Aereo and the Public Performance Right

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Executive Summary

In its 2008 *Cablevision* decision, the U.S. Court of Appeals for the Second Circuit held that Cablevision's Remote-Storage Digital Video Recorder ("RS-DVR") does not infringe copyright owners' public performance rights. The RS-DVR allows subscribers to record television programs for later viewing, just like a VCR or set-top DVR, but it stores the recordings remotely at Cablevision's head end. The RS-DVR does not publicly perform any works, the court reasoned, because the only person who can play back a recording is the one person who made it. That principle – that a technology provider does not engage in a public performance merely because subscribers can store and play back their own separate copies of the same works – has become a cornerstone of the cloud computing industry.

In its more recent *Aereo* decision, the Second Circuit substantially expanded on *Cablevision*. Like a cable system or satellite operator, Aereo captures broadcast television and retransmits it to subscribers over the Internet. Unlike cable and satellite companies, however, Aereo pays no licensing fees to retransmit the programming. Relying on a broad reading of *Cablevision*, the court of appeals held that Aereo was not publicly performing the programs because its system used thousands of mini-antennas rather than one communal antenna to capture the programming, and because it inserted an individual hard-drive copy into each subscriber's transmission stream.

Aereo thwarts Congress's intent in the 1976 Copyright Act. In seeking to overturn the decision, however, the broadcasters advance a radical new interpretation of the statute with far-reaching implications. They claim that a public performance occurs whenever a service provider enables consumers to transmit the same *prior* performance of a work, such as the same prior broadcast of a television show or the same prior rendition of a musical work, even if each consumer is independently transmitting a separate performance from his own separately acquired recording available to him alone. That interpretation threatens cloud technologies. It lacks any grounding in the Copyright Act. And there are narrower and more sensible grounds on which to prohibit services like Aereo's. Aereo provides a television retransmission service not meaningfully different from the cable systems Congress targeted in the 1976 Act. Cablevision's RS-DVR, by contrast, is simply a remote-storage version of a traditional VCR or DVR. Nothing in the Second Circuit's decision upholding the RS-DVR required the court to uphold Aereo's very different system as well.

The broadcasters' interpretation threatens accepted technologies.

The broadcasters' expansive interpretation of the public performance right casts doubt on numerous accepted technologies, particularly in the cloud computing sector. Under the broadcasters' theory, for example, if two consumers both independently purchase the same recording from Amazon's MP3 Store, upload the song to their own personal storage space on Amazon's Cloud Player, and then listen to the song by streaming it back to themselves, Amazon would be engaging in a public performance. Even though each consumer could play back only his own separate music collection, the performances would

be "public" under the broadcasters' interpretation because multiple consumers would be playing back the same *prior* performance of the song (*i.e.*, the same prior rendition of the musical composition as recorded in the MP3 files). That interpretation threatens a whole host of innovative cloud-based services offered by companies such as Google, Amazon, and Apple – services that are already widely embraced by consumers and represent a key driver of economic growth in the technology industry.

The broadcasters' theory would also upend the settled distinction between downloading and streaming. Under the prevailing industry understanding, when an online retailer makes a music or video file available for downloading (rather than streaming the content for contemporaneous viewing or listening), the retailer does not engage in a public performance. The retailer may need a reproduction or distribution license, but it does not need a separate public performance license. Under the broadcasters' theory, however, the retailer *would* be engaging in a public performance: It would be transmitting a *prior* performance of the work to the public. That result threatens massive liability for online retailers and other businesses that transmit electronic content.

The broadcasters' interpretation is wrong.

Nothing in the Copyright Act's text or legislative history supports the broadcasters' sweeping interpretation. Under the Transmit Clause, a service provider engages in a public performance if it "transmit[s] . . . a performance . . . of the work . . . to the public, . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." Thus, when a video-on-demand provider selects a particular library of content and offers to transmit that content to anyone willing to pay, the performances are transmitted "to the public" even though subscribers receive them "at different times." Viewed from the moment when the provider offers to transmit the content, *any subscriber* is capable of receiving the next transmission. By contrast, with cloud-based technologies like Cablevision's RS-DVR, the transmissions from discrete recordings made by each subscriber are available only to the particular subscriber who made the recording.

The broadcasters accuse *Cablevision* of wrongly focusing on the potential audience of a particular *transmission* while the statute speaks of "members of the public capable of receiving the *performance*." But the statute expressly defines a *transmission* of a performance to be one type of *performance*. And it is *that* performance – the new showing created by the act of transmission – to which Congress referred in the phrase "transmit . . . a *performance* . . . of the work . . . to the public" (not some *prior* performance, as the broadcasters contend). Under the statute, therefore, the potential audience for the relevant performance and the potential audience for the transmission are one and the same. That is the only interpretation that makes sense of the legislative history, which repeatedly refers to the potential audience of a *transmission*. That is the only interpretation that accounts for situations where there *is no* prior performance. And that is the only interpretation that properly distinguishes between downloading and streaming.

Pointing to a handful of commentators, the broadcasters assert that *Cablevision* lacks academic support. But multiple leading treatises agree with *Cablevision* that the potential audience of the *transmission* is what matters. And when the Supreme Court was considering whether to review the decision, more than 25 law professors weighed in to urge that the Second Circuit's analysis was correct.

The broadcasters' interpretation is not necessary to stop Aereo.

The broadcasters' theory is also wholly unnecessary to achieve the result they purport to seek: stopping unlicensed television retransmission services like Aereo's. One of Congress's principal goals in enacting the 1976 Copyright Act was to bring television retransmission services – and specifically cable systems – within the scope of the public performance right. Aereo's system performs the same basic function as a cable system: It captures over-the-air broadcast content and offers to retransmit that content to anyone willing to pay. Thousands of mini-antennas and hard-drive copies do not change the essential nature of the service Aereo is offering. That service bears no resemblance to cloud technologies like Cablevision's RS-DVR, which is simply a remote-storage version of widely accepted recording-and-playback technologies like VCRs and DVRs.

The Second Circuit reasoned that Aereo's performances were private because each transmission *from an intermediate hard-drive copy* was available only to the particular subscriber associated with that copy. But nothing in *Cablevision* required that myopic focus on the last leg of Aereo's transmissions. Aereo captures over-the-air broadcasts and retransmits that content to anyone willing to pay; the mini-antennas and hard-drive copies are mere intermediate steps in an overall transmission "to the public."

Cablevision, by contrast, offers the RS-DVR as a recording-and-playback service distinct from its underlying delivery of cable programming. Cablevision relies on a private performance argument to justify only that separate recording-and-playback service, not its underlying delivery of cable content (for which it already has a license). In that context, it makes sense to focus more narrowly on the potential audience for transmissions from particular RS-DVR recordings.

Finally, the broadcasters' expansive public performance argument also ignores an important antecedent question: whether Aereo's hard-drive copies are even lawful in the first place. They are not. Subscribers have no fair use right to make copies merely so they can receive programming over an unlicensed television delivery service. A court should hold Aereo's system unlawful on that basis without even reaching the public performance issue.

Existing law thus already provides ample grounds for enjoining Aereo without expansive new interpretations of the Copyright Act. *Aereo* was wrong, but *Cablevision* was correct, and the broadcasters' desire to hit a legal home run should not obscure the obvious differences between the two cases.

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I. Background

The Public Performance Right

The Copyright Act grants owners various exclusive rights, including the right to "reproduce the copyrighted work in copies" and to "prepare derivative works."[1] One such right is the right "to perform the copyrighted work publicly."[2] Although the Act has long granted that public performance right in some form, its scope has evolved over the years.

Before the 1976 Copyright Act, it was unclear whether the public performance right applied to cable systems. Cable system operators would erect community antennas to capture broadcast signals and retransmit them over cable lines to subscribers in areas where over-the-air reception was impaired by long distances or hilly terrain. In two cases – *Fortnightly Corp. v. United Artists Television, Inc.*[3] and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[4] – the Supreme Court ruled that such cable systems were not "performing" the programs they retransmitted. Since an individual consumer would not be performing by placing an antenna on his own rooftop to improve reception, the Court reasoned, a cable television operator should not be deemed to publicly perform by providing essentially that same service on a larger, commercial scale.

Congress responded in the 1976 Copyright Act. It recognized that, under *Fortnightly* and *Teleprompter*, "the cable television industry has not been paying copyright royalties for its retransmission of over-the-air broadcast signals."[5] Congress "believe[d] 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."[6] Congress thus amended the public performance definition to clarify its applicability to cable systems while enacting a statutory licensing scheme for cable retransmissions.[7]

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[1] 17 U.S.C. § 106(1)-(2).

[2] 17 U.S.C. § 106(4).

[3] 392 U.S. 390 (1968).

[4] 415 U.S. 394 (1974).

[5] H.R. Rep. No. 94-1476, at 89 (1976).

[6] *Id.*

[7] 17 U.S.C. §§ 101, 111. Although the 1976 Act's revisions are often described as a reaction to *Fortnightly* and *Teleprompter*, Congress had perceived the need to address the issue even before the Supreme Court decided those cases. As early as 1964, draft bills included language tracking the broader contours of what would eventually become the amended public performance right. *See, e.g.*, S. 3008, 88th Cong. § 5(b) (1964).

Congress accomplished that change through several revisions. First, it enacted a definition of "perform" that included a special definition for "audiovisual works" such as television programs:

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, *to show its images in any sequence* or to make the sounds accompanying it audible.[8]

In other words, to "perform" a television program is to "show" it – a performance is a *showing* of the program. Congress then further defined what it meant to perform a work "publicly":

> To perform or display a work "publicly" means –
>
> > (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
> >
> > (2) *to transmit or otherwise communicate a performance or display of the work* to a place specified by clause (1) or *to the public*, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[9]

The first clause covers performances *in* public places, while the second – the "Transmit Clause" – covers transmissions of performances either (i) *to* public places or (ii) "to the public." A person thus infringes the public performance right when, absent consent or exemption, he "transmit[s] . . . a performance . . . of the work . . . *to the public*."

Finally, Congress adopted a statutory licensing scheme for cable systems. Under Section 111, "secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station" are

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[8] 17 U.S.C. § 101 (emphasis added). Under the Act, "'[a]udiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." *Id.* And "'[m]otion pictures' are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." *Id.*

[9] 17 U.S.C. § 101 (emphasis added). Further, "[t]o '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." *Id.*

subject to statutory licensing upon payment of any applicable fees and compliance with other requirements.[10] (Since 1992, broadcasters themselves have also had the right to demand fees from cable companies under the "retransmission consent" provision of the Communications Act.[11])

Congress thus brought cable systems within the public performance right by making clear that one way to publicly perform a work is to transmit a performance – a "showing" – to the public. As the legislative history explains:

> Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, 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. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); 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 plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101.[12]

Individualized Transmission Systems

The Transmit Clause did more than bring cable systems within the public performance right. It also addressed individualized transmission systems. Traditional cable systems, like radio or television broadcasts, transmit content along a single shared transmission path to the public. When a radio listener, broadcast television viewer, or cable subscriber accesses content, he is tapping into the same common transmission stream sent out to everyone at the same time. As technology developed, however, systems began to use *individualized* transmissions to deliver content at the request of a recipient and at a time of his choosing. For example, many cable companies and other providers now offer "video on demand" services that allow subscribers to watch movies or other content from a provider-selected library at a time of the subscriber's choosing. When a subscriber selects a movie to watch, the system shows it by individualized transmission to that subscriber alone. Similarly,

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[10] 17 U.S.C. § 111(c)-(d). More recently, Congress adopted a similar statutory licensing scheme for satellite retransmission systems like DirecTV and Dish Network. *See* 17 U.S.C. §§ 119, 122.

[11] *See* 47 U.S.C. § 325(b) (prohibiting retransmission of broadcast television signals absent "express authority of the originating station").

[12] H.R. Rep. No. 94-1476, at 63 (1976).

companies like Pandora offer Internet radio or jukebox services. When a subscriber uses the service, the company streams music by individualized transmission to that particular subscriber's computer or mobile device.

The Copyright Act's Transmit Clause addresses such individualized transmission systems by clarifying that a transmission of a performance may be "to the public" "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."[13] The legislative history explains:

> Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[14]

An earlier committee report further adds that "[t]he same principles . . . are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public."[15]

The "separate places/different times" clause clearly assumes that *some* individualized transmission systems render performances "to the public" despite their individualized nature – otherwise the clause would be superfluous. As a matter of simple grammar, however, the clause does *not* say that a transmission of a performance is "to the public" merely because it is received at separate places or different times. The clause states that, *if* a transmission of a performance is otherwise "to the public," it does not cease to be so merely because it is actually received on an individualized basis. The key question remains, therefore, whether the transmission of the performance is "to the public."

In both ordinary and legal usage, something is "public" if it is "[o]pen or available for all to use, share, or enjoy"[16] or "accessible to or shared by all members of the community."[17]

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[13] 17 U.S.C. § 101.

[14] H.R. Rep. No. 94-1476, at 64-65 (1976).

[15] H.R. Rep. No. 90-83, at 29 (1967).

[16] *Black's Law Dictionary* 1348 (9th ed. 2009).

[17] *Webster's Third New International Dictionary* 1836 (2002).

Courts thus determine whether something is "public" based on whether it is offered, held out, or made generally available to a broad range of potential recipients.[18] The word "public" means the same thing in the Transmit Clause. The statute refers to "members of the public *capable of receiving* the performance,"[19] and the legislative history refers to performances "*made available* by transmission" and to "*potential recipients* of the transmission."[20] As one leading treatise explains, therefore, a "public" performance is one that is "'open' to, that is, *available to*, a substantial number of persons."[21]

Courts have generally interpreted the Transmit Clause consistent with those principles. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*,[22] for example, a video rental store offered a service by which it would transmit movies from videotapes in a central player in the store to patrons seated in individual viewing booths elsewhere in the store. The Third Circuit held that that service infringed the public performance right in two respects. First, it ran afoul of the "public place" clause because the video store was "open to the public," regardless of any privacy the viewing booths afforded.[23] Second, the system fell within the Transmit Clause because it transmitted performances "to the public": Even though "members of the public view the performance at different times," the proprietor's library of videotapes was "'*made available* by transmission to the public at large.'"[24]

Another court reached a similar result in *On Command Video Corp. v. Columbia Pictures Industries*.[25] There, a hotel proprietor offered a service by which movies were transmitted to guest rooms upon request from a central bank of video cassette players. As in *Redd Horne*, the court found infringement under the Transmit Clause: "A performance may still be public under the transmit clause 'whether the members of the public . . . receive it in the same place or in separate places and at the same time or at different times,'" and "Congress added this language to the transmit clause to cover precisely the sort of single-viewer system developed by plaintiff."[26]

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[18] *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976) (school open "to the public" because it catered to "'all children in the area who can meet [its] academic and other admission requirements'"); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 & n.8 (1973) (club open "to the public" because there was "'no selective element other than race'"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983) (forum not open "to the public" where it afforded only "selective access," not "indiscriminate use").

[19] 17 U.S.C. § 101 (emphasis added).

[20] H.R. Rep. No. 94-1476, at 64-65 (1976) (emphasis added).

[21] 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][2] (Supp. 2013) (emphasis added).

[22] 749 F.2d 154 (3d Cir. 1984).

[23] *Id.* at 159.

[24] *Id.* (quoting H.R. Rep. No. 94-1476, at 64-65 (1976)) (emphasis added).

[25] 777 F. Supp. 787 (N.D. Cal. 1991).

[26] *Id.* at 790 (quoting 17 U.S.C. § 101).

The systems in *Redd Horne* and *On Command* were precursors to modern video-on-demand services widely offered by cable and satellite providers today, as well as similar services offered over the Internet. Those services transmit performances "to the public" because any member of the public can receive a transmission from the provider's pre-selected library of movies or other content simply by signing up and paying the fee. A clear industry consensus has emerged that such video-on-demand systems transmit performances "to the public," and that the provider must obtain a public performance license from the copyright owner.[27]

Of course, as in *Redd Horne* and *On Command*, each individual video-on-demand transmission is *actually received* by only one person. But what matters under the Transmit Clause is not how many people *actually receive* a transmission. The *potential audience* is what matters.[28] A theater owner who sells tickets to the public engages in a public performance even if only one person ends up attending. And a television broadcaster engages in a public performance even if only one person – or nobody at all – turns on his television set.[29] The same is true for video on demand: The transmissions constitute public performances because they are held out or offered to anyone who wants to receive them, even though each one is ultimately received by only one person.

That focus on the *potential audience* is fundamental to the public performance right. If a brother calls his sister one Saturday morning and asks her to sing "Happy Birthday" over the phone, the performance is clearly private. But if that same sister realizes she really enjoys singing "Happy Birthday" over the phone and posts a sign in the grocery store that says, "Anyone who wishes to hear me sing Happy Birthday can call me this Saturday morning and I will sing it," and the brother then happens to be the only person who reads the sign and calls, the performance is public. Even though both situations involve the same content, the same sender and recipient, and the same individualized transmission path, the critical difference is the potential audience: In the second situation, the sister has held out her performance to the public at large.

To be sure, *after a transmission begins*, the only "potential audience" for a particular transmission may be the one person receiving it. But what matters is the potential audience for a transmission at the time the service provider holds out its content and offers to transmit it, before any particular transmission is sent. For example, when a video-on-demand subscriber orders a movie, the particular transmission stream he receives is

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[27] *Cf. Warner Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (enjoining a company known as Zediva from offering to transmit the contents of DVDs over the Internet to subscribers on demand).

[28] *See supra* notes 16-21 and accompanying text.

[29] *See* H.R. Rep. No. 94-1476, at 64-65 (1976) (television broadcast is a public performance "even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission").

dedicated to him and cannot be received by anyone else. But that does not make video on demand a private performance. The transmissions are "to the public" because, from an *ex ante* perspective, the service provider is offering to transmit particular content to anyone willing to pay for it. *Any subscriber* is capable of receiving the next transmission from the video-on-demand system, even though the transmissions are made by dedicated streams on a one-at-a-time basis.

Similarly, when an Internet user plays a movie or television show on a subscription website like Netflix, the particular transmission stream he receives is dedicated to him alone. But that does not change the fact that, at the time the website operator offered to transmit that particular content over the Internet, any user could have received the transmission simply by signing up. The relevant question is not who is the potential audience of a particular transmission once it has been sent; the question is who could have received the transmission before it was sent. In that respect, video on demand and Netflix are no different from hotels or other "public" accommodations: A hotel offers rooms "to the public" because anyone willing to pay can occupy a room – even though, once a particular guest pays for a room, he is the only one who can occupy it.

Of course, the fact that public performances may be delivered by individualized transmissions does not mean that *all* performances delivered by individualized transmissions are public. The Second Circuit made that point clear in the *Cablevision* case.

II. The *Cablevision* and *Aereo* Decisions

Cablevision

Cablevision Systems Corporation provides cable television service primarily in the New York area, carrying more than 400 channels under licenses with programmers. For years, Cablevision has offered traditional set-top DVRs to its subscribers. Set-top DVRs, however, have shortcomings – Cablevision must install an individual unit with an expensive hard drive in each home, and repairs or upgrades require disruptive house calls. Cablevision therefore developed the Remote-Storage DVR or "RS-DVR." The primary difference between the RS-DVR and a traditional DVR is where the recordings are stored. With a set-top DVR, recordings are stored on a hard drive in the set-top box. With the RS-DVR, each customer's recordings are stored on hard drives in a central location.

To the subscriber, the processes of recording and playback on the RS-DVR are very similar to those of a standard set-top DVR. With both systems, the subscriber can record a program by pressing "record" on his remote control when watching television or by scheduling the recording in advance from an on-screen guide. With both systems, the subscriber can then play back his recording by selecting it from an on-screen list.

As with a VCR or conventional set-top DVR, an RS-DVR subscriber can choose to record only programs he could have received and watched when they aired at their regularly

scheduled times under his cable subscription. The RS-DVR then records the subscriber's selected shows when they air over the cable system. The RS-DVR segregates each subscriber's recordings, so if 1,000 people all choose to record an episode of "Modern Family," 1,000 separate recordings are made. A subscriber cannot play back anything but the programs he recorded, and no other subscriber can access his recordings.

Cablevision's RS-DVR is an example of a technology trend known as "cloud computing." Increasingly, technology companies provide services to customers by means of remote storage and processing resources "in the cloud" – *i.e.*, on the Internet or at some other remote location. While consumers once received emails through client applications on their personal computers, they can now use web-based services like Gmail. While consumers once stored documents and other files on local media, they can now store them remotely with "virtual locker" services such as Amazon's Cloud Drive or Apple's iCloud. Centralizing storage and processing allows technology providers to offer services more efficiently and conveniently.

The RS-DVR is no different. Consumers have long used VCRs and set-top DVRs to record television programs for later viewing. In *Sony Corp. of America v. Universal City Studios, Inc.*,[30] the Supreme Court upheld the use of VCRs for that purpose, ruling that such consumer "time-shifting" is fair use. The RS-DVR is simply a DVR with the recording and storage hardware moved to Cablevision's head-end – a DVR "in the cloud."

Nonetheless, in 2006, several broadcasters and other content owners sued Cablevision, arguing that the RS-DVR would infringe their copyrights. Among other things, they contended that Cablevision would engage in an unlicensed "public performance" whenever a subscriber used the system to play back a recording. A district court in New York agreed and enjoined Cablevision from rolling out the service.[31] But the U.S. Court of Appeals for the Second Circuit reversed in a unanimous decision issued August 4, 2008.[32]

Under the Transmit Clause, the Second Circuit noted, the relevant question was whether Cablevision "'transmit[s] . . . a performance . . . of the work . . . to the public'" when a subscriber plays back his recording.[33] The court explained:

> [The Act's] plain language instructs us that, in determining whether a transmission is "to the public," it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times. The implication from this same language, however, is that it is relevant, in determining whether a transmission is made

[30] 464 U.S. 417, 447-56 (1984).

[31] *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

[32] *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*").

[33] *Id.* at 134 (quoting 17 U.S.C. § 101).

> to the public, to discern who is "capable of receiving" the performance being transmitted. The fact that the statute says "capable of receiving the performance," instead of "capable of receiving the transmission," underscores the fact that a transmission of a performance is itself a performance. [34]

The legislative history, the court added, also supports that interpretation, focusing on the "'potential recipients of the transmission.'"[35] The Act thus requires a court to "examine who precisely is 'capable of receiving' a particular transmission of a performance."[36]

The district court had ruled that RS-DVR playbacks were public performances because "'Cablevision would transmit the *same program* to members of the public, who may receive the performance at different times.'"[37] The court of appeals rejected that theory. The Transmit Clause, it noted, "speaks of people capable of receiving a particular 'transmission' or 'performance,' and not of the potential audience of a particular 'work.'"[38]

The broadcasters also urged that Cablevision was retransmitting the "same performance" to multiple subscribers – specifically, "the performance of the work that occurs when the programming service supplying Cablevision's content transmits that content to Cablevision."[39] The court rejected that "original performance" theory: "[W]e believe that when Congress speaks of transmitting a performance to the public, it refers to *the performance created by the act of transmission*."[40] In other words, the relevant "performance" under the Transmit Clause is not the *prior* performance from which the transmitter obtains its content, but the performance that occurs when the transmitter communicates that content to a subscriber. It is *that* performance whose potential audience matters in determining whether a transmission of a performance is "to the public." And "because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, . . . the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission."[41]

The broadcasters urged that it was irrelevant that each subscriber could play back only his own separate recordings. But the court ruled that, "in general, any factor that limits the *potential* audience of a transmission is relevant."[42] Contrasting the rental store in *Redd Horne* that offered to play movies from its library to anyone willing to pay, the court

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[34] *Id.* (quoting 17 U.S.C. § 101).

[35] *Id.* at 135 (quoting H.R. Rep. No. 94-1476, at 64-65 (1976)) (emphasis omitted).

[36] *Id.*

[37] *Id.* (quoting 478 F. Supp. 2d at 623 (emphasis added)).

[38] *Id.*

[39] *Id.* at 136.

[40] *Id.* (emphasis added).

[41] *Id.* at 137.

[42] *Id.*

explained that "the use of a unique copy may limit the potential audience of a transmission and is therefore *relevant* to whether that transmission is made 'to the public.'"[43] "Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, . . . such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance."[44]

The broadcasters petitioned for review by the Supreme Court, which invited the Solicitor General to file a brief expressing the views of the United States.[45] After the Solicitor General recommended against review, the Court denied the petition on June 29, 2009.[46] Cablevision began offering the RS-DVR in January 2011 and now has over half a million RS-DVR subscribers.

Aereo

Aereo, Inc., is a company that captures over-the-air broadcast television signals and retransmits them to subscribers over the Internet. To use the service, a subscriber simply goes to Aereo's website and selects a broadcast television channel to watch. The subscriber can then watch the television channel live, subject to a brief delay for processing. Aereo's system also offers DVR-type functionality that allows the subscriber to pause or rewind the show or record it for later viewing.

Aereo thus performs essentially the same function as a cable provider like Cablevision or a satellite provider like DirecTV or Dish Network: It captures over-the-air broadcasts and retransmits them to subscribers in real time. Unlike cable or satellite operators, however, Aereo does not pay any licensing or retransmission consent fees for providing that service. Cable and satellite providers must either comply with the statutory licensing requirements and pay any applicable fees or else negotiate licenses directly with copyright owners; they must also pay retransmission consent fees to broadcasters. Aereo, by contrast, claims it is exempt from those requirements because it engages in private rather than public performances.[47]

Aereo relies on two features of its system to justify that argument. First, rather than using a single communal antenna to capture broadcast signals, Aereo uses a pool of

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[43] *Id.* at 138 (emphasis added).

[44] *Id.* at 139.

[45] *Cable News Network, Inc. v. CSC Holdings, Inc.*, 555 U.S. 1095 (2009).

[46] *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

[47] There is currently no statutory licensing scheme for Internet retransmission services analogous to the schemes Congress enacted for cable and satellite retransmission services. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279-85 (2d Cir. 2012) (rejecting an Internet retransmission service's claim that it was a "cable system" for purposes of the Section 111 statutory license). Internet transmission services like Hulu or Netflix must therefore negotiate licenses with content owners.

individual mini-antennas, each of which is either permanently assigned to a particular user or (more commonly) assigned to a user temporarily while he is watching a show. Second, whenever a user watches a program, Aereo's system temporarily stores the content on a hard drive en route from the mini-antenna to the user's computer. According to Aereo, it makes those recordings to enable DVR functionality (such as pause or rewind) just in case a subscriber chooses to do one of those things.

It is no secret that Aereo designed its system with the goal of bringing itself within the scope of *Cablevision*. According to Aereo, its mini-antennas and hard-drive copies sufficiently "individuate" its transmissions to make them private performances, just as the RS-DVR's individual self-made recordings were relevant to the court's finding of a private performance in *Cablevision*. The obvious difference is that Cablevision pays licensing and retransmission consent fees to transmit programming to subscribers over its cable system; it relies on the "private performance" argument only to justify adding DVR functionality that enables those same subscribers to exercise their *Sony* fair-use rights to record programs for later viewing. Aereo, by contrast, pays no licensing or retransmission consent fees at all. It relies on the "private performance" argument to justify not only its DVR functionality but its entire retransmission system.

Broadcasters once again sued. This time, however, the district court denied an injunction,[48] and the Second Circuit affirmed.[49] The court of appeals acknowledged that "[t]he legislative history shows that the Transmit Clause was intended in part to abrogate *Fortnightly* and *Teleprompter* and bring a cable television system's retransmission of broadcast television programming within the scope of the public performance right."[50] But the court held that Aereo's hard-drive copies and mini-antennas were sufficient to make its transmissions private performances.

According to the *Aereo* court, *Cablevision*'s public performance holding rested on "two essential facts": "First, the RS-DVR system created unique copies of every program a Cablevision customer wished to record. Second, the RS-DVR's transmission of the recorded program to a particular customer was generated from that unique copy; no other customer could view a transmission created by that copy."[51] Although *Cablevision* had merely mentioned the individual recordings as "relevant" to its holding,[52] *Aereo* elevated those features to a dispositive test:

> When an Aereo customer elects to watch or record a program . . . , Aereo's system creates a unique copy of that program on a portion of a hard drive

[48] *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

[49] *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

[50] *Id.* at 685.

[51] *Id.* at 689 (citations omitted).

[52] 536 F.3d at 137-38.

> assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy. Thus, just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.[53]

The court rejected the argument that "Cablevision's RS-DVR copies 'broke the continuous chain of retransmission to the public' in a way that Aereo's copies do not."[54] Aereo's copies, the broadcasters urged, "are no different from the temporary buffer copies created by internet streaming."[55] The court held otherwise. "Aereo's copies do have the legal significance ascribed to the RS-DVR copies in *Cablevision*" because they enable Aereo to offer DVR functionality: The user "may begin watching [a program] nearly live, but then pause or rewind it," or "may elect not to begin watching the program at all until long after it began airing."[56] That "layer of control . . . means that Aereo's transmissions from the recorded copies cannot be regarded as simply one link in a chain of transmission."[57]

The court also rejected the broadcasters' argument because it "fail[ed] to account for Aereo's user-specific antennas."[58] Because "[e]ach user-associated copy of a program created by Aereo's system is generated from a unique antenna," "even if we were to disregard Aereo's copies, it would still be true that the potential audience of each of Aereo's transmissions was the single user to whom each antenna was assigned."[59] Ultimately, however, the court did not rest its decision solely on that ground: "Because Aereo's system uses both user-associated antennas and user-associated copies, we need not decide whether a system with only one of these attributes would be publicly performing copyrighted works."[60]

Judge Chin dissented,[61] and the Second Circuit later denied rehearing en banc over the dissent of two judges.[62] The broadcasters have petitioned for Supreme Court review, raising arguments discussed below. In the meantime, other district courts have also weighed in. Soon after Aereo rolled out service in New York, a copycat service now known as

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[53] 712 F.3d at 690.

[54] *Id.* at 692.

[55] *Id.*

[56] *Id.*; *see also id.* at 692-93 n.15

[57] *Id.*

[58] *Id.* at 693.

[59] *Id.*

[60] *Id.* at 693 n.17.

[61] *Id.* at 696-705. Judge Chin was also the district judge whose decision was reversed in *Cablevision*; he was elevated to the court of appeals between the two decisions.

[62] *WNET v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013).

"FilmOn X" began offering a similar service in other markets.[63] A district court in California enjoined FilmOn X from operating in the Ninth Circuit,[64] and a district court in the District of Columbia enjoined FilmOn X from operating anywhere in the nation outside the Second Circuit.[65] Meanwhile, Aereo itself expanded to other markets, and a district court in Boston refused to enjoin it, agreeing with the Second Circuit's decision.[66] All three cases currently remain pending on appeal.

The Broadcasters' Petition for Certiorari

On October 11, 2013, the broadcasters filed a petition for a writ of certiorari seeking Supreme Court review of *Aereo*.[67] They urge that Congress enacted the Transmit Clause specifically to cover cable retransmission systems and drafted the clause in "broad and technology-neutral" terms.[68] Departing from their position in the Second Circuit *Aereo* case, however, the broadcasters all but abandon their efforts to distinguish Aereo's system from the RS-DVR. Instead, they urge the Court to adopt a sweeping new interpretation of the Transmit Clause that threatens both the RS-DVR and numerous other cloud technologies. While the broadcasters stop short of explicitly asking the Court to overturn the result in *Cablevision*, the arguments they advance strike at the heart of the legal principles underpinning that decision.

The broadcasters contend that *Cablevision* misconstrued the Transmit Clause by focusing on the potential audience for a particular *transmission* rather than the potential audience for an underlying *performance* – by which they apparently mean the prior over-the-air broadcast being retransmitted over Aereo's system. The Transmit Clause, they note, confers an exclusive right "'to transmit . . . a performance . . . of the work . . . to the public, . . . whether the members of the public capable of receiving the *performance* . . . receive it in the same place or in separate places and at the same time or at different times.'"[69] "By its plain

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[63] FilmOn X was originally known as "BarryDriller," a play on Barry Diller, one of Aereo's financial backers. After Mr. Diller sued and obtained an injunction against the misuse of his name, *see Diller v. Barry Driller, Inc.*, No. CV 12-7200, 2012 WL 4044732 (C.D. Cal. Sept. 10, 2012), the company changed its name to "Aereokiller." Aereo then sued and obtained a stipulated injunction against the use of that name as well. *See Aereo Inc v. FilmOn.com Inc.*, No. 2:13-cv-01612 (C.D. Cal. May 20, 2013) (docket #47).

[64] *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

[65] *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), *stay denied*, 2013 WL 4852300 (D.D.C. Sept. 12, 2013).

[66] *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 WL 5604284 (D. Mass. Oct. 8, 2013).

[67] Petition for a Writ of Certiorari in *Am. Broad. Cos. v. Aereo, Inc.*, No. 13-461 (filed Oct. 11, 2013) ("*Aereo* Petition").

[68] *Id.* at 7-8, 21-24.

[69] *Id.* at 23 (quoting 17 U.S.C. § 101) (emphasis added).

terms," they insist, "the statute asks whether 'members of the public' are 'capable of receiving the *performance*' of a copyrighted work (e.g., a broadcast of a World Series game)."[70]

By contrast, under *Cablevision*, "whether a performance is public turns on how many people can receive any given *transmission* of the performance."[71] According to the broadcasters, "[t]he flaw in this reasoning is obvious: the statute asks whether the public is 'capable of receiving the *performance*,' *not* whether it is 'capable of receiving the *transmission*.'"[72] "Had Congress intended the inquiry to focus on a particular *transmission* rather than the underlying *performance* being transmitted, it would have said so."[73] In other words, according to the broadcasters, a service provider engages in a public performance whenever it makes the same *prior* performance – such as the same prior broadcast of a particular television show – available by transmission to its subscribers. That is so, they insist, even if each *transmission* is only ever offered to one subscriber.

The broadcasters' sole effort to limit the scope of their sweeping interpretation appears in a footnote. There, they state:

> Petitioners submit that a decision from this Court finding error in *Cablevision*'s construction of the Transmit Clause and holding that Aereo is engaged in an infringing public performance would not need to address the entirely distinct question of how the Transmit Clause or other portions of the Copyright Act, properly construed, apply to a licensed provider that offers a remote storage DVR service such as that at issue in *Cablevision*. Petitioners do not seek a ruling from this Court on that latter set of issues.[74]

The broadcasters, however, never explain how the Court could adopt their expansive construction and still distinguish remote-storage services like the RS-DVR.

III. The Impact of the Broadcasters' Expansive Interpretation

Before turning to the legal deficiencies in the broadcasters' analysis, it is important to appreciate just how revolutionary their proposed interpretation would be. Their approach poses a fundamental threat to cloud technologies. And it would also upset the settled distinction between downloading and streaming.

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[70] *Id.* (quoting 17 U.S.C. § 101 (emphasis added)).

[71] *Id.* at 25.

[72] *Id.* at 26 (quoting 17 U.S.C. § 101 (emphasis added)) (citation omitted).

[73] *Id.*

[74] *Id.* at 31 n.6.

Cloud Computing

Under the broadcasters' interpretation, any system that retransmits the same *prior performance* of a work to multiple members of the public is engaged in a public performance. That theory calls into question numerous technologies already in widespread use and poses a serious threat to cloud technologies generally.

For example, suppose two consumers both independently purchase the same album from an online music retailer like Amazon's MP3 Store. Each consumer uploads the songs to his own personal storage space on Amazon's Cloud Player service and then listens to them by streaming the music back to himself. On the broadcasters' theory, Amazon would be publicly performing the songs because it would be transmitting the same *prior performance* (*i.e.*, the musician's earlier performance recorded on the album) to multiple members of the public. That would be true even though each *transmission* was available to only one person – the subscriber who uploaded the particular copy being playing back.

Alternatively, suppose a video-on-demand provider is licensed to show a particular previously aired television show during certain hours of the day. At a time not covered by the license, a third-party repair technician causes the system to transmit the program to himself for diagnostic or maintenance purposes. Under the broadcasters' theory, that would be an unlicensed public performance because, even though the technician was the only person capable of receiving the *transmission*, he accessed the same *prior performance* of the show that the provider made available to the public by video on demand.

Or suppose a corporation maintains an internal corporate intranet where its employees can store and retrieve their personal work files. Two employees both happen to save and play back the same previously aired news clip. On the broadcasters' theory, the corporation would be publicly performing the clip merely because both employees happened to play back the same previously aired show.

Indeed, the broadcasters' interpretation would make a public performance out of nearly any technology that enables remote storage and playback of prior performances – which is to say, a substantial portion of the entire cloud computing industry. Such a rule would be catastrophic. Cloud computing is a major and rapidly growing sector of the economy.[75] That sector relies critically on *Cablevision*'s public performance holding. As one trade group puts it: "Every time a consumer uses an Internet cloud-based backup system or

[75] *See, e.g.*, John F. Gantz *et al.*, *Cloud Computing's Role in Job Creation* 1 (IDC White Paper Mar. 2012) (estimating that "last year alone, IT cloud services helped organizations of all sizes and all vertical sectors around the world generate more than $400 billion in revenue and 1.5 million new jobs," and that "[i]n the next four years, the number of new jobs will surpass 8.8 million"); Sand Hill Group, *Job Growth in the Forecast: How Cloud Computing Is Generating New Business Opportunities and Fueling Job Growth in the United States* 13 (2011) (projecting more than $20 billion in annual revenues and 685,000 new jobs from cloud service providers and startups).

online storage locker, both the consumer and the company providing that system rely on *Cablevision*'s clear holding[] that . . . the transmission of a performance of that work to that same user in a manner not capable of being received by others is a private performance that infringes no exclusive right of the rightsholder in the underlying work."[76] One Harvard Business School study found that "the *Cablevision* decision led to additional incremental investment in U.S. cloud computing firms that ranged from $728 million to approximately $1.3 billion over the two-and-a-half years after the decision."[77] Adoption of the broadcasters' expansive theory would thus have a disastrous effect on a major sector of the technology industry.[78]

Downloading and Streaming

The broadcasters' interpretation would also upend the settled distinction between downloading and streaming. For years, the industry has understood that there is a legal distinction between "streaming" (transmitting a song or video over the Internet for contemporaneous listening or viewing) and "downloading" (transmitting a copy of the music or video file for the consumer's later use). While streaming may constitute a public performance, downloading does not. That distinction has enormous practical significance because it means that an online music or video retailer does not engage in a public performance when it merely sells copies of songs or videos to consumers over the Internet. Of course, the retailer may need a reproduction or distribution license, but it does not need a separate *public performance* license.

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[76] Brief *Amicus Curiae* of the Computer & Communications Industry Association in *Fox Television Stations, Inc., v. Aereokiller LLC*, Nos. 13-55156 *et al.*, at 4-5 (9th Cir. filed Mar. 22, 2013) (emphasis omitted).

[77] Josh Lerner, Harvard Business School, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* 1 (2011).

[78] Some cloud technology providers may be able to avoid liability by invoking the safe harbors of the Digital Millennium Copyright Act, 17 U.S.C. § 512. For several reasons, however, that statute provides only incomplete protection. It applies only to certain "online" services, 17 U.S.C. § 512(k)(1); it does not preclude injunctive relief, *id.* § 512(j); and it imposes a number of other limitations that substantially restrict its application, *see, e.g.*, *id.* § 512(a) (safe harbor for transitory network communications applies only to transmissions over a "system or network controlled or operated by or for the service provider"); *id.* § 512(c)(1) (safe harbor for remote storage services applies only where the service provider does not have actual or constructive knowledge that the content is otherwise infringing). In any event, Congress specifically provided that "[t]he failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing." 17 U.S.C. § 152(*l*); *see also CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 552-55 (4th Cir. 2004) ("It is clear that Congress intended the DMCA's safe harbor for ISPs to be a floor, not a ceiling, of protection.").

The Second Circuit reached precisely that result in *United States v. ASCAP*,[79] a decision that relied heavily on *Cablevision*. The content owners in *ASCAP* argued that downloads are public performances because vendors transmit to the public "the *initial or underlying* performance of the copyrighted work" – *i.e.*, the earlier performances by musicians embodied in the recordings.[80] *ASCAP* rejected that argument, invoking *Cablevision*'s holding that, "'when Congress speaks of transmitting a performance to the public, it refers to the *performance created by the act of transmission*,' not simply to transmitting a recording of a performance."[81] "The downloaded songs," the court explained, "are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded."[82] "Because the electronic download itself involves no recitation, rendering, or playing of the musical work encoded in the digital transmission, . . . such a download is not a performance of that work, as defined by § 101."[83]

On the broadcasters' theory, that case would have come out the other way. According to the broadcasters, a public performance occurs whenever a company transmits a *prior performance* of a work to the public, even if the transmission itself does not effect a new showing. On that theory, a download of a recorded performance of a musical composition or a download of a previously broadcast television show would constitute a public performance because the online retailer would be transmitting that *prior* performance to the public. That result would radically unsettle existing market expectations. It would mean that every online music or video retailer violates the public performance right whenever it transfers a file containing a prior performance to a consumer. That result cannot be right, but it too follows from the broadcasters' expansive interpretation.

IV. The Flaws in the Broadcasters' Legal Arguments

Cablevision Did Not Confuse "Performance" with "Transmission"

The centerpiece of the broadcasters' legal arguments is that *Cablevision* improperly conflated "performance" with "transmission," focusing on the potential audience of a particular *transmission* when the Transmit Clause refers to persons capable of receiving a "performance."[84] Congress, they claim, could not possibly have been interested in the potential audience of a *transmission*: "'[V]ery few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in

[79] 627 F.3d 64 (2d Cir. 2010).

[80] *Id.* at 73 (emphasis added).

[81] *Id.* (quoting 536 F.3d at 136) (emphasis added).

[82] *Id.*

[83] *Id.*

[84] *Aereo* Petition at 23-25.

watching the *performance* of the *work*.'"[85] That argument both misunderstands *Cablevision*'s reasoning and ignores the text and history of the Transmit Clause.

The Act itself makes clear that one way to "perform" a work publicly is to "transmit" a performance of the work to the public. Under the Transmit Clause:

> *To perform* . . . a work "publicly" means –
>
> > (1) to perform . . . it at a place open to the public . . . ; or
> >
> > (2) *to transmit* or otherwise communicate a performance . . . of the work . . . to the public, . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[86]

In other words, the *Act itself* defines a transmission of a performance to be one kind of "performance," by defining "to transmit" as one way "to perform": To "perform" a work publicly is either to *perform* it in a public place or to *transmit* it to the public. (That latter half of the definition is, after all, the *Transmit* Clause.) When the broadcasters complain that *Cablevision* confused "transmission" with "performance," they are really objecting to a basic feature of the statute itself. To be sure, the Act defines "perform" and "transmit" as two separate terms, and not every performance is a transmission or vice versa. But the statute makes clear that a transmission of a performance is one type of performance, and to that extent, the terms overlap.

That same point also follows from the Act's definition of "perform": "to recite, render, play, dance, or act . . . or, in the case of a motion picture or other audiovisual work, *to show its images in any sequence* or to make the sounds accompanying it audible."[87] When a cable service or video-on-demand provider transmits content to subscribers, it is "show[ing] [the] images" of the work by means of that transmission. The transmission itself effects a "show[ing]" that constitutes a performance, wholly apart from any *prior* performance such as an earlier over-the-air broadcast.

The legislative history removes any doubt. As the 1976 House Report explains, "the concept[] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public."[88] Thus, "a broadcasting network is performing when it transmits [a performance of a song]; . . . [and] a cable television system is performing when it retransmits

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[85] *Id.* at 28-29 (quoting *BarryDriller*, 915 F. Supp. 2d at 1144-45).

[86] 17 U.S.C. § 101 (emphasis added).

[87] 17 U.S.C. § 101 (emphasis added).

[88] H.R. Rep. No. 94-1476, at 63 (1976).

the broadcast to its subscribers."[89] In short, "any act by which the initial performance . . . is transmitted, repeated, or made to recur would itself be a 'performance' . . . under the bill."[90] Congress thus could not have been more clear that, as *Cablevision* put it, "a transmission of a performance is itself a performance."[91]

Far from confusing two statutory terms, therefore, *Cablevision* simply interpreted the statute as Congress wrote it. The Transmit Clause applies where a person "transmit[s] . . . a *performance* . . . of the work . . . to the public, . . . whether the members of the public capable of receiving the *performance* . . . receive it in the same place or in separate places and at the same time or at different times."[92] As *Cablevision* recognized, there is a potential ambiguity in that definition because the clause does not specify *which* "performance" it is referring to: (1) the performance effected when the transmitter engages in the transmission; or (2) some *prior* performance that supplied the source material for the transmission (for example, a prior broadcast). *Cablevision* ruled in favor of the former alternative, holding that "when Congress speaks of transmitting a performance to the public, it refers to *the performance created by the act of transmission*."[93] Under that interpretation, the Act's reference to "whether the members of the public capable of receiving the *performance* . . . receive it in the same place or in separate places and at the same time or at different times" refers to "members of the public capable of receiving the performance" *created by the act of transmission* – in other words, the members of the public capable of receiving the transmission itself.

The broadcasters obviously disagree about what the relevant "performance" is and insist that Congress was referring to some *prior* performance.[94] As explained in the next section, they are wrong. But the point here is simply that the broadcasters' disagreement with *Cablevision* over *which* "performance" Congress was referring to does not mean *Cablevision* conflated the terms "transmission" and "performance" or otherwise ignored the text of the statute. Given the clarity of the statutory text and legislative history on that point, the broadcasters cannot seriously dispute that a transmission of a performance is itself a performance. *Cablevision* correctly recognized that the Act defines the transmission of a performance to be one type of "performance" and reasonably construed the term "performance" in the Transmit Clause to refer to the performance created by the act of transmission, not some earlier performance *preceding* the transmission.

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[89] *Id.*

[90] *Id.*

[91] 536 U.S. at 134.

[92] 17 U.S.C. § 101 (emphasis added).

[93] 536 U.S. at 136 (emphasis added).

[94] *See Aereo* Petition at 23 ("By its plain terms, the statute asks whether 'members of the public' are 'capable of receiving the *performance*' of a copyrighted work (e.g., *a broadcast of a World Series game*)." (emphasis added)).

The Relevant "Performance" Is the Performance Created by the Act of Transmission

Cablevision's holding that "when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission" is not only textually permissible – it is also correct. For several reasons, that interpretation is more plausible than the broadcasters' suggestion that Congress was referring to some *prior* performance, such as the earlier over-the-air broadcast a cable system uses as its source material.

First, that interpretation is the only one that reconciles the statutory text with the legislative history. Although the Transmit Clause refers to "members of the public capable of receiving the *performance*," the legislative history repeatedly refers to the potential audience of the *transmission*. For example, the 1967 House Report explains that the clause applies "where the *transmission* is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public."[95] The 1976 House Report similarly refers to "the potential recipients of the *transmission*."[96]

That interchangeable use of "transmission" and "performance" makes sense only if the relevant "performance" is the one created by the act of transmission, not a prior performance like an earlier television broadcast. If the relevant "performance" is the one created by the act of transmission, the potential audience for the "performance" is the same as the potential audience for the "transmission," so referring interchangeably to the potential audience of the "transmission" or the "performance" is entirely natural. By contrast, if the relevant "performance" is some *prior* performance, the two terms are *not* interchangeable, because the potential audience for the prior performance could be much larger than the potential audience for any particular transmission. That the legislative history uses the terms interchangeably shows that Congress had the former interpretation in mind.

Second, that Congress was focused on the performance created by the act of transmission is also supported by the fact that, in many cases, there is no "prior performance." For example, consider a broadcast of a sporting event. The sporting event itself is not a "performance" because the players on the field are not "performing" any work entitled to copyright protection.[97] Thus, when a television network broadcasts a sporting

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[95] H.R. Rep. No. 90-83, at 29 (1967) (emphasis added).

[96] H.R. Rep. No. 94-1476, at 64-65 (1976) (emphasis added).

[97] *See Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 846-47 (2d Cir. 1997) ("[T]he underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute 'original works of authorship' under 17 U.S.C. § 102(a)."). As the court explained, however, "recorded broadcasts of NBA games – as opposed to the games themselves – are now entitled to copyright protection" because "[t]he Copyright Act was amended in 1976 specifically to insure that simultaneously-recorded transmissions of live performances and sporting events would

event, the *only* performance being transmitted is the performance created by the act of transmission – there is no prior performance. Similarly, where a video-on-demand service transmits original animated movies to subscribers, there may be no prior performance of the movie, only the performance created by the transmission itself. If the word "performance" in the Transmit Clause means *prior* performance, then in cases like these where there *is no* prior performance, the service provider could transmit the content without a license – surely not the result the broadcasters intended.

Even where the prior subject-matter of a transmission is itself a "performance," that prior performance will often be a performance of a work different from the audiovisual work being transmitted. For example, where a television network is broadcasting a stage performance of a play, the "dramatic work" being performed by the actors on stage (the play) is different from the "audiovisual work" being performed by the broadcaster (the series of images recording the play).[98] The sheer variety of contexts where there is no prior performance of the audiovisual work being transmitted suggests that Congress would not have drafted the Transmit Clause with such prior performances in mind.

Finally, as already noted, *Cablevision*'s interpretation is the only one that properly distinguishes downloading from streaming.[99] If the relevant "performance" is the one created by the act of transmission, as *Cablevision* held, making files available for download is not a public performance, because there is no performance created by the act of transmission. By contrast, if the relevant "performance" is the *prior* performance, making files available for download *is* a public performance: The transmitter is "transmit[ting] . . . a *[prior]* performance . . . of the work . . . to the public."[100] On that view, any time a person transmits previously performed music or video files to the public – whether by attaching them to an email, uploading them to a website, or otherwise making them available for download – he would be engaged in a public performance. That result upends the widely shared industry understanding that downloading, unlike streaming, is not a public performance and does not require a public performance license.

The broadcasters insist that the statutory text compels their "prior performance" interpretation because the Transmit Clause refers to "'whether the members of the public capable of receiving *the performance* . . . receive *it* . . . at different times,'" and "two people cannot receive the *same* transmission of a performance 'at different times.'"[101] In other words, the argument goes, had Congress meant to refer to the performance created by the

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meet the Act's requirement that the original work of authorship be 'fixed in any tangible medium of expression.'" *Id.* at 847 (citing 17 U.S.C. §§ 101, 102(a)).

[98] *See* 17 U.S.C. § 102(a)(3), (6).

[99] *See supra* notes 79-83 and accompanying text.

[100] 17 U.S.C. § 101.

[101] *Aereo* Petition at 27 (quoting 17 U.S.C. § 101) (emphasis added).

act of transmission, it would have said "whether the members of the public capable of receiving *the performances* . . . receive *them* . . . at different times."

That argument is incorrect. Although the word "the" can be used to identify a specific item, it can also be used to "[i]ndicat[e] that a concrete term is to be understood generically and not individually," as in "*the* pen is mightier than *the* sword."[102] For example, a sign in a car rental agency stating that "Customers are responsible for any damage to the automobile during the rental period" is not implying that all customers must rent the same car at the same time. It is simply using the terms "the automobile" and "the rental period" to refer generically to whatever car and rental period are associated with a particular customer.

The Transmit Clause is written the same way. The term "the performance" is not a reference to a single unified performance that various members of the public all receive. It is a generic reference to the performance that each member of the public receives. Tellingly, the legislative history uses that same formulation on this exact issue. The 1967 House Report, when discussing "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public," explains that the Transmit Clause applies "where *the transmission* is capable of reaching different recipients *at different times*."[103] Congress itself thus used precisely the formulation the broadcasters deem impermissible.

Even If a Prior Performance Is Relevant, the Transmission Must Still Be "to the Public"

Even if the broadcasters were correct that the term "performance" in the Transmit Clause encompasses *prior* performances – so that, for example, a cable system was transmitting a broadcast station's *prior* performance of a television show when retransmitting the content to the public – that still would not support their expansive construction. The Transmit Clause applies where a person "transmit[s] . . . a performance . . . of the work . . . *to the public*, . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[104] That "to the public" requirement applies regardless of which performance the term "performance" refers to: Whether "performance" refers to the performance created by the act of transmission or some prior performance, the provider still must be "transmit[ting]" the performance "to the public." As the legislative history puts it: "Although any act by

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[102] *Webster's New International Dictionary of the English Language* 2617 (2d ed. 1954); *see also Evans v. Stephens*, 387 F.3d 1220, 1224-25 (11th Cir. 2004) (citing *The Random House Dictionary of the English Language* 1965 (2d ed. 1987) (defining "the" as "used to mark a noun as being used generically: the dog is a quadruped"); and 17 *The Oxford English Dictionary* 879 (2d ed. 1989) (defining "the" as "referring to a term used generically or universally")).

[103] H.R. Rep. No. 90-83, at 29 (1967) (emphasis added).

[104] 17 U.S.C. § 101 (emphasis added).

which the initial performance . . . is transmitted, repeated, or made to recur would itself be a 'performance' . . . under the bill, it would not be actionable as an infringement unless *it* [*i.e.*, the transmission] were done 'publicly,' as defined in section 101."[105]

As explained earlier, something is "public" only if it is "[o]pen or available for all to use, share, or enjoy"[106] or "accessible to or shared by all members of the community."[107] The Transmit Clause uses the term the same way.[108] A "public" performance is one that is "'open' to, that is, available to, a substantial number of persons."[109] Under the statute, therefore, a transmitter is not publicly performing a work unless it is transmitting a performance "to the public" – that is, making the performance generally available or holding it out to the public at large. That is true even if the "performance" is some *prior* performance rather than the performance created by the act of transmission.

Thus, a cloud service provider like Amazon Cloud Player is not publicly performing when two subscribers happen to upload and stream back their own separate copies of the same music album or the same television show. Although Amazon's servers may transmit the same prior performance of the song or show to multiple subscribers, Amazon is not transmitting that performance "to the public," because it is not holding out the performance or making the performance generally available to the public. It is merely offering a service that enables separate *private* performances of content that each individual subscriber independently selected and chose to upload.

The same is true of Cablevision's RS-DVR. The fact that multiple subscribers may independently choose to record and play back the same previously broadcast television show does not mean that Cablevision is transmitting that prior performance "to the public." Cablevision simply offers a service that allows subscribers to engage in private performances by recording television shows of their own choosing and then playing back their own personal recordings to themselves.

Those systems stand in sharp contrast to a typical video-on-demand service. A video-on-demand provider selects a library of content and holds it out to the public by offering to transmit performances to anyone willing to pay. Even though the performances are delivered by individualized transmissions, they are still held out generally to the public. The same cannot be said of cloud technologies like remote DVRs.

The Transmit Clause's "separate places/different times" language does not say otherwise. The Transmit Clause applies where a service provider "transmit[s] . . . a

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[105] H.R. Rep. No. 94-1476, at 63 (1976) (emphasis added).

[106] *Black's Law Dictionary* 1348 (9th ed. 2009).

[107] *Webster's Third New International Dictionary* 1836 (2002).

[108] *See supra* notes 16-21 and accompanying text.

[109] 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][2] (Supp. 2013).

performance . . . of the work . . . to the public, . . . *whether* the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[110] By its terms, the "separate places/different times" language does not purport to expand the scope of the clause. It simply clarifies that, *if* a performance is otherwise transmitted "to the public," the performance does not cease to be public merely because it is actually received at separate places or different times. Thus, even if the term "performance" includes prior performances, the question remains – as always – whether the service provider is transmitting those performances "to the public."

Cablevision Has Broad Academic Support

The broadcasters claim academic support for their theories. They point to three commentators – Jane Ginsburg, Paul Goldstein, and Jeffrey Malkan – who have criticized *Cablevision* on the same ground they invoke: that the court conflated "transmission" with "performance."[111] That argument is unfounded for reasons already stated, and it does not become any more persuasive merely because a handful of academics have repeated it. In any event, the broadcasters misdescribe the balance of scholarship on this point.

Leading treatises agree with *Cablevision* that whether the Transmit Clause applies depends on the potential audience of the *transmission*. For example, long before *Cablevision*, Professor Nimmer wrote that, "if a *transmission* is only available to one person, then it clearly fails to qualify as 'public.'"[112] He has not reconsidered that view since.[113] Professor Patry likewise endorses *Cablevision*'s public performance holding, writing that "the dividing line made in the statute is between those *transmissions* capable of being heard by multiple recipients . . . and those that are incapable of being so heard."[114] Other scholars agree.[115]

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[110] 17 U.S.C. § 101 (emphasis added).

[111] *Aereo* Petition at 26-27 (citing 2 Paul Goldstein, *Goldstein on Copyright* § 7.7.2 (3d ed. Supp. 2013); Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, Media Inst., Apr. 23, 2013; Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 Or. L. Rev. 505, 532 (2010)); *see also* Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?* 25-27 (Columbia Public Law & Legal Theory Working Paper No. 08158, Dec. 11, 2008).

[112] 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][2] (Supp. 2002) (emphasis added).

[113] *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][2] (Supp. 2013); *see also id.* § 8.14[C][3] (endorsing *Cablevision*'s public performance analysis).

[114] 4 William F. Patry, *Patry on Copyright* § 14:28 (Supp. 2013) (emphasis altered).

[115] *See, e.g.*, Jessica Litman, *Readers' Copyright*, 58 J. Copyright Soc'y U.S.A. 325, 350-51 & n.26 (2011) (endorsing *Cablevision*'s holding that a "cable subscriber's use of [the RS-DVR] resulted in copies made and privately performed by individual subscribers rather than made and publicly performed by the cable system"); Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 Vand. J. Ent. & Tech. L. 767, 792-96 (2011) (concluding that "[a]n examination of the precise technical operation of [Cablevision's] RS-DVR system supports the court's holding").

Moreover, when the broadcasters were seeking Supreme Court review of *Cablevision*, a group of 26 law professors sent a joint letter to the Solicitor General urging her to recommend denial.[116] The letter explained that "the [Second Circuit] properly concluded that the potential audience 'capable of receiving' any given RS-DVR transmission is an audience of one – *i.e.*, the one consumer who directed Cablevision's RS-DVR system to record a unique copy of a program and who alone is capable of receiving the transmission of that particular recording."[117] "Because Cablevision does not hold out any RS-DVR transmissions to the general public, it necessarily follows that Cablevision does not engage in any 'public' performances within the meaning of the Copyright Act when consumers use the RS-DVR to watch their own copies of programs that they previously recorded."[118] That letter was signed by noted scholars such as Julie Cohen, David Post, Jessica Litman, and Pamela Samuelson, among many others.[119] Numerous trade groups representing a broad array of companies including Amazon, Microsoft, Google, Verizon, Apple, Cisco, and AT&T have agreed with *Cablevision*'s interpretation of the Transmit Clause as well.[120]

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[116] Letter from Julie E. Cohen *et al.* to the Honorable Elena Kagan (Aug. 13, 2009). A copy of that letter is attached as an exhibit to this white paper.

[117] *Id.* at 3.

[118] *Id.*

[119] *See id.* at 1-3. The complete list of signatories was Julie E. Cohen, Timothy K. Armstrong, Derek E. Bambauer, Joseph P. Bauer, Annemarie Bridy, Dan L. Burk, Michael W. Carroll, Margaret Chon, Brett M. Frischmann, James Gibson, James Grimmelmann, Michael Grynberg, Raymond Ku, Jessica Litman, Jacqueline D. Lipton, Phil Malone, William McGeveran, Mark P. McKenna, John Palfrey, David G. Post, Matthew Sag, Pamela Samuelson, Niels Schaumann, Katherine J. Strandburg, Rebecca Tushnet, and Deborah Tussey.

[120] *See, e.g.*, Brief of *Amici Curiae* Center for Democracy & Technology *et al.* in *Cablevision*, No. 07-1480-cv, at 19-20 (2d Cir. filed June 8, 2007) ("Where multiple customers view their own personal copies of a copyrighted work in their own homes, that is at most parallel private viewing, not a public performance."). The signatories to that brief were the Center for Democracy & Technology, the Electronic Frontier Foundation, Public Knowledge, the Broadband Service Providers Association, the Computer & Communications Industry Association (whose members include Adventure Communications, Data Foundry, Dish, eBay, Facebook, Google, Intuit, Integra Telecom, LightSquared, Microsoft, NetAccess, Nvidia, OpenConnect, Pandora, Red Hat, Sprint, T3 Technologies, T-Mobile, TurboHercules, XO Communications, and Yahoo!), NetCoalition (whose members include Google, Amazon, eBay, IAC, PayPal, Bloomberg, and Yahoo!), the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, the Special Libraries Association, the Consumer Electronics Association (a group with over 2000 members including ActiveVideo, Cisco, Apple, Sony, and Comcast), the Home Recording Rights Coalition, CTIA – The Wireless Association (a group with dozens of members including AT&T, Verizon Wireless, US Cellular, T-Mobile, Apple, Cisco, Dish, Google, Disney-ESPN, and Nokia), the Internet Commerce Coalition, and USTelecom (which represents numerous U.S. telecom companies, including AT&T and Verizon).

Compared to that scholarly consensus, the broadcasters' handful of three authorities is a clear minority view. Notably, one of the three – Paul Goldstein – is also "of counsel" at Morrison & Foerster and represented one of the broadcasters' *amici* in *Cablevision*.[121] He is hardly a detached observer. The weight of scholarly authority thus favors *Cablevision*. In that respect too, the broadcasters' attempts to cast doubt on the decision fall short.

V. The Broadcasters' Expansive Interpretation Is Not Necessary To Prohibit Aereo's System

The broadcasters' interpretation is not only wrong but also wholly unnecessary to accomplish their professed goal of requiring Aereo to get a public performance license. Thousands of mini-antennas and individual hard-drive copies notwithstanding, Aereo retransmits performances of television programs to the public, just like the cable systems Congress targeted in the 1976 Act. Aereo's system bears no resemblance to cloud technologies like Cablevision's RS-DVR, which is simply a remote-storage version of recording-and-playback technologies already in widespread use. The technical details of how Aereo retransmits television programming to the public do not change the basic nature of the service it is offering or excuse it from obtaining a public performance license. The Copyright Act's plain language and legislative history already recognize that functional distinction. Thus, none of the broadcasters' expansive arguments is necessary to reach the result they seek.

Congress Enacted the Transmit Clause Specifically To Cover Television Retransmission Systems

The Transmit Clause cannot be interpreted in a vacuum. It was enacted to address specific issues and should be interpreted with that context in mind. Foremost among those issues was television retransmission services. Before 1976, the Supreme Court had held in *Fortnightly* and *Teleprompter* that cable systems do not perform a work when they retransmit it to subscribers.[122] Congress enacted the Transmit Clause specifically to reject that view. Under prior law, Congress explained, "the cable television industry has not been paying copyright royalties for its retransmission of over-the-air broadcast signals."[123] Congress "believe[d] 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."[124]

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[121] *See* Brief of the National Music Publishers' Association, Inc. as *Amicus Curiae* in Support of Petitioners in *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (filed Nov. 5, 2008).

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

[123] H.R. Rep. No. 94-1476, at 89 (1976).

[124] *Id.*; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984) ("In revising the Copyright Act, . . . Congress concluded that cable operators should be required to pay royalties to the owners

Aereo offers a service functionally identical to a cable system. It captures over-the-air broadcast signals and retransmits them for subscribers to watch. Although Aereo retransmits those signals over the Internet rather than a cable system, Congress specifically extended the Transmit Clause to transmissions "by means of any device or process," whether "now known or later developed."[125] In terms of the basic function it performs for subscribers, Aereo is not meaningfully different from cable or satellite providers, services that have long been required to pay statutory royalties and retransmission consent fees.[126]

That fact sharply distinguishes Aereo from cloud technologies like remote-storage servers, remote DVRs, and the many other technologies that would be swept up by the broadcasters' expansive rule. The RS-DVR, for example, is not a mere substitute for cable service. If anything, it is a substitute for VCRs and traditional set-top DVRs – technologies that have never been understood to require a license, at least since the Supreme Court upheld the lawfulness of consumer time-shifting in *Sony*.[127]

A service like Aereo's that so closely replicates the essential function of the services Congress targeted in the Transmit Clause should give a court pause. Aereo should bear a heavy burden to show that its particular architecture somehow removes it from the Act's textual coverage. Aereo cannot meet that burden here.

Mere Insertion of Individual Antennas and Hard-Drive Copies Into the Retransmission Streams Does Not Make Performances Private

Despite its functional similarity to a traditional television retransmission system, Aereo urges that it does not publicly perform the programs it retransmits. It relies on two design features to justify that argument: the individual mini-antennas and the individual hard-drive copies generated during transmission. With respect to the hard-drive copies, the *Aereo* court observed: "Aereo's system creates a unique copy of [each] program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, . . . the transmission sent by Aereo and received by that user is generated from that unique copy."[128] With respect to the mini-antennas: "Each user-associated copy of a program created by Aereo's system is generated from a unique antenna," so "even if we were to disregard Aereo's copies, it would still be true that the

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of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement.").

[125] 17 U.S.C. § 101.

[126] *See* 17 U.S.C. § 111(c)-(d) (statutory license for cable systems); 17 U.S.C. §§ 119, 122 (statutory license for satellite systems); 47 U.S.C. § 325(b) (retransmission consent requirement).

[127] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-56 (1984).

[128] 712 F.3d at 690.

potential audience of each of Aereo's transmissions was the single user to whom each antenna was assigned."[129]

Neither of those technical features justifies the result the court reached. At bottom, Aereo offers a service by which it takes a particular pool of content – the broadcast television signals it captures from the airwaves – and offers to transmit that content to anyone willing to subscribe. Any member of the public can receive the next transmission of that content from Aereo's system simply by signing up. That same pool of shared content is made available for transmission to all subscribers. Under those circumstances, Aereo is properly viewed as offering those transmissions "to the public" – making the same pool of content available for transmission to anyone willing to pay.

In that respect, Aereo is no different from a cable system or video-on-demand operator. A cable system captures a particular pool of content – the broadcast television signals it captures from the airwaves – and offers to retransmit that content to any subscriber who wants to receive it. Likewise, a video-on-demand operator acquires a particular pool of content – its library of movies or television shows – and offers to transmit that content to any subscriber who wants to receive it. The fact that Aereo delivers its television programming on an individualized basis, through individualized mini-antennas and individualized hard-drive copies, does not change the basic nature of what Aereo is doing.

The Second Circuit went astray by focusing on only a particular component of Aereo's retransmissions. Rather than considering the service as a whole, the court focused on the last leg of the transmission, from the temporary hard-drive copy to the consumer's computer. Because that last leg was available to only one subscriber at the time the hard-drive copy was generated, the court reasoned, Aereo was not transmitting "to the public."[130]

That narrow focus elevates a technical detail over a basic, common-sense understanding of what Aereo is doing. Aereo is not in the business of transmitting recorded content from individual hard-drive copies to subscribers. Rather, it is in the business of retransmitting broadcast television to subscribers. Any reasonable observer would understand the service that way. The "transmission" that Aereo's service offers to each subscriber is the entire chain from Aereo's broadcast content source, through a mini-antenna, through a hard-drive copy, to the subscriber – not merely the last leg of that chain. The fact that Aereo delivers its retransmission service by means of individual mini-antennas and hard-drive copies, rather than a single communal antenna, does not change the basic nature of the service it is offering.[131]

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[129] *Id.* at 693.

[130] *Id.* at 690.

[131] Aereo's mini-antenna argument is particularly weak for the majority of its subscribers who are assigned a mini-antenna only temporarily while they watch a show. Although subscribers may use the mini-antennas on a one-at-a-time basis, the mini-antennas, like the over-the-air broadcasts they capture, are held out to any subscriber who wants to use the system. Aereo's attempt to convert

Aereo's mini-antennas and hard-drive copies should not be viewed as distinct sources of transmissions shorn from the context in which they operate. Rather, they are more sensibly viewed as a mere part of the "device or process" Aereo uses to deliver its television retransmission service to subscribers. Or, as the broadcasters put it to the Second Circuit, Aereo's mini-antennas and hard-drive copies do not "'br[eak] the continuous chain of retransmission to the public.'"[132]

In that respect, Aereo's system differs fundamentally from the RS-DVR. The RS-DVR is a separate service, meaningfully distinct from Cablevision's underlying delivery of cable programming over its licensed cable system. A subscriber using the RS-DVR understands that he is not merely watching television – he is using a recording-and-playback technology to record a program and then play back the recording that *he* made at a more convenient time, just as he would with a VCR or set-top DVR. Cablevision offered cable service long before it developed the RS-DVR, and it continues to offer that service separately to subscribers who do not want to pay for the RS-DVR. Conversely, subscribers who want to record programs for later viewing have many options besides the RS-DVR, such as set-top DVRs, third-party DVRs such as TiVos, and even old-fashioned VCRs.

Given those facts, it makes sense to view RS-DVR playback transmissions as distinct transmissions rather than mere links in the chain by which Cablevision delivers television programming to cable subscribers. RS-DVR transmissions are not a mere "device or process" for retransmitting broadcast television; they are part of a distinct recording-and-playback service. Accordingly, the "potential audience" for those transmissions should be judged by looking to who is "capable of receiving" transmissions from particular recordings on the RS-DVR, not who is "capable of receiving" transmissions over Cablevision's cable system generally. And because each RS-DVR recording is available for playback only to the particular subscriber who made the recording, those transmissions are not "to the public."

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public performances into private ones by temporarily assigning transmission hardware to particular subscribers fares no better than Zediva's attempt to avoid a license for its video-on-demand system by temporarily "renting" DVDs to subscribers before transmitting their contents over the Internet. *See Warner Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011).

[132] *Aereo*, 712 F.3d at 692. Viewing the transmission from an individual hard-drive copy as merely a link in a longer transmission chain does not violate *Cablevision*'s proscription against looking "upstream" when analyzing whether a transmission is private or public. *See* 536 F.3d at 137 (directing courts to "look downstream, rather than upstream or laterally, to determine whether any link in a chain of transmissions made by a party constitutes a public performance"). It merely recognizes that certain intermediate copies should be disregard when determining where the relevant transmission *begins*. Moreover, the point here is not that all of Aereo's individual transmissions to various subscribers should be "aggregated" together into a single public performance. *Cf. Aereo*, 712 F.3d at 687-89 & n.11 (erroneously attributing this "aggregation" theory to *Cablevision*). Rather, the point is that *each* Aereo transmission is a public performance because each one was offered to the public at large. That approach generally leads to similar results as the "aggregation" theory, but the two approaches are conceptually distinct.

Contrary to the Second Circuit's holding in *Aereo*, nothing in *Cablevision* forecloses that common-sense distinction. *Aereo* read *Cablevision* to stand for a dispositive rule that, any time a system makes transmissions from unique user-associated copies, the transmissions are private rather than public.[133] But *Cablevision* did not adopt that inflexible rule. *Cablevision* stated only that "the use of a unique copy *may* limit the potential audience of a transmission and is therefore *relevant* to whether that transmission is made 'to the public.'"[134] In *Cablevision*, the separate copies mattered because Cablevision was offering a bona fide recording-and-playback service. The relevant question was who, from an *ex ante* perspective, was capable of receiving a transmission from one of those recordings at the time *the recording* was made available for playback. Because the only potential audience was the particular subscriber who made the recording, the performances were private. In Aereo's system, by contrast, the "separate copies" are simply technical steps in a process by which Aereo retransmits television programming to the public. The relevant question is who, from an *ex ante* perspective, is capable of receiving a transmission from Aereo's pool of television content at the time Aereo makes *that* content available. And the answer is, any of Aereo's subscribers.

If a video-on-demand operator reconfigured its system so that, any time a subscriber selected a movie to watch, the system would make a temporary user-associated copy of the movie and then transmit from that copy to the subscriber, the operator would still be offering the same basic video-on-demand service. The relevant "transmission" would be the entire chain of transmissions starting from the provider's library of content, through the hardware used to read that content, through the user-associated hard-drive copy, to the subscriber – not merely the last leg of the chain. Inserting "unique copies" into the transmission stream would not alter the fundamental nature of the service and should not transform a public performance into a private one. Aereo's system is no different.[135]

There is no basis in law or sensible copyright policy for a rule that unique user-associated copies break the chain of transmission without regard to the function they serve in the context of the overall transmission service being provided. As Judge Chin put it in his dissent, "[w]hereas Cablevision promoted its RS-DVR as a mechanism for recording and playing back programs, Aereo promotes its service as a means for watching 'live' broadcast

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[133] 712 F.3d at 690.

[134] 536 F.3d at 138 (emphasis added).

[135] As *Cablevision* pointed out, a video-on-demand operator that reconfigured its system this way would likely also run afoul of other exclusive rights. *See* 536 F.3d at 139-40 (cautioning that its holding "does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies," because such a provider might face "liability for unauthorized reproductions or liability for contributory infringement"). But in Cablevision's view – and, we suspect, most of the industry's – such a system would infringe the public performance right as well.

television on the Internet and through mobile devices."[136] By treating *Cablevision* as compelling *Aereo*'s result despite the very different roles the "unique copies" play, the Second Circuit went astray.

Mere Enabling of DVR Functionality Does Not Make Performances Private

Aereo did not hold that user-associated "unique copies" could *never* be insufficient to break the chain of transmission. It left open the possibility that a copy might be a mere "technical link in a process of transmission that should be deemed a unit[ary] transmission," such as "temporary buffer copies created by internet streaming."[137] But Aereo's hard-drive copies, the court ruled, did not fall within that category. "Aereo's copies . . . have the legal significance ascribed to the RS-DVR copies in *Cablevision*" because they enable the user to pause, rewind, or record a program for later viewing.[138] That "layer of control . . . means that Aereo's transmissions from the recorded copies cannot be regarded as simply one link in a chain of transmission."[139] The court reached that conclusion despite conceding that Aereo users often would not be using the pause, rewind, or record functions, and instead would simply be watching live television.[140] In the court's view, that fact was "not significant because the Aereo user *can* exercise such control if he wishes to."[141]

That comparison to *Cablevision* is unpersuasive. Cablevision offered two distinct services: A licensed cable retransmission service and a distinct recording-and-playback service. Cablevision did not rely on the separate RS-DVR recordings to justify the lawfulness of its underlying retransmission service. It had no need to, because the underlying retransmission service was licensed. Instead, Cablevision relied on the separate recordings to justify only the lawfulness of the RS-DVR itself.

Aereo, by contrast, is not relying on its separate hard-drive copies merely to justify the lawfulness of its pause, rewind, and record functions. It is relying on those copies to justify the *entire underlying television retransmission service itself*. It is doing so even in the many cases where subscribers are *not even using* the pause, rewind, or record functions but are merely watching television live. That is a far cry from *Cablevision*.

That Aereo's separate hard-drive copies enable pause, rewind, and record functions may prove that those copies are not a total sham. But that is not the test. The relevant

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[136] *Aereo*, 712 F.3d at 702 (Chin, J., dissenting).

[137] 712 F.3d at 692 & n.14.

[138] *Id.*; *see also id.* at 692-93 n.15

[139] *Id.* at 692.

[140] *Id.* at 692 n.14 ("[A]n Aereo user in 'Watch' mode will often not exercise volitional control over the playback of the program, because the program will automatically begin playing when selected and he will watch it through to the end.").

[141] *Id.* (emphasis added).

question is whether, in the context of *the system whose lawfulness is at issue*, the transmissions emanating from the separate copies are better viewed as distinct transmissions or as mere links in a chain in some longer transmission. In *Cablevision*, the separate subscriber-made recordings were utterly central to the system whose lawfulness was at issue – which was, after all, a *recording*-and-playback system. In that context, it made sense to treat the playback transmissions as distinct rather than mere links in a chain, and to analyze the potential audience for the playback transmissions emanating from each separate recording. Because each transmission was available only to the subscriber who made the recording, the performances were private.

Aereo's hard-drive copies, by contrast, are wholly collateral to its television retransmission service and do not fundamentally change the nature of the service Aereo is offering. As Judge Chin put it, "[t]he core of Aereo's business is streaming broadcasts over the Internet in real-time; the addition of the record function . . . cannot legitimize the unauthorized retransmission of copyrighted content."[142] Indeed, it is absurd to think that a television retransmission system's lawfulness could depend on whether the system happens to offer pause, rewind, and record functions. The seven-second buffer that Aereo inserted into its transmission streams to enable DVR functionality is not different in any relevant respect from a fifteen-second buffer inserted to enable quality assurance review or a five-second buffer inserted to enable reformatting. There may be perfectly valid reasons to insert all those separate copies, but none of them changes the basic fact that Aereo is retransmitting television programming to the public. Undoubtedly, that is how consumers perceive the service. In that context, it makes sense to view the hard-drive copies as mere steps in the retransmission process and to consider the potential audience for the retransmissions as a whole, not merely their final legs.

Aereo's System Also Infringes the Reproduction Right

The broadcasters' efforts to expand the public performance right also ignore an important antecedent question. Aereo's private performance argument relies critically on the individual hard-drive copies that consumers make when they use the system. But that defense only even *begins* to work if the *copies themselves* are lawful. They are not: The very "unique copies" on which Aereo relies for its private performance argument doom it by infringing the reproduction right. The Copyright Act grants owners the exclusive right to "reproduce the copyrighted work in copies,"[143] and a service provider may be held secondarily liable for inducing customers to engage in unlawful reproduction.[144] That is

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[142] *Aereo*, 712 F.3d at 702 (Chin, J., dissenting).

[143] 17 U.S.C. § 106(1).

[144] *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Because the copies made by Aereo's system are infringing even if subscribers are deemed to be the ones making them, a court would not need to determine whether Aereo engages in sufficient volitional conduct to be a direct infringer. *See Cablevision*, 536 F.3d at 130-33 (explaining the volition standard for direct

what Aereo's system does here. Thus, there is no need even to reach the public performance issue. Aereo's system induces unlawful copying and should be enjoined for that reason alone.

Aereo argues that the copies are not infringing because subscribers have a fair use right to make them under *Sony*.[145] But *Sony* recognized only one specific fair use: time-shifting.[146] Aereo's customers use the hard-drive copies for a very different purpose: watching live television over an unlicensed retransmission system. Nothing in *Sony* supports the claim that that is fair use.

A consumer using a VCR or DVR is not acquiring any television programming he does not already lawfully receive, and he is not receiving that content in any way other than how he ordinarily receives it (whether over the air or through a cable or satellite subscription). Aereo's system, by contrast, supplants other content delivery mechanisms. The consumer is not simply watching the same programming later; he is acquiring the programming from an entirely different source.

The critical factor in *Sony* was the absence of any showing of "meaningful likelihood of future harm" to content owners.[147] *Sony* concluded that, where programming is already being delivered to a consumer's home through a licensed delivery network that provides fair compensation to copyright holders, content owners suffer no significant harm from a consumer's mere decision to record those licensed transmissions for later viewing. By contrast, Aereo's system supplants rather than complements licensed delivery networks. Aereo competes directly with cable systems and broadcast networks while refusing to pay any licensing or retransmission consent fees.

Aereo urges that the hard-drive copies are necessary to allow consumers to pause, rewind, or record a show for later viewing. But those time-shifting functions do not make the copies lawful when they are in fact used – as they always are – to deliver television over an unlicensed retransmission system. A copy made for one valid fair use purpose (such as time-shifting) may not be used for another purpose (such as delivering television over an unlicensed retransmission system) that does not *on its own* justify making the copy as fair use – especially where that non-fair-use purpose is how the copy is primarily used. Moreover, whatever justifications Aereo may offer, there can be little doubt that one important function of the hard-drive copies – if not the principal one – is simply to transform otherwise public performances into allegedly private ones by interposing separate user-associated copies into the transmission streams. That hardly qualifies as "fair use."

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infringement); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (same); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1368-70 (N.D. Cal. 1995) (same).

[145] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[146] *See id.* at 447-56.

[147] *See id.* at 451.

The importance of the reproduction issue has been obscured by the way *Aereo* was litigated. Although the plaintiffs invoked the reproduction right in their complaints, they sought a preliminary injunction solely on public performance grounds.[148] Consequently, the appeal to the Second Circuit was limited to that one theory. The reproduction issue, however, is now being hotly contested in summary judgment proceedings.[149] Those arguments may yet succeed where the public performance arguments failed. Indeed, in Aereo's parallel litigation in Boston, the district court, while denying an injunction, expressly found that the reproduction issue posed "a closer question than the issue of public performance."[150] For that reason too, the broadcasters' novel and expansive interpretation of the Transmit Clause is not only incorrect but unnecessary to achieve the goal they profess to seek.

VI. Conclusion

The broadcasters are justifiably critical of the *Aereo* decision. But rather than pursue a measured response tailored to the problem at hand, they seek a massive overcorrection that would wipe out not only *Aereo* but also *Cablevision* and much of the cloud computing industry in the process. Traditional copyright principles already provide more than adequate grounds for holding Aereo's system unlawful. The public performance right should not be radically expanded to address a need that does not exist.

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[148] *See Aereo*, 712 F.3d at 686 n.9.

[149] *See, e.g.*, Plaintiffs' Opposition to Aereo's Motion for Summary Judgment in *WNET v. Aereo, Inc.*, No. 1:12-cv-01543, at 18-25 (S.D.N.Y. filed July 17, 2013) (docket #237) (arguing that *Sony* does not grant consumers any fair use right to make hard-drive copies with Aereo's system and that Aereo is secondarily liable for that infringement).

[150] *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 WL 5604284, at *7 (D. Mass. Oct. 8, 2013).

EXHIBIT

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The Honorable Elena Kagan
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Dear Ms. Kagan:

We submit this letter to urge the United States to recommend that the Supreme Court deny the petition for certiorari in *CNN v. Cablevision*. As law professors who teach and write about copyright and Internet law at law schools throughout the United States, we think Supreme Court intervention in this case is both unnecessary and unwarranted. To begin with, we note our agreement with the Respondents' position that the Second Circuit decision does not satisfy the Supreme Court's criteria for review: it presents no conflict with the decision of any other Circuit Court, it is consistent with Supreme Court precedent, and it would make an exceedingly poor vehicle for review given various concessions by the parties before the trial court. This letter focuses on an additional and, in our view, particularly compelling reason why the Supreme Court should decline to intervene in this case – the Second Circuit's interpretation and application of the Copyright Act were clearly correct.

In a well-reasoned opinion, the Second Circuit properly applied settled copyright law to the particular facts presented by one new technology – Cablevision's Remote-Storage Digital Video Recorder ("RS-DVR"). Just like a conventional digital video recorder ("DVR") or a VCR, the RS-DVR permits a consumer to record a television program, as it airs, for later viewing by that consumer and no one else (a practice referred to in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984), as "time shifting"). The sole technologically meaningful distinction between the RS-DVR and a conventional DVR is that the consumer using the RS-DVR records programs on a hard drive in a server located in a Cablevision facility, rather than on a hard drive in a set-top box located in the consumer's home. In every other respect, the RS-DVR replicates the functionality of the DVR; it is essentially a DVR hooked up to the TV through a very long wire. Petitioners filed this lawsuit arguing that this technological distinction somehow transformed an unquestionably lawful copyright use – a consumer's "fair use" right to "time shift" – into an act of unauthorized copyright infringement by Cablevision. The Second Circuit held that the particular location of the consumer's copy is a distinction without a copyright difference. The court reached three legal conclusions in support of that ruling – each of which is, in our view, fully supported by the Copyright Act.

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First, the court held that Cablevision could not be held directly liable for creating the copies stored on the RS-DVR system because those copies are made by Cablevision's customers, not Cablevision. Relying on a line of cases beginning with *Religious Technology Center v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995), the court found that the Copyright Act requires that, to be liable for direct infringement of the reproduction right, the defendant engage in volitional conduct in the making of the copy. Examining the RS-DVR, the court concluded that Cablevision's role in designing and operating a system that automatically produces copies on the command of others is not the sort of volitional conduct that can turn Cablevision into one who does the copying in question. Rather, Cablevision's operation of the RS-DVR system is analogous to the role of a proprietor of a copyshop whose self-service machines are used by customers to make copies: nobody would suggest that the proprietor of the copyshop makes those copies himself. We think this analogy is perfectly fitting, and that the legal conclusion that the consumer does the relevant copying with the RS-DVR is plainly correct. As the court noted, the doctrine of contributory liability stands ready to provide adequate protection for copyright holders against those who do not themselves engage in volitional copying conduct, but who nonetheless contribute to the copying of others. In this case, however, Petitioners expressly disavowed any argument that Cablevision could be held liable for contributory infringement. As a result, the "parade of horribles" identified by Petitioners cannot plausibly be considered a consequence of the Second Circuit's holding – which merely demarcated a sensible boundary line for direct copyright liability in the context of one particular technology, and which left undisturbed the fact-sensitive, flexible doctrine of secondary liability.

Second, the Second Circuit correctly concluded that Cablevision did not violate the Copyright Act as a result of the RS-DVR's automatic generation of temporary "buffer copies" in Cablevision's system – consisting of a sequence of 1.2 second snippets of programs that are overwritten immediately after they are created. The court held that such evanescent buffering does not meet the Copyright Act requirement that a copy be "fixed," which requires that it not only permit reproduction, perception, or communication but also that it last "for a period of more than transitory duration," 17 U.S.C. § 101. The court sensibly rejected Petitioners' argument that the buffering creates "fixed" copies simply because the work is "capable" of being reproduced from the buffer. That argument, if accepted, would have read the "transitory duration" requirement out of the Copyright Act and would have radically destabilized copyright law because *all* digital devices – cell phones, digital microphones, digital televisions, set-top DVRs – momentarily buffer data as they operate. The Second Circuit's ruling does not call into question other cases holding that data stored in RAM for longer periods could be considered a "copy" under the Copyright

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Act because the court expressly limited its decision to the particular buffer process at issue in this case. And the court's fact-specific judgment that these particular 1.2-second snippets are too temporary to be considered "copies" is not a legal question that merits Supreme Court review.

Third, the Second Circuit concluded that Cablevision does not engage in a "public" performance when a consumer plays back his or her unique copy of a program recorded on the RS-DVR. The court rightly understood that such performances are quintessentially "private" in nature – and that even if 1000 consumers record and playback the same program, those are just 1000 separate private performances. Petitioners based their contrary argument on language in the Copyright Act providing that a transmission of a performance is considered "to the public . . . 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. But the court properly concluded that the potential audience "capable of receiving" any given RS-DVR transmission is an audience of one – *i.e.*, the one consumer who directed Cablevision's RS-DVR system to record a unique copy of a program and who alone is capable of receiving the transmission of that particular recording. Because Cablevision does not hold out any RS-DVR transmissions to the general public, it necessarily follows that Cablevision does not engage in any "public" performances within the meaning of the Copyright Act when consumers use the RS-DVR to watch their own copies of programs that they previously recorded. Although Petitioners might object to that result as a policy matter, it is the result dictated by the statute that Congress enacted.

In sum, we think the Second Circuit reached the right result in a well-reasoned decision that was appropriately narrow in scope. In our view, copyright law would be best served by letting that sound decision stand.

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