

No. 13-461

In the
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC.; DISNEY ENTERPRISES, INC.; CBS BROADCASTING INC.; CBS STUDIOS INC.; NBCUNIVERSAL MEDIA, LLC; NBC STUDIOS, LLC; UNIVERSAL NETWORK TELEVISION, LLC; TELEMUNDO NETWORK GROUP LLC; WNJU-TV BROADCASTING LLC; WNET; THIRTEEN PRODUCTIONS, LLC; FOX TELEVISION STATIONS, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; WPIX, LLC; UNIVISION TELEVISION GROUP, INC.; THE UNIVISION NETWORK LIMITED PARTNERSHIP; AND PUBLIC BROADCASTING SERVICE,
Petitioners,

v.

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

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

REPLY BRIEF FOR PETITIONERS

PAUL M. SMITH*	PAUL D. CLEMENT†
MATTHEW E. PRICE	<i>Counsel of Record</i>
JENNER & BLOCK LLP	ERIN E. MURPHY
1099 New York Ave. NW,	BANCROFT PLLC
Ste. 900	1919 M Street NW, Ste. 470
Washington, DC 20001	Washington, DC 20036
(202) 639-6060	(202) 234-0090
psmith@jenner.com	pclement@bancroftpllc.com

Additional Counsel Information on Inside Cover

April 14, 2014

RICHARD L. STONE*
AMY M. GALLEGOS
JENNER & BLOCK LLP
633 West 5th Street
Los Angeles, CA 90071
(213) 239-5100

BRUCE P. KELLER†
JEFFREY P. CUNARD
DEBEVOISE &
PLIMPTON LLP
919 Third Avenue,
31st Floor
New York, NY 10022
(212) 909-6000

** Counsel for Petitioners WNET; THIRTEEN Productions, LLC; Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; WPIX, LLC; Univision Television Group, Inc.; The Univision Network Limited Partnership; and Public Broadcasting Service.*

† Counsel for Petitioners American Broadcasting Companies, Inc.; Disney Enterprises, Inc.; CBS Broadcasting Inc.; CBS Studios Inc.; NBCUniversal Media, LLC; NBC Studios, LLC; Universal Network Television, LLC; Telemundo Network Group LLC; and WNJU-TV Broadcasting LLC.

CORPORATE DISCLOSURE STATEMENT

American Broadcasting Companies, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

Disney Enterprises, Inc. is a wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the voting stock of CBS Corporation.

CBS Studios Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the voting stock of CBS Corporation.

NBCUniversal Media, LLC is indirectly owned by Comcast Corporation, a publicly held corporation. No other publicly held corporation owns 10% or more of the equity of NBCUniversal Media, LLC.

NBC Studios, LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation, a publicly held corporation. No other publicly held corporation owns 10% or more of the equity of NBCUniversal Media, LLC.

Universal Network Television, LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation, a publicly held corporation. No

other publicly held corporation owns 10% or more of the equity of NBCUniversal Media, LLC.

Telemundo Network Group LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation, a publicly held corporation. No other publicly held corporation owns 10% or more of the equity of NBCUniversal Media, LLC.

WNJU-TV Broadcasting LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation, a publicly held corporation. No other publicly held corporation owns 10% or more of the equity of NBCUniversal Media, LLC.

WNET is a non-profit education corporation chartered by the Board of Regents of the University of the State of New York, has no parent corporation, and there is no publicly held corporation that owns more than 10% of its stock.

THIRTEEN Productions, LLC (formerly THIRTEEN) is wholly owned by its parent corporation, WNET, a non-profit education corporation chartered by the Board of Regents of the University of the State of New York. WNET has no parent corporation, and there is no publicly held corporation that owns more than 10% of its stock.

Fox Television Stations, Inc. is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company.

Twentieth Century Fox Film Corporation is a wholly owned subsidiary of Fox Entertainment

Group, Inc., which in turn is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company.

WPIX, LLC (formerly WPIX, Inc.) is a wholly owned subsidiary of Tribune Broadcasting Company, LLC, which in turn is a wholly owned subsidiary of Tribune Company, which is privately held. JPMorgan Chase & Company, a publicly held company, owns (directly or through affiliates) approximately 9.88% of Tribune Company's stock, according to the most recent information available. This percentage fluctuates, and could total 10% or more while this case is pending.

Univision Television Group, Inc. is wholly owned by PTI Holdings, Inc., which in turn is wholly owned by Univision Local Media, Inc. Univision Local Media, Inc. is wholly owned by Univision Communications Inc., which in turn is wholly owned by Broadcast Media Partners Holdings, Inc., which is itself wholly owned by Broadcasting Media Partners, Inc. None of these entities is publicly traded.

The Univision Network Limited Partnership is owned by Univision Communications Inc. and Univision Networks & Studios, Inc. Univision Networks & Studios, Inc. is itself wholly owned by Univision Communications Inc. Univision Communications Inc. is wholly owned by Broadcast Media Partners Holdings, Inc., which is itself wholly owned by Broadcasting Media Partners, Inc. None of these entities is publicly traded.

Public Broadcasting Service is a non-profit District of Columbia corporation with no parent corporation. There is no publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... i
TABLE OF AUTHORITIES..... v
REPLY BRIEF 1
Argument 4
I. Aereo Plainly Transmits Performances Of
Copyrighted Works To The Public..... 4
 A. Aereo’s User-Specific Transmissions Do
 Not Render Its Performances Private 4
 B. Aereo’s User-Specific Copies Do Not
 Render Its Performances Private 9
II. Aereo Performs Copyrighted Works And
Does Not Merely Supply Equipment Or
Enable Its Subscribers To Perform..... 14
III. Aereo’s Policy Arguments Are Unavailing 20
CONCLUSION 25

TABLE OF AUTHORITIES

Cases

<i>Fortnightly Corp.</i> <i>v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968).....	14
<i>N.Y. Times Co. v. Tasini</i> , 533 U.S. 483 (2001).....	18
<i>Sony Corp. of Am.</i> <i>v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	17
<i>Teleprompter Corp.</i> <i>v. Columbia Broad. Sys., Inc.</i> , 415 U.S. 394 (1974).....	19
<i>United States v. ASCAP</i> , 627 F.3d 64 (2d Cir. 2010).....	11, 12

Statutes & Regulation

17 U.S.C. § 101	<i>passim</i>
17 U.S.C. § 111	13, 20, 23
17 U.S.C. § 512(c)(1)	17, 21
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385	24
70 Fed. Reg. 16,306 (Mar. 30, 2005)	23

Other Authorities

H.R. Rep. No. 90-83 (1967).....	6, 9, 15
H.R. Rep. No. 94-1476 (1976).....	<i>passim</i>
S. Rep. No. 102-92 (1991)	24

REPLY BRIEF

Aereo is in the business of retransmitting performances of the copyrighted works of others to the public for a profit. In other words, Aereo engages in the precise conduct Congress enacted the transmit clause to reach. Congress could hardly have been clearer that it did not want technological advances (or, in Aereo's case, gimmicks) to undermine its basic policy judgment that a third party should not be able to build a business model out of supplying performances of the copyrighted works of others to the public without authorization. Congress thus expressly defined performing publicly to encompass transmitting or otherwise communicating a performance to the public by "*any* device or process," whether "*now known or later developed.*" That clear statutory language renders Aereo's reliance on its miniature antennas and user-specific copies—*i.e.*, the features that arguably differentiate its devices and process from the cable systems Congress confronted in 1976—wholly unavailing. Congress did not want its judgment circumvented by a retransmission service with a thousand little antennas—whether on a hillside or in a warehouse in Brooklyn—instead of one big one, and it wrote a statute that foreclosed that result.

Aereo responds in three basic ways: by defending the Second Circuit's misguided analysis, by resurrecting arguments Congress rejected in 1976, and by making policy arguments better directed to Congress. None of its efforts succeeds.

First, Aereo attempts to defend the Second Circuit's reasoning that as long as each subscriber

receives a user-specific transmission, Aereo can enable thousands of viewers to “Watch live TV” without publicly performing. But Aereo’s felt need to distinguish video-on-demand services forces it to admit that simply providing user-specific transmissions is not enough to render a performance private. Aereo thus follows the Second Circuit’s lead in suggesting that what matters is whether the user-specific transmissions flow from user-specific copies, rather than a master copy. But even putting aside the irony of Aereo’s effort to avoid copyright liability by making lots of extra copies, its focus on user-specific copies has no textual mooring. To the contrary, this detail of the process by which Aereo transmits performances to the public is precisely what Congress’ “any device or process” language renders irrelevant.

Aereo next makes the argument (not considered below) that it is not performing *at all*, but rather merely supplies equipment that enables end-users to watch broadcast television. That argument is nearly identical to the one this Court accepted when the cable systems raised it in the late 1960s—and the one Congress rejected in enacting the transmit clause. Congress could not have made clearer that a retransmission service is publicly performing, regardless of what role the user may play in the process. Aereo’s contrary argument could exempt the entire Internet from direct liability for unauthorized public performance, as the user always initiates an online transmission. Aereo fares no better in attempting to analogize itself to suppliers of equipment like copy machines and DVRs because those suppliers do not supply the content along with

the equipment. A copy machine that came pre-loaded with unlicensed materials would hardly escape copyright liability. Aereo responds that over-the-air broadcasts are different from other content because they are available to the public for free, but, once again, that is an argument Congress considered and rejected. In Congress' view, the public availability of broadcasts does not render third parties free to build business models out of facilitating the public's access to that copyrighted content without authorization. And in all events, emphasizing that the general public has a claim to access this content is hardly a promising basis for suggesting that Aereo is doing anything other than performing to the public.

Aereo closes with a variety of policy arguments, but when the text and legislative purpose are this clear, policy arguments are largely irrelevant. To the extent Aereo contends that Congress was not concerned with retransmission of local broadcasts, it is simply wrong. Nor is there any merit to Aereo's suggestion that its service is indistinguishable from legitimate cloud computing services. There is an obvious difference between providing storage for content that the end-user independently possesses and making the content itself available to anyone who pays a fee. There are legitimate services that use cloud computing technology to do the latter, but unlike Aereo, they pay for licenses to exploit the content. In all events, the United States has already identified the answer for cloud computing, RS-DVR services, and all the other things Aereo is not: The Court should decide this case narrowly and evaluate those future cases on their own facts, with ample

tools that may include arguments not even presented here. In the end, the only thing Aereo is indistinguishable from is the cable systems that caused Congress to enact the transmit clause in the first place.

ARGUMENT

I. Aereo Plainly Transmits Performances Of Copyrighted Works To The Public.

A. Aereo’s User-Specific Transmissions Do Not Render Its Performances Private.

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. Pet.App.18a. But as even Aereo ultimately recognizes, that transmission-centric rationale cannot be reconciled with the statute’s text, structure, and purpose.

The transmit clause defines “[t]o perform or display a work ‘publicly’” as:

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

17 U.S.C. § 101. The plain text creates massive problems for the Second Circuit’s interpretation. *See* Petrs.’Br.31-37; U.S.Br.23-30. Indeed, the very text that tied the Second Circuit in knots addresses only

what is *not* relevant. The ultimate statutory question is whether the defendants “transmit or otherwise communicate a performance ... of the work ... to the public.” The rest of the clause simply clarifies what does not matter—namely, the precise details of the device or process used to do so, and whether members of the public capable of receiving the *performance* (*not* the *transmission*) receive it in the same place or at the same time.

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.” Resp.Br.23, 26. Aereo attempts to cure this superfluity problem and distinguish video-on-demand services (which provide user-specific transmissions) by conceding that the public is “*capable* of receiving a transmission at different times” if a performance is “made *available* to the public on demand” at a time of each subscriber’s choosing—“even though ... a *particular transmission*” is sent to “only one person.” Resp.Br.26 (some emphasis added); *see also* Resp.Br.39 (conceding that a video-on-demand service publicly performs when it “transmit[s] a performance ... only to a single user, if such a performance [is] available to anyone who request[s] it”). That concession is unavoidable, but it is also fatal.

It is unavoidable because the House Report accompanying the addition of the “at different times” language specifically explains that this language was added to reach, among other things, “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.” Resp.Br.26 (quoting H.R. Rep. No. 90-83, at 29 (1967)); *see also Amicus* Br. of Profs. Peter S. Menell & David Nimmer 12-16. Aereo thus is absolutely correct to concede that a video-on-demand service—or a hotel that offers private transmissions in rooms made available to members of the public—is publicly performing. *See* Resp.Br.39.

But once Aereo concedes this point, there is very little left to its case. As Aereo acknowledges, the whole point of the “at different times” language is to reach a service that *offers* each member of the public a user-specific transmission of a performance of the same work, regardless of who takes the service up on that offer, and even though no one else can access the transmission once the offer is accepted. But that describes Aereo’s service to a tee: Just like an on-demand service, Aereo offers to transmit performances to any subscriber, “even though only one person might request and receive a particular transmission.” Resp.Br.26. The only even arguable difference between Aereo and a video-on-demand service (or the hotel) is Aereo’s interposition of user-specific copies, but that is simply the particular “device or process” Aereo has chosen. *See infra* Part II.

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 of the statute that petitioners explicitly disclaimed in their opening brief (something Aereo conveniently ignores). According to Aereo, if the Second Circuit's reading is rejected, otherwise-private performances will become public whenever "some other performance" of the same work—*e.g.*, "a prior performance by a broadcaster"—was transmitted "to the public." Resp.Br.24. That is a red herring. The statute does not ask whether a "public performance" has been transmitted; it asks whether a performance has been transmitted "to the public." 17 U.S.C. § 101.

Whether an alleged infringer is transmitting "to the public" therefore has nothing to do with whether some prior performance of the same work was "to the public." *See* Petrs.'Br.36-37. Instead, it turns solely on the actions of *the alleged infringer*, and whether *those actions* constitute transmitting a performance "to the public." Thus, when an individual uses a DVR to record the Super Bowl and play that recording back to himself or his family, his private performance does not somehow become public simply because the broadcast he recorded was transmitted to the public. Petrs.'Br.36-37. On the other hand, if he transmitted the Super Bowl (or a never-before-seen recording of a family football game) to anyone willing to pay a fee, he would be transmitting a performance to the public. But in either case, that the broadcaster previously transmitted a

performance of the Super Bowl to the public is entirely irrelevant.

That is so regardless of whether the performance being transmitted is viewed as the underlying broadcast or the performances resulting from the user-specific transmissions. *See* U.S.Br.23-28. Since the former is the performance that Aereo makes available to its subscribers, there is no question that Aereo is retransmitting that performance to the public. But even if the proper focus is the performance that each end-user receives, it would be an extreme elevation of form over substance not to aggregate these performances and conclude that Aereo is publicly performing by transmitting performances of the same work to the public. The legislative history supports this commonsense conclusion by emphasizing that the typical retransmission context in the heartland of Congress' concern involves multiple performances. H.R. Rep. No. 94-1476, at 63 (1976) ("a local broadcaster is performing when it transmits the network broadcast [and] a cable television system is performing when it retransmits the broadcast to its subscribers"). In any event, even a one-to-one transmission is not private in the sense Congress contemplated if, as in Aereo's case, it is made available to any paying stranger. In this context, individualized and private are not synonymous.

Aereo also contends that rejecting the Second Circuit's reading would render the transmit clause's cross-reference to the "place open to the public" prong of the definition of "to perform ... 'publicly'" redundant. *Resp.Br.24*. But the same could be said

of the Second Circuit’s reading, or any other reading, as the public is always “capable of receiving” a transmission to a place “open to the public.” Congress included this intentional overlap to clarify the relationship between the transmit clause’s two subsections. At the same time, Congress included the “different times” language to make “doubly clear” that the clause applies “where the transmission is capable of reaching different recipients at different times.” H.R. Rep. No. 90-83, at 29. The Second Circuit not only rendered this clarifying language superfluous, but read it as somehow defeating its very purpose.

B. Aereo’s User-Specific Copies Do Not Render Its Performances Private.

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 baldly asserts that “the two steps of (1) making a recording from a first performance and (2) transmitting a playback of that recording cannot be treated as ‘device or process’ for ‘retransmitting’ the first performance.” Resp.Br.30. But it does not and cannot explain how a statute that reaches “*any* device or process”—whether “now known *or later developed*”—for transmitting

performances to the public fails to reach a process that employs identical user-specific copies to accomplish that feat. 17 U.S.C. § 101 (emphasis added).¹

The legislative history only underscores that the addition of a user-specific copy to the mix cannot be outcome determinative. Whatever else Congress intended the transmit clause to reach, Congress plainly intended it to reach any service that captures over-the-air broadcasts and retransmits them to the public. Indeed, that is the *raison d'être* of the clause. The legislative history is replete with admonishments that what matters is *whether* a performance is transmitted or otherwise communicated to the public, not the means by which that occurs. *See, e.g.*, H.R. Rep. No. 94-1476, at 63 (“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” (emphasis added)); *id.* at 64 (“[t]he definition of ‘transmit’ ... is 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” (emphasis added)).

Congress clearly wanted the transmit clause to reach “any act by which the initial performance or

¹ Even the BSA, whose *amicus* brief Aereo repeatedly invokes, rejects Aereo’s user-specific copies argument as wholly unmoored from the statute’s text and Congress’ manifest intent. *See Amicus Br. of BSA et al.* 21-24.

display is transmitted, repeated, or made to recur” to the public. *Id.* at 63. It is completely implausible that Congress intended to exempt a device or process that accomplishes the core conduct it was targeting simply because it involves identical user-specific copies—particularly when those copies serve no apparent role in the process other than to attempt to insulate the service against copyright liability.² Indeed, even the author of the treatise from which Aereo’s contrary argument derives has disavowed it and agrees that Aereo is publicly performing. *See* Menell/Nimmer Br.

Aereo makes the puzzling claim that rejecting its argument would render a distributor who “makes multiple copies of a DVD from a master copy, then sells them by mail” liable for public performance. Resp.Br.31. A DVD distributor is not publicly performing because it is not performing at all. Aereo’s contrary suggestion ignores the prerequisite of “a *contemporaneously perceptible* performance.” *United States v. ASCAP*, 627 F.3d 64, 74 (2d Cir. 2010) (emphasis added). Aereo makes the same mistake in suggesting that petitioners’ reading of the statute threatens Internet services that offer content for download: Those services are not performing because they provide no *contemporaneously*

² Although Aereo suggests that the user-specific copies enable its subscribers to pause and rewind, Resp.Br.30 n.14, in the same breath it is forced to concede that they interfere with subscribers’ ability to channel surf and are otherwise detrimental to subscribers’ ability to watch live TV. *Id.* The user-specific copies’ only *net* benefit appears to be the hope of avoiding copyright liability.

perceptible performance. *See id.* (distinguishing between downloading and streaming); U.S.Br.7 n.2 (same). Aereo, by contrast, does not distribute copies for users to download and watch later. Instead, its copies are simply the mechanism by which it transmits contemporaneously perceptible performances—*i.e.*, enables users to “Watch live TV.”³

Aereo’s rather convoluted attempt (at 34-35) to derive support for its emphasis on its copies from section 111’s compulsory licensing scheme for retransmissions by a cable system (something Aereo readily concedes it is not) is unavailing. Indeed, section 111 actually undermines Aereo’s argument. Aereo misleadingly suggests that section 111 “generally defines ‘secondary transmissions’ as the ‘simultaneous[]’ retransmission of broadcast signals.” Resp.Br.34. In fact, the statute defines “secondary transmissions” to include both simultaneous *and*

³ In any event, Aereo’s argument only underscores that it is violating petitioners’ reproduction rights as well. Download services still must obtain a reproduction, as opposed to a public-performance, license. *See ASCAP*, 627 F.3d at 71. Aereo itself notes that a video-on-demand service “cannot avoid liability by making individual copies without implicating the copyright owner’s *reproduction* right.” Resp.Br.38. Aereo assumes its own copies escape the same fate only because it erroneously assumes its users are responsible for making them. *See infra* Part II. Contrary to Aereo’s suggestions, Resp.Br.37, petitioners’ reproduction claims remain very much alive; they just are not part of this preliminary injunction proceeding. Of course, the possibility that Aereo violates petitioners’ copyrights twice over is no reason to excuse its plain violation of their public-performance rights.

nonsimultaneous transmissions and includes an entire subsection addressing nonsimultaneous secondary transmissions. 17 U.S.C. § 111(e), (f)(2). Nothing in that subsection suggests that a nonsimultaneous secondary transmission is anything other than “a performance or display of a work embodied in a primary transmission.” *Id.* § 111(a).

The provision to which Aereo points, section 111(e)(1)(B), is just one of the many requirements (specifically, that the copyrighted program, including commercials, be transmitted without editing) for such secondary transmissions to come within the terms of section 111’s compulsory license rather than constitute infringing public performance. Congress thus explicitly *rejected* the notion that injecting an identical copy (or a delay in retransmission) into the process severs the link to the primary broadcast. And with Congress having expressly rejected the idea that the interposition of a videotaped copy renders a nonsimultaneous secondary transmission any less a public performance, it is implausible to suggest that a thousand user-specific copies would make any difference.

Ultimately, Aereo’s argument that it is not publicly performing is really a direct assault on section 111’s finely reticulated scheme. If Aereo were correct, it would be the only retransmission service since 1976 unconstrained by any of the carefully calibrated provisions of section 111 and comparable provisions for satellite services, and nothing would stop it from stripping out advertising or altering copyrighted content. *See* Menell/Nimmer Br. 28-30.

II. Aereo Performs Copyrighted Works And Does Not Merely Supply Equipment Or Enable Its Subscribers To Perform.

After attempting to escape liability on the theory that its Rube Goldberg-like contrivance of miniature antennas and serial copying facilitates thousands of *private* performances, Aereo swings for the fences and 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 should sound familiar, not because it was considered below (it was not), but because it is nearly identical to the one this Court adopted in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968)—only to have its analysis rejected by Congress when it enacted the transmit clause. Aereo’s argument thus is not so much an effort to interpret the clause as to wish it away.

According to Aereo, it is not performing at all because its “equipment is designed to emulate the operation of a home antenna and DVR” and Aereo’s sole “role is to make antennas and DVRs available for other’s use.” Resp.Br.41. Those arguments track nearly verbatim the arguments this Court invoked in *Fortnightly* to conclude that a cable system was not performing. *See, e.g., Fortnightly*, 392 U.S. at 399 (“the basic function [cable] equipment serves is little different from that served by the equipment generally furnished by a television viewer”); *id.* at 398-99 (“Broadcasters perform. Viewers do not perform,” and a cable system “falls on the viewer’s side of the line” because it “no more than enhances

the viewer's" experience by "provid[ing] a well-located antenna." (footnotes omitted)).

Congress enacted the transmit clause to reject that logic and make clear that "a cable television system is performing when it retransmits the broadcast to its subscribers." H.R. Rep. No. 94-1476, at 63. The plain text of the transmit clause and the accompanying definition of to "transmit" a performance—"to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"—thus foreclose Aereo's argument. 17 U.S.C. § 101. Indeed, the driving force behind the clause was to confirm 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." H.R. Rep. No. 94-1476, at 63. As the legislative history makes explicit, that includes a service that transmits "*at the initiative of individual members of the public.*" H.R. Rep. No. 90-83, at 29 (emphasis added).

In short, Congress was well aware of the respective roles of a retransmission service and its subscribers (and *Fortnightly's* conclusion that *neither* performed), which is why it made crystal clear that *both* engage in performances—the cable system performs publicly "when it retransmits the broadcast to its subscribers," and the subscriber performs (typically, privately) when he "communicates the performance by turning on a receiving set." H.R. Rep. No. 94-1476, at 63. Aereo's argument that only its subscribers perform not only is contrary to

Congress' text and purpose but would have extraordinary ramifications. It would suggest that retransmission services could avoid liability through the simple expedient of automating their functions, and could potentially immunize all Internet-based transmissions—which are *always* initiated by the user—from direct copyright liability.

Aereo nonetheless attempts to liken itself to a copy shop or VCR manufacturer, insisting that it is not performing because the user “presses the button to make the recording[]” that Aereo uses to retransmit broadcast television. Resp.Br.43. But Aereo ignores not just the statutory text and legislative history discussed above, but also the multiple features that distinguish its examples—including that the copy shop and VCR manufacturer supply only the equipment for copying content, while users supply the content. *See also* U.S.Br.20 (distinguishing copying example on the additional ground that Aereo controls centralized servers integral to the process by which content is transmitted).⁴ A normal copy machine is useless unless the user has something to copy. The same is

⁴ Aereo also ignores a more fundamental problem with its analogies. The copy shop and VCR analogies implicate only the reproduction right, not the public-performance right, and Congress in 1976 expressly defined the latter to make crystal clear that *both* the transmitting service and the receiving end-user are performing (and to abrogate *Fortnightly's* suggestion that neither is performing). Thus, whatever significance attaches to the end-user pushing the button in other contexts, Congress itself has foreclosed Aereo's suggestion that only the end-user performs.

true of a VCR or DVR—neither can be used to record a program to which the user has no access. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[p]etitioners ... do not supply Betamax consumers with respondents’ works”).⁵ Even the RS-DVR service in *Cablevision* permitted users to copy only programs they had already obtained access to through their paid cable subscription.⁶

In stark contrast, the whole point of Aereo’s service is to provide access to the content. That is clear from Aereo’s own marketing of itself as a means to “Watch live TV”—not to “Record and play back in nearly real-time TV shows that you have already acquired.” It is equally clear from the fact that Aereo’s system can be used to record only from channels Aereo chooses to offer; if Aereo stops offering a channel, its subscribers can no longer record programs broadcast on that channel. That is why Aereo’s effort to liken itself to an RS-DVR service is so puzzling. It elides the question of where the content being recorded came from. The RS-DVR service in *Cablevision* was an ancillary service

⁵ This same distinction is reflected in the Digital Millennium Copyright Act, which gives qualifying Internet service providers a limited defense against liability for infringing material stored on their sites when, among other things, the user bears sole responsibility for supplying the material. 17 U.S.C. § 512(c)(1).

⁶ As explained, *see* *Petrs.’Br.37* n.5; *infra* p. 22, how the transmit clause or other portions of the Copyright Act should apply to an RS-DVR service is a question this Court need not address here, as “[t]he precise Copyright Act analysis ... will depend on the particular details of the service.” *U.S.Br.32*.

offered only in addition to the content Cablevision was licensed to provide. But here, Aereo's RS-DVR analogy is an elaborate effort to lift itself by its own bootstraps. That is why Aereo must analogize itself to *the combination* of a DVR and an antenna—without the content the antenna receives, Aereo's DVR functionality would be useless. And where a service like Aereo provides the users with content, it cannot coherently argue that the user is the only one performing that content.

In short, Aereo is more like a copy shop that provides access to a copy machine fully pre-loaded with copyrighted works ready to copy at the push of a button. The purveyor of such a machine could not avoid liability because the user must push the button. That is true regardless of whether the technology for making the copies is located in the copy shop, the user's home, or "the cloud." Indeed, this Court has squarely rejected an argument just like Aereo's in the specific context of an Internet-based content provider. *See N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505-06 (2001). Because Aereo is offering not just a piece of equipment, but an integrated service that includes access to copyrighted content, its efforts to suggest that it is a mere equipment supplier and only its subscribers perform are doomed.⁷

⁷ Contrary to Aereo's suggestion, the District Court made no "factual findings" that compel a different conclusion. In fact, it expressly declined to consider Aereo's "volitional conduct" argument and cautioned that nothing in its opinion should "be viewed as a decision" on that question. Pet.App.60a n.1. The

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. *See, e.g., Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974) (“The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so.”). But it just as clearly was rejected by Congress when it concluded that anyone who seeks to build a business model around transmitting over-the-air broadcasts should compensate the holders of the copyrights in that content. *See* H.R. Rep. No. 94-1476, at 89 (because “cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material[,] ... copyright royalties should be paid”).

Attempting to rewrite this history, Aereo makes the remarkable claim that “Congress, in fact, *codified* the outcome of *Fortnightly*” in section 111. Resp.Br.46. Aereo fundamentally misunderstands section 111, which, unlike *Fortnightly*, takes as its premise that cable systems are publicly performing

“findings” Aereo attempts to attribute to the court come from descriptions of Aereo’s *arguments*. *See* Pet.App.60a n.1 (“Aereo ... *argues* that ... it is the user ... that controls ... Aereo’s system” (emphasis added)); Pet.App.74a (“Aereo *argues* that ... it effectively rents to its users remote equipment” (emphasis added)).

and provides them a mechanism for obtaining a license to do so. That much is clear from section 111(c)(2), which underscores that absent payment of royalties and compliance with all relevant rules, a cable system's retransmission of broadcast television "is actionable as an act of infringement." 17 U.S.C. § 111(c)(2).

Not only does section 111's animating premise underscore that Congress abrogated *Fortnightly* and *Teleprompter* and concluded that retransmission services are publicly performing; section 111 also demonstrates that Congress knows how to legislate in technology-specific terms. It did so in section 111 when it established a licensing scheme for cable systems, and again when it created a similar scheme for satellite providers—both things that Aereo proclaims it is not, Resp.Br.34 n.17. But Congress took a completely different tack in section 101, sweeping in any device or process—including ones not yet invented. Needless to say, any device or process includes Aereo's devices and process, no matter how many miniature antennas or user-specific copies Aereo employs, and no matter that the consumer must push a button to initiate the process (just as with a cable system or virtually any online content supplier).

III. Aereo's Policy Arguments Are Unavailing.

Aereo rounds out its brief with a series of unadorned policy arguments that are completely unmoored from the statutory text and Congress' 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. Aereo first posits that courts should not apply copyright law to new technologies absent “explicit legislative guidance.” Resp.Br.48. But it does not get much more explicit than Congress’ instruction to apply the transmit clause to “*any* device or process” for transmitting performances to the public, whether “now known or *later developed*.” 17 U.S.C. § 101 (emphasis added).

Aereo fares no better with its attempt to portray a decision in petitioners’ favor as the death knell for “cloud computing technologies.” Resp.Br.49. As explained, *see supra* pp. 16-18, there is an obvious difference between a service that provides the means to store, copy, or access content supplied by the user and a service that provides the content itself. *See* U.S.Br.31 (Aereo provides “access to copyrighted content *in the first instance*”). The kind of cloud computing service Aereo invokes is a perfect example of the former: It merely allows users to store and access “personal copies of copyrighted content” that they have acquired (whether lawfully or not) through other means. Resp.Br.49. That is a far cry from Aereo, which supplies the content itself. Contrary to Aereo’s contentions, no one has suggested that these “virtual locker” services necessarily are liable for infringement whenever they are used to store content that was not “lawfully” acquired. In fact, Congress has already addressed this concern. *See* 17 U.S.C. § 512(c)(1) (providing qualified Internet service providers with a limited defense against liability for infringing material stored on their sites when, among other things, the user bears sole responsibility for supplying the material); *Amicus* Br. of Center for Democracy & Technology et al. 19.

Of course, some Internet-based services, such as iTunes in the Cloud, offer both content and the means to store and access it. Unlike Aereo, however, these services have *obtained licenses* to offer the content (typically, a performance license if they “stream” it and a reproduction license if they offer it for download, *see* U.S.Br.32). A decision requiring Aereo to do the same would have little, if any, effect on this well-developed market or consumers’ access to copyrighted content. By contrast, a decision validating Aereo’s effort to avoid paying for the same rights that others have lawfully acquired would be tremendously disruptive. Not only would it call into question whether “streaming” services such as Netflix and Hulu must continue to compensate copyright holders and abide by their licensing conditions, but it risks rendering the entire Internet exempt from the transmit clause—a result that Congress could not possibly have intended.

In all events, the United States has identified how this Court should handle cloud computing, RS-DVR services, and all the other things Aereo is not. “The precise Copyright Act analysis of such services will depend on the particular details of the service in question” and “should await a case in which they are squarely presented.” U.S.Br.32, 34. What matters here is that Aereo’s service violates copyright law whether or not it employs “cloud technology.” Courts will have time and tools enough to examine the details of other services on a fully developed record if and when the need to do so arises. This case thus provides no occasion to adopt a meta-theory of copyright for the digital age. The only question here is whether Aereo’s Rube Goldberg-like contrivance

somehow excuses it from seeking authorization or providing compensation to retransmit broadcast television to paying strangers. Both the statutory text and Congress' manifest intent provide the straightforward answer.

That Aereo (at least for now) transmits only local broadcasts does not remotely suggest that Congress would be indifferent to Aereo's effort to build a business model out of performing the copyrighted works of others. At the outset, this local-only arrangement is purely voluntary; nothing in Aereo's *legal* argument necessitates that self-imposed limitation, and Aereo conspicuously declines to foreswear a different model. In any event, Aereo's argument that Congress is indifferent to exploitation of others' copyrights in the local market rests on a flawed premise, as Congress does not "permit[] cable systems to retransmit local broadcast signals without paying any copyright royalties." Resp.Br.46 n.25.

In fact, section 111 requires all cable systems—even those that retransmit only *local* signal—to pay royalties "*for the privilege of*" retransmitting distant signals. 17 U.S.C. § 111(d)(1)(B)(i) (emphasis added); *see also, e.g.*, H.R. Rep. No. 94-1476, at 96 ("The purpose of this initial rate ... is to establish a basic payment, whether or not a particular cable system elects to transmit distant non-network programming."); 70 Fed. Reg. 16,306, 16,307 n.1 (Mar. 30, 2005) ("[f]or large cable systems which retransmit only local broadcast stations, there is still a minimum royalty fee"). And Congress authorized broadcasters to obtain retransmission fees on top of section 111 royalties precisely because local-only

broadcast signals are particularly valuable and Congress did “not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.” S. Rep. No. 102-92, at 35 (1991).

Aereo emphasizes that these retransmission fees flow from a different statutory regime. But Aereo ignores Congress’ explicit finding that this regime was needed because the “effective subsidy of the development of cable systems by local broadcasters” that resulted from section 111’s treatment of local-only broadcasts “may have been appropriate” when cable was in its infancy, but “is no longer so.” Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(19). These fees are thus a direct result of Congress’ conclusion that its copyright laws were unfairly causing local broadcasters to subsidize competitors. That is hardly a compelling basis for allowing Aereo to use local broadcasts as seed capital.

In the end, Aereo’s policy arguments are no more persuasive than its legal arguments, as neither can refute the commonsense conclusion that Aereo does exactly what Congress enacted the transmit clause to prevent: It transmits performances of copyrighted works to the public without seeking authorization from or providing compensation to copyright holders. There is simply no basis in law or logic for treating Aereo’s convoluted scheme for retransmitting broadcast television as anything other than blatant and unapologetic copyright infringement.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

PAUL M. SMITH*
MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6060
psmith@jenner.com

RICHARD L. STONE*
AMY M. GALLEGOS
JENNER & BLOCK LLP
633 West 5th Street
Los Angeles, CA 90071
(213) 239-5100

PAUL D. CLEMENT†
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

BRUCE P. KELLER†
JEFFREY P. CUNARD
DEBEVOISE &
PLIMPTON LLP
919 Third Avenue
31st Floor
New York, NY 10022
(212) 909-6000

April 14, 2014

* *Counsel for Petitioners WNET; THIRTEEN Productions, LLC; Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; WPIX, LLC; Univision Television Group, Inc.; The Univision Network Limited Partnership; and Public Broadcasting Service.*

† *Counsel for Petitioners American Broadcasting Companies, Inc.; Disney Enterprises, Inc.; CBS Broadcasting Inc.; CBS Studios Inc.; NBCUniversal Media, LLC; NBC Studios, LLC; Universal Network Television, LLC; Telemundo Network Group LLC; and WNJU-TV Broadcasting LLC.*