

Does Aereo's Internet Transmission of Commercial Television Broadcasts Violate Copyright Law?

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American Broadcasting Companies, Disney Enterprises, CBS Broadcasting, et al., Petitioners
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In 1976, the U.S. Congress updated Federal copyright law to give additional powers to traditional over-the-air television broadcasters to prevent unauthorized rebroadcasting of their programming. In 2012, a group of broadcasters and other media companies filed suit against Aereo, Inc., alleging that their service, which allowed users to record over-the-air programming from a remote location and then transmit it to an Internet-connected viewing device, constituted a violation of this law. On July 11, 2012, a Federal district court ruled in favor of Aereo. The Second U.S. Circuit Court of Appeals later upheld the decision. The media companies then appealed to the U.S. Supreme Court, which granted certiorari on January 10, 2014. Paul D. Clement is a partner with Bancroft PLLC and an adjunct professor at Georgetown University Law Center. He served as U.S. solicitor general from June 2005 to June 2008. The following is excerpted from the Brief for the Petitioners as submitted to the U.S. Supreme Court on February 24, 2014.

Aereo retransmits broadcast television to members of the public without seeking authorization from, or paying compensation to, copyright holders. Aereo's unauthorized retransmission of broadcast television to the public is obvious and unambiguous copyright infringement. Both the transmit clause [of copyright law] and common sense foreclose any other conclusion.

Aereo transmits performances to paying strangers who all "watch live TV" programs at the same time, albeit in different places. The details of how Aereo provides this service are irrelevant. The transmit clause is expressly indifferent to technical details.

Indeed, the Congress that enacted the transmit clause could not possibly have thought otherwise. The whole point of the provision was to reject emphatically the conclusion of *Fortnightly Corp. v. United Artists Television, Inc.* (1968) that a commercial retransmission system is not engaged in public performance. Congress went to great lengths to draft a technology-neutral statute that would reach not just the cable services at issue in *Fortnightly*, but "all conceivable forms and combinations of wired or wireless communications media" that might be used to retransmit broadcast television to the public. — House Report No. 94-1476 (1976).

The Second Circuit's contrary conclusion is flawed at every turn. The Second Circuit's conclusion is irreconcilable with the text, Congress's intent, and common sense.

It is settled law that third parties must pay for the rights to transmit performances of copyrighted works to the public. And if Aereo prevails, nothing will stop other services that currently pay for the rights to retransmit broadcast television from devising their own Aereo-like workarounds to achieve the same result.

It also would fundamentally undermine copyright protection by depriving copyright holders of their core right to decide if, when, and how to make their works available to the public. Aereo's efforts to circumvent that market and avoid paying for the same rights that others have paid for strikes at the very heart of copyright protection in the digital age.

At bottom, Aereo's arguments are irreconcilable not just with the transmit clause and Congress's

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manifest intent in enacting it, but also with the basic philosophy that copyright protection embodies. As this Court has recognized, the Copyright Act [of 1976] does not tolerate business models premised on the unauthorized exploitation of the copyrighted works of others. Aereo's massive, for-profit scheme for exploiting Petitioners' public-performance rights is no exception.

I. Aereo's Unauthorized Retransmission Service Infringes Upon Petitioners' Public-Performance Rights.

A. The Plain Text of the transmit clause Clearly Reaches Aereo's Conduct.

Aereo is in the business of retransmitting live television broadcasts to paying strangers. That conduct falls squarely within Congress's unambiguous definition of what it means "to perform or display a work 'publicly'": Aereo "transmits or otherwise communicates a performance ... of the work ... to the public, by means of any device or process." There is no dispute that Aereo captures over-the-air television broadcasts for retransmission to its paying subscribers. There is no dispute that the broadcasts Aereo captures for retransmission are performances of copyrighted works. There is no dispute that Aereo offers retransmission of these performances to the public. And there is no dispute that Aereo does not have permission to do so from the holders of the copyrights in the works performed. It is difficult to conceive of a more clear-cut case of infringement of the public-performance right.

The plain text of the transmit clause forecloses any other conclusion. That Aereo retransmits broadcast television to individuals in the privacy of their homes is irrelevant, as Congress made perfectly clear that it does not matter "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places."

That Aereo uses multiple transmissions to transmit the same performance to members of the public is immaterial as well, as Congress expressly contemplated the use of multiple transmissions when it provided that an alleged infringer is transmitting a performance to the public regardless of whether members of the public receive the performance "at the same time or at different times." And the technological details of the process by which Aereo retransmits broadcast television to its subscribers are beside the point, as Congress explicitly defined the public-performance right to encompass the use of "any device or process" to transmit or otherwise communicate a performance of a copyrighted work to the public.

Indeed, the text could not more clearly convey Congress's manifest desire to define the public-performance right in broad and technology-neutral terms, to ensure that future technologies like Aereo's would not escape its reach.

In sum, there can be no serious dispute that the plain text of the statute renders the use of any device or process to transmit or otherwise communicate a performance of a copyrighted work to the public without the consent of the copyright holder an infringement upon the exclusive public-performance right. Nor can there be any serious dispute that Aereo's system of dime-size antennas and gratuitous copies is just another device or process for doing exactly that. Nothing about the device or process through which Aereo achieves that impermissible end changes this straightforward textual analysis in any way.

B. Aereo Provides Precisely the Kind of Service That Congress Enacted the transmit clause to Reach.

Although the text of the statute squarely resolves this case, the history of the transmit clause readily reinforces the conclusion the text demands. The whole point of the transmit clause was to reject any suggestion that retransmission services fall outside the public-performance right.

Congress enacted the transmit clause to address a question virtually identical to the question in this case — namely, whether a third party may retransmit over-the-air broadcast television programming

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to paying members of the public without obtaining authorization from copyright holders. By the time Congress enacted the transmit clause, *Fortnightly* and *Teleprompter Corp. v. Columbia* (1974) had set the terms of the debate, and Congress legislated with the express objective of overturning the conclusion that retransmitting over-the-air television broadcasts was not public performance — indeed, was not performance at all.

The basic question of *Fortnightly* was whether the public availability of over-the-air broadcasts compelled a different analysis for public-performance purposes when a third party retransmitted those broadcasts without authorization from copyright holders. This Court answered that question by concluding that, under the 1909 Copyright Act, a cable company was not engaged in any kind of performance — public or private — because it “no more than enhanced the viewer’s capacity to receive the broadcaster’s signals,” which the broadcaster already had agreed to make available to the public free of charge.

Congress emphatically rejected that approach in its 1976 revisions to the Copyright Act, which were designed to “completely overturn” *Fortnightly* and *Teleprompter*. — House Report No. 94-1476. As the legislative history accompanying those revisions makes clear, in Congress’s view, there is a fundamental difference between an individual who uses an antenna to receive broadcast television programming for free and a “commercial enterprise whose basic retransmission operations are based on the carriage of copyrighted program material.” Because the latter involves an entire business model built around public exploitation of the copyrighted content of others, Congress concluded that “further transmission of a broadcast to the public” without authorization should be “considered an infringing act.”

In keeping with that conclusion, the legislative history expressly confirms that Congress’s broad definitions of “perform,” “display,” “publicly,” and “transmit” were designed to ensure that “the concepts of public performance and public display cover 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.”

Furthermore, Congress went out of its way to craft a statute that would reach future technologies that might be used to transmit performances of copyrighted works to the public. Indeed, one of Congress’s primary goals was to ensure that its revisions were “broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them.”

The legislative history of the 1976 revisions thus makes two things crystal clear. First, Congress considered and rejected the notion that retransmission services do not infringe upon copyright holders’ public-performance rights simply because the initial broadcast is available to the public for free.

Second, Congress was at pains to ensure that the transmit clause would leave no room for technological workaround. It carefully crafted the statute to reach “each and every method” — whether existing or not yet invented — “by which the images or sounds comprising a performance or display are picked up and conveyed” to the public. Congress did not want to risk any possibility that changes in technology would render the transmit clause a nullity.

This history forecloses any conceivable argument that Aereo’s technological design somehow immunizes it from liability for infringement of Petitioners’ public-performance rights. Just like the cable companies Congress enacted the transmit clause to reach, Aereo is in the business of offering access to copyrighted content to the public for a profit. No amount of miniature antennas or gratuitous copies can change that reality. Aereo markets itself as an alternative to the cable services that prompted enactment of the transmit clause, yet somehow insists that it need not seek permission or provide compensation to offer the same service.

Aereo is mistaken. It is no more a mere equipment provider than a cable or satellite company; it is clearly performing the content it uses to market its service. And its simultaneous retransmission of “live TV” to paying strangers is no more private than the live retransmissions of cable and satellite companies. A service that offers to retransmit “live TV” to anyone willing to pay a fee clearly is offering to retransmit to the public. Any construction of the transmit clause that suggests otherwise necessarily fails.

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II. The Second Circuit's Construction of the transmit clause Is Fundamentally Flawed.

The Second Circuit concluded that when Aereo simultaneously retransmits the same broadcast of a television program to thousands of paying strangers, it is engaged in thousands of “private” performances that do not implicate Petitioners’ exclusive rights. That implausible result rests on a novel and flawed reading of the transmit clause.

According to the Second Circuit, whether Aereo is infringing upon Petitioners’ public-performance rights turns not on whether Aereo “transmits ... a performance ... of the work ... to the public,” but rather on whether the public at large is capable of receiving each distinct transmission through which Aereo does so. By that logic, solely because Aereo uses individualized antennas and copies to send each of its subscribers a separate transmission of whatever television program he or she chooses to watch, Aereo’s simultaneous retransmission of the same program to thousands of paying strangers is not “to the public.”

That conclusion is every bit as illogical as it sounds. The court purported to derive it from a subordinate clause in the second half of the transmit clause that merely confirms that an alleged infringer is transmitting “to the public” regardless of “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.” Although Congress plainly included that language to underscore the breadth of the clause, and to confirm what does not matter when determining whether a performance has been transmitted or otherwise communicated “to the public,” the Second Circuit instead construed it as the key to substantially narrowing the statute.

In the Second Circuit’s view, a communication is only to the public if multiple members of the public are “capable of receiving” a particular transmission of a performance” of the copyrighted work.

One glaring problem with the Second Circuit’s construction is that it renders a significant part of the language from which it is purportedly derived entirely superfluous. Congress said explicitly that an alleged infringer is transmitting a performance to the public even when “members of the public capable of receiving the performance or display receive it ... at different times.” Of course, it is essentially impossible for two people to receive the same transmission of a performance “at different times.” Accordingly, the Second Circuit was forced to acknowledge that its reading of the transmit clause renders that language superfluous.

Of course, the Second Circuit’s reading of the statute suffers from the equally fundamental problem that the transmit clause does not say “capable of receiving the transmission.” It says “capable of receiving the performance or display.”

“Transmit” and “perform” are each defined terms with their own distinct meanings. Had Congress intended liability for infringement to turn on whether each distinct transmission of a performance is accessible to the public, it would have been easy enough for Congress to say so. But that would have been a very different statute — a statute that would have allowed a retransmission service to reach countless members of the public as long as it did so through separate transmissions. That is decidedly not the result Congress intended. Congress referred to “the performance or display” and not “the transmission” precisely because it sought to capture someone who is transmitting the same performance to the public, even if members of the public are watching it in the privacy of their homes, even if they are watching it at different times and without regard to the precise “device or process” through which they receive it.

And that leads to a third problem with the Second Circuit’s construction of the transmit clause — it places dispositive weight on the “device or process” by which a performance is transmitted to the public, when Congress could not have been more emphatic that it wanted to capture transmitting a performance to the public “by means of any device or process.” It is both a hoary principle of statutory construction and a basic tenet of common sense that a court should “never adopt an interpretation” of a statute “that will defeat its own purpose” by rendering “evasion of the law ... almost certain.” — *The Emily* (1824). And yet that is precisely what the Second Circuit’s interpretation would do.

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The Second Circuit's conclusion that Aereo is not publicly performing is perhaps the most telling sign that its construction of the transmit clause cannot be correct. The very clause that the Second Circuit relied upon makes clear that an alleged infringer is performing to the public even when viewers watch the performance "at different times." And yet Aereo trumpets its ability to allow consumers to "watch TV live" — i.e., to allow thousands of people to watch the performance at the same time. Congress could not have intended such a result.

Even the Second Circuit has recognized the problems its statutory construction creates, acknowledging that it "would essentially read out the 'different times' language." The court attempted to cure that redundancy by devising "an exception" to its distinct transmissions rule "when private transmissions are generated from the same copy of the work." Why that should matter is a mystery, however, as the transmit clause says not a word about whether transmissions originate from a single copy of a performance. The Second Circuit's need to read into the statute a solution to a problem of its own making is all the more reason to reject its construction.

The Second Circuit alternatively suggested that its reading was necessary to avoid rendering a "hapless customer" liable for violating the public-performance right whenever he "records a program in his den and later transmits the recording to a television in his bedroom." That puzzling contention only underscores the depths of the *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (2nd Circuit 2008) [also known as the *Cablevision* case] court's confusion. The transmit clause is concerned not with whether someone else transmitted a performance of the work to the public before the alleged infringer did, but rather with whether the alleged infringer is transmitting the performance to the public.

When an individual uses a DVR to record and then retransmit a recording of a broadcast to his family in his home, his private performance does not somehow become public just because the broadcast that he recorded was to the public in the first instance. But when a cable company uses a combination of strategically placed antennas and cables to retransmit a live broadcast to its subscribers, it is transmitting to the public.

At bottom, there is simply nothing to recommend the Second Circuit's illogical reading of the transmit clause. Not only is it wholly irreconcilable with the text of the statute, but it would also render meaningless all of Congress's careful efforts to guard against the elevation of technological detail over functionality. The transmit clause focuses on what an alleged infringer is doing, not the "device or process" by which the alleged infringer is doing it. Aereo is transmitting performances of copyrighted works to the public. That is public performance.

III. Aereo's Contrary Arguments Imperil the Very Innovation Copyright Protection Is Meant to Foster.

The plain text of the statute and Congress's manifest intent to reach all retransmission services are more than enough to foreclose Aereo's efforts to escape liability for its blatant infringement. But the problems with Aereo's arguments run much deeper than their incompatibility with the statute. Its arguments strike at the heart of the "philosophy behind the" Copyright Clause "that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." — *Eldred v. Ashcroft* (2003).

It is no surprise that this Court has had little tolerance for business models premised on the unauthorized exploitation of the copyrighted works of others on a "gigantic scale." — *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* (2005). The entire enterprise of "securing a fair return for an 'author's' creative labor," *Twentieth Century Music Corp. v. Aiken* (1975), would be undermined completely if third parties could reap the benefits of those labors without obtaining authorization from or paying compensation to the author. That is the central principle underlying copyright law, and the broadcast television industry is no exception. Collectively, broadcasters spend billions of dollars creating and acquiring their copyrighted content. Although they have agreed to make that content available to the public over the air for free, they can afford to do so only if they retain the ability to recoup their

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substantial investments by, among other things, generating critical revenue when that content is retransmitted to the public.

Aereo has built an entire business around the unauthorized exploitation of broadcasters' copyrighted content. It seeks to siphon off cable and satellite subscribers by offering this content for a lower fee, which it can do only because, unlike its competitors, Aereo does not compensate copyright owners for its use. Rather than recognize that business model for what it is — a blatant and unapologetic violation of copyright law — the Second Circuit legitimized it. In doing so, the court created a gaping hole in copyright law that threatens broadcast television as we know it.

Aereo's own deliberate circumvention of copyright law is troubling enough, but it is the implications of Aereo's legal argument that are truly destabilizing. For the time being, Aereo has offered its subscribers only local broadcast programming, but that is just a voluntary decision and an artifact of Aereo's current business model. If Aereo is correct that its retransmissions are not public performances at all, then its logic would seem to suggest that it could retransmit New York broadcasts live to viewers in California — or even to viewers in London or Beijing.

If the transmit clause could be circumvented through the simple expedient of simultaneously supplying each user with a distinct transmission generated from a distinct copy, then cable and satellite companies could potentially devise Aereo-like workarounds of their own, and in the process render the transmit clause a dead letter. Indeed, the ink on the Second Circuit's decision was barely dry when proposals for exploiting it began to surface. That result would fly in the face of Congress's careful efforts to guard against the risk of technological advancement rendering the transmit clause obsolete. It also could be devastating to the future of broadcast television, the providers of which "have come to rely more heavily on retransmission fees" "to make their free public broadcasts profitable."

And it is not just fees from cable and satellite companies that they may stand to lose. Broadcasters have hardly been oblivious to the reality that there is an ever-growing demand for online access to their programming. To the contrary, they have been as eager as anyone to capitalize on this demand by developing their own technologies and licensing agreements to offer online access to content.

For instance, ABC recently launched Watch ABC, an application that allows cable subscribers in certain regions to watch ABC's broadcasts live over the Internet, and Fox negotiated the rights to provide live online access to its broadcast of the Super Bowl. As is their right, however, both broadcasters and owners of the content they provide have been careful to go about meeting this consumer demand in ways that maximize, rather than undermine, the value of their copyrighted content — not only by demanding compensation from those licensed to distribute or retransmit that content, but also by, among other things, controlling whether that content is made available in ways that advertisers do not measure, or to West Coast viewers on the same schedule as East Coast viewers.

All of those efforts — and the critical licensing agreements broadcasters have negotiated — would go by the wayside if Aereo were allowed to seize control of those decisions and retransmit broadcasters' copyrighted content in whatever way is best for Aereo's bottom line.

Indeed, if that is the world in which broadcasters must live, then they may be forced to reconsider whether they can afford to continue making the same quantity and quality of programming available to the public for free in the first place. That consequence of Aereo's legal theory would be most unfortunate. "The importance of local broadcasting outlets can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." — *Turner Broadcasting Systems, Inc. v. FCC* (1994). That is no less true today. Millions of Americans still rely on free over-the-air broadcasts to receive television programming. And broadcast television also remains a critically important source of local and national news.

All of that just underscores that there is far more at stake here than Aereo or retransmission fees or even the future of broadcast television. What is at stake is the basic right of every copyright holder to determine if, when, and how to make its copyrighted work available to the public. As the register of copyrights has noted, robust protection of that right — and, in particular, the public-performance right — has never been more important to the continued development of copyright works than it is at this moment,

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when content can be both accessed and made available through the simple click of a mouse, and individuals are increasingly more reliant on the Internet to obtain it.

Of course, the technological advancements of the Internet age are fully capable of furthering the interests of both the public and the copyright holder, such as when Netflix pays for a license to transmit a movie or Apple pays for a license to distribute a song. As these arrangements readily confirm, copyright protection need not fall by the wayside for innovation to continue. The history of online music distribution over the past decade is a case in point. The demise of early file-sharing services that fostered infringement on a “gigantic scale,” *Grokster*, did not sound the death knell for online distribution of music. To the contrary, it paved the way for the rapid growth of licensed distribution services such as iTunes, which provide affordable access to music without depriving copyright holders of the fruits of their labors.

Post-*Grokster* experience thus teaches that, in the end, there is no real tension between protecting copyright and fostering innovation and widespread, inexpensive access to content. The real choice is between incentivizing the development of technology that more efficiently transmits, performs, or displays content while respecting copyrights, or incentivizing technology that offers no real advances, but simply provides a superficial basis for eluding copyright liability.

Again, broadcast television is no exception. A robust and affordable market for licensed online distribution of broadcast television content already exists through services such as Hulu, Netflix, Amazon, and Watch ABC. As that market reflects, Congress’s incentive scheme is working just fine: Online access to broadcast television content and other copyrighted works was available long before Aereo came on the scene, and so long as those who retransmit copyrighted content to the public continue to compensate copyright holders for the rights to do so, online access will continue to be available once Aereo is gone.

In seeking to avoid providing that compensation, Aereo seeks to upend not only our own copyright law, but also our compliance with international obligations. The United States is a signatory to and has been a driving force behind multiple international agreements that enshrine the same broad and technology-neutral public-performance right that the transmit clause was designed to protect.

In keeping with these agreements, the United States also has entered into multiple free trade agreements protecting the broad and technology-neutral public-performance right. And in approving these agreements, Congress repeatedly and expressly has confirmed its understanding that domestic copyright law already protects the same broad and technology-neutral right.

As all of these agreements illustrate, Aereo’s cramped and hyper-technical view of the public-performance right is fundamentally incompatible not just with Congress’s judgments in the Copyright Act, but with norms of copyright law worldwide — norms developed largely to reflect settled understandings of what U.S. law protects, no less. In fact, decisions from courts of other signatories to these agreements have rejected arguments nearly identical to Aereo’s and held that materially analogous online retransmission services are engaged in copyright infringement.

Contrary to Aereo’s alarmist suggestions, a decision from this Court reaching the same conclusion need not threaten the future of “cloud computing” technology, or any of the readily distinguishable services to which Aereo attempts to analogize itself. There is an obvious difference between a service that merely stores and provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large.

Of course, it is no accident that Aereo seeks to make this case about cloud computing, the RS-DVR, hardware providers, or anything other than its own business model. The debate has to be refocused on something else, because Aereo’s own business model is essentially indefensible in light of the plain text of the statute and Congress’s manifest intent.

Aereo has built an entire business model around the unauthorized commercial retransmission of Petitioners’ copyrighted content to the public. That is precisely what Congress enacted the transmit clause to prevent. Indeed, the very fact that the Second Circuit’s reading of the statute would not prohibit

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Aereo's conduct is evidence enough that it cannot be right. Aereo is in the business of retransmitting performances of copyrighted works to the public. Nothing about the Rube Goldberg-like contrivance through which it does so provides even the slightest basis for concluding otherwise.

Reply Brief

The following is excerpted from the Reply Brief of the Petitioners as submitted to the U.S. Supreme Court on April 14, 2014.

Aereo gamely attempts to defend the Second Circuit's reasoning that an alleged infringer is not transmitting "to the public" unless the public is "capable of receiving" a particular transmission of a performance" of a copyrighted work. But as even Aereo ultimately recognizes, that transmission-centric rationale cannot be reconciled with the statute's text, structure, and purpose.

Not only did the Second Circuit focus on the wrong language; it also adopted an interpretation that renders part of that language superfluous. As Aereo acknowledges, "a particular transmission ... cannot be received at different times," meaning the "different times" language does no work if "the 'performance' that the public must be capable of receiving is the transmission itself." That concession is unavoidable, but it is also fatal.

Aereo thus is correct to concede that a video-on-demand service is publicly performing. But once Aereo concedes this point, there is very little left to its case.

Aereo nonetheless attempts to buttress the Second Circuit's reading of the transmit clause by suggesting that alternative readings have their own problems. But Aereo assumes an alternative reading that Petitioners explicitly disclaimed in their opening brief.

Having accepted that user-specific transmissions do not take a service like video-on-demand outside the transmit clause, Aereo is left insisting that what distinguishes its service are the user-specific copies it employs to transmit performances to its subscribers. That form-over-substance argument would be strained even if the statute did not specifically sweep in transmitting by "any device or process." But given that language, Aereo's effort to distinguish itself based on the details of its devices and process is a non-starter.

Aereo's convoluted attempt to derive support for its emphasis on its copies from Section 111's compulsory licensing scheme for retransmissions by a cable system (something Aereo concedes it is not) is unavailing. Indeed, Section 111 actually undermines Aereo's argument.

Aereo argues that it is not performing at all — privately or publicly — but rather merely supplies equipment that enables its users to watch broadcast television. That argument is nearly identical to the one this Court adopted in *Fortnightly Corp. v. United Artists Television, Inc.* (1968) — only to have its analysis rejected by Congress when it enacted the transmit clause.

Implicitly recognizing as much, Aereo falls back on another argument that Congress squarely rejected in 1976 — namely, that broadcast television is different because it is available over the air for free. That argument clearly carried the day in this Court. But it just as clearly was rejected by Congress.

Aereo rounds out its brief with a series of unadorned policy arguments that are completely unmoored from the statutory text and Congress's manifest intent. When the statutory text and evident legislative purpose are this clear, there is little role for policy arguments. But Aereo's policy appeals are unavailing in any event.

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United States of America, *Amicus Curiae* Edwin S. Kneedler, Deputy U.S. Solicitor General

The United States has filed an amicus brief in this case because it involves questions about Federal copyright law. Edwin S. Kneedler was appointed deputy solicitor general in 1993. He served as acting solicitor general from January 26, 2009, to March 19, 2009. The following is excerpted from the Amicus Curiae Brief for Petitioners as submitted to the U.S. Supreme Court on March 3, 2014.

Under the 1976 Copyright Act, a company that retransmits copyrighted broadcast television programs must obtain a license, though qualifying retransmission services may avail themselves of the detailed statutory licensing schemes established by Congress. Respondent's unauthorized Internet retransmissions violate these statutory requirements and infringe Petitioners' public-performance right.

Respondent transmits copyrighted broadcast programs to the public, without the authorization of the copyright holders, and is therefore liable for infringement.

Respondent "performs" copyrighted works. Respondent argues that, because an individual subscriber determines what content she will receive and when, it is the subscriber rather than Respondent itself that "transmits" the broadcast programming. In a variety of circumstances, however, commercial actors "transmit" or otherwise "perform" copyrighted works, even though they do so at the behest of individual customers.

Respondent observes that, from the subscriber's perspective, Respondent's service provides substantially the same functionality that consumers could obtain by purchasing equipment for their homes. In enacting the 1976 Copyright Act amendments, however, Congress overrode decisions of this Court that drew on the same analogy. In applying the Copyright Act in its current form, the more important functional equivalence is between Respondent and the cable systems that the 1976 Congress brought within the Copyright Act's purview.

Respondent transmits performances of copyrighted broadcast programming "to the public." For these purposes, the term "performance" encompasses both the allegedly infringing transmissions themselves and any underlying performances, such as the network broadcast. Even if Respondent were correct that its own transmissions are the only relevant "performances," those transmissions themselves are made "to the public" within the meaning of the transmit clause.

Contrary to the court of appeals' suggestion, treating Respondent as an infringer would not call into question the legality of purely private performances, such as an individual's transmission of a lawfully acquired copyrighted work to himself. And any doubt about the statute's proper application to Respondent's system is resolved by the context and purposes of the 1976 Act, which created a nuanced scheme to govern the retransmission of over-the-air broadcasts of copyrighted television programs to the public, including detailed exceptions and a reticulated statutory licensing scheme.

Reversal of the judgment below need not threaten the legality of cloud computing. One function of cloud-computing services is to offer consumers more numerous and convenient means of playing back copies that the consumers have already lawfully acquired. A consumer's playback of her own lawfully acquired copy of a copyrighted work to herself will ordinarily be a non-infringing private performance, and it may be protected by fair-use principles as well.

Respondent's service, by contrast, enables subscribers to gain access to copyrighted content in the first instance — the same service that cable companies have traditionally provided. Unlike cable companies, however, Respondent does not pay licensing fees to the copyright holders. A decision holding that Respondent publicly performs the broadcast programs it transmits to paying subscribers will not threaten the use of different technologies that assist consumers in hearing or viewing their own lawfully acquired copies of copyrighted works.

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National Football League (NFL) and Major League Baseball (MLB), *Amici Curiae* Robert Alan Garrett, Counsel of Record

The NFL and MLB are two of the largest professional sports leagues in the United States, with television broadcast licensing deals worth tens of millions of dollars annually. Robert Alan Garrett is a partner with the law firm Arnold & Porter, where he specializes in copyright and telecommunications law. The following is excerpted from the Amicus Curiae Brief for Petitioners as submitted to the U.S. Supreme Court on March 3, 2014.

Petitioners have demonstrated that the Second Circuit's decision in this case cannot be squared with the text, structure, or legislative intent of the Copyright Act of 1976; the decision below is irreconcilable with Congress's determination in the 1976 Act that commercial enterprises may not retransmit broadcast programming to paying subscribers without first obtaining copyright licenses. *Amici* submit this brief to explain the impact of that decision on the leagues and their telecasting practices.

The NFL and MLB were actively involved in the debates that led Congress, in the 1976 Copyright Act, to impose copyright liability on commercial services that retransmit broadcast television programs. At the urging of the leagues and other program owners, Congress broadened the scope of the public performance right specifically to encompass such retransmissions.

For nearly 40 years, it has been settled law that commercial services must obtain copyright licenses to retransmit broadcast signals, regardless of the technology such services employ and regardless of the fact that broadcast programming is freely available over the air. The courts, Copyright Office, Executive Branch, and Congress repeatedly have reinforced that settled law in multiple contexts, including where the broadcast retransmission services (like Aereo) use the Internet as their distribution platform. The decision below improperly upends the well-established and well-functioning legal framework upon which the leagues and other program owners have relied in determining their telecasting strategies.

The decision below not only permits Aereo and similar services to commercially exploit the leagues' copyrighted telecasts without compensation; it also unfairly allows these unlicensed services to distribute, over the Internet around the world, digital products comparable to the very valuable products that the leagues license to others. It also permits such services to destroy the exclusivity that the leagues have provided their various rights-holders in marketplace-negotiated agreements. And it threatens the significant revenue stream that the leagues receive from services that, unlike Aereo, play by the rules and compensate the leagues for retransmission.

The decision below also jeopardizes copyright protection that the leagues and other copyright owners receive abroad. The decision below unnecessarily places the United States in violation of several international treaties, which require the United States and its trading partners to prohibit retransmission of broadcast stations over the Internet without the consent of the program and station owners. The decision thus is contrary to a fundamental maxim of statutory interpretation that courts should construe statutes, if at all possible, in conformity with U.S. treaty obligations. The decision also disregards the reciprocal nature of those treaties; the failure of the United States to honor its international copyright commitments could prompt its treaty partners to do the same, to the detriment of the leagues and other U.S. copyright owners.

If program owners, including the leagues, lose the substantial benefits derived from retransmission licensing when they place programming on broadcast stations, such stations will become less attractive media for distributing copyrighted content. The obvious alternative for program owners will be to move more of that content to non-broadcast networks, where Aereo-like services cannot exploit such content without authorization. Thus, if upheld, the Second Circuit's decision ultimately may deprive viewers of popular programming that is now freely available on over-the-air broadcast television.

Does Aereo's Internet Transmission of Commercial Television Broadcasts Violate Copyright Law?

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Aereo, Inc., Respondent
David C. Frederick, Counsel of Record

Aereo, Inc. is a technology company that devised a system whereby users could record over-the-air television broadcasts by “renting” small antennae connected to hard drives at a remote location and then stream the broadcasts via the Internet to a viewing device at a time of their choosing. A group of broadcasting and media companies alleged that Aereo’s service was an unauthorized, illegal rebroadcast of their copyright-protected content and filed suit against Aereo in Federal court. On July 11, 2012, a Federal district court ruled in favor of Aereo. The Second U.S. Circuit Court of Appeals later upheld the decision. The media companies then appealed to the U.S. Supreme Court, which granted certiorari on January 10, 2014. David C. Frederick is a partner with the law firm Kellogg, Huber, Hansen, Todd, Evans & Figel, where he specializes in appellate law. The following is excerpted from the Brief for the Respondent as submitted to the U.S. Supreme Court on March 26, 2014.



Aereo does not publicly perform copyrighted works. For two independent reasons, Aereo’s technology enables completely lawful private performances, not infringing public performances.

First, the Second Circuit correctly interpreted the transmit clause [of copyright law] to extend liability only to transmissions “to the public.” There is no statutory basis for Petitioners’ request that private performances be “aggregated” into a public performance.

Second, Petitioners argue that the Court should treat users’ playing of copies as a mere “device or process” for transmitting Petitioners’ performances. The government reaches even further, asserting that transmissions from Aereo’s equipment “contain” all “underlying performances.” Both positions, however, would lead to untenable results.

This Court should affirm for the additional reason that Aereo’s users — not Aereo — create, play, and transmit their recordings of broadcast content and therefore “perform” within the meaning of the Copyright Act [of 1976].

The government errs in contending that the nature of Aereo’s equipment transforms Aereo into a direct infringer. That position is inconsistent with the government’s acknowledgement that systems indistinguishable from Aereo’s do not directly infringe.

Considerations of copyright policy strongly support affirmance. First, any ambiguity in the statute must be resolved against liability.

Petitioners’ position would limit consumers’ access to local over-the-air broadcasts. It also would expose a wide variety of cloud computing businesses to strict, and potentially ruinous, liability. Petitioners refuse to acknowledge this issue. The government acknowledges the problem, but its proposed solution is unsustainable.

Finally, nothing in the Copyright Act suggests that Congress would have wanted Petitioners to be able to extract copyright royalties here.

Without ever acknowledging the difference, Petitioners repeatedly refer not to copyright royalties, but to the “retransmission fees” some cable systems pay under the Cable Television Consumer Protection and Competition Act of 1992. Congress was “careful to distinguish” copyright royalties from

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retransmission fees, *Senate Report No. 102-92* (1991), and warned that the Cable Act should not be construed “to affect Federal copyright law.”

Petitioners’ primary reliance on retransmission fees to justify their copyright analysis shows just how far afield they are from any result Congress would have intended.

I. Aereo Does Not Publicly Perform Copyrighted Works.

A. *The Transmissions From Aereo’s Equipment Are Not “Public” Performances.*

The Second Circuit concluded that, to determine whether an accused infringer publicly performs by means of a transmission, the relevant performance is the transmission itself. Because each transmission from Aereo’s equipment is available only to a specific user, each is a private performance. And the statute does not restrict private performances, so the Court should affirm.

Not all performances of copyrighted works infringe; the copyright holder’s exclusive right is to perform “publicly.” The act of transmitting is not necessarily a public performance, because the transmission may be available to only a particular individual.

The statute provides that a transmission is a public performance if it is “to the public” — that is, if “members of the public are capable of receiving the performance.” Because “to transmit” is one way “to perform,” the “performance” that the public must be capable of receiving is the transmission itself.

Precisely because “perform” is broadly defined, Congress chose language focusing on the public nature of the challenged transmission itself, not some other performance — whether a prior performance by a broadcaster or a later performance by the viewer. That reading is further supported by the transmit clause’s distinction between transmissions to a public place and transmissions “to the public.” Under Petitioners’ reading, every transmission to a public place is also a transmission “to the public.”

The Second Circuit’s construction correctly imposes liability only on those who perform publicly. The audience capable of receiving a particular transmission is what determines whether the transmission is a “public performance.”

As both courts below correctly found, Aereo’s equipment enables only private performances, because each transmission is available only to a specific user. The user transmits those data only to herself; she cannot download the program or transmit it to anyone else.

A public performance does not occur simply because many of Aereo’s users record and watch the same program. As the Second Circuit correctly observed, nothing in the transmit clause authorizes the aggregation of “private transmissions ... not capable of being received by the public.”

Petitioners incorrectly assert that Aereo’s construction of the statute cannot be reconciled with the “different times” language of the transmit clause. The statute provides that a transmission is a public performance if “members of the public are capable of receiving the performance,” regardless of whether they “receive it ... at the same time or at different times.” The evident purpose of that language is to ensure that liability turns on the potential — not the actual — recipients of any given transmission.

Although a particular transmission cannot be received at different times, it does not follow that members of the public cannot be capable of receiving a transmission at different times. The legislative history discusses that scenario in explaining “different times”: “A performance made available by transmission to the public at large is “public” even though ... 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.” — *House of Representatives Report No. 90-83* (1967).

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B. *Aereo's Users Transmit a New Performance From a Recording of the Broadcast, Not the Same Performance Embodied in the Broadcast.*

1. The playing of a copy is a performance distinct from the performance from which the copy was made.

The Copyright Act provides that “to ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” A “performance” of an audiovisual work is thus the act of sequentially showing a portion of its images or making the sounds accompanying it audible.

This definition makes clear that each new act of showing a work is a separate performance, because each makes the work’s images and sounds perceptible. That is true even where multiple performances are derived from the same copy of a work.

2. Aereo’s users do not receive the performances embodied in broadcasters’ transmissions.

When a consumer plays a personal recording using Aereo’s DVR and transmits it to her device, the “performance” transmitted is the playback, not the broadcaster’s prior performance of the program. With Aereo’s technology, a consumer first sends a command that activates an individual antenna to access a broadcast transmission for the selected program and then makes a recording from the data received by that antenna. The user then plays that recording and streams that performance to herself over the Internet. Even when a user is watching a program “live,” she is watching the playback of her individual recording. That playback, not the broadcast, supplies the sequence of images and sounds that is transmitted. Because the user is the only person “capable of receiving” a transmission of her playback, there is no public performance.

Moreover, because the playing of a recording is itself a performance, the two steps of (1) making a recording from a first performance, and (2) transmitting a playback of that recording cannot be treated as a “device or process” for “retransmitting” the first performance. The transmit clause makes clear that a single performance is embodied in a transmission. The definition of “perform” confirms that reading. A “performance” is not a sequence of images and sounds but rather the transitory act of showing them. Other interpretations lead to absurd results.

The incongruity of the government’s reading is particularly pronounced when copies of copyrighted content are distributed through transmissions — i.e., downloads. The government consistently has taken the position that distribution through downloads is not a performance. As it has explained, when a song is downloaded, the purchaser obtains a fixed copy of the song and then performs the copy. The digital music vendor does not perform the song by transmitting the data embodied in the consumer’s copy. On Petitioners’ theory here, however, the vendor’s transmission could be treated as a “device or process” for communicating the performance from which the copy is made — as their own *amici* acknowledge.

For similar reasons, treating the creation and playback of an Aereo user’s fixed copy as a “process” for transmitting an underlying performance would undercut the compulsory license for digital distribution of sound recordings. Congress could not have intended that result.

3. Section 111 reflects the distinction between the performance embodied in a broadcaster’s transmission and a performance from a recording of the broadcast.

Section 111 establishes the rules to govern “secondary transmissions” of “primary transmissions.” It establishes the compulsory license for retransmission of broadcasts to distant markets and makes clear that cable systems can retransmit local broadcasts for free. The section generally defines “secondary

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transmission” as the “simultaneous” retransmission of broadcast signals. And it indicates that, when a broadcast signal is simply passed through by a cable system to its subscribers, what is contained in the secondary transmission is the “performance ... embodied in the primary transmission.”

Section 111(e), however, also includes a limited category of secondary transmissions that are “nonsimultaneous” because they are derived from the playback of a “videotape” (broadly defined to include any “reproduction of the images and sounds of a program or programs broadcast by a television broadcast station”). The statute refers to the content transmitted through such a “nonsimultaneous” secondary transmission not as the transmission “of a performance ... embodied in the primary transmission,” but as “the copyrighted program, episode or motion picture videotape.”

The statute uses that different formulation precisely because the playback of a videotape is not the same performance as the one embodied in the primary transmission — it is a new and different performance. Because Aereo’s equipment does not — ever — transmit broadcast content other than from an individual user’s reproduction, it never transmits the performance embodied in the broadcast.

4. There is no justification for disregarding the fact that all transmissions using Aereo’s equipment are derived from individual recordings.

Neither Petitioners nor the government can dispute that the “performance” transmitted by an Aereo user is the playback of her recording. Petitioners’ public-performance claim fails.

The government argues that transmissions to Aereo’s users “contain” the prior broadcast performance. To the extent the government’s theory conflates the performance from a copy with the performance from which the copy is made, it does not avoid any of the problems of Petitioners’ theory. Moreover, the government acknowledges that the playback of a copy is not a public performance in the case of a remote-storage DVR (RS-DVR) [like the one in *Cablevision*]. The government offers no evidence to distinguish Cablevision’s RS-DVR and Aereo’s.

Aereo’s technology permits consumers only to make personal copies of local broadcast television — fair use under *Sony Corp. of America v. Universal Studios, Inc.* (1984).

By contrast, if Petitioners had a legitimate challenge to the use of Aereo’s system to copy their copyrighted works, they would not need to rely on their (unavailing) public-performance theory at all.

5. Rejection of Petitioners’ misreading of the statute would not affect the copyright liability of video-on-demand systems.

A ruling in Aereo’s favor would not allow video-on-demand (VOD) companies like Hulu and Netflix to provide copyrighted content without paying royalties. The transmit clause requires consideration of whether the public — any broader audience than “a normal circle of a family and its social acquaintances” — is “capable of receiving” a performance. The only person capable of receiving a performance from a personal recording housed in Aereo’s DVR is the user who created the recording. A VOD system that uses a master copy, by contrast, “transmits ... to the public” because anyone may elect to receive a performance (the playback of the master copy). And a VOD system cannot avoid liability by making individual copies for viewers without implicating the copyright owner’s reproduction right.

As the government previously has acknowledged, the performances transmitted using Aereo’s equipment are not “public” because no user may ever access the recording made by another. By contrast, it would not make a difference if a VOD provider actually transmitted a performance from a master copy only to a single user, if such a performance were available to anyone who requested it.

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II. Aereo's Users, Not Aereo, "Perform" by Using the Equipment.

A. *Aereo Does Not Meet the Statutory Standard for Direct Infringement.*

The Copyright Act imposes direct liability for infringement on one who "violates any of the exclusive rights of the copyright owner as provided by Section 106"—that is, engages in affirmative action that renders the copyrighted work capable of being perceived.

Aereo's users, and not Aereo, "perform" the copyrighted works. Aereo's equipment is designed to emulate the operation of a home antenna and DVR, and thus to allow a user to control every aspect of the receipt, recording, and transmission of the programming. The undisputed facts make clear that each challenged performance is the result of user commands that cause Aereo's equipment to operate in a particular way. In that circumstance, only the user, not Aereo, may be held directly liable for infringement.

B. *This Court's Cases Confirm Aereo Cannot Be Liable for Direct Infringement.*

Because Aereo's role is to make antennas and DVRs available for others' use, its position is comparable to that of other defendants that provide equipment or software allegedly used to engage in infringing conduct. Such conduct can support liability under the Copyright Act, if at all, only for contributory infringement.

In *Sony*, this Court addressed whether a VCR manufacturer could be held liable for contributory infringement for distributing the machines knowing that consumers would use them in a manner alleged to infringe the respondents' copyrights. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* (2005), the Court held that one who "intentionally induces or encourages direct infringement" by "distributing a device with the object of promoting its use to infringe copyright" is contributorily liable for "the resulting acts of infringement by third parties."

The focus on the scope of contributory liability in these cases makes clear that strict liability is reserved for the actor who directly engages in prohibited conduct.

C. *Aereo's Provision of Remote Equipment to Consumers Does Not Render It Directly Liable for Infringement.*

Relying on the statutory text and this Court's precedents, Federal courts have rejected attempts to impose direct liability on those who merely provide equipment used by others in an allegedly infringing manner. These lower court cases persuasively reject the argument that direct liability can be premised on "ownership, operation or maintenance" of equipment used for an infringing activity. — *CoStar Group, Inc. v. LoopNet, Inc.* (3rd Cir 1986).

Lower court cases likewise support the sound principle that direct liability is inappropriate where a defendant programs equipment to respond "automatically" to a user command that results in alleged infringement. These courts have emphasized that this limitation "is especially important" in light of the expansive liability that might otherwise result from networked communications and storage systems.

Post-*Sony* amendments to the copyright law confirm that these judicial interpretations are consistent with Congress's intent.

D. *The Government's "Integrated System" Argument Is Unpersuasive.*

The government effectively concedes that Aereo cannot be held directly liable for infringement if its users "actively control" the allegedly infringing transmissions. And it has acknowledged that, insofar as Aereo's equipment operates like an RS-DVR, Aereo does not directly infringe. The government reaffirms those conclusions here.

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The government seeks to distinguish this case on the ground that Aereo “operates an integrated system, substantially dependent on physical equipment that is used in common by its subscribers.” But the government does not and cannot justify this distinction by reference to the statute or case law, because it cites neither. Nor is the distinction supported by logic or facts: Aereo’s equipment is indistinguishable from the RS-DVR in *Cablevision*.

The inconsistencies in the government’s position mean there is no “clear” standard for determining when a company, rather than its customer, has engaged in volitional conduct. As other *amici* demonstrate, the government’s new approach leaves unclear how cloud-computing companies could avoid being directly liable for their consumers’ use of that equipment.

The government’s position appears colored by its incorrect assumption that all uses of Aereo’s equipment are infringing. But that is obviously untrue, given that Aereo’s equipment also can be used to access non-copyrighted broadcast material. Moreover, the status of rights in a copy has no logical bearing on the identification of the actor responsible for transmitting it.

E. *The Supposed Analogy Between Aereo and Cable Systems Has No Merit.*

The government also incorrectly asserts that Aereo’s contention that its users, not Aereo, “perform” is comparable to the analogy this Court drew in *Fortnightly Corp. v. United Artists Television, Inc.* (1968) between a community antenna and a home antenna. The government further maintains that, because Congress supposedly rejected that analogy in enacting the transmit clause, it must have intended direct liability to be imposed on Aereo here. But Congress evinced no intent to impose direct liability on the provider of a different technology that facilitates access to over-the-air broadcasts or that technology’s users.

Cable systems actively “transmit”; Aereo does not. Cable systems receive all broadcast frequencies at all times, and retransmit all channels to all subscribers at all times, whether or not any particular subscriber has requested them. A cable subscriber exercises no control over the cable system’s equipment. Aereo’s antennas and DVRs, by contrast, do nothing except as directed by a user.

III. Considerations of Copyright Policy Strongly Support the Decision Below.

A. *Any Statutory Ambiguity Should Be Resolved Against Liability.*

The Constitution assigns to Congress “the task of defining the scope of the limited monopoly that should be granted to authors.” — *Sony*. When applying the Copyright Act to “new technology,” this Court has been “reluctant” “to expand the protections afforded by the copyright without explicit legislative guidance.”

“*Sony* ... recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including those that help disseminate information and ideas more broadly or more efficiently.” — *Grokster*. That concern could hardly be more strongly implicated than in this case, given the stakes for cloud computing technologies. Consumers increasingly rely on remote equipment to store files — including personal copies of copyrighted content like songs and videos — and access those files via transmissions over the Internet.

Petitioners’ argument that the relevant “performance” for purposes of the transmit clause is the original broadcast, rather than the consumer’s performance from her personal copy, would pervasively threaten the use of cloud technologies to store and access copyrighted content. Petitioners, however, hardly acknowledge, much less address, this concern.

The government argues that “reversal of the decision below need not call into doubt the general legality of cloud technologies” because “a consumer’s streaming of her own lawfully acquired copy to herself would effect a private performance.” Similarly, it asserts that the RS-DVR service at issue in *Cablevision* was not infringing because there “the cable company already possessed a license to transmit

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copyrighted television programs to its subscribers.” Under *Sony*, it reasons, consumers have a fair-use right to make a personal copy of televised content for time-shifted viewing, and “there is no evident reason to reach a different result ... merely because the relevant personal copy is created and stored remotely in digital form.”

Properly understood, the government’s reasoning compels dismissal of Petitioners’ claim. The recordings made by Aereo’s users are equally lawful under fair-use principles — a fact Petitioners effectively conceded by advertent to *Sony* in explaining why they did not seek an injunction on reproduction grounds. As this case comes to the Court, there is simply no basis for the government’s assertion that the recordings made by Aereo’s users are unlawful.

Moreover, the government’s position is internally inconsistent. In the government’s view, a public performance occurs “when either the allegedly infringing transmission itself or some underlying performance is transmitted to the public.” It never explains why the performances enabled by cloud storage services are “private” under this reading. And it offers no statutory basis for its position that liability for infringement of the public-performance right turns on whether the copy from which the performance is made was “lawfully acquired.”

The government’s proffered solution also is unworkable. To avoid strict liability based on its customers’ actions, a cloud storage company would have to monitor all of the content stored on its system to make sure it was “licensed” or otherwise “authorized.” No industry could operate under such an obligation.

B. Nothing in the Copyright Act Suggests That Congress Would Have Wanted Petitioners to Be Able to Extract Copyright Royalties Here.

Petitioners imply that cable and satellite providers must pay copyright royalties to retransmit local broadcasts, but that is not true. In fact, the Copyright Act grants broadcasters no royalties even when a third party retransmits local broadcast programming to its subscribers.

Broadcasters make programming available over the airwaves for “free” by selling broadcast time to advertisers. The more consumers who view a broadcast program, the more valuable the advertising time.

Because broadcasters are directly compensated (and copyright holders indirectly compensated) by advertisers, a third party that simply provides technology that allows consumers to access content they could receive over the air is not required to compensate copyright owners. That is true even for third parties that (unlike Aereo) actually retransmit Petitioners’ broadcasts “to the public.” In the case of cable systems, Section 111(d) of the Copyright Act sets forth a compulsory licensing scheme for copyrighted content whereby cable systems pay no royalties for local content they retransmit within the service area of the broadcaster. The same approach is reflected in Section 122(a), which creates a royalty-free “statutory license” for satellite carriers that retransmit a broadcaster’s signals within its local market. Petitioners’ claim that Congress “mandated that the providers of retransmission services compensate copyright holders for the statutory privilege of exploiting their public-performance rights” is simply incorrect.

Copyright law is designed to reward creators only to the extent necessary “to induce them to release to the public ... the products of their creative genius.” — *United States v. Paramount Pictures, Inc.* (1948). There is no plausible claim that stretching the Copyright Act to force consumers to pay twice to watch the same over-the-air broadcast programming would encourage the creation of new works. Accordingly, this Court has rejected efforts by a statutory monopolist to extract a second round of compensation for the public’s enjoyment of a use once authorized, by finding that the use is “no longer within the monopoly.” — *Adams v. Burke* (1873).

The Court referred to that principle in *Buck v. Jewell-La Salle Realty Co.* (1931), a case that Petitioners’ *amici* claim was “resurrected” by Congress in the 1976 Act. There, the Court found that an hotelier’s retransmission of a radio broadcast that was itself unauthorized by the copyright holder constituted an infringement. It noted, however, that, if the original broadcast had been lawful, “a license

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for its retransmission by the hotel company might possibly have been implied,” and cited a district court case where that result had been reached.

In its *Fortnightly* amicus brief — in stark contrast to the position it takes here — the government argued that a copyright holder who authorizes a public performance of its work by broadcast has already been compensated for the public receipt of the performance “in those areas where the signals ... could be directly received off-the-air by potential viewers.”

Petitioners protest that “although they have agreed to make their content available to the public over the air for free, they can afford to do so only if they retain the ability to recoup their substantial investments by, among other things, generating critical revenue when that content is retransmitted to the public.” But the retransmission fees to which Petitioners refer have nothing to do with copyright law; they are mandated by the separate regulatory regime established in the Cable Act and administered by the Federal Communications Commission.

Under that regime, a broadcaster can require a cable system to pay retransmission fees any time it “retransmits the broadcaster’s signal.” Liability for retransmission fees depends on the cable system’s status, not the way it delivers content to subscribers. Accordingly, the claim that a ruling by this Court in *Aereo*’s favor might allow cable companies to bargain for lower retransmission fees or avoid paying them altogether by “devising their own *Aereo*-like workarounds” has no merit. They would still be cable systems and therefore still liable for retransmission fees.

Dish Network and Echostar Technologies, Amici Curiae **E. Joshua Rosenkranz, Counsel of Record**

Dish Network is a satellite television company, and Echostar is a technology company that manufactures digital set-top boxes for satellite television service providers. E. Joshua Rosenkranz is a partner with the law firm Orrick, Herrington & Sutcliffe, where he specializes in intellectual property, commercial, and anti-trust law. The following is excerpted from the Amicus Curiae Brief for Respondent as submitted to the U.S. Supreme Court on April 2, 2014.

Under *Sony Corporation of America v. Universal City Studios, Inc.* (1984), the technology provider could never be directly liable for an infringing use. But it could be secondarily liable under certain circumstances for inducing, encouraging or profiting from the user’s infringement.

This case is emblematic of a technological shift. Nowadays, the device is not always in the consumer’s hands.

Petitioners, various television networks, broadcast digital signals of their programming over the airwaves through local stations. They have been doing so for years. For just as long, any individual has been entitled to set up her own, personalized antenna in her living room, capture the signal, and watch it on her television. And since the advent of the VCR, she could make a copy of that programming for later viewing. This Court recognized that right in *Sony*. The modern viewer uses a digital video recorder (DVR) to the same effect.

Respondent *Aereo, Inc.* uses new technology to allow users to do the same old things: direct individualized antennas to receive free broadcast signals, make individualized copies of desired programming, and view that programming privately and for noncommercial purposes. The only difference is that the users do not purchase and maintain the equipment.

Aereo is among a host of technologies that uses the Internet to offer consumers the ability to do what they always have more cheaply and conveniently.

Other recent innovations come under the banner of “cloud computing.” Add to these examples plenty more recent innovations in consumer convenience. Cablevision’s remote-storage DVR (RS-DVR), for example, which effectively houses a cable subscriber’s DVR remotely and then sends back a signal of the subscriber’s recordings when prompted. Or even software-based “devices,” like hyperlinks, that point

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to and then deliver content at a click.

The question presented in this appeal is whether Aereo transgresses the Copyright Act. But the way the Court resolves this question could have implications for similar technologies such as the Cablevision RS-DVR, cloud computing, and a broad swath of well-established functionality on the Internet.

Aereo is correct that the one-to-one transmissions made through its technology (1) are not made by Aereo under the Copyright Act's Section 106, and (2) are not "to the public," so therefore are not unlawful public performances under the "transmit clause" in the Copyright Act. But if this Court disagrees with Aereo, *amici* respectfully submit that a narrow ruling is the best way to avoid unintended consequences for the other technologies discussed above.

Even if Congress intended to prevent free riding by commercial intermediaries on the public performance right, it never intended to authorize copyright holders to charge the public repeatedly just to access their lawful copy of a work at a different time or place. Such a broad copyright monopoly would offend long-established exhaustion principles in copyright. The set of limitations expressed in sections 107 through 122, indeed the entire structure of the Copyright Act, make clear that copyright holders cannot control private noncommercial activity. No matter what happens to Aereo, affirming that bright line is essential.

The Consumer Federation of American and the Consumers Union, *Amici Curiae* Peter Jaszi, *Counsel of Record*

The Consumer Federation of America is the largest consumer advocacy organization in the United States. The Consumers Union is the policy and advocacy division of the nonprofit group Consumer Reports. Peter Jaszi is a professor at American University's Washington College of Law, where he heads the Intellectual Property Law Clinic. The following is excerpted from the Amicus Curiae Brief for Respondent as submitted to the U.S. Supreme Court on April 2, 2014.

The public policy of the United States copyright regime strongly favors protecting consumer sovereignty and consumer choice. Aereo's technology empowers consumers with an individual remotely located antenna and digital video recorder accessible over the Internet. It is a cloud-computing tool that allows consumers to access and record free over-the-air (OTA) television broadcasts and enables time- and place-shifting of broadcast programming.

In offering this technology, Aereo not only provides greater consumer choice in where and how to watch free OTA broadcast programs, but also uses cloud-computing economies of scale to make such flexibility more affordable. These savings allow consumers to participate more fully in the broader economy and help to bridge the digital divide. Without Aereo and similar technologies, the current restrictions on consumer choice imposed by incumbent content providers will continue to unreasonably restrict consumers' control of their locally available arrays of free OTA broadcasts.

In supporting the legality of Aereo's and other similar time- and place-shifting technologies, the Second Circuit's holding below in *WNET, Thirteen v. Aereo, Inc.* (2nd Cir. 2012) is consistent with the holdings of this Court with respect to earlier copying technology. For the past 30 years, this Court has consistently urged caution in restricting technologies with significant potential for lawful consumer use. Finding Aereo to be a retransmitter, rather than an equipment provider enabling consumers to enjoy lawful private performances, would restrict consumer sovereignty and permit incumbent providers to dictate terms on which significant technological innovations will be made available to consumers of free OTA broadcasts.

Copyright law emphatically protects consumers' right to choose how and where to make use of lawfully acquired content. From its origins, copyright legislation always has respected consumer sovereignty, as have the courts. The idea-expression distinction, the doctrines of fair use and first sale,

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and the limitation of significant exclusive rights to “public” activities all serve as vital constraints on the power of copyright owners to control the market for information.

Choice-empowering forms of consumer information technology change over time. Copyright’s response should not. The purpose of each new technology remains the same: to advance citizens’ participation in culture and society.

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