

No. 13-461

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

*v.*

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

*Respondent.*

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

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**BRIEF OF 36 INTELLECTUAL PROPERTY  
AND COPYRIGHT LAW PROFESSORS AS *AMICI  
CURIAE* IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are law professors who teach and write about intellectual property and copyright law at law schools, colleges, and universities throughout the United States and Canada. We have no personal stake in the outcome of this case; our interest is in seeing that copyright law is applied in a manner most likely to fulfill its Constitutional mandate “to promote the Progress of Science,” taking into account both the protections afforded to and the obligations imposed upon copyright holders and users of copyrighted works.<sup>1</sup>

## SUMMARY OF ARGUMENT

The Aereo system is the functional equivalent of the Sony Betamax: consumers use it to record television programs for subsequent playback to themselves. In copyright terms, these are reproductions subject to the Copyright Act, many of which are likely protected as fair uses under *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984). If any consumers do infringe, Aereo might be secondarily liable.

More than this, it is impossible to say on the current record. Petitioners have not pursued before this Court the

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1. 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. The only persons (other than amici curiae) making a monetary contribution to the preparation or submission of this brief are the University of Maryland Francis King Carey School of Law and the Beasley School of Law at Temple University. *See* Sup. Ct. R. 37.6. Petitioners and Respondents have consented to the filing of this brief through blanket consent letters filed with the Clerk’s Office. A list of all the *Amici* is set forth in the Appendix to this brief.

argument that Aereo's users infringe, the argument that anyone infringes the reproduction right, or the argument that Aereo is secondarily liable for its customers' infringements. As a result, the facts that would bear on these questions are not in evidence.

Petitioners obscure, or ignore, the fundamental similarity between Aereo's system and a VCR. They describe this as a case about "retransmitting live television broadcasts," Pet. Br. at 23. But whether a consumer views a recorded television program after a delay of five minutes, five hours, or five months is entirely her choice, not Aereo's, and Petitioners present no reason why § 106(4) would treat the length of the time-shifted delay as dispositive (or even relevant) for the purpose of determining whether a public performance has occurred. In the District Court, counsel for Petitioners asserted that they were "focused on [Aereo's] real time transmission, not [its] record function." See Tr. Oral Arg. at 426, *ABC v. Aereo*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012), ECF No. 118. But Petitioners' arguments often blur the distinction between the two, perhaps because they cannot, in reality, be separated; consumers can play back recordings they make using the Aereo system only because they have already made those recordings. Petitioners describe Aereo's DVR features as merely "a Rube Goldberg-like contrivance," Pet. Br. at 15 (quoting *WNET, Thirteen v. Aereo*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting)). But that is exactly backwards: it is the live-transmission-like features of Aereo that are ancillary to its DVR-like features, not *vice versa*. Watching recorded programs in near real-time is just one use of the Aereo system, just as watching programs while also storing them for later use is just one use of a home DVR.

Petitioners instead press a very different theory: that Aereo itself *directly* infringes the *public performance* right. The mistake is understandable; as broadcasters, they are accustomed to thinking of their copyright-protected performances. But it is a mistake nonetheless: the public performance right is the wrong tool for the job.

Aereo does not infringe the public performance right for the same reason Sony did not: consumers who play back programs they previously recorded are engaged in private performances. Putting the storage device online rather than in a consumer's home does not change its essential operation. The Petitioners' theory to the contrary requires an implausible interpretation of "public performance," one so broad that it would read "public" out of the statutory definition entirely.

Petitioners are, of course, free to advance whatever theories they wish. But Congress and the courts have spent decades crafting a system to resolve complex infringement suits clearly, fairly, and effectively. Petitioners' characterization of this case, if accepted by this Court, would disrupt every part of that system. It would interfere with Congress's finely crafted machinery of distinct but interlocking exclusive rights. It would abrogate both of *Sony's* core holdings: that consumers have a fair use right to time-shift broadcast television, and that companies like Sony and Aereo are not secondarily liable merely because they assist home recording. And it would hopelessly scramble the doctrines of direct and secondary liability.

These consequences would be all the more unfortunate because they are so unnecessary. There is no need to

stretch the public performance right when the reproduction right is so closely on point. The Second Circuit’s decision did not give Aereo a “get-out-of-jail-free” card, Br. of Professors Menell and Nimmer as Amici Curiae at 7, by placing Aereo beyond the reach of copyright, any more than *Sony* placed the VCR beyond the reach of copyright. For decades, the reproduction right has policed illicit use of VCRs; it stands ready to police illicit use of Aereo’s system. And as this Court affirmed in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), secondary liability is always available against those who culpably facilitate infringement.

This case, in sum, is not the Super Bowl of television copyright. It is the halftime show: an overproduced diversion from the real event.

## ARGUMENT

### I. Petitioners Have Pursued the Wrong Theory of Infringement

At Congress’s direction, the federal courts have developed a straightforward framework to analyze complex multi-party infringement suits. It asks, in order, three questions: *First*, whose conduct directly implicates any of the copyright owner’s exclusive rights? *Second*, does fair use or another defense justify this conduct? *Third*, if not, are any defendants secondarily liable?

This framework is clear and logical. Each step is firmly rooted in the Copyright Act and has been applied in dozens of cases. The steps lock together like the gears of a machine. The framework makes careful distinctions

among alleged infringers while providing predictable guidance for authors, consumers, and innovators. In a properly presented case, a court would analyze Aereo's conduct as follows:

1. Consumers use Aereo's system like a VCR: to record broadcast television programs and to view recorded programs. The recordings implicate the reproduction right, but the viewings do not implicate the public performance right because each viewing is a private performance.

2. Many of those recordings are protected as "fair uses" under *Sony*, while others may go beyond what *Sony* protects.

3. Aereo might or might not be secondarily liable for the infringement of any consumers who go beyond fair use, depending upon Aereo's knowledge of and control over specific infringing acts.

If this is not the framework the Second Circuit applied in the proceedings below, and if the record is devoid of factual evidence bearing those questions, it is because this is not a properly presented case. It is Petitioners who elected not to pursue the logical claim that users infringe the reproduction right, and who elected not to develop the evidence that would bear on fair use or secondary liability. Instead, they based their motion for an injunction, and this appeal, solely on the theory that Aereo (not its users) infringes the public performance right (not the reproduction right), that any fair use defenses Aereo subscribers may have are irrelevant, and that Aereo is directly (not secondarily) liable.

As explained *infra* Part II, Petitioners’ theory of liability fails on its own terms. But it also mangles every step of the three-step infringement framework. Accepting it would undo decades of work by Congress and the courts.

### A. The Wrong Infringer

This should have been a case about infringement by consumers. As in *Sony*, consumers are using a technology to record copyrighted works for their later enjoyment. As in *Sony*, consumers make every specific decision about how to use the technology. They choose which television programs to record, for how long to record them, when to watch those programs later, for how long to watch them, and when to discard previously stored programs. Consumers call all of the shots. On the present record, if anyone here is a direct infringer, it is the consumers. Aereo lacks the necessary “aspect of volition,” *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004), to be held directly rather than secondarily liable.

This rule—the “volitional conduct” doctrine—has an impeccable pedigree. Every Court of Appeals to have considered the volitional conduct doctrine has adopted it. *See Fox Broadcasting Co. v. Dish Network, LLC*, 723 F.3d 1067, 1073 (9th Cir. 2013); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2nd Cir. 2008); *Parker v. Google*, 242 Fed. Appx. 833, 837 (3d Cir. 2007); *CoStar*, 373 F.3d at 550 (4th Cir.). In addition, District Courts in another three circuits have endorsed the doctrine. *See, e.g., Disney Enterprises, Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011); *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997); *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512 (N.D. Ohio 1997).

The point of asking whether a defendant “made the copies,” *Dish Network*, 723 F.3d at 1074, is not to excuse the defendant from all accountability in copyright. Rather, it is to sort the case onto the correct track: direct or secondary. “[T]he question is *who* made this copy,” *Cartoon Network*, 536 F.3d at 130, and is therefore to be treated as the direct infringer. See *Perfect 10 Inc. v. Giganeews Inc.*, 2013 WL 2109963, at \*5–\*7, No. CV11-07098 AHM (SHx) (C.D. Cal. Mar. 8, 2013) (describing doctrine in terms of the fundamental tort “requirement of causation”). Indeed, the case that first clearly articulated the volitional conduct doctrine, *Religious Technology Center v. Netcom Online Communication Services, Inc.*, 907 F. Supp. 1361, 1368–70 (N.D. Cal. 1995), perfectly illustrates this sorting function. While holding that the defendant did “no more than operate or implement a system that is . . . merely used to create a copy by a third party” and therefore could not be liable as *direct* infringers, *Netcom* also held that the plaintiffs had presented sufficient evidence of the defendant’s *contributory* infringement. *Id.* at 1373–74.

Some such rule is a necessary component of any system that distinguishes direct from secondary liability, and therefore must distinguish direct from secondary infringers. Without it, all infringement becomes direct infringement, and the entire system collapses. The volitional conduct doctrine is how the federal courts have drawn and maintained the line in copyright cases. Petitioners’ theory of liability would erase the line entirely.

This is not to prejudge the *application* of the volitional conduct doctrine in this case. The courts agree that the operator of an automated computer system that “creates the copy only in response to the user’s command,” *Dish*



*Network*, 723 F.3d at 1074, lacks the necessary volition to be treated as a direct, rather than secondary infringer. *See, e.g., CoStar*, 373 F.3d at 551. But relevant facts have not been developed on this question, because the District Court did not reach the issue. *Aereo*, 874 F. Supp. 2d at 396. If necessary, the relevant facts and arguments can be developed on remand.

### **B. The Wrong Exclusive Right**

This should have been a case about the reproduction right. Every time a consumer presses “record,” a version of a television program is stored on a hard drive in Aereo’s facilities. That hard drive becomes a “copy” within the meaning of the Copyright Act because it is now a “material object[] . . . in which [a] work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated,” 17 U.S.C. § 101. By pressing “record,” the consumer thereby implicates the copyright owner’s exclusive right “to reproduce the copyrighted work in copies.” *Id.* § 106(1). Q.E.D.

Copyright owners do not have the right to prevent all use of a copyrighted work. Instead, Congress has crafted a statutory system of detailed and distinct exclusive rights, carefully tailoring the scope of each with definitions and exceptions. In addition to the six enumerated rights in Section 106—reproduction, adaptation, distribution, public performance, public display, and digital audio transmission—Congress has enacted distinct rights against misattribution, mutilation, and destruction of a work of visual art, 17 U.S.C § 106A, unauthorized fixation of a live musical performance, *id.* § 1101, reproduction of a semiconductor mask work, *id.* § 905, circumvention of

technological measures, *id.* § 1201, removal or alteration of copyright management information, *id.* § 1202, and manufacture and sale of vessel hull designs, *id.* § 1308.

This system of distinct exclusive rights is a *system*. The rights must be read in concert, rather than in isolation, and the system's integrity depends crucially on distinguishing among them. The proliferation of numerous, narrow, and carefully defined rights expresses Congress's expectations that each right will be construed strictly according to its terms. Many defenses, licenses, and exceptions turn on identifying the right in question. For example, first sale is a defense to the public distribution right, but not to the reproduction right, *id.* § 109(a); that is why a used bookstore can resell the copies it buys, *see Kirtsaeng v. John Wiley & Sons*, 133 S.Ct. 1351 (2013), but not print new copies. Without the distinction between reproduction and distribution, first sale's balance between copyright owners and copy owners becomes unworkable.

The Court should be especially cautious about extending the public performance right in this case, given the availability and aptness of the reproduction right. Of course, more than one exclusive right can apply to a given course of conduct: a pirate printer both reproduces books and distributes them to the public. But Congress's choice to divide copyright's work among the exclusive rights means the courts should not ask one right to do another right's job. Often, what appears to be a gap in a right is simply the boundary where it abuts another. For example, the public performance right does not apply to sound recordings, 17 U.S.C. § 106(4)—but the digital audio transmission right does, *id.* § 106(6). The compulsory license for webcasting, *id.* § 114(d), applies to public

performances but not to reproductions or distributions, while the compulsory license for “cover” songs, *id.* § 115, conversely, applies to reproductions and distributions but not to public performances.

Copyright-dependent industries have built their businesses around settled understandings of these distinctions among the exclusive rights. When a new business model arises, it is crucial to know who has the authority to grant the necessary licenses. *See, e.g. In re Cellco Partnership*, 663 F. Supp. 2d 363, 371–74 (S.D.N.Y. 2009) (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance). Blurring or eliminating the lines between the rights creates uncertainty, frustrating development of healthy licensing markets. Petitioners’ invitation to rely on the public performance right here would similarly create chaos, exposing industries to ill-defined liability and upending existing understandings of the licenses needed (and not needed) to offer video-based products and services to consumers.

### **C. The Wrong View of Fair Use**

This should have been a case about fair use. In *Sony*, on facts extraordinarily similar to those here, the Court held that “home-time shifting is fair use.” *Sony*, 464 U.S. at 455. There, as here, the copyright owners broadcast their works via free over-the-air television signals, and consumers were invited to watch. There, as here, consumers used a novel technological device to make copies of televised programs and to watch them later. And there, as here, the plaintiffs introduced no credible evidence that the practice was leading to real, as opposed to speculative, market harm.

Courts have consistently followed *Sony's* fair use holding, protecting consumers' rights to store and review copyrighted works to which they have obtained lawful access. See *Recording Industry Association of Am. v. Diamond Multimedia Systems*, 180 F.3d 1072, 1078 (9th Cir. 1999); *Fox Broadcasting*, 723 F.3d at 1074; *In re Autohop Litigation*, 2013 U.S. Dist. LEXIS 143492 (S.D.N.Y. Oct. 1, 2013). To the extent that Aereo's system provides the same functionality to consumers, they should enjoy the same fair use privilege to use it.

Fair use interlocks closely with the volitional conduct doctrine, because fair use is assessed based on the use made by the party identified as the direct infringer. Compare, e.g., *Dish Network*, 723 F.3d at 1076 (allowing DVR provider to assert consumers' fair use defense where customers were the direct infringers) with *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1385–86 (6th Cir. 1996) (refusing to allow copy shop to assert customers' fair use defense where the copy shop itself was the direct infringer). Thus, even though Sony was unquestionably engaged in commercial activity by selling VCRs, this Court called the copying there “noncommercial, nonprofit activity,” *Sony*, 464 U.S. at 449, because the relevant acts of direct infringement—“time-shifting for private home use,” *id.*—were carried out by consumers, not by Sony. Getting the details of fair use right depends on getting the identity of the direct infringer right.

Fair use is also carefully calibrated to the system of exclusive rights. Fair uses often both depend on prior non-infringing acts and facilitate future non-infringing acts. Here, as in *Sony*, consumers are already “invited to

witness [a broadcaster’s programming] in its entirety free of charge,”<sup>2</sup> an indisputably non-infringing act, and here too, consumers’ recordings facilitate later non-infringing private performances.

None of this is to say that the Petitioners could not overcome consumers’ fair use defense by building an appropriate record. For example, they could hypothetically show that some consumers host public parties at which they show programs recorded using Aereo’s system, or repost recorded programs on a video-sharing site like YouTube. These uses are less likely to be fair uses. But if Petitioners have evidence of this sort, they have introduced none of it. Instead, they have pursued a theory under which facts about how consumers actually use Aereo’s system are irrelevant.

#### **D. The Wrong Kind of Liability**

This should have been a case about secondary liability. If some Aereo users are infringers, it would be natural to ask whether Aereo is liable along with them under one of copyright’s secondary liability doctrines. A vicarious infringer “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Gershwin Publishing Corp. v.*

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2. This is the true significance of Aereo’s geographic restrictions. Unlike consumers in geographically remote areas, consumers in a television station’s service area already enjoy lawful access to its programs. As a consequence, their fair use case could well be considerably stronger than the one for consumers in geographically remote locations. This highly significant fact—local versus remote recording—is of no relevance whatsoever in Petitioners’ public-performance theory, yet another indication of how badly that theory goes awry.

*Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). A contributory infringer “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Id.* An inducing infringer “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 191.<sup>3</sup>

Like volitional conduct, the system of exclusive rights, and fair use, secondary liability is a “well-established” piece of copyright’s infringement machinery. *Grokster*, 545 U.S. at 930. Importantly, all the secondary liability doctrines incorporate stringent protections for defendants:

1. *Primary Infringement.* There can be no secondary infringement without a primary infringement. *See Grokster*, 545 U.S. at 930, 940; *Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 40 (2d Cir. 2005). Although plaintiffs are not required to join the primary infringers as defendants, they must show that someone actually has infringed.

2. *Knowledge.* Ordinarily, copyright infringement is a strict liability tort: while innocent infringement is grounds for a reduction of statutory damages, 17 U.S.C. § 504(c)(2), it is still infringement. *Netcom*, 907 F. Supp. at 1370. But contributory liability requires knowledge of the infringement, and inducement requires an intent to cause the infringement. *Grokster*, 545 U.S. at 930.

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3. Some courts treat inducement as a species of contributory infringement, *see e.g.*, *Perfect 10*, 494 F.3d at 795, while others regard them as distinct, *see, e.g.*, *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 n.5 (2d Cir. 2012).

3. *Control*. Every secondary liability doctrine requires a significant showing that the defendant had the power to prevent the infringement. Vicarious liability requires the right and ability to control the infringement, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963), contributory liability requires a material contribution to the infringement, *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1019 (9th Cir. 2001), and inducement requires “clear expression or other affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 918.

4. *Dual-Use Technologies*. Every copying technology can be used both to infringe and for wholly legal purposes, such as copying public-domain works. To preserve these legal uses, *Sony* forbids imposing contributory liability on one who does no more than distributes a device that is “capable of substantial non-infringing uses,” *Sony*, 464 U.S. at 442, and *Grokster*’s inducement rule is narrowly crafted to catch only those whose “unlawful objective is unmistakable.” *Grokster*, 545 U.S. at 940.

These doctrines, which the courts have worked out over decades in dozens of cases, perform a crucial filtering role. They distinguish between the harmless and the dangerous, between bystanders and participants, between the innocent and the malicious. All of these distinctions are possible only because of the more basic distinction between direct and secondary liability.

Numerous cases illustrate the wisdom of the distinction. For example, in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), Google’s image search engine both displayed tiny “thumbnail” versions of the plaintiff’s copyrighted images and linked to full-

size versions. In a well-reasoned opinion, the Ninth Circuit drew a fundamental distinction between the two. Google *itself* communicated copies of the thumbnails to users, making it a prima facie direct infringer. *Id.* 1160. But Google merely facilitated the display of the full-size images by *others*, so it could only be secondarily liable for those displays. *Id.* at 1160–61. Critically, neither decision ended the analysis. The Ninth Circuit held that Google’s display of the thumbnails was protected as fair use, *id.* at 1163–68, but remanded for consideration of whether Google was contributorily liable for others’ display of the full-size images. *Id.* at 1170–73.

Again, none of this is to say that Petitioners cannot show that Aereo is secondarily liable, only that they have not tried to do so here. The road to secondary liability is well-marked and well-traveled. Copyright owners have brought numerous successful lawsuits against secondary infringers who put new technologies to harmful uses. *See, e.g., Grokster*, 545 U.S. at 938; *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013); *Napster*, 239 F. 3d 1004; *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2013); *Disney Enterprises, Inc. v. Hotfile Corp.*, 2013 WL 6336286, No. 11-20427-CIV (S.D. Fla. Sept. 20, 2013); *Capitol Records, Inc. v. MP3tunes*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011). Petitioners’ theory of direct infringement is an attempt to avoid the question entirely.



### E. A Dangerous Shortcut

Petitioners suggest that the sky will fall on their business model should the Second Circuit's decision stand.<sup>4</sup> But direct infringement of the public performance right is not the only theory of liability available to the Petitioners, and indeed, it is far from their best theory. They seek to discard the framework of copyright law and start again with one they like better. Their theory of the case is a shortcut: a way to avoid being put to their proof in this and future cases.

One indication of the awkwardness of Petitioners' theory is how many seemingly significant facts it disdains. Consider Aereo's geographic restrictions. They are highly relevant to fair use, because consumers in a television station's service area already enjoy lawful access to its programs, while consumers in remote areas do not. But this distinction is wholly immaterial to the Petitioners' public performance theory. Similarly, despite emphasizing Aereo's "live" transmissions at length, they offer a theory of public performance that treats live and time-shifted broadcasts identically. Time-shifting, of course, is at the heart of *Sony*.

Copyright owners have tried this trick before. *Cartoon Network*, too, involved the wrong legal theory. There, as here, the plaintiffs "alleged theories only of direct infringement, not contributory infringement."

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4. This is a familiar theme. See Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMM. & HIGH TECH. L. 125 (2011) (lamenting the content industry's "Chicken Little problem" and providing historical examples).

*Cartoon Network*, 536 F.3d at 124. There, as here, the motivation was to circumvent consumers’ fair use rights and duck under the hurdles of secondary liability. And there, as here, the Second Circuit properly rejected the direct infringement theory without passing on secondary liability. If *Cartoon Network*’s public-performance holding appears odd at first, it is because of the oddity of using a direct-infringement claim in a paradigm case for a contributory-infringement analysis. Seen in this context—a suit against a provider of a consumer technology that studiously avoids accusing the consumers of infringing—*Cartoon Network*’s holding makes complete sense. Like the Second Circuit’s holding in this case, it directs copyright owners to the claims they should have brought all along.

We do not ask this Court to apply this alternative analysis of the case to Aereo’s system; it has not been briefed or argued, and the record is missing crucial facts bearing on it. But that is precisely our point: the Petitioners chose a theory of the case that avoided discussing these issues—and now seek a holding that would effectively preclude them from ever being considered. The Court should be extremely cautious in this case about re-making fundamental copyright doctrine to assist in this end run around settled copyright principles.

## **II. Aereo is Not Transmitting Performances “To The Public”**

The transmissions that Aereo subscribers make to themselves using the Aereo system are performances, but they are not public performances. Three interlocking

definitions in Section 101 of the Copyright Act show why they are not<sup>5</sup>:

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. 17 U.S.C. § 101.

To “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. *Id.*

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5. We believe, as discussed *infra*, that the statutory text unambiguously refutes Petitioners’ public performance claim. To the extent there is ambiguity, we urge the Court to apply the interpretive principle that has long guided its copyright jurisprudence: The “general benefits derived by the public from the labor of authors,” not authorial reward, is the “sole interest of the United States,” and when “technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.” *Sony*, 464 U.S. at 432 (quoting *Twentieth Century Music*, 422 U.S. at 156). *See* Br. of Intellectual Property and Copyright Law Professors as Amicus Curiae, *WNET v. Aereo*, 712 F.3d 676 (2d Cir. 2013) (available at <http://www.scribd.com/doc/111298508/10-26-12-Brief-of-Amici-Curiae-in-Support-of-Aereo>). We respectfully suggest that former Register of Copyrights Ralph Oman has turned this principle on its head, *see* Br. of Ralph Oman as Amicus Curiae, in his suggestion that “[w]henever possible, when the law is ambiguous or silent on the issue at bar, the courts should let those who want to market new technologies carry the burden of persuasion that a new exception to the broad rights enacted by Congress in 1976 should be established” and that “[c]ommercial exploiters of new technologies should be required to convince Congress to exempt them from normal copyright liability.” *Id.* at 14.

To perform . . . a work “publicly” means— . . . (2) to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times (the “Transmit Clause”).  
*Id.*

To fall within the plain meaning of the Transmit Clause, then, there must be (1) a transmission (or “other communicat[ion]”), (2) of “a performance” of a work, (3) “to the public.” Not all performances involve transmissions, and not all transmissions communicate performances. A live concert is a performance without a transmission (because the performance has not been “communicated . . . beyond the place” from which it originated); a download of a screenplay is a transmission without a performance (because the work has not been “play[ed]” or “render[ed]”).

Only when the two coincide—that is, when a performance takes place *by transmission*—does the Transmit Clause come into play, and only for those transmissions that are “to the public.” Two friends who practice a dance routine together by means of a Skype video chat both transmit and perform, but they do not do so “publicly.”

The relevant performance of an audiovisual work for Transmit Clause purpose is the one that takes place when a recipient of the transmission views it; the transmission is “to the public” when multiple unrelated parties received (or could have received) the transmission. Aereo’s users

create a fresh “performance” of a television program each time they stream it to themselves; these performances are not transmitted “to the public.”

**A. Only Contemporaneously Viewable Transmissions Are “Performances”**

To “perform” an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101. Until the images contained in an audiovisual work have been “show[n],” or the sounds contained in the work have been “made audible,” there has been no “performance” of the underlying audiovisual work. Shipping film reels to a movie theater is a public distribution of copies of the audiovisual work, but there is no performance until a projectionist “show[s]” the film.

The same is true for performances via transmission: there is no “performance” until the images are shown or the sounds are made audible. *See, e.g., U.S. v. ASCAP*, 627 F.3d 64 (2d Cir. 2010) (holding that a transmission of a “copy” or “phonorecord” is not a performance). Transmitting a file to a user’s computer may be a reproduction and/or a distribution, but it is not itself a performance. *See id.*; accord *Capitol Records v. ReDigi, Inc.* 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (finding infringement of the reproduction and distribution rights, but not the public performance right); *London-Sire Records, Inc. v. John Doe I*, 542 F. Supp. 2d 153, 174 (D. Mass. 2008) (“[E]lectronic file transfers fit within the definition of ‘distribution’ of a ‘phonorecord’”). Only when the *audience* can perceive the work “simultaneously with the transmission” can there be a performance by transmission. *ASCAP*, 627 F.3d at 74.

This is not a loophole; it reflects the basic division between copyright’s exclusive rights. Transmissions stored for later viewing implicate the reproduction and public distribution rights when they are made, but performances occur only when the works are actually viewed.

In this case, then, a “performance” of a television program—for example, the January 12 episode of *The Good Wife*, “We, the Juries”—occurs when an Aereo user directs an Aereo server to play back a recorded version of the episode. When she does, the server transmits electronic signals to her computer or other device and those signals are translated into visible images and audible sounds. It is not necessary that any viewer *actually* watch a given transmission contemporaneously for it to constitute a “performance”; this is why the Transmit Clause speaks of the “members of the public *capable* of receiving the performance” (emphasis added). When a CBS affiliate broadcasts “We, the Juries,” the potential audience constitutes the members of the public in the affiliate’s service area with the appropriate receiving apparatus. But if the affiliate’s equipment malfunctions during the 9:00 PM time slot and broadcasts an hour’s worth of static, no “performance” has taken place because no one at all was “capable of receiving” it.

Thus, in this case, it is the transmission from Aereo to the user that creates the “performance” that is being transmitted by “show[ing]” its images. See *Cartoon Network*, 536 F.3d at 136 (“When Congress speaks of transmitting a performance to the public, it refers to the performance *created by the act of transmission.*”) (emphasis added); Brief of United States as Amicus

Curiae at 26 (“The Transmit Clause does make clear that the transmission of a performance is itself a performance”) (internal citations and quotations omitted). It is the capability for contemporaneous translation into images and sounds by recipients of a transmission that constitutes the “performance.” Put another way, the phrase “to transmit . . . a performance” describes the act of performing a work via a transmission, rather than describing the act of transmitting a separate performance that has previously taken place.

The contemporaneity is crucial. If a consumer uses a download video service that, like iTunes, does not permit simultaneous viewing, the subsequent playback is not a performance by transmission, even though there is both a transmission (the download) and a performance (the playback), because the two are not contemporaneous. This is why the Transmit Clause speaks of “the members of the public capable of receiving the *performance*” (emphasis added) rather than “capable of receiving the transmission”: the iTunes user receives a transmission, but not a performance.

Petitioners insist that the relevant “performance” in the Transmit Clause is the one created by their prior act of broadcasting:

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. . . . It is difficult to conceive of a more clear-cut case of infringement

of the public-performance right. Pet. Br. at 23 (emphasis added).<sup>6</sup>

This mischaracterizes the dispute here. “Capturing” a broadcast does not involve “play[ing]” it, “show[ing] its images in any sequence,” or “mak[ing] the sounds accompanying it audible.” 17 U.S.C. § 101; see, e.g., *ASCAP*, 627 F.3d at 72 (no performance without “contemporaneous perceptibility”). A viewer who “captures” a “broadcast” of a copyrighted audiovisual work reproduces the work itself, not a “performance” of the work. Similarly, while a viewer who plays back her captured copy clearly performs the work, under Petitioners’ theory, she also “perform[s]” the broadcast “performance” of the work—a linguistic impossibility.

By treating the previous broadcast as the “performance” in the phrase “to transmit . . . a performance,” Petitioners would sweep *any* transmission of a previously broadcast work into the Transmit Clause, regardless of whether it is contemporaneously visible or audible. Aereo users who “capture” the broadcast of “We, the Juries,” or consumers who download “We, the Juries” from iTunes, would be surprised to learn that they had “perform[ed]” the episode even if they never watched it. If this Court were to accept Petitioners’ view that these downloads are *performances*

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6. See also Pet. for Rehearing with Suggestion for Rehearing *En Banc* at 11, *Aereo*, 712 F.3d 676 (2d Cir. 2013) (distinguishing *Cablevision* on grounds that “Aereo sends the identical broadcast program to thousands of its subscribers at the same time” while the “DVR service at issue in *Cablevision* did not”) (emphasis added).



(requiring additional performance licenses), download services would face staggering liability.<sup>7</sup>

### B. One Viewer Is Not “The Public”

Once the relevant performance has been identified as the performance inherent in a transmission for contemporaneous viewing, the remaining question is whether the transmission is “to the public.” Although the phrase is not defined in the Copyright Act, the language of the Transmit Clause itself, as the Second Circuit correctly recognized, directs attention to the question: Who is “capable of receiving the performance” that is transmitted? *See Aereo*, 712 F.3d at 689-91; *see also Cartoon Network*, 536 F.3d at 135. If “members of the public” are capable of receiving the transmission of the performance, it is a transmission to the public and within the scope of § 106(4). If “members of the public” are not capable of receiving the transmission, it is not.

“The public” is plural, and so is “members.” A performance to a single individual cannot be a public performance. *See* Br. of United States as Amicus Curiae at 32 (“Ordinarily, . . . a consumer’s streaming of her own lawfully acquired copy to herself would effect a private performance outside the scope of the Transmit Clause”); 2 *Nimmer on Copyright* § 8.14[C][2] (2008)

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7. Apple alone has sold more than a billion TV episodes, *HBO GO & WatchESPN Come to Apple TV* (June 13, 2014), <https://www.apple.com/pr/library/2013/06/19HBO-GO-WatchESPN-Come-to-Apple-TV.html>, and more than 25 billion songs, *iTunes Store Sets New Record with 25 Billion Songs Sold* (Feb. 6, 2013), <http://www.apple.com/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>, as licensed downloads.

(“[I]f a transmission is only available to one person . . . then it clearly fails to qualify as ‘public.’”).

Thus when an Aereo subscriber initiates a transmission of a previously-recorded episode of *The Good Wife*, and a “performance” of that audiovisual work begins (*i.e.*, a “show[ing]” of the images contained in the work), she is the only person who is capable of receiving *that* transmitted performance. No other “member of the public” wishing to view the episode can access the transmission; it is for the subscriber and the subscriber alone. The performance of the work that is taking place is a *private* performance. It is the precise equivalent of an ordinary rooftop antenna capturing over-the-air broadcast signals and transmitting those signals to a receiving set in the living room; a transmission of a performance has occurred, but it is not “to the public.”

This approach fully effectuates Congress’s intent to bring ordinary cable system retransmissions of broadcast programming within the Transmit Clause (and, therefore, within the scope of the copyright holders’ § 106(4) right of public performance). When Comcast broadcast “We, the Juries” to its subscribers on January 12, millions of “members of the public” were “capable of receiving,” by transmission, the resulting performance. This was a paradigmatic public performance.

No party suggests that Aereo is a “cable system” as the Copyright Act defines that term, inasmuch as it does not make “secondary transmissions . . . by wires, cables, microwave, or other communications channels.” 17 U.S.C. § 111(f)(3) (defining “cable system”). *See generally* *WPIX, Inc. v. ivi, Inc.*, 691 F. 3d 275 (2nd Cir. 2012)

(agreeing with Copyright Office’s repeated findings from 1997 to 2008 that Internet broadcasters are not “cable systems” as defined in the Copyright Act). Petitioners do, however, continue to press the argument that Aereo is “functionally equivalent” to a cable system, *see* Pet. Br. at 32 (characterizing Second Circuit decision as “illogical” because it ignores “Aereo’s functional equivalence to a hypothetical cable company with a thousand antennas instead of one”), and that, accordingly, its actions fall within the Transmit Clause.

But suggesting that a system like Aereo’s is functionally equivalent to the cable systems on which Congress imposed secondary transmission liability ignores crucial differences between the two. “Cable systems” do not do what Aereo’s system does: help users to record over-the-air programming, to store the copies made, and to transmit performances to themselves at a later date.<sup>8</sup> And Aereo’s system—which, like a DVR or VCR, is entirely inert unless and until a customer initiates

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8. Many cable companies *do* now offer store-record-playback functionality (like the RS-DVR in the *Cartoon Network* case); but when they do so, they’re acting as something other than as a secondary transmitter (or “cable system”) for copyright purposes. Indeed, when cable systems offer this functionality, broadcasters sue them precisely on the grounds that these activities are distinct and separate from their broadcast service (and are therefore *not* covered by the cable system compulsory license in § 111). *See Dish Network*, 905 F. Supp. 2d at 1088 (DVR functionality offered by satellite cable system not covered by system’s licenses from copyright owners, but protected as fair use), *aff’d* 723 F. 3d 1067 (9th Cir. 2013); *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 610 (S.D.N.Y. 2007) (DVR functionality offered by cable system not covered by system’s licenses from copyright owners), *aff’d* 536 F.3d 121 (2d Cir. 2008).

an action<sup>9</sup>—does not do what cable systems do: capture (regardless of whether requested to do so by individual customers) all local over-the-air broadcast programming and offer to transmit that simultaneously to any person wishing to receive any of those performances. Courts have no problems finding true “functional equivalence” when it is present—*see, e.g., WPIX v. ivi, Inc.* 765 F. Supp. 2d 594 (S.D.N.Y. 2011), *aff’d*, 691 F. 3d 275 (2nd Cir. 2012) (holding that defendant company “that captures over-the-air broadcasts of plaintiffs’ programming and simultaneously, without plaintiffs’ consent, streams those broadcast signals over the Internet to subscribers” liable for infringement of broadcasters’ public performance right)—but there is no such equivalence here. Swiss Army knives have corkscrews, and so, too, do wine bars—but that does not make a Swiss Army knife the “functional equivalent” of a wine bar.<sup>10</sup>

The Second Circuit’s interpretation of “to the public” correctly captures the widely-shared understanding that video-on-demand services implicate, and online cloud storage providers (*e.g.*, Dropbox, Amazon Cloud Drive, and Google Drive) do *not* implicate, the public performance right.<sup>11</sup> In a video-on-demand service like Netflix, the provider chooses audiovisual works, obtains copies of

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9. See Resp. Br. at 46-7.

10. Many *amici* discuss the legislative history of the Copyright Act in detail. That history, however, shows only what was never in any doubt: that Congress intended to regulate cable systems and video-on-demand service. The extrapolation from these undisputed examples to Aereo’s very different technology simply begs the question at issue.

11. See, *e.g., Aereo*, 712 F.3d at 690, 702-03 (2d Cir. N.Y. 2013).

those works, and offers to transmit performances of those works to any person agreeing to the provider's terms. Numerous subscribers receive individual transmissions of the same work generated at different times from the same copy. It is true that the actual audience for each performance via transmission consists of an individual, who is not herself "the public." But the Transmit Clause speaks of the "members of the public *capable of receiving* the performance," 17 U.S.C. § 101(2) (emphasis added), not merely those who actually receive it. The transmission could have gone to any member of the public who subscribes to Netflix, and whether Subscriber X or Subscriber Y receives a particular transmission is simply a matter of which of them clicked "play" first. By holding itself out as offering to perform (by means of a transmission) the audiovisual works in its library to any and all of its subscribers (and any non-subscribers willing to pay the required fee), Netflix offers to transmit those performances "to the public"; that larger group is the audience "capable of receiving" the performance, and they constitute "the public."

Cloud storage providers, on the other hand, choose no content themselves to offer to the public, but instead permit users to store content of the user's choosing and to which the user has obtained access, and subsequently to retrieve that content (whether via download or streaming). Even if many Dropbox subscribers have stored copies of "We, the Juries" and they are all watching performances generated by those copies at this very moment, Dropbox is not publicly performing the work, because it is not offering to transmit any performances of "We, the Juries" *to the*

*public*.<sup>12</sup> Only the authorized user of the specific account in which a copy of the work was stored and from which the transmission of the performance takes place can access any such transmission.

### C. There Is No “Unique Copies” Loophole

Petitioners argue that the Second Circuit’s decision creates a blueprint for evading the public performance right. They write, for example:

But Aereo is really just the tip of the iceberg. 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. Pet. Br. at 40.

This argument shows merely that they have failed to understand the holding below. Petitioners’ overbroad theory of the public performance right is hardly necessary to deal with a company that decides to make a distinct copy of a program for each of its subscribers. Cable or satellite companies that “devise Aereo-like workarounds” would be *reproducing* copyrighted works on a gargantuan scale,

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12. Of course, as explained in Part I, online storage service providers may, in the proper circumstances, be subject to secondary copyright liability arising out of the infringing activities of their users.

and would need authorization from the copyright holder (or some other defense) to do so.<sup>13</sup>

This is the true significance of the discussion of “unique copies” in the decision below and in *Cartoon Network*. The point is not that using one shared copy versus many individual copies is always determinative of whether there is copyright liability. Rather, the distinction serves to channel the case into the appropriate analytical category under the appropriate exclusive right. Making multiple copies from which private transmissions are generated, each to a single subscriber, shifts, but does not end, the inquiry: Who made the copies, were they authorized to do so, and who should bear liability for them? Conversely, if performances by transmission are generated from a single copy, there is no reproduction claim (because there are no reproductions), and the inquiry becomes: are members of the public *capable* of receiving any of those performances?

This well illustrates the manner in which the exclusive rights form an integrated system of protection. There is no copyright loophole. Instead, parties that do different things are subject to a different analysis of their actions for copyright liability purposes—as they should be. In cases like *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), *Warner Bros. Entm’t, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011), and *On Command Video Corp. v. Columbia Pictures*, 777 F.Supp 787 (N.D. Cal. 1999), defendants purchased a single copy of an audiovisual work on the open market, and then offered to perform the work by transmission

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13. Unlike the public performance right, the reproduction right is not subject to the statutory licenses in Sections 111, 119, and 122.

from that copy to any member of the public who paid for the privilege. Although each transmission was to a single recipient, the *potential* audience—the audience “capable of receiving” each performance made via transmission from that copy—was the public at large, as with any other video-on-demand system. The defendants in those cases would not have been able to skirt their copyright obligations simply by making a unique copy for each customer; they would still have to answer for the violation of the § 106(1) reproduction right.

Petitioners and their *amici* argue for a much broader aggregation principle: that distinct transmissions to different subscribers in different places and at different times should be aggregated whenever they involve the same underlying work or derive from the same prior broadcast. *See, e.g.*, Pet. Br. at 32 (characterizing Second Circuit decision as holding that “Aereo’s simultaneous retransmission of the same program to thousands of paying strangers is not ‘to the public’”) (emphasis added).<sup>14</sup>

As the Second Circuit correctly recognized, this is an attempt to have the statute say something that it simply

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14. *See also Aereo*, 874 F. Supp. 2d at 393 (characterizing plaintiffs’ argument as based on the “mere fact that a content provider is *making a given work available* to all of its subscribers results in a public performance”) (emphasis added); Br. of Plaintiffs—Counter-Defendants—Appellants at 2, *Aereo*, 712 F.3d 676 (2d Cir. 2013) (“Under the Copyright Act, the transmission of a *copyrighted work* to the public is a public performance, regardless of the device or process used to make the transmissions”) (emphasis added); Reply Br. of Plaintiffs—Counter-Defendants—Appellants at 17, *Aereo*, 712 F.3d 676 (2d Cir. 2013) (“businesses that transmit *movies or television shows* to their customers are *publicly performing those works*—even if each viewer receives a separate transmission”).



does not say: that transmitting *a work* to the public is a public performance of that work. *See Aereo*, 712 F.3d at 691. If the statute read thus, Petitioners’ claim would make sense, and they could attempt to show that Aereo transmits individual copyrighted audiovisual *works* to multiple members of the public. But the statute, of course, does not say that; instead, it says that it is a public performance to transmit “a *performance . . . of the work . . . to the public*,” and, as shown above, this directs the inquiry away from the underlying copyrighted work and towards each “showing” of the work. The fact that many transmissions involve the same underlying copyrighted work is irrelevant to determining whether any particular transmission of a performance of that work is “to the public.”

Petitioners’ aggregation principle would have serious and troublesome consequences. If any service making multiple transmissions of the same underlying copyrighted audiovisual work is publicly performing that work, then the distinction between video-on-demand services and online storage services would vanish, and *all* such services would henceforth face infringement liability. Thus, if two Dropbox users independently streamed “We, the Juries,” then under Petitioners’ theory, those two transmissions would be aggregated together, making them collectively “to the public.” Under Petitioners’ theory of this case—direct infringement by public performance—that would be game, set, and match against Dropbox. Congress could not have intended such a result, and did not.<sup>15</sup>

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15. The United States attempts to re-assure the Court that there will be no such dramatic effect on cloud service provider liability. It notes that Aereo’s system performs a “wholly different function” than cloud storage systems: Aereo “provides a means

## CONCLUSION

Congress, this Court, and the lower federal courts have established a straightforward and nuanced doctrinal framework to enforce copyright owners' rights while safeguarding consumers and innovators. This framework has proven, time and time again, that it can identify and hold accountable those whose businesses are built around selling infringement wholesale. Where serious misconduct exists, it is not hard to prove.

Petitioners, ignoring this framework, instead seek a broad holding that would sweep millions of transmissions within the ambit of the public performance right. But if separate and independent transmissions can be aggregated into a single "performance" whenever they involve the same underlying work, copyright owners will

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by which consumers can gain access to copyrighted content *in the first instance*," Br. of United States at 31 (emphasis in original), whereas cloud storage services "typically permit individual consumers to receive private performances of copyrighted works *after* the consumers have lawfully acquired their own copies." *Id.* at 32 (emphasis in original). But nowhere does the United States explain why that distinction makes any difference whatsoever under the Transmit Clause or the public performance right more generally. Amazon, to take but one example, offers cloud storage services to consumers who have obtained copyrighted content from Amazon itself; under this reasoning, would Amazon be liable for publicly performing those works because it "provides a means by which consumers can gain access to copyrighted content *in the first instance*"? Aereo's system is functionally equivalent to RS-DVRs and other cloud storage services for this purpose; users have lawful access to the television broadcast programming that they record using the Aereo system, have "lawfully acquired" their own copies of those works that they have stored on that system, and receive private performances of those works.

gain a veto power over new consumer media technologies. This Court denied them such a veto in *Sony* and it should do so again here.

Faced with Petitioners' specific, artificial question of law, the District Court gave an impeccably correct answer: Aereo is not liable *in the way that Petitioners describe*. When Petitioners doubled down rather than bring their infringement claim the right way, the Second Circuit quite properly affirmed. Now Petitioners have quadrupled down and brought their trick question to this Court. But the answer has not changed. Aereo is not *directly* liable for violating the *public performance* right.

The Second Circuit's decision does not exempt Aereo's operations from the Copyright Act. It merely channels copyright plaintiffs to the correct theory of the case: *secondary* liability for *consumers'* violation of the *reproduction* right, subject to those consumers' *fair use* defense. With appropriate emphasis on these qualifiers, this Court should affirm.

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**APPENDIX**

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