

No. 13-461

In the Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., ET AL.,
PETITIONERS

v.

AEREO, INC., FKA BAMBOOM LABS, INC.

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, grants the owner of copyright in an audiovisual work the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. 106(4). Respondent’s service enables paying subscribers to receive copyrighted broadcast television programs over the Internet by using thousands of miniature antennas to capture, create, and stream an individual digital copy of a broadcast program to each subscriber who seeks to watch it. The question presented is as follows:

Whether respondent’s service infringes petitioners’ exclusive right “to perform [their] copyrighted work[s] publicly.”

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INTEREST OF THE UNITED STATES

This case presents questions about the scope of the Copyright Act's public-performance right in the context of novel technologies for transmitting and viewing copyrighted audiovisual works using the Internet. The United States Copyright Office is responsible for administering the registration of creative works and for advising Congress, federal agencies, the courts, and the public on copyright law and policy. 17 U.S.C. 701. This case also implicates matters of concern to other federal agencies charged with administering federal laws governing intellectual property, the television industry, and the Internet. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, grants copyright protection to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. 102(a). Copyright protection confers certain exclusive rights, including the rights to copy and to distribute the work. 17 U.S.C. 106(1) and (3). Holders of copyrights in audiovisual, musical, and certain other works also have the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. 106(4).

a. Like the Copyright Act in its current form, the Copyright Act of 1909 granted an exclusive right to perform certain copyrighted works “publicly” or “in public.” 17 U.S.C. 1(c), (d), and (e) (1976). In 1931, this Court held that a hotel infringed the public-performance right in musical works when it provided speakers and headphones in each guestroom to enable guests to hear music received by a “master radio receiving set” operated by the hotel. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 195. Writing for a unanimous Court, Justice Brandeis concluded that one who “receives and distributes” a radio broadcast of a copyrighted work is engaged in a public performance. *Id.* at 198.

In a series of three decisions between 1968 and 1975, however, the Court held that businesses did not “perform” copyrighted works when they made over-the-air broadcasts of those works available for viewing or listening by paying customers. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the Court addressed “community antenna television” systems that received broadcast television signals using master antennas located on hilltops and then retransmitted those signals over coaxial cables to

subscribers in nearby communities. *Id.* at 391-392. The Court held that those systems did not “perform” the copyrighted television programs they retransmitted because they did “no more than enhance[] the viewer’s capacity to receive the broadcaster’s signals” by “provid[ing] a well-located antenna with an efficient connection to the viewer’s television set.” *Id.* at 398-399.

Subsequently, in *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), the Court held that cable television systems did not “perform” copyrighted programs even when they allowed subscribers to view programming originally broadcast in distant cities. The Court reasoned that “reception and rechanneling of [broadcast] signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.” *Id.* at 408.

Finally, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), the Court held that a restaurant owner did not “perform” copyrighted musical works played over a radio in his establishment. The Court explained that *Fortnightly* and *Teleprompter* “explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance,” even if the person who receives the broadcast then makes its contents available to members of the public. *Id.* at 161.

b. In the Copyright Act of 1976, Congress responded to those decisions by adopting expansive definitions of “perform” and “publicly.” The Act states that 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. The

Act further provides that “[t]o perform or display a work ‘publicly’ means”:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

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

Ibid.

The second paragraph of that definition is commonly known as the “Transmit Clause.” The 1976 Act’s definitional provisions also state that to “‘transmit’ a performance” means “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. 101. Congress defined the terms “device” and “process” to include “one now known or later developed.” *Ibid.* Those provisions overturned *Fortnightly*, *Teleprompter*, and *Aiken* by establishing that “the concepts of public performance and public display cover not only the initial rendition or showing” of a work, “but also any further act by which that rendition or showing is communicated to the public.” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 63 (1976) (1976 House Report).

Congress balanced the breadth of those new definitions with provisions protecting the public’s continued ability to enjoy performances of copyrighted works.

Although “perform” is defined broadly enough to include even the act of turning on a television, nothing in the 1976 Act restricts private performances of copyrighted works. See 17 U.S.C. 106(4) (granting a copyright holder the exclusive right “to perform the copyrighted work *publicly*” (emphasis added)). Congress also enacted—and has continued to refine—a detailed scheme of exemptions for certain public performances. See, *e.g.*, 17 U.S.C. 110(1)-(4), (6), and (8)-(10) (qualifying educational, religious, governmental, and nonprofit performances); 17 U.S.C. 110(5)(A) (public reception of a transmission “on a single receiving apparatus of a kind commonly used in private homes” provided “no direct charge is made to see or hear the transmission”); 17 U.S.C. 111(a)(1) (retransmission of broadcast signals by a hotel or apartment building to guest rooms or apartments).

Finally, Congress adopted a statutory licensing scheme for cable systems like the ones at issue in *Fortnightly* and *Teleprompter*. See 17 U.S.C. 111. The 1976 Act reflected a determination that “cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984). But Congress also provided cable operators with a statutory license because it recognized that it would be “impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted.” 1976 House Report 89. Congress later enacted a comparable licensing scheme for satellite television carriers. See 17 U.S.C. 119, 122. These statutory licenses ensure that copyright owners are compensated by entities that retransmit performances

of their works to paying subscribers, while also promoting the spread of new and useful mechanisms for communicating broadcast television programming to the public.

2. Respondent charges consumers a monthly subscription fee to watch broadcast television programs over the Internet. Pet. App. 3a. When a subscriber visits respondent's website, she is "presented with a programming guide" that lists programs airing over broadcast stations in her local area. *Ibid.*¹ If she chooses to "Watch" a program that is currently airing, the program begins playing on her computer or other Internet-connected device. *Id.* at 3a-4a. If the subscriber instead chooses to "Record" a program, respondent's system creates and stores a digital copy that the subscriber can view over the Internet at a time of her choosing. *Id.* at 4a-5a.

Respondent's system relies on "thousands of individual antennas," each about the size of a dime, arranged on "large antenna boards" at respondent's central facility. Pet. App. 6a. When a subscriber selects a television program, a centralized server temporarily "assigns one of the individual antennas" to that user and tunes the assigned antenna to the appropriate channel. *Ibid.* The antenna receives the program, which is "saved to a large hard drive" at respondent's facility in a "directory reserved for" the user who requested it. *Id.* at 7a. If the user chooses to record the program, the system "create[s] a complete copy of the program" in the user's directory. *Ibid.* If the user chooses to watch the program live,

¹ Respondent's service was available only in New York City when this action was brought, but it has now expanded to additional markets. Pet. App. 3a; Pet. 33-34.

“the same operations occur, except that once six or seven seconds of programming have been saved,” the system “begins streaming the program to the user” from the copy in the user’s personal directory. *Ibid.*²

Respondent’s system is engineered to ensure that the data streams and recordings associated with each user remain separate. “No two users share the same antenna at the same time,” and when two or more users watch or record the same program, “a separate copy of the program is created for each.” Pet. App. 7a-8a. This means, for example, that if 10,000 of respondent’s subscribers “are watching or recording the Super Bowl, [respondent] has 10,000 antennas tuned to the channel broadcasting” the game, and 10,000 copies of the broadcast are created in the users’ individual directories on respondent’s hard drives. *Id.* at 8a n.7.

3. Petitioners produce, market, distribute, and broadcast television programming, including programs in which they own the relevant copyrights. Pet.

² “Streaming” is a method of transmitting audio or video content over the Internet that allows the recipient to listen or watch while the transmission is in progress. See *United States v. American Soc’y of Composers, Authors, & Publishers*, 627 F.3d 64, 74 (2d Cir. 2010), cert. denied, 132 S. Ct. 366 (2011). “Downloading,” in contrast, is the “transmission of an electronic file containing a digital copy” of a work “that is sent from an on-line server to a local hard drive.” *Id.* at 69. Ordinarily, the work contained in the copy cannot be seen or heard during the download process; “[o]nly after the file has been saved on the user’s hard drive” can the user hear or see the work “by playing it using a software program on his local computer” or other device. *Ibid.* Streaming therefore involves a “performance” of an audiovisual work, while downloading (without simultaneous playing of the work) does not. See *id.* at 73-75.

App. 59a. It is undisputed that petitioners' copyrighted works are transmitted to respondent's subscribers over respondent's system, and that respondent does not have a license to perform the copyrighted works publicly. *Id.* at 3a.

In March 2012, petitioners brought this suit for copyright infringement in the United States District Court for the Southern District of New York. Pet. App. 60a. Petitioners sought a preliminary injunction barring respondent from retransmitting their copyrighted television programs while those programs were being broadcast over the air. *Id.* at 60a-61a. Petitioners contended that those contemporaneous retransmissions constituted unauthorized public performances in violation of 17 U.S.C. 106(4).³ The district court declined to enter an injunction, finding that petitioners' claim was foreclosed by the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2008) (*Cablevision*), cert. denied, 557 U.S. 946 (2009). Pet. App. 59a-126a.

4. A divided panel of the court of appeals affirmed. Pet. App. 1a-58a.

a. The court of appeals agreed with the district court that *Cablevision* was controlling. That case involved a cable company that held licenses to transmit copyrighted programs to its subscribers live, but also sought to offer subscribers an unlicensed service

³ Petitioners' complaint also alleged that respondent's non-contemporaneous transmissions violated their public-performance rights, and further argued that respondent's actions violated their exclusive right to reproduce their copyrighted works and constituted contributory infringement. Pet. App. 15a n.9, 60a-61a. Those additional theories are not involved here because petitioners did not rely on them in seeking a preliminary injunction. *Ibid.*

known as a “Remote Storage’ Digital Video Recorder” (RS-DVR). 536 F.3d at 123-124; see Pet. App. 24a. Like a traditional home digital video recorder (DVR), Cablevision’s RS-DVR system allowed subscribers to record television programs for later viewing. *Cablevision*, 536 F.3d at 124. Instead of storing the recorded programs on a device in the subscriber’s home, however, the RS-DVR system allowed subscribers to “record cable programming on central hard drives housed and maintained” by Cablevision, and to “receive playback of those programs through their home television sets” using only a standard cable box. *Ibid.*

The court of appeals in *Cablevision* held that the RS-DVR system’s transmissions did not violate the public-performance right because they were private rather than public performances. 536 F.3d at 139. The court rejected the contention that the Transmit Clause inquiry turns on whether the public is capable of receiving the “same underlying performance” of the work. *Id.* at 136; see *id.* at 135-136. The court instead interpreted the Transmit Clause to require an examination of “the potential audience of *a given transmission* by an alleged infringer to determine whether *that transmission* is ‘to the public.’” *Id.* at 137 (emphasis added). Because “each RS-DVR playback transmission [was] made to a single subscriber using a single unique copy produced by that subscriber,” the court concluded that Cablevision’s transmissions were not made “to the public.” *Id.* at 139.

In the present case, the court of appeals interpreted *Cablevision* as establishing several “guideposts that determine[d] the outcome” of petitioners’ suit. Pet. App. 22a. First, “the Transmit Clause directs courts to consider the potential audience of the indi-

vidual transmission.” *Ibid.* “If that transmission is ‘capable of being received by the public’ the transmission is a public performance; if the potential audience of the transmission is only one subscriber, the transmission is not a public performance.” *Ibid.* Second, and relatedly, “private transmissions * * * should not be aggregated,” and it is therefore “irrelevant to the Transmit Clause analysis whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions.” *Ibid.* Finally, “there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work”; such transmissions “*should* be aggregated,” and if they “enable the public to view that copy, the transmissions are public performances.” *Ibid.*⁴

Applying this interpretation of the Transmit Clause, the court of appeals agreed with the district court that respondent’s system is materially indistinguishable from the RS-DVR system found to be non-infringing in *Cablevision*. The court explained that, when a subscriber chooses to watch a program, respondent’s system “creates a unique copy of that program on a portion of a hard drive assigned only to that [subscriber].” Pet. App. 23a. The court further explained that “the transmission sent by [respondent] and received by that user is generated from that unique copy.” *Ibid.* The court rejected petitioners’ attempts to distinguish *Cablevision* on other grounds, finding that these two features rendered respondent’s

⁴ The court of appeals also interpreted *Cablevision* to hold that “‘any factor that limits the *potential* audience of a transmission is relevant’ to the Transmit Clause analysis.” Pet. App. 22a (quoting *Cablevision*, 536 F.3d at 137).

system noninfringing under *Cablevision*'s interpretation of the Transmit Clause because "just as in *Cablevision*, the potential audience of each [of respondent's transmissions] is the single user who requested that a program be recorded." *Ibid.*; see *id.* at 23a-33a.

b. Judge Chin dissented. Pet. App. 39a-58a. Judge Chin would have held that, because respondent is engaged in the business of "transmitting television signals to paying strangers, all of its transmissions are to the public, even if intervening devices or processes limit the potential audience of each separate transmission to a single member of the public." *Id.* at 44a-45a (brackets, internal quotation marks, and citation omitted). Judge Chin distinguished *Cablevision* on the ground that the subscribers in that case "already had the ability to view television programs in real-time through their *authorized* cable subscriptions, and the [RS-DVR] service at issue there was a supplemental service that allowed subscribers to store that authorized content for later viewing." *Id.* at 40a-41a. Here, in contrast, "no part of [respondent's] system is authorized." *Id.* at 41a.

5. The court of appeals denied petitioners' requests for rehearing and rehearing en banc. Pet. App. 127a-155a. Judge Chin, joined by Judge Wesley, dissented from the denial of rehearing en banc. *Id.* at 128a-155a. In addition to reiterating the arguments made in his panel dissent, Judge Chin argued that *Cablevision* is inconsistent with the text and purpose of the Transmit Clause and therefore should be overruled. *Id.* at 139a-151a.

SUMMARY OF ARGUMENT

The Copyright Act strikes a balance between the public's interest in access to creative works and au-

thors' right to be compensated for the exploitation of the fruits of their labors. Under the 1976 Act, a company that retransmits copyrighted broadcast television programs must obtain a license, though qualifying retransmission services may avail themselves of the detailed statutory licensing schemes established by Congress. Respondent's unauthorized Internet retransmissions violate these statutory requirements and infringe petitioners' public-performance rights under 17 U.S.C. 106(4). But a decision rejecting respondent's infringing business model and reversing the judgment below need not call into question the legitimacy of innovative technologies that allow consumers to use the Internet to store, hear, and view their own lawfully acquired copies of copyrighted works.

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

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

Respondent both owns and actively controls the individual antennas, centralized servers, and software that operate together to receive broadcast signals and transmit copyrighted content to the public. The functioning of that integrated system depends substantial-

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

B. Respondent transmits performances of copyrighted broadcast programming "to the public." For these purposes, the term "performance" encompasses *both* the allegedly infringing transmissions themselves *and* any underlying performances, such as the network broadcast. Because respondent's system transmits the same underlying performances to numerous subscribers, the system is clearly infringing. In any event, even if respondent were correct that its own transmissions are the only relevant "performances," those transmissions themselves are made "to the public" within the meaning of the Transmit Clause. Although each transmission is ultimately sent only to a single individual, those transmissions are *available* to any member of the public who is willing to pay the monthly fee.

Contrary to the court of appeals' suggestion, treating respondent as an infringer would not call into question the legality of purely private performances, such as an individual's transmission of a lawfully-acquired copyrighted work to himself (*e.g.*, to facilitate viewing at a different location). And any doubt

about the statute’s proper application to respondent’s system is resolved by the context and purposes of the 1976 Act, which created a nuanced scheme to govern the retransmission of over-the-air broadcasts of copyrighted television programs to the public, including detailed exceptions and a reticulated statutory licensing scheme. There is no reason to think Congress would have intended to allow respondent to escape these regulations merely because of the technical details of its retransmission system.

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

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

ARGUMENT

“[T]he administration of copyright law is an exercise in managing the tradeoff” between “supporting creative pursuits through copyright protection and

promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005). This case implicates these two competing values. On the one hand, the transmission of a performance of a copyrighted audiovisual work to the public is copyright infringement, regardless of the technical details of the “device or process” by which it is carried out. 17 U.S.C. 101. On the other hand, members of the public may legitimately acquire and use physical equipment (*e.g.*, an improved television antenna) that enhances their ability to receive broadcast programming, and may privately perform their own lawfully acquired copies of copyrighted works.

Each of these principles is valid so far as it goes, and the parties invoke one or the other of them in support of their competing characterizations of respondent’s activity. Petitioners contend that respondent, like the cable companies whose activities Congress sought to regulate in the 1976 Copyright Act amendments, retransmits broadcast television signals to the public. Respondent, by contrast, describes itself not as a retransmitter, but as a provider of physical equipment through which its subscribers acquire broadcast programming and transmit it to themselves over the Internet.

The proper resolution of this dispute is straightforward. Unlike a purveyor of home antennas, or the lessor of hilltop space on which individual consumers may erect their own antennas (see Resp. Br. 18), respondent does not simply provide access to equipment or other property that facilitates customers’ reception of broadcast signals. Rather, respondent operates an

integrated *system*—*i.e.*, a “device or process”—whose functioning depends on its customers’ shared use of common facilities. The fact that as part of that system respondent uses unique copies and many individual transmissions does not alter the conclusion that it is retransmitting broadcast content “to the public.” Like its competitors, respondent therefore must obtain licenses to perform the copyrighted content on which its business relies. That conclusion, however, should not call into question the legitimacy of businesses that use the Internet to provide new ways for consumers to store, hear, and view their own lawfully acquired copies of copyrighted works.

I. RESPONDENT PERFORMS COPYRIGHTED WORKS PUBLICLY IN VIOLATION OF 17 U.S.C. 106(4)

Respondent does not dispute that the transmissions of broadcast programming from its central facility to subscribers constitute performances within the meaning of the Copyright Act. Instead, respondent denies that *it* transmits the copyrighted material. On respondent’s view, it simply provides subscribers with access to physical equipment, which the subscribers use to capture broadcast signals and to transmit the copyrighted content to themselves.

Although the court of appeals ruled in respondent’s favor, it did not decide the case on that theory. To the contrary, the court decided the case on the assumption that “[respondent] transmits to its subscribers broadcast television programs over the internet for a monthly subscription fee.” Pet. App. 3a.⁵ The court

⁵ Like the court of appeals, the district court did not address respondent’s argument that “it is ‘the consumer, not [respondent], who makes the transmissions’” at issue here. Pet. App. 107a.

nevertheless held that respondent did not infringe petitioners' public-performance rights because the court viewed each of respondent's transmissions as a separate private performance.

Both of those rationales lack merit. Like the cable television systems at issue in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), respondent captures broadcast television signals and transmits programming to subscribers for a fee. And, under the expansive definition of "perform * * * 'publicly'" that Congress enacted in response to those decisions, 17 U.S.C. 101, respondent's transmissions are public performances that cannot lawfully be made without licenses from the copyright holders.

A. Respondent "Performs" Copyrighted Works

Under the Copyright Act, "[t]o perform or display a work 'publicly' means," *inter alia*:

[T]o transmit or otherwise communicate a performance or display 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.

17 U.S.C. 101. The Act further provides that to "transmit" a performance" of an audiovisual work is "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Ibid.* Respondent offers a subscription service that uses centralized equipment to provide subscribers with retransmissions of broadcast television programming. Like the cable companies

that the 1976 Congress sought to bring within the Copyright Act's purview, respondent is legally responsible for transmitting the copyrighted works its servers send to subscribers.

1. Respondent emphasizes that individual subscribers control when its antennas are active, select the specific channels the antennas receive, and dictate when the system transmits performances of television programs to subscribers. Resp. Br. 17-18. Respondent contends on that basis that it is the individual subscriber, rather than respondent, "who employs [respondent's] system to transmit broadcast programming to herself." *Id.* at 17; see *id.* at 14 ("A unique copy of a performance of a work, created at the direction of the user, is transmitted only by and to that user."). Respondent argues that this "volitional-conduct test appropriately reflects the actual operation of [respondent's] system, which makes equipment located on [respondent's] premises available for customers' use." *Id.* at 18.

The identity of the person who directs that a performance occur may sometimes be *relevant* in deciding who has performed copyrighted material. The fact that a particular transmission or other performance was prompted by a customer request, however, is not by itself dispositive.

For example, video-on-demand services allow cable subscribers to request individualized transmissions of content, such as movies or television shows, stored on computers at the cable company's facility. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008), cert. denied, 557 U.S. 946 (2009). Streaming services such as Netflix, Hulu, and Amazon also make television programs and movies

available on demand over the Internet. Pet. App. 55a n.5. All of these services involve the transmission of content only on the command of the individual user, who chooses which content to play and when to begin playing it. It is nevertheless these businesses, rather than their customers, that “transmit” and thereby “perform” the relevant copyrighted works. See *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011) (concluding that “the fact that [a streaming service’s] customers initiate the transmission by turning on their computers and choosing [the content] they wish to view is immaterial” to the infringement analysis).⁶ Accordingly, the mere fact that respondent’s system responds automatically to user commands cannot exempt respondent from direct liability for transmitting copyrighted works.

2. On the other hand, ownership of the physical equipment by which a performance is accomplished does not always determine who performs a copyrighted work. When an individual plays his own CD of copyrighted music on the sound system of a rented car, that individual, rather than the rental company, performs the copyrighted songs. By the same token, “the owner of a traditional copying machine whose customers pay a fixed amount per copy and operate the machine themselves” is not directly liable for infringing the reproduction right when a customer duplicates a copyrighted work. *CoStar Grp., Inc. v.*

⁶ Similarly, if a movie theater’s policy is to show a film only when a customer is present, and a single patron purchases a ticket, the film patron does not thereby “perform” the film. Rather, the theater performs the film by showing the images of the film and making its sounds audible. See 17 U.S.C. 101 (defining “perform”).

LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004). Respondent’s ownership of the antennas and other physical equipment located at its central facility therefore does not, by itself, compel the conclusion that respondent (rather than its customers) transmits, and thereby performs, the copyrighted works.

3. Respondent, however, not only owns, but actively controls, the system of antennas, centralized servers, and software that receives broadcast signals and transmits content to the user. The district court found that respondent’s “antennas function independently,” in the sense that “each antenna separately *receives* the incoming broadcast signal, rather than functioning collectively with the other antennas or with the assistance of the shared metal substructure.” Pet. App. 73a (emphasis added); see Resp. Br. 22. But while each antenna functions independently in *receiving* broadcast signals, respondent’s centralized server and other shared equipment are integral to the process by which content is *transmitted* to the subscriber. See Pet. App. 66a-67a. Moreover, the existence of separate antennas serves no apparent operational purposes, and instead was adopted after *Cablevision*, in aid of respondent’s efforts to render each separate transmission a private performance. See *id.* at 32a-33a.

Respondent thus operates an integrated system, substantially dependent on physical equipment that is used in common by respondent’s subscribers, through which any “paying stranger[.]” (*id.* at 44a (Chin, J., dissenting)) may access respondent’s antenna farms and receive a transmission of copyrighted television programs. Respondent therefore “transmits” perfor-

mances of copyrighted works in a way that mere equipment suppliers clearly do not.

Even if respondent's antennas were viewed in isolation from the other centralized equipment used in the transmitting process, any analogy to purveyors of home antennas would be inapt. It is true that, at any moment in time, each subscriber who is logged into the system is assigned a discrete antenna. That unique assignment occurs, however, only after the subscriber has logged in and has requested a transmission of a particular copyrighted work. See Pet. App. 3a, 6a. And when that subscriber is no longer connected to respondent's system (or discontinues her subscription), respondent's computerized server may reassign the same antenna to a different subscriber—that is, a different paying stranger. *Id.* at 8a n.7; *id.* at 44a (Chin, J., dissenting). The monthly fee that respondent's subscribers pay thus purchases a right of access to a shared pool of antennas and the content they make available, not (as in respondent's hilltop hypothetical, see Resp. Br. 18) to a discrete antenna dedicated solely to a single subscriber's use.

4. Respondent also observes that, from the viewer's perspective, respondent's service provides subscribers substantially the same functionality that consumers could obtain, without incurring liability for copyright infringement, by purchasing various pieces of equipment for their homes. See Resp. Br. 21-22. That functional resemblance, however, cannot control the determination whether respondent is transmitting copyrighted content. Indeed, Congress adopted the broad definitions of "perform" and "transmit" in the 1976 Act to overturn the results of this Court's deci-

sions applying the same logic on which respondent now relies.

In *Fortnightly*, the Court noted that cable systems “receive[d] programs that ha[d] been released to the public” by broadcast and merely “enhance[d] the viewer’s capacity to receive the broadcaster’s signals” by providing “a well-located antenna with an efficient connection to the viewer’s television set.” 392 U.S. at 399-400. In *Teleprompter*, the Court reasoned that “[w]hen a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program.” 415 U.S. at 408. The Court concluded that “[t]he 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.” *Ibid.*

The 1976 Act overturned those decisions, making clear that a company can “perform” copyrighted works within the meaning of the Copyright Act even when it simply retransmits broadcast signals to consumers who could have acquired them for free over the airwaves. See *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012), appeal pending, No. 13-55226 (9th Cir. docketed Feb. 7, 2013) (*BarryDriller*) (explaining that Congress “rejected” the “mode of reasoning” used in *Fortnightly* and *Teleprompter*, which was based on the “equivalency between (1) what individuals could lawfully do for themselves and (2) what a commercial provider doing the same thing for a number of individuals could lawfully do”). Like cable, satellite, and Internet streaming services that retransmit local broadcast signals to consumers using

other means, respondent therefore is “performing” the broadcast programs within the meaning of the Copyright Act.

B. Respondent Transmits Performances Of Copyrighted Broadcast Programming “To The Public”

1. Under the Transmit Clause, a company “perform[s] or display[s]” a work “publicly” if it

transmit[s] or otherwise communicate[s] a performance or display 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.

17 U.S.C. 101. Under that definition, the term “performance” encompasses *both* the transmission or communication to the eventual viewer or listener *and* any underlying performance that is transmitted or communicated. Other Copyright Act provisions confirm this interpretation. For example, 17 U.S.C. 111, which regulates the retransmission of broadcast signals, repeatedly refers to “[t]he secondary transmission of a performance or display of a work embodied in a primary transmission.” 17 U.S.C. 111(a) (emphasis added); see 17 U.S.C. 111(b) and (c).

The legislative history is to the same effect:

[A] singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance * * * ; a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing

whenever he or she * * * communicates the performance by turning on a receiving set.

1976 House Report 63. Thus, when a cable company retransmits a local broadcast signal under the circumstances described in the above-quoted passage, the statutory term “performance” encompasses the cable company’s own retransmission, as well as the underlying performances embodied in the local broadcast and the singer’s original rendition.

As several courts outside the Second Circuit have concluded, respondent and providers of similar services are plainly engaged in public performances within the meaning of Section 101. See *Community Television of Utah, LLC v. Aereo, Inc.*, No. 2:13-cv-910, 2014 WL 642828, at *7-*8 (D. Utah Feb. 19, 2014), appeal pending, No. 14-4020 (10th Cir. docketed Feb. 20, 2014); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 WL 4763414, at *13 (D.D.C. Sept. 5, 2013), appeal pending, Nos. 13-7145 and 13-7146 (D.C. Cir. docketed Sept. 17, 2013); *BarryDriller*, 915 F. Supp. 2d at 1146. The over-the-air broadcasts of petitioners’ copyrighted programs by local television stations unquestionably constitute “performance[s]” of those copyrighted works. Respondent “transmit[s] or otherwise communicate[s]” those performances to its paying subscribers by means of a “device or process.” The transmission of a performance to respondent’s paying subscribers qualifies as a transmission of that performance “to the public” within the meaning of the Copyright Act. See 1976 House Report 64-65 (explaining that the Transmit Clause encompasses transmissions to “a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television ser-

vice”). And, under the plain terms of Section 101, the fact that respondent’s subscribers receive the performance “in separate places” and “at different times” does not alter the public character of respondent’s performances.

The broad statutory definition of “transmit” further confirms this conclusion. “To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. 101. And a “device” or “process” is defined to include “one now known or later developed.” *Ibid.* These definitions are “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.” 1976 House Report 64. Congress may not have envisioned the details of respondent’s system of miniature antennas, large hard drives, and Internet streaming when it enacted the statute in 1976. The Copyright Act’s broad, technology-neutral definitions make clear, however, that respondent’s system of individualized digital transmissions constitutes a “device or process” for communicating the performances embodied in television broadcasts to the public. As Judge Chin explained, one “can ‘transmit’” within the meaning of the statute “by sending one transmission or multiple transmissions.” Pet. App. 147a-148a.

2. The court of appeals reached a contrary result based on *Cablevision*’s holding that the only “performance” referenced in the Transmit Clause is the one created by an act of transmission itself. “*Cablevision* * * * decided that ‘capable of receiving the performance’ refers not to the performance of the under-

lying work being transmitted but rather to the transmission itself, since the “transmission of a performance is itself a performance.” Pet. App. 18a (quoting *Cablevision*, 536 F.3d at 134). On this understanding, the court below held that respondent’s transmissions are private performances because “the potential audience of each [of respondent’s] transmission[s] is the single user who requested that a program be recorded,” even though the collective result of respondent’s individual transmissions is to communicate the same underlying performance of a program to a large number of subscribers. *Id.* at 23a.

As explained above, the Transmit Clause does make clear that the “transmission of a performance is itself a performance.” In some circumstances, moreover, the initial “performance” may be the act of transmission itself. For example, when a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work. See *National Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846-847 (2d Cir. 1997).

It does not follow, however, that the *only* relevant “performance” for these purposes is the particular transmission or set of transmissions that is alleged to be infringing. Transmissions or retransmissions of copyrighted content frequently contain one or more underlying performances. See 1976 House Report 63 (explaining that “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”); cf. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) (explaining that “nothing in the Act * * * prevents a sin-

gle rendition of a copyrighted selection from resulting in more than one public performance”). That is unquestionably true of respondent’s transmissions, each of which contains the prior performance by the local broadcaster (and typically antecedent performances as well). By transmitting *those* performances to the public, respondent performs the copyrighted works publicly, even though each of respondent’s transmissions goes to a single subscriber.

The court of appeals’ interpretation disregards the underlying performances and instead treats the performance created by the act of transmission as the *only* “performance” encompassed by the Transmit Clause. The relevant definitional provision specifies, however, that a company performs a copyrighted work publicly whenever it “transmit[s] or otherwise communicate[s] a performance or display of the work” to the public. 17 U.S.C. 101 (emphasis added). That language applies by its terms when *either* the allegedly infringing transmission itself *or* some underlying performance is transmitted to the public. The court of appeals’ approach would also render superfluous Congress’s directive that the public-performance right may be infringed “whether the members of the public capable of receiving the performance or display receive it * * * at the same time or at different times.” *Ibid.* The court identified no scenario in which a particular transmission could be received “at different times.”

3. The court of appeals expressed concern that a more natural reading of the text would “make a seemingly private transmission public by virtue of actions taken by third parties.” Pet. App. 19a. The court suggested that, “if a person records a program and

then transmits that recording to a television in another room, he would be publicly performing the work because some other party, namely the original broadcaster, had once transmitted the same performance to the public.” *Ibid.* Respondent echoes the same objection. Resp. Br. 13-14. But this concern rests on a misunderstanding of the statute. Although the Transmit Clause encompasses the transmission or communication of an underlying performance, it imposes liability only on parties who “transmit or otherwise communicate” that performance “to the public.” 17 U.S.C. 101; see 17 U.S.C. 106(4). A party who transmits a performance of a copyrighted work only to himself does not infringe the copyright because he does not transmit the performance “to the public,” even though others may do so.

4. Even if respondent’s own transmissions were the only “performances” relevant to the infringement analysis, those transmissions would still be “to the public” within the meaning of the Transmit Clause. The court below reached a contrary conclusion because each of respondent’s transmissions goes to a single subscriber. Under the Transmit Clause, however, the relevant “public” is the audience “*capable of receiving* the performance.” 17 U.S.C. 101 (emphasis added). The essence of respondent’s business model is its promise to transmit broadcast programming to any member of the public who is willing to pay a monthly fee—in the words of the dissent below, to any “paying stranger[],” Pet. App. 44a. Each of respondent’s transmissions is therefore “to the public” in the relevant sense, even though each ultimately goes only to a single subscriber.

5. If there were any doubt about the proper application of the statutory text to respondent's system, it should be resolved by the context and manifest purpose of the relevant provisions of the 1976 Act. Congress concluded that "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material," and that "copyright royalties should be paid by cable operators to the creators of such programs." 1976 House Report 89. If respondent used a single master antenna to transmit television programming to thousands of subscribers, it clearly would function as a retransmission system subject to liability under the Copyright Act. Respondent seeks to accomplish the same result by maintaining thousands of individual antennas instead of one. But even if the statutory language could bear a construction under which that technical detail exempted respondent from the Act's coverage, that surely is not the natural reading—and respondent identifies no reason why Congress would have wanted to countenance such a loophole. To the contrary, that result would afford talismanic significance to precisely the sort of technological minutiae that Congress intended to treat as irrelevant in crafting the 1976 Act.

The nuanced scheme that Congress has created to govern the retransmission of copyrighted works in Sections 110 and 111 of the Copyright Act—including detailed exceptions and a reticulated statutory licensing scheme with a carefully calibrated system of royalties—further belies any contention that Congress would have regarded respondent's commercial performances as outside the Copyright Act's purview. Congress made clear that transmitting "a perfor-

mance or display of a work” to “subscribing members of the public who pay for such service” infringes the public-performance right, except in narrow and specifically identified circumstances. 17 U.S.C. 111(a) and (f)(3). Congress expressly contemplated that even the smallest retransmission services would pay royalties to copyright owners. See 17 U.S.C. App. 111(d)(2)(C) (1976) (establishing a minimum royalty fee for small cable systems); 17 U.S.C. 111(d)(1)(E) (2012) (same). The Section 111 statutory license ensures that copyright owners will generally be compensated for the public performance of their works by entities of every size that retransmit copyrighted materials to paying subscribers, while ensuring that transaction costs (or the inability of cable operators and copyright owners to agree on an appropriate royalty) do not inhibit the spread of new and useful mechanisms for broadcast television programming to be retransmitted to the public.⁷

⁷ This case does not present the question whether respondent is eligible for a Section 111 statutory license. The Copyright Office has previously expressed doubt that a different Internet retransmission service would qualify for the statutory license. See Register of Copyrights, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 193-194 (June 2008), <http://www.copyright.gov/reports/section109-final-report.pdf>. The Second Circuit reached the same conclusion, though it found the relevant statutory text “ambiguous.” *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2012), cert. denied, 133 S. Ct. 1585 (2013). Whether respondent would ultimately qualify for a Section 111 license depends not only on the resolution of unsettled questions about the proper interpretation of that provision, but also on the manner and extent, if at all, to which respondent’s business is subject to regulation by the Federal Communications Commission. See, e.g., 17 U.S.C. 111(e)(1) (statutory license applies “where the carriage of the signals comprising the secondary transmission is permissible

II. REVERSAL OF THE JUDGMENT BELOW NEED NOT THREATEN CLOUD COMPUTING

As the court of appeals observed, advances in communications technology have led many users to shift from local to network-based methods for storing and viewing copyrighted audio and video content. Pet. App. 35a-36a n.19. The RS-DVR system at issue in *Cablevision* is one example of such a technology. Cloud-based media storage services are another.⁸ These technologies, and others that may be developed in the future, may offer substantial benefits to businesses and consumers.

Contrary to respondent's suggestion (Resp. Br. 21-22), reversal of the decision below need not call into doubt the general legality of cloud technologies and services. One function of such services is to offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired. Respondent's service performs a wholly different function. That service provides a means by which consumers can gain access to copyrighted content *in the first instance*—the same service that cable companies have traditionally provided. There is consequently no sound reason to suppose that

under the rules, regulations, or authorizations of the Federal Communications Commission"); 17 U.S.C. 111(d).

⁸ Cloud-based media storage services are one type of cloud computing, which is "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computer resources (e.g., networks, servers, storage, applications, and services)." Peter Mell & Timothy Grance, National Inst. of Standards & Tech., U.S. Dep't of Commerce, *Special Pub. No. 800-145, The NIST Definition of Cloud Computing 2* (2011), <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

a decision holding respondent liable for copyright infringement will threaten the use of different technologies that assist consumers in hearing or viewing their own lawfully-owned copies.

Unlike respondent's system, cloud storage services typically permit individual consumers to use the Internet to receive private performances of copyrighted works *after* the consumers have lawfully acquired their own copies. This may occur, for example, when a consumer purchases a digital copy of a movie, uploads it to a so-called "virtual locker" service on the Internet, and streams a performance of the movie back to herself in a convenient way (for example, on a mobile device). The commercial entity that produces and sells the digital copy must obtain a license from the copyright holder, since those acts implicate the exclusive rights to reproduce and to distribute copyrighted works. See 17 U.S.C. 106(1) and (3). The consumer's subsequent streaming of copyrighted content to herself, however, is analogous to the private playback of a lawfully acquired CD or DVD, for which no separate license is required.

The precise Copyright Act analysis of such services will depend on the particular details of the service in question. Ordinarily, however, a consumer's streaming of her own lawfully acquired copy to herself would effect a private performance outside the scope of the Transmit Clause. Transmissions for personal use may also be shielded by fair-use principles. See 17 U.S.C. 107.

Reversal of the decision below also need not disturb the RS-DVR service upheld in *Cablevision*. The Second Circuit's *reasoning* in *Cablevision*, which treated the performance created by the act of trans-

mission as the only relevant performance for purposes of the infringement analysis, reflected an erroneous interpretation of the Transmit Clause. See pp. 23-28, *supra*. It does not follow, however, that the court in *Cablevision* reached the wrong *result*. Cf. Pet. Br. 37-38 n.5.

In *Cablevision*, the cable company already possessed the necessary licenses to transmit copyrighted television programs to its subscribers. The RS-DVR system simply allowed subscribers to engage in “time shifting” by recording, for later viewing, programs they received through their authorized cable subscriptions. Pet. App. 40a-41a (Chin, J., dissenting); see *Cablevision*, 536 F.3d at 123-124. The court in *Cablevision* reasonably concluded that the copies so created were made by the subscribers rather than by the cable company itself. See 536 F.3d at 130-133.

In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447-456 (1984), this Court recognized a fair-use right to engage in time shifting when the consumer copies programs that she is already authorized and able to view in real time, and when the relevant copy is created locally on an analog videocassette recorder in the consumer’s home. There is no evident reason to reach a different result under fair-use principles merely because the relevant personal copy is created and stored remotely in digital form, as it was in *Cablevision*. And if the stored copy has been lawfully made by the consumer herself, the subsequent playback of that copy to the consumer through the RS-DVR system may reasonably be understood as a private performance.

Respondent’s system, however, presents very different issues. As Judge Chin observed, “*Cablevision*’s

RS-DVR system ‘exist[ed] only to produce a copy’ of material that it already had a license to retransmit to its subscribers.” Pet. App. 51a (brackets in original) (quoting *Cablevision*, 536 F.3d at 131). In contrast, respondent transmits to its subscribers copyrighted content for which no such license exists. In light of these distinctions, the Court can and should decide this case narrowly by holding that respondent’s retransmission service falls squarely within the scope of the public-performance right defined by the 1976 Act. Questions involving cloud computing, RS-DVRs, and other novel issues not before the Court, as to which “Congress has not plainly marked [the] course,” *Sony*, 464 U.S. at 431, should await a case in which they are squarely presented.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General and the Principal Deputy Solicitor General are recused in this case.