February 28, 2014

Cable Television and the Aereo Case – Then and Now

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ABSTRACT

The Supreme Court will soon confront whether Aereo's service – which affords subscribers access to over-the-air television signals through the use of dime-sized, customer-specific antennas and remote digital video recorders – infringes the Copyright Act's public performance right. In endorsing the Second Circuit's decision holding that Aereo does not so infringe, some advocates have suggested that such disruptive digital age technology is well beyond what Congress contemplated when it drafted the "Transmit Clause" of the public performance right nearly 50 years ago. Our exploration of the history indicates otherwise.

The drafters of the Copyright Act of 1976 had greater foresight than the Second Circuit recognized. As the 1965 Supplementary Report of the Register of Copyrights emphasizes, "it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation."

The following year, Congress explained its intent in crafting the public performance right to cover transmissions of performances "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." Its 1966 report notes that liability would arise "whenever the potential recipients of the transmission represent a limited segment of the public, such as . . . the subscribers of a community antenna television service." It noted that the "same principles apply . . . 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" – language that comes eerily close to describing Aereo's service.

It is difficult to imagine the drafters not considering Aereo to fall comfortably within their conception of a public performance right, especially when considered in light of the drafters' stated intention that the statute be interpreted broadly so as protect against the "real danger" of confining the "scope of the author's rights on the basis of the present technology" in the face of even "unforeseen technical advances."

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When Congress's development of the retransmission compulsory license is added to the mix, the case for liability becomes airtight. After 1966, the governing law affecting cable television evolved considerably. After the Supreme Court determined that cable television services do not implicate the copyright owner's rights, Congress added Section 111 as part of its stated intention to legislatively reverse the Court's *Teleprompter* and *Fortnightly* rulings. This provision establishes a detailed compensation regime whereby cable services are charged for sending over-the-air signals to their subscribers. Retransmission of those signals absent compliance with the provisions set forth in Section 111 or authorization from the copyright owner constitutes copyright infringement. Over the ensuing decades, Congress has cemented this proposition time and again.

When taken together, the text, structure, and legislative history of the 1976 Act establish that Congress intended its public performance right to reach the Aereo service.

No. 13-461

In The
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., et al.,

Petitioners,

v.

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

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS PETER S. MENELL AND DAVID NIMMER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The authors of this brief are law professors at the University of California who study and teach intellectual property law.

Professor Peter S. Menell holds a law degree and a doctorate degree in economics. Beginning in law school, he has focused a significant portion of his research on intellectual property law. Soon after joining the University of California at Berkeley School of Law faculty in 1990, he laid the groundwork to establish the Berkeley Center for Law & Technology (BCLT). Since its founding in 1995, BCLT has sought to foster the beneficial and ethical understanding of intellectual property (IP) law and related fields as they affect public policy, business, science and technology through a broad range of public policy conferences, collaboration with government agencies (U.S. Patent & Trademark Office, Federal Trade Commission, the U.S. Copyright Office), interaction with intellectual property practitioners and technology companies, and research and educational initiatives.

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[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief through blanket consent letters filed with the Clerk's Office.

Professor Menell has authored or co-authored more than fifty articles and eight books, including leading casebooks on intellectual property and internet law. He has written numerous articles on copyright law and has contributed to NIMMER ON COPYRIGHT. Professor Menell has organized more than 50 intellectual property education programs for the Federal Judicial Center, including an annual multi-day program on "Intellectual Property in the Digital Age" since 1998. He has advised the U.S. Congress, federal agencies, state Attorneys General, and major technology and entertainment companies on a wide range of intellectual property and antitrust matters. He served as Vice-Chair of the National Academies of Sciences project on copyright and innovation. He writes regular commentaries on copyright law and policy that appear on the Media Institute website. He was selected by the Copyright Society of the U.S.A. to present the 42nd Annual Donald C. Brace Memorial Lecture in 2011-12. The article based on that lecture – This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347674> – will soon appear in the Journal of the Copyright Society of the U.S.A.

Professor David Nimmer has taught courses in copyright law and lectured on the subject at his home institution of UCLA and at other universities across the country and around the world, including LUISS in Rome, Waseda University in Tokyo, and Haifa University in Israel. Since 1985, he has authored

Releases 18 through 93 of NIMMER ON COPYRIGHT, maintaining up-to-date the treatise originally published by his late father, Melville B. Nimmer, in 1963. He has also written approximately fifty articles about domestic and international copyright law as well as its historical development, some of which are gathered in two anthologies published by Kluwer Law International in the Netherlands: COPYRIGHT: SACRED TEXT, TECHNOLOGY AND THE DMCA (2003) and COPYRIGHT ILLUMINATED (2008).

In January 2014, Professor Nimmer testified before Congress at the invitation of the House Judiciary on the subject of copyright reform, particularly regarding copyright law's "making available" right. Previously, he had testified to Congress on behalf of the United States Telephone Association and the National Association of Broadcasters, as well as to a Parliamentary commission in Sydney on behalf of the Combined Newspaper and Magazine Copyright Committee of Australia. In 2013, THE BEST LAWYERS IN AMERICA named him Los Angeles Litigation Intellectual Property "Lawyer of the Year."

SUMMARY OF ARGUMENT

Congress framed the governing Copyright Act of 1976 to achieve several objectives. Most importantly, Congress wished to "insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works,"

while guarding against two "dangers": (1) "that these works will not be disseminated and used as fully as they should because of copyright restrictions"; and (2) "confining the scope of an author's rights on the basis of the present technology so that, as the years go by, [the author's] copyright loses much of its value because of unforeseen technical advances."

Presciently, even as of the 1965 report stating these principles, Congress recognized that "it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation."

The following year, Congress explained its intent in formulating the copyright owner's public performance right through a Transmit Clause that recognizes liability "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." Its 1966 report explained that liability would arise "whenever the potential recipients of the transmission represent a limited segment of the public, such as . . . the subscribers of a community antenna television service." It noted that the "same principles apply . . . 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*." Congress crafted the language of the Transmit Clause to make liability under those circumstances "doubly clear."

The circumstances that Congress perceived as possible in the 1960s have been realized today. Respondent Aereo offers a service that essentially replicates the functionality of providing programming to "the subscribers of a community antenna television service [CATV]" using "*an information system [] capable of being performed or displayed at the initiative of individual members of the public*."

After 1966, the governing law affecting those services (then called "CATV," now known more generally as "cable television") evolved considerably. In its *Teleprompter* (1968) and *Fortnightly* (1974) rulings, this Court determined that cable television services do not implicate the copyright owner's rights. By virtue of those rulings, cable companies were able to retransmit to their subscribers the only pertinent signals then available – those broadcast over the air. They were allowed to do so without seeking authorization from the copyright owners of the affected programming and without the need to pay any compensation for that privilege. A burgeoning cable industry thereby began in the United States. At the outset, its only originated offerings consisted of low-quality "local access" shows. Today, by contrast, programs that are

originated on cable channels rank among the most popular and critically acclaimed television programs.

Congress took notice of that shift in the law. In a bargain that took over a decade to effectuate, Congress added to its 1966 handiwork the lengthiest provision that went into what ultimately became the Copyright Act of 1976. In particular, Section 111 minutely regulates cable television, legislatively reversing the result of the *Teleprompter* and *Fortnightly* rulings. It sets up a compensation scheme whereby cable services are charged for the privilege of sending over-the-air signals to their subscribers. Retransmission of those signals absent punctilious compliance with the detailed provision set forth in Section 111 or authorization from the copyright owner constitutes copyright infringement.

Over the ensuing decades, Congress has cemented this proposition time and again. Its numerous intervening amendments in the 1980s, 1990s, continuing all the way through 2010, rely on the premise that services retransmitting over-the-air television signals must compensate the copyright owners of the affected programming and comply with all the other laborious requirements that Congress has incorporated into numerous provisions of the Copyright Act. Absent such compliance, their conduct constitutes copyright infringement.

Until the ruling below, that is. For the first time since the 1976 Act went into effect, a service that retransmits television signals has been exempted from

the elaborate scheme that Congress laboriously created. That service is called Aereo, and the source of its unique get-out-of-jail-free card is the majority ruling below. Given its effect of unraveling the basis on which the Copyright Act of 1976 was passed into law and reaffirmed by Congress on multiple occasions since, that ruling cannot stand.

ARGUMENT

This case concerns copyright owners' public performance right. Petitioners advanced two separate arguments to the Court of Appeals regarding the public performance right: "Plaintiffs claim that Aereo's transmissions of broadcast television programs while the programs are airing on broadcast television **[a]** fall within the plain language of the Transmit Clause and **[b]** are analogous to the retransmissions of network programming made by cable systems, which the drafters of the 1976 Copyright Act viewed as public performances." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 686 (2013).

With respect to **[a]**, the Second Circuit majority construed "the plain language of the Transmit Clause" against plaintiffs,[2] whereas the dissent construed the

[2] *Id*. at 693 n.16 ("Congress clearly believed that, under the terms of the Act, some transmissions were private. The methodology Congress proscribed for distinguishing between public and private transmissions is the size of the potential audience, and by that methodology, the feed from Aereo's antennas is a private

(Continued on following page)

same "plain language" to reach the opposite conclusion.[3] That dispute arises precisely because the language that Congress enacted in 1976 is anything but plain. In analyzing the 1976 Act, Professor Melville B. Nimmer quoted the Transmit Clause and then concluded that "it is difficult to believe that it was intended literally."

> It would mean, for example, that the performance of music on a commercial phonograph record in the privacy of one's home constitutes a public performance because other members of the public will be playing duplicates of the same recorded performance "at different times." It is absurd to suppose that under the current Act it has become necessary for private purchasers of phonorecords to obtain a performing rights license from ASCAP or BMI before they may lawfully play such phonorecords within their homes.

2 NIMMER ON COPYRIGHT § 8.14[C][3] (1982). Precisely because literal application of the statutory language yielded some absurd consequences, he backed into a different conclusion: "Upon reflection, it would seem that what must have been intended was that *if the same copy* (or phonorecord) of a given work is repeatedly played (i.e., 'performed') by different members of

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transmission because it results in a performance viewable by only one user.").

[3] *Id*. at 701 (Chin, J., dissenting) ("Aereo seeks to avoid the plain language of the Copyright Act . . . ").

the public, albeit at different times, this constitutes a 'public' performance." *Id.* Focusing on particular scenarios that were salient as opposed to technologies not yet invented, he forthrightly acknowledged that this particular interpretation was not without its own problems – for example, it could render videotape rental infringing, inasmuch as that conduct results in the same videotape being played repeatedly by different members of the public at different times.

It is the above conclusion that Courts of Appeals, including the majority decision below, have cited from NIMMER ON COPYRIGHT as the basis to interpret the Transmit Clause. See *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 749 F.2d 154, 159 (3d Cir. 1984); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 688 & n.11. The challenge of this case, however, lies in assessing how Congress intended courts to apply the 1976 Act provisions to Aereo's unprecedented service – one that integrally affects other aspects of copyright doctrine which Congress has minutely regulated. See Part II, *infra*. Aereo affords its subscribers access to over-the-air signals through the use of customer-specific, miniature antennas and customer-specific, remote hard drives that provide customers the choice of nearly instantaneous viewing or recording for later viewing. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 680-83. In other words, this case poses plaintiffs' argument **[a]** above in conjunction with their argument **[b]**. From the customers' perspective, Aereo's service is

functionally equivalent to a cable service, as plaintiffs' argument **[b]** highlights. Because such systems were technologically feasible neither at the time that the 1976 Act was passed nor when Professor Melville B. Nimmer analyzed the pertinent provisions, deeper statutory archeology is required to determine the proper interpretation.[4]

Part I traces the development of the 1976 Act's public performance right. It examines specific legislative history surrounding the definition of "publicly." The drafters of the key provision actually envisioned services close to Aereo's falling squarely within the Transmit Clause. Part I also reveals general legislative history explicating the drafters' design and

[4] While the text and structure of the 1976 Act support our conclusion, the additional insights gleaned from systematic review of the legislative history reinforce that conclusion. Recognizing that some members of the Court do not regard legislative history as an appropriate source for determining legislative intent, we urge three propositions. First, the Congress of the 1960s and 1970s believed that its reports and hearings would be consulted in determining its intent. Second, the legislative record surrounding the 1976 Act is remarkable in its detailed analysis and transparency. Third, as discussed in Part IB, the drafters of the 1976 Act very much sought to establish a law that could stand the test of time. Congress struggled to reform the 1909 Act over many decades and saw the enactment of omnibus reform as a monumental achievement for the nation. Thus, even if skepticism may be warranted in approaching modern-day legislative history negotiated behind closed doors, such concerns are diminished or non-existent in the context of the 1976 Act materials resulting from open hearings involving the copyright experts of the day.

intention surrounding the 1976 Act's exclusive rights. Part II examines key structural features of the 1976 Act that shed light on the applicability of the public performance right to subscription retransmission services.

I. The Specific Legislative History Relating to the Definition of "Publicly" as Well as Congress's Clear Intention to Ensure that Unforeseen Technological Changes Not Undermine Creators' Rights Support Finding that Aereo Infringes the Public Performance Right

Throughout its history, copyright protection has been buffeted by technological change. See generally Peter S. Menell, Envisioning Copyright Law's Digital Future, 46 N.Y.L. Sch. L. Rev. 63 (2002-2003) (tracing the arc of copyright law's adaptation to distribution technologies). Indeed, the emergence of broadcast technology shortly after the passage of the 1909 Act led to regular calls to update the statute. Congress set out to update the 1909 Copyright Act at various points during the first half of the twentieth century without success. See U.S. Copyright Office, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at x (July 1961). The reform forces coalesced in 1955, persuading Congress to authorize appropriations over the next three years for comprehensive research and preparation of studies by the Copyright Office as the groundwork for general revision. The drafters of what became the 1976 Act

were acutely aware of the need to draft the statute in such a manner as to afford courts the flexibility and guidance to ensure that unforeseen technological changes did not undermine the Act's core protections.

It was expected that omnibus copyright reform would be completed by the early to mid-1960s. Due in substantial part to a logjam over how to address the emerging cable television marketplace, however, passage of the statute was delayed more than a decade. Critical to understanding the provisions at issue in this case is what transpired in the early to mid-1960s, when the bulk of the statute was drafted. See Peter S. Menell, In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. Copyright Soc'y U.S.A. 1, 31-33 (2011).

A. Specific Legislative History: The Scope of "Publicly"

The public performance right developed through several iterations following general principles set forth in the Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 22-23, 27-31 (H.R. Judiciary Comm. Print 1961). The changes broadened the public performance right, principally by expanding the definition of "publicly." See Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., 45, 47, 48, 241, 257, 282-84, 289-90,

303, 316, 332, 348-50, 394-95, 404-06 (H.R. Judiciary Comm. Print 1963); Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 4-6, 13-14, 135-58, 238-54 (House Comm. 1964); Copyright Law Revision, Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., 4-5, 128, 238, 268, 272, 284, 302-03, 315, 343, 344 (H.R. Judiciary Comm. Print 1965) (1964 Revision Bill); Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., 19-25 (H.R. Judiciary Comm. Print 1965).

By the time that the 1966 draft was circulated, the definition of the "publicly" provision (including the Transmit Clause – designated "(2)") was essentially complete.

> 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 time[s].

Copyright Law Revision, Report to Accompany H.R. 4347, Committee of the Judiciary, Sectional Analysis and Discussion, 89th Cong., 2d Sess., Section 106, Exclusive Rights in Copyrighted Works, Definitions 3 (Report No. 2237) (Oct. 12, 1966). The brackets in clause (2) contain the few words and comma that were added in the final 1976 Act version. Thus, the substantive scope of the provision as relates to this litigation had reached fruition by 1966, with the only addition being to further expand the Transmit Clause to include transmission or communication to the places described in clause (1). The accompanying report adds several pertinent observations:

> 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 direct 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 **[i]** the occupants of hotel rooms or **[ii]** the subscribers of a community antenna television service; they 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*. To make these principles doubly clear, the committee has amended clause (2) of the definition of "publicly" so that it 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."

Id. at 58 (emphasis added). The text following **[ii]** confirms that cable television services engage in public performances. The italicized text above comes eerily close to describing Aereo's technology. By specifying that the public performance right is implicated when a 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*," the drafters effectively described an on-demand DVR device providing access to over-the-air signals.

This is not to say that Congress foresaw all aspects of the Aereo service more than four decades before it reached the market. The report did not specifically refer to separate recording devices for each subscriber – more than a decade prior to the emergence of the household video cassette recorder (VCR), see Peter S. Menell & David Nimmer, Unwinding Sony, 95 Cal. L. Rev. 941, 945 (2007) – but nonetheless presciently described "an information system" that could be activated "at the initiative of *individual*

members of the public." It also refers to Congress's desire to be "doubly clear" that it viewed the provision very broadly. It is difficult to imagine the drafters not considering Aereo to fall comfortably within their conception of a public performance right when they describe both cable services and recording devices that can deliver performances to individual members of the public on demand as falling within the public performance right. When the general legislative history of the Act, treated immediately below, is additionally taken into account, any doubt as to that intention evaporates.

B. General Legislative History

A comparison of the 1965 Revision Bill and the 1976 Act reveals that the omnibus copyright reform package was nearly complete by the mid-1960s. Thus, the detailed Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (House Comm. Print 1965) provides unusual insight into the general legislative design grounding the provisions.

Chapter 2 of the 1965 Supplementary Report explicates the "exclusive rights" section of the draft copyright law. It notes at the outset that "of the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by advancing technology in all fields of communications, including a number of future developments

that can only be speculated about." See *id*. at 13. It goes on to explain:

> The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.
>
> Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an

author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest. In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.

We are entirely sympathetic with the aims of nonprofit users, such as teachers, librarians, and educational broadcasters, who seek to advance learning and culture by bringing the works of authors to students, scholars, and the general public. Their use of new devices for this purpose should be encouraged. It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of "fair use," may severely curtail the copyright owner's market for copies of his work. Likewise, it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting,

> linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."

Id. at 13-14.

The 1965 Supplementary Report's general statement of legislative purpose is remarkable in several respects. First, it shows that Congress was cognizant of the dangers posed by technological change and intended the statute to be interpreted broadly so as protect against the "real danger" of confining the "scope of the author's rights on the basis of the present technology" in the face of "unforeseen technical advances." More significantly, Congress worried as early as 1965 that "transmission of works by . . . linked computers, and other new media of communication" could threaten authors' ability to derive compensation. When combined with the specific legislative explanation for the definition of "publicly,"

the basis for holding Aereo liable for infringing the public performance right acquires irresistible force.[5] When Congress's development of the retransmission compulsory license (discussed next) is added to the mix, the case for liability becomes airtight.

II. The 1976 Act's Retransmission Regime Indicates that Congress Intended Commercial Retransmission Services to Obtain Either Express or Statutory Licenses to Retransmit Broadcast Signals

When it came time to consider plaintiffs' second argument that "Aereo is functionally equivalent to a cable system," the majority opinion below dismissed it summarily: "However, this reading of the legislative history is simply incompatible with the conclusions of the *Cablevision* court." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 694. It noted in a footnote that, "in 1976, when cable TV was still in its infancy, many Americans used rooftop antennas. Thus Congress would have certainly wished to avoid adopting language

[5] Judge Chin reached the same logic based on the common sense notion that courts should be appropriately skeptical of a technologically unsound "Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 697 (Chin, J., dissenting). For the reasons set forth above, the perceived loophole does not exist. Congress passed the 1976 Act in the belief that, within our constitutional structure, courts would be faithful to its intent in their interpretation of its statutes.

that would make millions of Americans copyright infringers because they transmitted broadcast television programs from their personal rooftop antennas to their own television sets." *Id*. at 694 n.18. The totality of its analysis consisted of a single paragraph:

> In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today. New devices such as RS-DVRs and Slingboxes complicate our analysis, as the transmissions generated by these devices can be analogized to the paradigmatic example of a "private" transmission: that from a personal roof-top antenna to a television set in a living room. As much as Aereo's service may resemble a cable system, it also generates transmissions that closely resemble the private transmissions from these devices. Thus unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private. Although Aereo may in some respects resemble a cable television system, we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act. And we certainly cannot disregard the express language Congress selected in doing so. That language and its legislative history, as interpreted by this Court in *Cablevision*,

> compels the conclusion that Aereo's transmissions are not public performances.

Id. at 694-95.

Beyond overlooking Congress's intent that courts ensure that unforeseen technological changes not undermine copyright law's core protections, see *supra*, Part IB, the majority's analysis overlooks the broader statutory structure. As noted previously, much of the legislative work between 1965 and 1976 involved crafting a compulsory license regime for the emerging cable television industry. See Copyright Law Revision, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess. on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 33-36 (1966) (Remarks of George D. Cary, Deputy Register of Copyrights) (describing the "controversy" surrounding community antenna television). The Second Circuit's terse dismissal of this substantial structural feature of the 1976 Act ignores the familiar canon of statutory construction that courts

> are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been

> repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. Market Co. v. Hoffman, 101 U.S. 112, 115-116.

Mastro Plastics Corp. et al. v. National Labor Relations Board, 350 U.S. 270, 298 (1956) (Frankfurter, J. dissenting); see also *TRW Inc. v. Adelaide Andrews*, 534 U.S. 19, 31 (2001); see generally SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (2013) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole."). In essence, the majority's interpretation of the few lines of the Transmit Clause sets at naught *41 pages* of the Copyright Act that Congress has devoted to the regulation of satellite and cable television.[6]

When Congress passed the Copyright Act of 1976, the enactment's most lengthy provision minutely regulated cable television's retransmission of over-the-air signals. 17 U.S.C. § 111. In gross measure, the purpose of that section was to legislatively overrule the rulings in *Fortnightly Corp. v. United Artists*

[6] The calculation is based on the length of Sections 111, 119, and 122 of the statute. See U.S. Copyright Office, Circular 92: Copyright Law of the United States (Dec. 2011).

Television, Inc., 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974), that cable television (then called Community Antenna Television, or CATV) did not implicate the copyright interests of works that were transmitted through its instrumentality.

> If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

Fortnightly, 392 U.S. at 400. Moving to some specifics, Section 111 eliminated the free pass that cable operators formerly enjoyed. See generally NIMMER ON COPYRIGHT § 8.18[E]. Instead, it substituted an elaborate regime, including the following (among many other features):

- Eligible "cable systems" are to compute their "gross receipts" base;
- They are then to pay royalty percentages geared to the amount of distant non-network programing that each system carries, which

the Act designates a "distant signal equivalent";[7]

- Those monies need to be tendered to the Copyright Office, which holds them pending a distribution proceeding carried out under the auspices of the Copyright Royalty Judges, whereby the money is disbursed to copyright claimants;

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[7] The level of detail set forth in the statute can be measured by this one excerpt of but a single subparagraph:

> (B) Except in the case of a cable system whose royalty fee is specified in subparagraph (E) or (F), a total royalty fee payable to copyright owners pursuant to paragraph (3) for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during such period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:
>
> (i) 1.064 percent of such gross receipts for the privilege of further transmitting, beyond the local service area of such primary transmitter, any non-network programming of a primary transmitter in whole or in part, such amount to be applied against the fee, if any, payable pursuant to clauses (ii) through (iv);
>
> (ii) 1.064 percent of such gross receipts for the first distant signal equivalent;
>
> (iii) 0.701 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents; and
>
> (iv) 0.330 percent of such gross receipts for the fifth distant signal equivalent and each distant signal equivalent thereafter.

17 U.S.C. § 111(d)(1)(B).

- Already by the early days of the Copyright Act, the fund totaled in the tens of millions of dollars. See *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982). More recently, the fees generated by Section 111 and its later-added cognates (discussed below) have amounted to $1 billion. See U.S. Copyright Office, Satellite Television Extension and Localism Act § 302 Report 52 (August 29, 2011).

- The license is nullified by failure to comply with numerous particulars. To highlight one on which the Senate/House conferees focused in 1976, see H.R. Rep. No. 94-1733 (1976), the compulsory license is lost if any commercial advertising transmitted by the primary transmitter is altered by the cable system through changes, deletions, or additions, except specified exceptions by those engaged in television commercial advertising market research.[8]

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[8] The actual language is that the cablecast:

> is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television

(Continued on following page)

Aereo undertakes none of those safeguards. As Judge Chin observed, Aereo claims the right to "retransmit, for example, the Super Bowl 'live' to 50,000 subscribers" without in any way complying with the elaborate specifications set forth above. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 697 (Chin, J., dissenting). The copyright laws as they existed before 1978 allowed cable companies to retransmit live broadcasts of the Super Bowl without any payment obligation. For the past 36 years, by contrast, all cablecasts of the Super Bowl have been either out of compliance with Section 111, in which case they constituted outright copyright infringement, or else have fallen within the parameters of Section 111, in which case they have been under the obligation to pay the significant royalties outlined above.

The decision below eviscerates that legislative scheme. In the past, those engaging in retransmission over the Internet have been ineligible to qualify for

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commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

17 U.S.C. § 111(c)(3) (emphasis in original).

the Section 111 compulsory license.[9] Aereo, by contrast, has been dealt a trump card by virtue of the majority decision below – it need not remit royalties via Section 111 or obtain any permission. Instead, the elaborate specifications that Congress legislated to allow rebroadcast of over-the-air transmissions is now set at naught.

The ramifications are dramatic. When a cablecaster wishes to send its subscribers a rebroadcast of the Super Bowl, not only must it remit the royalties discussed above, but it is also under an obligation not to alter the advertising, pursuant to the exquisitely worded statutory mandate. By contrast, Aereo is under no such disability. Once Aereo has been deemed not to implicate the copyright owner's public performance right by rebroadcasting material, it is trivial to conclude that it violates no cognizable rights by omitting material. Thus, if Aereo chooses to send a hit

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[9] In the thirty-five years since the passage of Section 111, many companies have constructed business models revolving around the use of new technologies and the statutory license. * * * No technology, however, has been allowed to take advantage of Section 111 to retransmit copyrighted programming to a national audience while not complying with the rules and regulations of the FCC and without consent of the copyright holder.

WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594, 602 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275 (2d Cir. 2012). As Judge Chin noted in that appeal, "Continued live retransmissions of copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry." *Id*. at 286.

television show to its customers with the deletion of authorized commercials, it cannot incur liability. Indeed, if it wished to go further and sell its own commercials in substitution for the aired material, that conduct, too, might well escape liability. After all, Aereo's own advertisers would have consented to the transmission of their proprietary material, and the copyright owner of the show has already been rendered powerless to complain of the violation of its public performance right.

But that is not all. The decision below arose in the context of over-the-air transmissions. Nonetheless, altering our focus to cable-originated programming, there is no reason to conclude that the opinion below somehow fails to reach that conduct as well. HBO charges each of its subscribers for the privilege of receiving its programming; let us imagine that Aereo were to configure its system to offer the same functionality regarding HBO that it currently affords to over-the-air broadcasts. It could do so simply by enlisting an HBO subscriber to route his signal through Aereo's instrumentality. Thereafter, Aereo could offer all of its subscribers the full panoply of HBO programming – after all, if the majority rule below stands, then it does not implicate copyright owners' public performance right for their content to be sent to Aereo's subscribers. It is immaterial to that conclusion whether the programming in question started out on free television or on cable television – if the public performance right is not implicated, then there is no infringement about which HBO can

complain.[10] To that extent, the opinion below threatens to decimate multiple industries.

The majority opinion's impact on cable television is especially striking given developments that have unfolded in that domain since passage of the Copyright Act in 1976. As the Copyright Office has noted, cable penetration in 1976 was 15.5% of households; in the intervening years, it has risen to 85%. See U.S. Copyright Office, Satellite Television Extension and Localism Act § 302 Report 31 (August 29, 2011). Congress has closely monitored these developments, returning time and again to amend the Copyright Act to take cognizance of marketplace developments.

The process started in 1988. Taking note of the many locations "that cannot pick up . . . signals through a rooftop antenna or a cable because they are far from the big cities, or in some cases just on the wrong side of the mountain," H.R. Rep. No. 100-887(1) (1988) at 18, Congress decided to add yet a new compulsory license to the Copyright Act. Importantly, Congress acted against the backdrop that any time a new technology would bring television signals into thousands (or millions) of homes, the result under the 1976 Act, unless amended, would

[10] It is no answer to this conundrum to respond that HBO could incorporate license terms into its subscriber agreements barring Aereo's retransmission. For if Aereo were to obtain the HBO signal from a third party who subscribed to that premium cable service, then Aereo would not be in privity of contract with HBO.

be to render the retransmitter liable for copyright infringement. Therefore, Congress passed a new amendment to that law. Specifically, the Satellite Home Viewer Act of 1988 added Section 119 to the Copyright Act. Act of Nov. 16, 1988, Pub. L. No. 100-667, 102 Stat. 3935. Its details are even more convoluted than Section 111. See NIMMER ON COPYRIGHT § 8.18[F]. Suffice it to say that Section 119 continues in the path of its predecessor by requiring the payment of royalties for the privilege of retransmitting television signals to large numbers of people, gathering those royalties for distribution to copyright owners, and minutely regulating the scope of what conduct is permitted thereunder.[11]

Congress later returned to this domain by enacting the Satellite Home Viewer Act of 1994 and then the Satellite Home Viewer Improvement Act of 1999. Act of Oct. 18, 1994, Pub. L. No. 103-369, 108 Stat. 3477; Act of Nov. 29, 1999, Pub. L. No. 106-113, App. I, 113 Stat. 1501. The latter added yet another compulsory license to this domain in the form of Section 122 of the Copyright Act. See NIMMER ON COPYRIGHT § 8.18[G]. In broad stroke, this third compulsory license continues the same themes from the first two

[11] Several highly technical opinions have issued regarding compliance with the Individual Location Longley-Rice model of Section 119, which is designed to predict signal strength and thereby draw the line between permitted and forbidden satellite exploitation. See *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193 (11th Cir. 2001); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999).

by allowing retransmissions in yet new domains, subject to the obligation to remit royalties to copyright owners, pursuant to minute specifications as elaborately charted by Congress.[12]

Even those multiple interventions scarcely exhaust the field. Congress again returned to overhaul its handiwork by passing the Satellite Home Viewer Extension and Reauthorization Act of 2004. Act of Dec. 8, 2004, Pub. L. No. 108-447, 118 Stat. 2809, div. J, tit. IX. Later, it passed the Satellite Television Extension and Localism Act of 2010. Act of May 27, 2010, Pub. L. No. 111-175, 124 Stat. 1218. Each is massive in import and works significant adjustments to the Copyright Act and Communications Act, in order to effectuate Congress's will regarding the payment of royalties for the privilege of retransmitting television signals in a constantly evolving technical environment. In sum, the passage of major revisions to the 1976 Copyright Act in 1988, 1994, 1999, 2004, and 2010 attests to the vital interest that Congress has continued to maintain regarding appropriate regulation of this domain.

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[12] To cite but one example, this latest compulsory license obligates satellite carriers to furnish, within 90 days after commencing their secondary transmissions, "(A) a list identifying (by name in alphabetical order and street address, including county and 9-digit zip code) all subscribers to which the satellite carrier makes secondary transmissions of that primary transmission," as well as "(B) a separate list, aggregated by designated market area," of other subscribers. 17 U.S.C. § 122(b)(1).

Against that backdrop, the majority's support for its conclusion below withers. To reiterate, its rationale was threefold:

(1) Plaintiffs' "reading of the legislative history is simply incompatible with the conclusions of the *Cablevision* court." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 694.

(2) "[I]n 1976, when cable TV was still in its infancy, many Americans used rooftop antennas. Thus Congress would have certainly wished to avoid adopting language that would make millions of Americans copyright infringers because they transmitted broadcast television programs from their personal rooftop antennas to their own television sets." *Id*. at 694, n.18; and

(3) "In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today. . . . Thus unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private. Although Aereo may in some respects resemble a cable television system, we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act." *Id*. at 694-95.

In response to each, we note:

(1) Beyond *Cablevision* not being binding on this Court, the majority below was mistaken to root consideration of the structural relevance of Section 111 in the legislative history of another provision. To the contrary, the incompatibility of Aereo's position with governing law unfolds over 41 pages of the Copyright Act itself. Having focused its attention exclusively on the Transmit Clause, the majority below blinded itself to the larger meaning of Congress's handiwork. That myopia results in an opinion that traduces whole swathes of governing law.

(2) The majority's rationale is that anyone could set up a rooftop antenna, so commercial services doing effectively the same thing should rest beyond liability. That rationale exactly matches the above quotation from *Fortnightly* concluding that the "only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur." Yet Congress deliberately rejected that standard by adopting Section 111, as the dissent below emphasized. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 699 (Chin, J., dissenting).

(3) The majority looks to "the technological environment of 1976" to conclude that

> there have been "unanticipated technological developments" in the interim, but expressed its obligation as being to follow the "concerns expressed by Congress in drafting the 1976 Copyright Act." As revealed in Parts I and II of this brief, Congress's specific and general statements as well as the structure of the 1976 Act compel the opposite conclusion. Furthermore, Congress reinforced those concerns to accommodate the progress of technology by amending the Act in 1988; then further reinforced those concerns as technology marched forward by again amending the Act in 1994; and did the same yet again in 1999; and likewise in 2004; plus yet another time in 2010.

The one constant is that Congress has considered infringing any service that provides television signals on a wholesale basis. It has consistently amended the Act to add compulsory licenses to allow services to provide those television signals when it deemed that conduct to be in the public interest – always subject to a royalty obligation to benefit copyright owners, along with a host of specific statutory requirements. The decision below has allowed the first entity since 1976 to provide television signals on a wholesale basis without being governed by those detailed requirements – not to mention without undertaking any corresponding royalty obligation.

The Second Circuit majority acknowledged that its holding "created tension [with] Congress's view that retransmissions of network programs by cable television systems should be deemed public performances," *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 695, but it overrode those concerns based on a misguided understanding of the text, structure, specific legislative guidance, and general legislative purposes of the 1976 Act.

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CONCLUSION

For the reasons set forth above, we respectfully submit that the Court should hold that Aereo's service infringes the copyright owners' exclusive right of public performance, and therefore reverse the decision below.

Respectfully submitted,

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February 27, 2014