freely available. Some of those broadcasts are copyrighted; others are in the public domain. The key point is that subscribers call all the shots: Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. Aereo's operation of that system is a volitional act and a but-for cause of the resulting performances, but, as in the case of the copy shop, that degree of involvement is not enough for direct liability. See *Grokster*, 545 U. S., at 960 (BREYER, J., concurring) ("[T]he producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying").

In sum, Aereo does not "perform" for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, it cannot be held directly liable for infringing the Networks' public-performance right.[3] That conclusion does not necessarily mean that Aereo's service complies with the Copyright Act. Quite the

---

[3] Because I conclude that Aereo does not perform at all, I do not reach the question whether the performances in this case are to the public. See *ante,* at 10–15.

contrary. The Networks' complaint alleges that Aereo is directly *and* secondarily liable for infringing their public-performance rights (§106(4)) *and also* their reproduction rights (§106(1)). Their request for a preliminary injunction—the only issue before this Court—is based exclusively on the direct-liability portion of the public-performance claim (and further limited to Aereo's "watch" function, as opposed to its "record" function). See App. to Pet. for Cert. 60a–61a. Affirming the judgment below would merely return this case to the lower courts for consideration of the Networks' remaining claims.

III. Guilt By Resemblance

The Court's conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts;[4] (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs. *Ante,* at 4–10. That reasoning suffers from a trio of defects.

First, it is built on the shakiest of foundations. Perceiving the text to be ambiguous, *ante,* at 4, the Court reaches out to decide the case based on a few isolated snippets of legislative history, *ante,* at 7–8 (citing H. R. Rep. No. 94–1476 (1976)). The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress. Little else need be said here about the severe shortcomings of that interpretative methodology. See *Lawson* v. *FMR LLC*, 571 U. S. ___, ___ (2014) (SCALIA, J., concurring in principal part and concurring in judgment) (slip op., at 1–2).

---

[4] See *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968).

Second, the Court's reasoning fails on its own terms because there are material differences between the cable systems at issue in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.,* 415 U. S. 394 (1974), and *Fortnightly Corp.* v. *United Artists Television, Inc.,* 392 U. S. 390 (1968), on the one hand and Aereo on the other. The former (which were then known as community-antenna television systems) captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmits only specific programs selected by the user, at specific times selected by the user. The Court acknowledges this distinction but blithely concludes that it "does not make a critical difference." *Ante,* at 10. Even if that were true, the Court fails to account for other salient differences between the two technologies.[5] Though cable systems started out essentially as dumb pipes that routed signals from point A to point B, see *ante,* at 5, by the 1970's, that kind of service "'no longer exist[ed],'" Brief for Petitioners in *Columbia Broadcasting System, Inc.* v. *Teleprompter Corp.*, O. T. 1973, No. 72–1633, p. 22. At the time of our *Teleprompter* decision, cable companies "perform[ed] the same functions as 'broadcasters' by deliberately selecting and importing distant signals, originating programs, [and] selling commercials," *id.,* at 20, thus making them curators of content—more akin to video-on-demand services than copy shops. So far as the record reveals, Aereo does none of those things.

---

[5]The Court observes that "[t]he subscribers of the *Fortnightly* and *Teleprompter* cable systems . . . selected what programs to display on their receiving sets," but acknowledges that those choices were possible only because "the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob." *Ante,* at 10. The latter point is dispositive: The signals were "ready to emerge" because the cable system—much like a video-on-demand provider—took affirmative, volitional steps to *put* them there. As discussed above, the same cannot be said of the programs available through Aereo's automated system.

Third, and most importantly, even accepting that the 1976 amendments had as their purpose the overruling of our cable-TV cases, what they were meant to do and how they did it are two different questions—and it is the latter that governs the case before us here. The injury claimed is not violation of a law that says operations similar to cable TV are subject to copyright liability, but violation of §106(4) of the Copyright Act. And whatever soothing reasoning the Court uses to reach its result ("this looks like cable TV"), the consequence of its holding is that someone who implements this technology *"perform[s]" under that provision*. That greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work. If that test is not outcome determinative in this case, presumably it is not outcome determinative elsewhere as well. And it is not clear what the Court proposes to replace it. Perhaps the Court means to adopt (invent, really) a two-tier version of the Copyright Act, one part of which applies to "cable companies and their equivalents" while the other governs everyone else. *Ante,* at 9–10, 16.

The rationale for the Court's ad hoc rule for cable-system lookalikes is so broad that it renders nearly a third of the Court's opinion superfluous. Part II of the opinion concludes that Aereo performs because it resembles a cable company, and Congress amended the Act in 1976 "to bring the activities of cable systems within [its] scope." *Ante,* at 8. Part III of the opinion purports to address separately the question whether Aereo performs "publicly." *Ante,* at 10–15. Trouble is, that question cannot remain open if Congress's supposed intent to regulate whatever looks like a cable company must be given legal effect (as the Court says in Part II). The Act reaches only public performances, see §106(4), so Congress could not have regulated "the activities of cable systems" without

deeming their retransmissions public performances. The upshot is this: If Aereo's similarity to a cable company means that it performs, then by necessity that same characteristic means that it does so publicly, and Part III of the Court's opinion discusses an issue that is no longer relevant—though discussing it certainly gives the opinion the "feel" of real textual analysis.

Making matters worse, the Court provides no criteria for determining when its cable-TV-lookalike rule applies. Must a defendant offer access to live television to qualify? If similarity to cable-television service is the measure, then the answer must be yes. But consider the implications of that answer: Aereo would be free to do exactly what it is doing right now so long as it built mandatory time shifting into its "watch" function.[6] Aereo would not be providing *live* television if it made subscribers wait to tune in until after a show's live broadcast ended. A subscriber could watch the 7 p.m. airing of a 1-hour program any time after 8 p.m. Assuming the Court does not intend to adopt such a do-nothing rule (though it very well may), there must be some other means of identifying who is and is not subject to its guilt-by-resemblance regime.

Two other criteria come to mind. One would cover any automated service that captures and stores live television broadcasts at a user's direction. That can't be right, since it is exactly what remote storage digital video recorders (RS–DVRs) do, see *Cartoon Network*, 536 F. 3d, at 124–125, and the Court insists that its "limited holding" does not decide the fate of those devices, *ante,* at 16–17. The other potential benchmark is the one offered by the Government: The cable-TV-lookalike rule embraces any entity

---

[6] Broadcasts accessible through the "watch" function are technically not live because Aereo's servers take anywhere from a few seconds to a few minutes to begin transmitting data to a subscriber's device. But the resulting delay is so brief that it cannot reasonably be classified as time shifting.

that "operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers." Brief for United States as *Amicus Curiae* 20. The Court sensibly avoids that approach because it would sweep in Internet service providers and a host of other entities that quite obviously do not perform.

That leaves as the criterion of cable-TV-resemblance nothing but th'ol' totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation). It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances.) The Court vows that its ruling will not affect cloud-storage providers and cable-television systems, see *ante,* at 16–17, but it cannot deliver on that promise given the imprecision of its result-driven rule. Indeed, the difficulties inherent in the Court's makeshift approach will become apparent in this very case. Today's decision addresses the legality of Aereo's "watch" function, which provides nearly contemporaneous access to live broadcasts. On remand, one of the first questions the lower courts will face is whether Aereo's "record" function, which allows subscribers to save a program while it is airing and watch it later, infringes the Networks' public-performance right. The volitional-conduct rule provides a clear answer to that question: Because Aereo does not select the programs viewed by its users, it does not perform. But it is impossible to say how the issue will come out under the Court's analysis, since cable companies did not offer remote recording and playback services when Congress amended the Copyright Act in 1976.

* * *

I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it. As discussed at the outset, Aereo's secondary liability for performance infringement is yet to be determined, as is its primary and secondary liability for reproduction infringement. If that does not suffice, then (assuming one shares the majority's estimation of right and wrong) what we have before us must be considered a "loophole" in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude "looks-like-cable-TV" solution the Court invents today.

We came within one vote of declaring the VCR contraband 30 years ago in *Sony*. See 464 U. S., at 441, n. 21. The dissent in that case was driven in part by the plaintiffs' prediction that VCR technology would wreak all manner of havoc in the television and movie industries. See *id.*, at 483 (opinion of Blackmun, J.); see also Brief for CBS, Inc., as *Amicus Curiae*, O. T. 1982, No. 81–1687, p. 2 (arguing that VCRs "directly threatened" the bottom line of "[e]very broadcaster").

The Networks make similarly dire predictions about Aereo. We are told that nothing less than "the very existence of broadcast television as we know it" is at stake. Brief for Petitioners 39. Aereo and its *amici* dispute those forecasts and make a few of their own, suggesting that a decision in the Networks' favor will stifle technological innovation and imperil billions of dollars of investments in cloud-storage services. See Brief for Respondents 48–51; Brief for BSA, The Software Alliance as *Amicus Curiae* 5–

13. We are in no position to judge the validity of those self-interested claims or to foresee the path of future technological development. See *Sony*, *supra*, at 430–431; see also *Grokster*, 545 U. S., at 958 (BREYER, J., concurring). Hence, the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade. I conclude, as the Court concluded in *Sony*: "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be [affirmed]." 464 U. S., at 456.

I respectfully dissent.

No. 13-461

In The Supreme Court of the United States

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 OF PROFESSORS PETER S. MENELL AND DAVID NIMMER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

PETER S. MENELL
Counsel of Record
Koret Professor of Law
and Director
BERKELEY CENTER FOR LAW
& TECHNOLOGY
UC BERKELEY SCHOOL OF LAW
Boalt Hall
Berkeley, CA 94720
(510) 642-5489
pmenell@law.berkeley.edu

DAVID NIMMER
Professor from Practice
UCLA SCHOOL OF LAW
385 Charles E. Young Drive East
1242 Law Building
Los Angeles, CA 90095

February 27, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. The Specific Legislative History Relating to the Definition of "Publicly" as Well as Congress's Clear Intention to Ensure that Unforeseen Technological Changes Not Undermine Creators' Rights Support Finding that Aereo Infringes the Public Performance Right 11

A. Specific Legislative History: The Scope of "Publicly" 12

B. General Legislative History 16

II. The 1976 Act's Retransmission Regime Indicates that Congress Intended Commercial Retransmission Services to Obtain Either Express or Statutory Licenses to Retransmit Broadcast Signals 20

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES:

ABC, Inc. v. PrimeTime 24, 184 F.3d 348 (4th Cir. 1999) 31

Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).....9

CBS Broadcasting, Inc. v. EchoStar Communications Corp., 265 F.3d 1193 (11th Cir. 2001) 31

Columbia Pictures Indus., Inc. v. Redd Horne Inc., 749 F.2d 154 (3d Cir. 1984).....9

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).....5, 6, 23, 24, 34

Mastro Plastics Corp. et al. v. National Labor Relations Board, 350 U.S. 270 (1956) 23

National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982) 26

Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974).....5, 6, 24

TRW Inc. v. Adelaide Andrews, 534 U.S. 19 (2001).....23

WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2013).....*passim*

WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275 (2d Cir. 2012) 28

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

17 U.S.C. § 111 ..... *passim*

17 U.S.C. § 122 ..... 23, 32

Copyright Act of 1976 ..... *passim*

Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 31

Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 31

Satellite Home Viewer Act of 1999, Pub. L. No. 106-113, App. I, 113 Stat. 1501 31

Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809, div. J, tit. IX 32

Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 32

RULES AND REGULATIONS:

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES:

Copyright Law Revision, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess. on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 (1966) 22

TABLE OF AUTHORITIES – Continued

Page

Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1961) 12

Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1963) 12

Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft (House Comm. 1964).....13

Copyright Law Revision, Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1965) (1964 Revision Bill).....13

Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1965) 13

Copyright Law Revision, Report to Accompany H.R. 4347, Committee of the Judiciary, Sectional Analysis and Discussion, 89th Cong., 2d Sess., Section 106, Exclusive Rights in Copyrighted Works, Definitions 3 (Report No. 2237) (Oct. 12, 1966) 14, 15

H.R. Rep. No. 94-1733 (1976).....26

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 100-887(1) (1988) 30

NIMMER ON COPYRIGHT .....*passim*

Peter S. Menell & David Nimmer, Unwinding Sony, 95 Cal. L. Rev. 941 (2007) 15

Peter S. Menell, Envisioning Copyright Law's Digital Future, 46 N.Y.L. Sch. L. Rev. 63 (2002-2003).....11

Peter S. Menell, In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. Copyright Soc'y U.S.A. 1 (2011) 12

Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (House Comm. Print 1965) 16, 19

SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (2013).....23

U.S. Copyright Office, Circular 92: Copyright Law of the United States (Dec. 2011).....23

U.S. Copyright Office, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (July 1961).....11

U.S. Copyright Office, Satellite Television Extension and Localism Act § 302 Report (August 29, 2011) 26, 30

INTEREST OF AMICI CURIAE[1]

The authors of this brief are law professors at the University of California who study and teach intellectual property law.

Professor Peter S. Menell holds a law degree and a doctorate degree in economics. Beginning in law school, he has focused a significant portion of his research on intellectual property law. Soon after joining the University of California at Berkeley School of Law faculty in 1990, he laid the groundwork to establish the Berkeley Center for Law & Technology (BCLT). Since its founding in 1995, BCLT has sought to foster the beneficial and ethical understanding of intellectual property (IP) law and related fields as they affect public policy, business, science and technology through a broad range of public policy conferences, collaboration with government agencies (U.S. Patent & Trademark Office, Federal Trade Commission, the U.S. Copyright Office), interaction with intellectual property practitioners and technology companies, and research and educational initiatives.

---

[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief through blanket consent letters filed with the Clerk's Office.

Professor Menell has authored or co-authored more than fifty articles and eight books, including leading casebooks on intellectual property and internet law. He has written numerous articles on copyright law and has contributed to NIMMER ON COPYRIGHT. Professor Menell has organized more than 50 intellectual property education programs for the Federal Judicial Center, including an annual multi-day program on "Intellectual Property in the Digital Age" since 1998. He has advised the U.S. Congress, federal agencies, state Attorneys General, and major technology and entertainment companies on a wide range of intellectual property and antitrust matters. He served as Vice-Chair of the National Academies of Sciences project on copyright and innovation. He writes regular commentaries on copyright law and policy that appear on the Media Institute website. He was selected by the Copyright Society of the U.S.A. to present the 42nd Annual Donald C. Brace Memorial Lecture in 2011-12. The article based on that lecture – This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347674> – will soon appear in the Journal of the Copyright Society of the U.S.A.

Professor David Nimmer has taught courses in copyright law and lectured on the subject at his home institution of UCLA and at other universities across the country and around the world, including LUISS in Rome, Waseda University in Tokyo, and Haifa University in Israel. Since 1985, he has authored

Releases 18 through 93 of NIMMER ON COPYRIGHT, maintaining up-to-date the treatise originally published by his late father, Melville B. Nimmer, in 1963. He has also written approximately fifty articles about domestic and international copyright law as well as its historical development, some of which are gathered in two anthologies published by Kluwer Law International in the Netherlands: COPYRIGHT: SACRED TEXT, TECHNOLOGY AND THE DMCA (2003) and COPYRIGHT ILLUMINATED (2008).

In January 2014, Professor Nimmer testified before Congress at the invitation of the House Judiciary on the subject of copyright reform, particularly regarding copyright law's "making available" right. Previously, he had testified to Congress on behalf of the United States Telephone Association and the National Association of Broadcasters, as well as to a Parliamentary commission in Sydney on behalf of the Combined Newspaper and Magazine Copyright Committee of Australia. In 2013, THE BEST LAWYERS IN AMERICA named him Los Angeles Litigation Intellectual Property "Lawyer of the Year."

SUMMARY OF ARGUMENT

Congress framed the governing Copyright Act of 1976 to achieve several objectives. Most importantly, Congress wished to "insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works,"

while guarding against two "dangers": (1) "that these works will not be disseminated and used as fully as they should because of copyright restrictions"; and (2) "confining the scope of an author's rights on the basis of the present technology so that, as the years go by, [the author's] copyright loses much of its value because of unforeseen technical advances."

Presciently, even as of the 1965 report stating these principles, Congress recognized that "it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation."

The following year, Congress explained its intent in formulating the copyright owner's public performance right through a Transmit Clause that recognizes liability "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." Its 1966 report explained that liability would arise "whenever the potential recipients of the transmission represent a limited segment of the public, such as . . . the subscribers of a community antenna television service." It noted that the "same principles apply . . . where the transmission is capable of reaching different

recipients at different times, *as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public*." Congress crafted the language of the Transmit Clause to make liability under those circumstances "doubly clear."

The circumstances that Congress perceived as possible in the 1960s have been realized today. Respondent Aereo offers a service that essentially replicates the functionality of providing programming to "the subscribers of a community antenna television service [CATV]" using "*an information system [] capable of being performed or displayed at the initiative of individual members of the public*."

After 1966, the governing law affecting those services (then called "CATV," now known more generally as "cable television") evolved considerably. In its *Teleprompter* (1968) and *Fortnightly* (1974) rulings, this Court determined that cable television services do not implicate the copyright owner's rights. By virtue of those rulings, cable companies were able to retransmit to their subscribers the only pertinent signals then available – those broadcast over the air. They were allowed to do so without seeking authorization from the copyright owners of the affected programming and without the need to pay any compensation for that privilege. A burgeoning cable industry thereby began in the United States. At the outset, its only originated offerings consisted of low-quality "local access" shows. Today, by contrast, programs that are

originated on cable channels rank among the most popular and critically acclaimed television programs.

Congress took notice of that shift in the law. In a bargain that took over a decade to effectuate, Congress added to its 1966 handiwork the lengthiest provision that went into what ultimately became the Copyright Act of 1976. In particular, Section 111 minutely regulates cable television, legislatively reversing the result of the *Teleprompter* and *Fortnightly* rulings. It sets up a compensation scheme whereby cable services are charged for the privilege of sending over-the-air signals to their subscribers. Retransmission of those signals absent punctilious compliance with the detailed provision set forth in Section 111 or authorization from the copyright owner constitutes copyright infringement.

Over the ensuing decades, Congress has cemented this proposition time and again. Its numerous intervening amendments in the 1980s, 1990s, continuing all the way through 2010, rely on the premise that services retransmitting over-the-air television signals must compensate the copyright owners of the affected programming and comply with all the other laborious requirements that Congress has incorporated into numerous provisions of the Copyright Act. Absent such compliance, their conduct constitutes copyright infringement.

Until the ruling below, that is. For the first time since the 1976 Act went into effect, a service that retransmits television signals has been exempted from

the elaborate scheme that Congress laboriously created. That service is called Aereo, and the source of its unique get-out-of-jail-free card is the majority ruling below. Given its effect of unraveling the basis on which the Copyright Act of 1976 was passed into law and reaffirmed by Congress on multiple occasions since, that ruling cannot stand.

ARGUMENT

This case concerns copyright owners' public performance right. Petitioners advanced two separate arguments to the Court of Appeals regarding the public performance right: "Plaintiffs claim that Aereo's transmissions of broadcast television programs while the programs are airing on broadcast television **[a]** fall within the plain language of the Transmit Clause and **[b]** are analogous to the retransmissions of network programming made by cable systems, which the drafters of the 1976 Copyright Act viewed as public performances." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 686 (2013).

With respect to **[a]**, the Second Circuit majority construed "the plain language of the Transmit Clause" against plaintiffs,[2] whereas the dissent construed the

[2] *Id*. at 693 n.16 ("Congress clearly believed that, under the terms of the Act, some transmissions were private. The methodology Congress proscribed for distinguishing between public and private transmissions is the size of the potential audience, and by that methodology, the feed from Aereo's antennas is a private

(Continued on following page)

same "plain language" to reach the opposite conclusion.[3] That dispute arises precisely because the language that Congress enacted in 1976 is anything but plain. In analyzing the 1976 Act, Professor Melville B. Nimmer quoted the Transmit Clause and then concluded that "it is difficult to believe that it was intended literally."

> It would mean, for example, that the performance of music on a commercial phonograph record in the privacy of one's home constitutes a public performance because other members of the public will be playing duplicates of the same recorded performance "at different times." It is absurd to suppose that under the current Act it has become necessary for private purchasers of phonorecords to obtain a performing rights license from ASCAP or BMI before they may lawfully play such phonorecords within their homes.

2 NIMMER ON COPYRIGHT § 8.14[C][3] (1982). Precisely because literal application of the statutory language yielded some absurd consequences, he backed into a different conclusion: "Upon reflection, it would seem that what must have been intended was that *if the same copy* (or phonorecord) of a given work is repeatedly played (i.e., 'performed') by different members of

---

transmission because it results in a performance viewable by only one user.").

[3] *Id*. at 701 (Chin, J., dissenting) ("Aereo seeks to avoid the plain language of the Copyright Act . . . ").

the public, albeit at different times, this constitutes a 'public' performance." *Id.* Focusing on particular scenarios that were salient as opposed to technologies not yet invented, he forthrightly acknowledged that this particular interpretation was not without its own problems – for example, it could render videotape rental infringing, inasmuch as that conduct results in the same videotape being played repeatedly by different members of the public at different times.

It is the above conclusion that Courts of Appeals, including the majority decision below, have cited from NIMMER ON COPYRIGHT as the basis to interpret the Transmit Clause. See *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 749 F.2d 154, 159 (3d Cir. 1984); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 688 & n.11. The challenge of this case, however, lies in assessing how Congress intended courts to apply the 1976 Act provisions to Aereo's unprecedented service – one that integrally affects other aspects of copyright doctrine which Congress has minutely regulated. See Part II, *infra*. Aereo affords its subscribers access to over-the-air signals through the use of customer-specific, miniature antennas and customer-specific, remote hard drives that provide customers the choice of nearly instantaneous viewing or recording for later viewing. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 680-83. In other words, this case poses plaintiffs' argument **[a]** above in conjunction with their argument **[b]**. From the customers' perspective, Aereo's service is

functionally equivalent to a cable service, as plaintiffs' argument **[b]** highlights. Because such systems were technologically feasible neither at the time that the 1976 Act was passed nor when Professor Melville B. Nimmer analyzed the pertinent provisions, deeper statutory archeology is required to determine the proper interpretation.[4]

Part I traces the development of the 1976 Act's public performance right. It examines specific legislative history surrounding the definition of "publicly." The drafters of the key provision actually envisioned services close to Aereo's falling squarely within the Transmit Clause. Part I also reveals general legislative history explicating the drafters' design and

[4] While the text and structure of the 1976 Act support our conclusion, the additional insights gleaned from systematic review of the legislative history reinforce that conclusion. Recognizing that some members of the Court do not regard legislative history as an appropriate source for determining legislative intent, we urge three propositions. First, the Congress of the 1960s and 1970s believed that its reports and hearings would be consulted in determining its intent. Second, the legislative record surrounding the 1976 Act is remarkable in its detailed analysis and transparency. Third, as discussed in Part IB, the drafters of the 1976 Act very much sought to establish a law that could stand the test of time. Congress struggled to reform the 1909 Act over many decades and saw the enactment of omnibus reform as a monumental achievement for the nation. Thus, even if skepticism may be warranted in approaching modern-day legislative history negotiated behind closed doors, such concerns are diminished or non-existent in the context of the 1976 Act materials resulting from open hearings involving the copyright experts of the day.

intention surrounding the 1976 Act's exclusive rights. Part II examines key structural features of the 1976 Act that shed light on the applicability of the public performance right to subscription retransmission services.

I. The Specific Legislative History Relating to the Definition of "Publicly" as Well as Congress's Clear Intention to Ensure that Unforeseen Technological Changes Not Undermine Creators' Rights Support Finding that Aereo Infringes the Public Performance Right

Throughout its history, copyright protection has been buffeted by technological change. See generally Peter S. Menell, Envisioning Copyright Law's Digital Future, 46 N.Y.L. Sch. L. Rev. 63 (2002-2003) (tracing the arc of copyright law's adaptation to distribution technologies). Indeed, the emergence of broadcast technology shortly after the passage of the 1909 Act led to regular calls to update the statute. Congress set out to update the 1909 Copyright Act at various points during the first half of the twentieth century without success. See U.S. Copyright Office, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at x (July 1961). The reform forces coalesced in 1955, persuading Congress to authorize appropriations over the next three years for comprehensive research and preparation of studies by the Copyright Office as the groundwork for general revision. The drafters of what became the 1976 Act

were acutely aware of the need to draft the statute in such a manner as to afford courts the flexibility and guidance to ensure that unforeseen technological changes did not undermine the Act's core protections.

It was expected that omnibus copyright reform would be completed by the early to mid-1960s. Due in substantial part to a logjam over how to address the emerging cable television marketplace, however, passage of the statute was delayed more than a decade. Critical to understanding the provisions at issue in this case is what transpired in the early to mid-1960s, when the bulk of the statute was drafted. See Peter S. Menell, In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. Copyright Soc'y U.S.A. 1, 31-33 (2011).

A. Specific Legislative History: The Scope of "Publicly"

The public performance right developed through several iterations following general principles set forth in the Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 22-23, 27-31 (H.R. Judiciary Comm. Print 1961). The changes broadened the public performance right, principally by expanding the definition of "publicly." See Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., 45, 47, 48, 241, 257, 282-84, 289-90,

303, 316, 332, 348-50, 394-95, 404-06 (H.R. Judiciary Comm. Print 1963); Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 4-6, 13-14, 135-58, 238-54 (House Comm. 1964); Copyright Law Revision, Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., 4-5, 128, 238, 268, 272, 284, 302-03, 315, 343, 344 (H.R. Judiciary Comm. Print 1965) (1964 Revision Bill); Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., 19-25 (H.R. Judiciary Comm. Print 1965).

By the time that the 1966 draft was circulated, the definition of the "publicly" provision (including the Transmit Clause – designated "(2)") was essentially complete.

> To perform or display a work 'publicly' means –
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (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 time[s].

Copyright Law Revision, Report to Accompany H.R. 4347, Committee of the Judiciary, Sectional Analysis and Discussion, 89th Cong., 2d Sess., Section 106, Exclusive Rights in Copyrighted Works, Definitions 3 (Report No. 2237) (Oct. 12, 1966). The brackets in clause (2) contain the few words and comma that were added in the final 1976 Act version. Thus, the substantive scope of the provision as relates to this litigation had reached fruition by 1966, with the only addition being to further expand the Transmit Clause to include transmission or communication to the places described in clause (1). The accompanying report adds several pertinent observations:

> Under the bill, as under the present law, a performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no direct proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as **[i]** the occupants of hotel rooms or **[ii]** the subscribers of a community antenna television service; they are also applicable where the transmission is capable of reaching different recipients at different times, *as in the case of sounds or images stored in an information system and capable of being performed or displayed at*

> *the initiative of individual members of the public*. To make these principles doubly clear, the committee has amended clause (2) of the definition of "publicly" so that it is applicable "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."

Id. at 58 (emphasis added). The text following **[ii]** confirms that cable television services engage in public performances. The italicized text above comes eerily close to describing Aereo's technology. By specifying that the public performance right is implicated when a transmission is "capable of reaching different recipients at different times, *as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public*," the drafters effectively described an on-demand DVR device providing access to over-the-air signals.

This is not to say that Congress foresaw all aspects of the Aereo service more than four decades before it reached the market. The report did not specifically refer to separate recording devices for each subscriber – more than a decade prior to the emergence of the household video cassette recorder (VCR), see Peter S. Menell & David Nimmer, Unwinding Sony, 95 Cal. L. Rev. 941, 945 (2007) – but nonetheless presciently described "an information system" that could be activated "at the initiative of *individual*

members of the public." It also refers to Congress's desire to be "doubly clear" that it viewed the provision very broadly. It is difficult to imagine the drafters not considering Aereo to fall comfortably within their conception of a public performance right when they describe both cable services and recording devices that can deliver performances to individual members of the public on demand as falling within the public performance right. When the general legislative history of the Act, treated immediately below, is additionally taken into account, any doubt as to that intention evaporates.

B. General Legislative History

A comparison of the 1965 Revision Bill and the 1976 Act reveals that the omnibus copyright reform package was nearly complete by the mid-1960s. Thus, the detailed Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (House Comm. Print 1965) provides unusual insight into the general legislative design grounding the provisions.

Chapter 2 of the 1965 Supplementary Report explicates the "exclusive rights" section of the draft copyright law. It notes at the outset that "of the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by advancing technology in all fields of communications, including a number of future developments

that can only be speculated about." See *id*. at 13. It goes on to explain:

> The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.
>
> Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an

author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest. In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.

We are entirely sympathetic with the aims of nonprofit users, such as teachers, librarians, and educational broadcasters, who seek to advance learning and culture by bringing the works of authors to students, scholars, and the general public. Their use of new devices for this purpose should be encouraged. It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of "fair use," may severely curtail the copyright owner's market for copies of his work. Likewise, it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting,

> linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."

Id. at 13-14.

The 1965 Supplementary Report's general statement of legislative purpose is remarkable in several respects. First, it shows that Congress was cognizant of the dangers posed by technological change and intended the statute to be interpreted broadly so as protect against the "real danger" of confining the "scope of the author's rights on the basis of the present technology" in the face of "unforeseen technical advances." More significantly, Congress worried as early as 1965 that "transmission of works by . . . linked computers, and other new media of communication" could threaten authors' ability to derive compensation. When combined with the specific legislative explanation for the definition of "publicly,"

the basis for holding Aereo liable for infringing the public performance right acquires irresistible force.[5] When Congress's development of the retransmission compulsory license (discussed next) is added to the mix, the case for liability becomes airtight.

II. The 1976 Act's Retransmission Regime Indicates that Congress Intended Commercial Retransmission Services to Obtain Either Express or Statutory Licenses to Retransmit Broadcast Signals

When it came time to consider plaintiffs' second argument that "Aereo is functionally equivalent to a cable system," the majority opinion below dismissed it summarily: "However, this reading of the legislative history is simply incompatible with the conclusions of the *Cablevision* court." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 694. It noted in a footnote that, "in 1976, when cable TV was still in its infancy, many Americans used rooftop antennas. Thus Congress would have certainly wished to avoid adopting language

[5] Judge Chin reached the same logic based on the common sense notion that courts should be appropriately skeptical of a technologically unsound "Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 697 (Chin, J., dissenting). For the reasons set forth above, the perceived loophole does not exist. Congress passed the 1976 Act in the belief that, within our constitutional structure, courts would be faithful to its intent in their interpretation of its statutes.

that would make millions of Americans copyright infringers because they transmitted broadcast television programs from their personal rooftop antennas to their own television sets." *Id*. at 694 n.18. The totality of its analysis consisted of a single paragraph:

> In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today. New devices such as RS-DVRs and Slingboxes complicate our analysis, as the transmissions generated by these devices can be analogized to the paradigmatic example of a "private" transmission: that from a personal roof-top antenna to a television set in a living room. As much as Aereo's service may resemble a cable system, it also generates transmissions that closely resemble the private transmissions from these devices. Thus unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private. Although Aereo may in some respects resemble a cable television system, we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act. And we certainly cannot disregard the express language Congress selected in doing so. That language and its legislative history, as interpreted by this Court in *Cablevision*,

> compels the conclusion that Aereo's transmissions are not public performances.

Id. at 694-95.

Beyond overlooking Congress's intent that courts ensure that unforeseen technological changes not undermine copyright law's core protections, see *supra*, Part IB, the majority's analysis overlooks the broader statutory structure. As noted previously, much of the legislative work between 1965 and 1976 involved crafting a compulsory license regime for the emerging cable television industry. See Copyright Law Revision, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess. on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 33-36 (1966) (Remarks of George D. Cary, Deputy Register of Copyrights) (describing the "controversy" surrounding community antenna television). The Second Circuit's terse dismissal of this substantial structural feature of the 1976 Act ignores the familiar canon of statutory construction that courts

> are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been

> repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. Market Co. v. Hoffman, 101 U.S. 112, 115-116.

Mastro Plastics Corp. et al. v. National Labor Relations Board, 350 U.S. 270, 298 (1956) (Frankfurter, J. dissenting); see also *TRW Inc. v. Adelaide Andrews*, 534 U.S. 19, 31 (2001); see generally SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (2013) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole."). In essence, the majority's interpretation of the few lines of the Transmit Clause sets at naught *41 pages* of the Copyright Act that Congress has devoted to the regulation of satellite and cable television.[6]

When Congress passed the Copyright Act of 1976, the enactment's most lengthy provision minutely regulated cable television's retransmission of over-the-air signals. 17 U.S.C. § 111. In gross measure, the purpose of that section was to legislatively overrule the rulings in *Fortnightly Corp. v. United Artists*

---

[6] The calculation is based on the length of Sections 111, 119, and 122 of the statute. See U.S. Copyright Office, Circular 92: Copyright Law of the United States (Dec. 2011).

Television, Inc., 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974), that cable television (then called Community Antenna Television, or CATV) did not implicate the copyright interests of works that were transmitted through its instrumentality.

> If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

Fortnightly, 392 U.S. at 400. Moving to some specifics, Section 111 eliminated the free pass that cable operators formerly enjoyed. See generally NIMMER ON COPYRIGHT § 8.18[E]. Instead, it substituted an elaborate regime, including the following (among many other features):

- Eligible "cable systems" are to compute their "gross receipts" base;
- They are then to pay royalty percentages geared to the amount of distant non-network programing that each system carries, which

the Act designates a "distant signal equivalent";[7]

- Those monies need to be tendered to the Copyright Office, which holds them pending a distribution proceeding carried out under the auspices of the Copyright Royalty Judges, whereby the money is disbursed to copyright claimants;

---

[7] The level of detail set forth in the statute can be measured by this one excerpt of but a single subparagraph:

> (B) Except in the case of a cable system whose royalty fee is specified in subparagraph (E) or (F), a total royalty fee payable to copyright owners pursuant to paragraph (3) for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during such period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:
>
> (i) 1.064 percent of such gross receipts for the privilege of further transmitting, beyond the local service area of such primary transmitter, any non-network programming of a primary transmitter in whole or in part, such amount to be applied against the fee, if any, payable pursuant to clauses (ii) through (iv);
>
> (ii) 1.064 percent of such gross receipts for the first distant signal equivalent;
>
> (iii) 0.701 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents; and
>
> (iv) 0.330 percent of such gross receipts for the fifth distant signal equivalent and each distant signal equivalent thereafter.

17 U.S.C. § 111(d)(1)(B).

- Already by the early days of the Copyright Act, the fund totaled in the tens of millions of dollars. See *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982). More recently, the fees generated by Section 111 and its later-added cognates (discussed below) have amounted to $1 billion. See U.S. Copyright Office, Satellite Television Extension and Localism Act § 302 Report 52 (August 29, 2011).

- The license is nullified by failure to comply with numerous particulars. To highlight one on which the Senate/House conferees focused in 1976, see H.R. Rep. No. 94-1733 (1976), the compulsory license is lost if any commercial advertising transmitted by the primary transmitter is altered by the cable system through changes, deletions, or additions, except specified exceptions by those engaged in television commercial advertising market research.[8]

---

[8] The actual language is that the cablecast:

> is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television

(Continued on following page)

Aereo undertakes none of those safeguards. As Judge Chin observed, Aereo claims the right to "retransmit, for example, the Super Bowl 'live' to 50,000 subscribers" without in any way complying with the elaborate specifications set forth above. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 697 (Chin, J., dissenting). The copyright laws as they existed before 1978 allowed cable companies to retransmit live broadcasts of the Super Bowl without any payment obligation. For the past 36 years, by contrast, all cablecasts of the Super Bowl have been either out of compliance with Section 111, in which case they constituted outright copyright infringement, or else have fallen within the parameters of Section 111, in which case they have been under the obligation to pay the significant royalties outlined above.

The decision below eviscerates that legislative scheme. In the past, those engaging in retransmission over the Internet have been ineligible to qualify for

---

commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

17 U.S.C. § 111(c)(3) (emphasis in original).

the Section 111 compulsory license.[9] Aereo, by contrast, has been dealt a trump card by virtue of the majority decision below – it need not remit royalties via Section 111 or obtain any permission. Instead, the elaborate specifications that Congress legislated to allow rebroadcast of over-the-air transmissions is now set at naught.

The ramifications are dramatic. When a cablecaster wishes to send its subscribers a rebroadcast of the Super Bowl, not only must it remit the royalties discussed above, but it is also under an obligation not to alter the advertising, pursuant to the exquisitely worded statutory mandate. By contrast, Aereo is under no such disability. Once Aereo has been deemed not to implicate the copyright owner's public performance right by rebroadcasting material, it is trivial to conclude that it violates no cognizable rights by omitting material. Thus, if Aereo chooses to send a hit

---

[9] In the thirty-five years since the passage of Section 111, many companies have constructed business models revolving around the use of new technologies and the statutory license. * * * No technology, however, has been allowed to take advantage of Section 111 to retransmit copyrighted programming to a national audience while not complying with the rules and regulations of the FCC and without consent of the copyright holder.

WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594, 602 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275 (2d Cir. 2012). As Judge Chin noted in that appeal, "Continued live retransmissions of copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry." *Id*. at 286.

television show to its customers with the deletion of authorized commercials, it cannot incur liability. Indeed, if it wished to go further and sell its own commercials in substitution for the aired material, that conduct, too, might well escape liability. After all, Aereo's own advertisers would have consented to the transmission of their proprietary material, and the copyright owner of the show has already been rendered powerless to complain of the violation of its public performance right.

But that is not all. The decision below arose in the context of over-the-air transmissions. Nonetheless, altering our focus to cable-originated programming, there is no reason to conclude that the opinion below somehow fails to reach that conduct as well. HBO charges each of its subscribers for the privilege of receiving its programming; let us imagine that Aereo were to configure its system to offer the same functionality regarding HBO that it currently affords to over-the-air broadcasts. It could do so simply by enlisting an HBO subscriber to route his signal through Aereo's instrumentality. Thereafter, Aereo could offer all of its subscribers the full panoply of HBO programming – after all, if the majority rule below stands, then it does not implicate copyright owners' public performance right for their content to be sent to Aereo's subscribers. It is immaterial to that conclusion whether the programming in question started out on free television or on cable television – if the public performance right is not implicated, then there is no infringement about which HBO can

complain.[10] To that extent, the opinion below threatens to decimate multiple industries.

The majority opinion's impact on cable television is especially striking given developments that have unfolded in that domain since passage of the Copyright Act in 1976. As the Copyright Office has noted, cable penetration in 1976 was 15.5% of households; in the intervening years, it has risen to 85%. See U.S. Copyright Office, Satellite Television Extension and Localism Act § 302 Report 31 (August 29, 2011). Congress has closely monitored these developments, returning time and again to amend the Copyright Act to take cognizance of marketplace developments.

The process started in 1988. Taking note of the many locations "that cannot pick up . . . signals through a rooftop antenna or a cable because they are far from the big cities, or in some cases just on the wrong side of the mountain," H.R. Rep. No. 100-887(1) (1988) at 18, Congress decided to add yet a new compulsory license to the Copyright Act. Importantly, Congress acted against the backdrop that any time a new technology would bring television signals into thousands (or millions) of homes, the result under the 1976 Act, unless amended, would

[10] It is no answer to this conundrum to respond that HBO could incorporate license terms into its subscriber agreements barring Aereo's retransmission. For if Aereo were to obtain the HBO signal from a third party who subscribed to that premium cable service, then Aereo would not be in privity of contract with HBO.

be to render the retransmitter liable for copyright infringement. Therefore, Congress passed a new amendment to that law. Specifically, the Satellite Home Viewer Act of 1988 added Section 119 to the Copyright Act. Act of Nov. 16, 1988, Pub. L. No. 100-667, 102 Stat. 3935. Its details are even more convoluted than Section 111. See NIMMER ON COPYRIGHT § 8.18[F]. Suffice it to say that Section 119 continues in the path of its predecessor by requiring the payment of royalties for the privilege of retransmitting television signals to large numbers of people, gathering those royalties for distribution to copyright owners, and minutely regulating the scope of what conduct is permitted thereunder.[11]

Congress later returned to this domain by enacting the Satellite Home Viewer Act of 1994 and then the Satellite Home Viewer Improvement Act of 1999. Act of Oct. 18, 1994, Pub. L. No. 103-369, 108 Stat. 3477; Act of Nov. 29, 1999, Pub. L. No. 106-113, App. I, 113 Stat. 1501. The latter added yet another compulsory license to this domain in the form of Section 122 of the Copyright Act. See NIMMER ON COPYRIGHT § 8.18[G]. In broad stroke, this third compulsory license continues the same themes from the first two

[11] Several highly technical opinions have issued regarding compliance with the Individual Location Longley-Rice model of Section 119, which is designed to predict signal strength and thereby draw the line between permitted and forbidden satellite exploitation. See *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193 (11th Cir. 2001); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999).

by allowing retransmissions in yet new domains, subject to the obligation to remit royalties to copyright owners, pursuant to minute specifications as elaborately charted by Congress.[12]

Even those multiple interventions scarcely exhaust the field. Congress again returned to overhaul its handiwork by passing the Satellite Home Viewer Extension and Reauthorization Act of 2004. Act of Dec. 8, 2004, Pub. L. No. 108-447, 118 Stat. 2809, div. J, tit. IX. Later, it passed the Satellite Television Extension and Localism Act of 2010. Act of May 27, 2010, Pub. L. No. 111-175, 124 Stat. 1218. Each is massive in import and works significant adjustments to the Copyright Act and Communications Act, in order to effectuate Congress's will regarding the payment of royalties for the privilege of retransmitting television signals in a constantly evolving technical environment. In sum, the passage of major revisions to the 1976 Copyright Act in 1988, 1994, 1999, 2004, and 2010 attests to the vital interest that Congress has continued to maintain regarding appropriate regulation of this domain.

---

[12] To cite but one example, this latest compulsory license obligates satellite carriers to furnish, within 90 days after commencing their secondary transmissions, "(A) a list identifying (by name in alphabetical order and street address, including county and 9-digit zip code) all subscribers to which the satellite carrier makes secondary transmissions of that primary transmission," as well as "(B) a separate list, aggregated by designated market area," of other subscribers. 17 U.S.C. § 122(b)(1).

Against that backdrop, the majority's support for its conclusion below withers. To reiterate, its rationale was threefold:

(1) Plaintiffs' "reading of the legislative history is simply incompatible with the conclusions of the *Cablevision* court." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 694.

(2) "[I]n 1976, when cable TV was still in its infancy, many Americans used rooftop antennas. Thus Congress would have certainly wished to avoid adopting language that would make millions of Americans copyright infringers because they transmitted broadcast television programs from their personal rooftop antennas to their own television sets." *Id*. at 694, n.18; and

(3) "In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today. . . . Thus unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private. Although Aereo may in some respects resemble a cable television system, we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act." *Id*. at 694-95.

In response to each, we note:

(1) Beyond *Cablevision* not being binding on this Court, the majority below was mistaken to root consideration of the structural relevance of Section 111 in the legislative history of another provision. To the contrary, the incompatibility of Aereo's position with governing law unfolds over 41 pages of the Copyright Act itself. Having focused its attention exclusively on the Transmit Clause, the majority below blinded itself to the larger meaning of Congress's handiwork. That myopia results in an opinion that traduces whole swathes of governing law.

(2) The majority's rationale is that anyone could set up a rooftop antenna, so commercial services doing effectively the same thing should rest beyond liability. That rationale exactly matches the above quotation from *Fortnightly* concluding that the "only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur." Yet Congress deliberately rejected that standard by adopting Section 111, as the dissent below emphasized. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 699 (Chin, J., dissenting).

(3) The majority looks to "the technological environment of 1976" to conclude that

> there have been "unanticipated technological developments" in the interim, but expressed its obligation as being to follow the "concerns expressed by Congress in drafting the 1976 Copyright Act." As revealed in Parts I and II of this brief, Congress's specific and general statements as well as the structure of the 1976 Act compel the opposite conclusion. Furthermore, Congress reinforced those concerns to accommodate the progress of technology by amending the Act in 1988; then further reinforced those concerns as technology marched forward by again amending the Act in 1994; and did the same yet again in 1999; and likewise in 2004; plus yet another time in 2010.

The one constant is that Congress has considered infringing any service that provides television signals on a wholesale basis. It has consistently amended the Act to add compulsory licenses to allow services to provide those television signals when it deemed that conduct to be in the public interest – always subject to a royalty obligation to benefit copyright owners, along with a host of specific statutory requirements. The decision below has allowed the first entity since 1976 to provide television signals on a wholesale basis without being governed by those detailed requirements – not to mention without undertaking any corresponding royalty obligation.

The Second Circuit majority acknowledged that its holding "created tension [with] Congress's view that retransmissions of network programs by cable television systems should be deemed public performances," *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 695, but it overrode those concerns based on a misguided understanding of the text, structure, specific legislative guidance, and general legislative purposes of the 1976 Act.

———♦———

CONCLUSION

For the reasons set forth above, we respectfully submit that the Court should hold that Aereo's service infringes the copyright owners' exclusive right of public performance, and therefore reverse the decision below.

Respectfully submitted,

PETER S. MENELL
Counsel of Record
Koret Professor of Law
and Director
BERKELEY CENTER FOR LAW
& TECHNOLOGY
UC BERKELEY SCHOOL OF LAW
Boalt Hall
Berkeley, CA 94720
(510) 642-5489
pmenell@law.berkeley.edu

DAVID NIMMER
Professor from Practice
UCLA SCHOOL OF LAW
385 Charles E. Young Drive East
1242 Law Building
Los Angeles, CA 90095

February 27, 2014