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### We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the "Transmit" Clause

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**We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud  
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# We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the “Transmit” Clause

Rebecca Giblin\* and Jane C. Ginsburg\*\*

## Abstract

*Businesses are exploiting perceived gaps in the structure of copyright rights by ingeniously designing their technologies to fulfill demand for individual access through a structure of personalized copies and playback engineered in ways intended to implicate neither the public performance nor the reproduction rights. The archetypal example is Aereo Inc.’s system for providing online access to broadcast television. Aereo allows users to tune into individual antennae to stream TV to themselves, near-live, online. Aereo’s activities look a lot like the retransmission of broadcast signals, an activity which Congress has made very clear must result in remuneration for rightholders. However, Aereo’s careful design, which assigns each user her own antenna to generate an individual transmission copy from which she can access only the signals she could freely pick up from her own rooftop, means that it can also be argued that Aereo is simply enabling consumers to engage in legitimate non-remunerable uses. If the legality of this design is upheld by the Supreme Court this term, Aereo and subsequent comers will be able to offer consumers on-demand access to content, in a way that competes with licensed services, without any obligation to remunerate the rightholder.*

*The implications of these business models are significant: in the case of audio and audiovisual works, for example, the on-demand access market may soon exceed the value of the retention copy-based market. When some participants are licensed but their competitors are not, the imbalance may provoke licensees to revise or forego their agreements. More generally, opportunistic engineering choices that obscure some courts’ perceptions of the impact on the on-demand access market risk removing evolving markets from the scope of copyright owners’ exclusive rights. Businesses that free-ride on copyrighted works also obtain an unfair competitive advantage over copyright licensees. The authors of*

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The authors thank Jonathan Band; David Carson, Jacqueline Charlesworth, Jeffrey Cunard, Margaret Larkin - Columbia Law School class of 2015, Matthew Sag, Mitch Stoltz, Kimberlee Weatherall, Jennifer Urban and Matthew Zinn. We are especially grateful for research assistance to Taylor Jones - Columbia Law School class of 2014.

*this paper approach copyright from very different perspectives, but are united in the view that it is undesirable for legal outcomes to depend so heavily on technical design.*

*This article addresses the U.S. caselaw that encouraged businesses such as Aereo to design technologies that could rival or even displace copyright-remunerative modes of making works of authorship available to the public. We consider the implications for copyright owners were Aereo and its supporters to succeed in their reading of the Copyright Act, as well as the implications for other technologies, particularly those involving “cloud” storage, were the broadcasters to prevail. Finally, each author offers her own analysis to demonstrate how it is possible to read the U.S. Copyright Act’s transmit clause in a way that does not make technological design determine the outcome. Either one of our readings, we argue, enables copyright’s exclusive rights to remain effective without discouraging technological innovation.*

## **Introduction**

Copyright has long focused on copies, starting, in common law countries, from the 1710 Statute of Anne’s sole rights to print, publish and sell. Copyright’s other principal exclusive right, the public performance right, later (in the U.K. and the U.S.) joined the reproduction right to cover most forms of exploitation of works of authorship. Deriving from distinct enactments, these rights often were administered separately, and both business practice and legal rules reinforced the borders between the regimes of rights. Digital media have now largely blurred those boundaries and their attendant commercial consequences. Business models and consumer expectations are shifting from providing and possessing copies to enjoying access to the content of works of authorship online. The right of communication to the public, or (in U.S. copyright terminology) of public performance or display by transmission, thus becomes a much more significant copyright prerogative.

As our consumption of creative works shifts to accessing digital works online, some commentators have warned of the potential for copyright to intrude too far, triggering copyright owner claims to control all acts, public or private, that follow on from the initial, perhaps ephemeral, digital copy, in effect extending the Copyright Act’s enumerated rights into a general “use” right, or, as Jessica Litman feared, into an “exclusive right to read.”<sup>1</sup> Recent developments, however, have taken an ironic turn: where ephemeral copies once seemed to offer copyright owners a hook to draw in even private enjoyment of copyrighted works, now

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<sup>1</sup> Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994); *see also* J.H. Spoor, “The Copyright Approach to Copying on the Internet: (Over) Stretching the Reproduction Right?”, in *THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT* 67-79 (1996); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462 (1998).

temporary copies foster an opposite variety of overreaching. They serve as the fulcrum for the copyright-avoiding business models of for-profit enterprises that make others' content available for consumer enjoyment. Businesses are exploiting perceived gaps in the structure of copyright rights by ingeniously designing their technologies to fulfill demand for individual access through a structure of personalized copies and playback engineered in ways intended to implicate neither the public performance nor the reproduction rights. The archetypal example is Aereo Inc.'s system for providing online access to broadcast television. Aereo allows users to tune into individual antennae to stream TV to themselves, near-live, online. Aereo's activities look a lot like the retransmission of broadcast signals, an activity which Congress has made very clear must result in remuneration for rightholders. However, Aereo's careful design, which assigns each user her own antenna to generate an individual transmission copy from which she can access only the signals she could freely pick up from her own rooftop, means that it can also be argued that Aereo is simply enabling consumers to engage in legitimate non-remunerable uses. If the legality of this design is upheld by the Supreme Court this term, Aereo and subsequent comers will be able to offer consumers on-demand access to content, in a way that competes with licensed services, without any obligation to remunerate the rightholder.

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This article addresses the U.S. caselaw that encouraged businesses such as Aereo to design technologies that could rival or even displace copyright-remunerative modes of making works of authorship available to the public. We consider the implications for copyright owners were Aereo and its supporters to succeed in their reading of the Copyright Act, as well as the implications for other technologies, particularly those involving "cloud" storage, were the broadcasters to prevail. *Finally, each author offers her own analysis to demonstrate how it is possible to read the U.S. Copyright Act's transmit clause in a way that does not make technological design determine the outcome. Either one of our readings, we argue, enables copyright's exclusive rights to remain effective without discouraging technological innovation.*

## Aereo: technological design and legal arguments

Aereo, Inc., launched its online television service in 2012. Tapping into perceived consumer frustration with high cable prices and inflexible “bundling” models,<sup>2</sup> it enables individuals to access recorded broadcast content over the internet, from computers and mobile devices, in a way that obviates consumers’ need for any physical recording device – or even a TV set. Subscribers can use Aereo’s technology to watch broadcast television either near-live or at their later convenience from a variety of internet-connected screens, including phones and tablets. By adding geographic and temporal flexibility while still preserving the ability to watch TV live, Aereo provides what for many users is a better-than-perfect substitute for live TV viewership.<sup>3</sup>

The technology works by combining thousands of thumbnail-sized, independently-functioning antennas with cloud-based recording and storage functionality.<sup>4</sup> The system is based around copies, which are made regardless of whether a subscriber requests to ‘watch’ a broadcast (for near-live viewing) or ‘record’ it (for future consumption). When a subscriber launches a request for either service, by clicking on a program in the electronic programming guide that Aereo offers its customers, Aereo’s servers allocate a personal antenna and transcoder to the requesting user.<sup>5</sup> The servers then instruct the antenna to tune in to the relevant broadcast frequency and create a new directory in which to store the recording.<sup>6</sup> Since users are typically assigned a new antenna for each transaction, many individuals access the same antenna over time.<sup>7</sup> However, no two users are ever assigned the same antenna simultaneously, and recordings made while an antenna is assigned to a particular user are never available to any other subscriber.<sup>8</sup> This system means that, if 10,000 users all request the same program to be recorded, 10,000 antennas will separately tune in to it, and unique copies will be made for each.<sup>9</sup> If a user has selected ‘watch’, the recording will be discarded once she finishes watching (unless she chooses to keep it); ‘recorded’ programs will not be automatically discarded.<sup>10</sup>

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<sup>2</sup> Jeff John Roberts, *Aereo’s big bet to break the TV industry: CEO Chet Kanojia explains*, GIGAOM (Feb. 7, 2013, 1:14 PM), <http://gigaom.com/2013/02/07/aeros-big-bet-to-break-the-tv-industry-ceo-chet-kanojia-explains/>.

<sup>3</sup> Aereo emphasizes this in a press release, announcing: “Now you have the gift of portability. And when it comes to sports, the only thing better than portability is LIVE access . . . and there is no arguing that sports are best live.” *Gaining Yards*, AEREO (Feb. 24, 2012), <http://blog.aereo.com/2012/02/aereo-football/>.

<sup>4</sup> *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 381 (S.D.N.Y. 2012) (finding that each antenna functioned independently). This finding was not appealed. *See* *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013).

<sup>5</sup> *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 377 (S.D.N.Y. 2012).

<sup>6</sup> *Id.* at 378.

<sup>7</sup> Note however that users with ‘static’ subscriptions are generally assigned the same antennas on an ongoing basis. *See id.* at 377-78

<sup>8</sup> *Id.* at 378.

<sup>9</sup> It appears that three different copies of each program are actually made, of different quality, allowing users to choose the one best suited to the internet connection they’re using. *Hearst Stations Inc. v. Aereo, Inc.*, No. 13–11649–NMG, 2013 WL 5604284, at \*1 (D. Mass Oct. 8, 2013).

<sup>10</sup> *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 377-78 (S.D.N.Y. 2012).

Users of either method are able to commence playback of the recording as it is being made, and the recording enables them to pause and rewind ‘live’ broadcasts.<sup>11</sup>

Viewed in technical isolation, Aereo’s design looks clumsy and wasteful. Why utilize thousands of antennae and copies when just one of each could achieve the same end? Why make copies at all for subscribers who simply want to watch a program live? Viewed through the lens of recent judicial interpretation of the U.S. copyright law however, the design comes into focus as logical and even rather elegant. Aereo’s service implicates two of the copyright owner’s exclusive rights – those concerning reproduction and public performance. Network broadcasts are free for consumers to access, but cable television providers are obliged to license the rights to retransmit them to their subscribers, delivering billions in revenue to broadcasters. Aereo has sought to exploit the contours of the existing law, as interpreted by the Supreme Court in *Sony* and the Second Circuit in *Cablevision*,<sup>12</sup> in an attempt to look like a tool for facilitating legitimate consumer uses rather than resembling a cable retransmitter. If Aereo’s attempt to design its technology to fall outside the copyright owners’ exclusive rights is successful, it will avoid the obligation to compensate rightholders for these uses. In recognition of the seriousness of this threat to the broadcast and cable models, broadcasters have waged legal battles against Aereo across the First, Second and Tenth Circuits, and against a copycat technology in the Ninth and D.C. Circuits. The Supreme Court granted certiorari regarding the Second Circuit’s finding that Aereo does not infringe the public performance right; it heard oral arguments on April 22, 2014, and is expected to decide by the end of June.

### ***What makes the law vulnerable to Aereo’s challenge?***

The challenges posed by Aereo and its ilk relate to the copyright owner’s exclusive rights of reproduction and public performance.<sup>13</sup>

#### **The reproduction right**

17 U.S.C. § 106(1) grants copyright owners the exclusive right to reproduce their works in copies or phonorecords. Copies of broadcasts are made when users instruct Aereo’s system that they wish to “watch” or “record” a show. Aereo argues that these copies are made by

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<sup>11</sup> *Id.* at 377.

<sup>12</sup> Defendant’s Amended Answer and Counterclaim at 1, *WNET v. Aereo, Inc.*, 871 F. Supp. 2d 281 (S.D.N.Y. 2012) (Nos. 12-cv-1543, 12-Civ.-1540), 2012 WL 3019466 (“Aereo merely provides the Aereo Technology that consumers may use to do what they are legally entitled to do: (1) access free and legally accessible over-the-air television broadcasts using an antenna [see 47 U.S.C. § 151 *et seq.*] (2) create individual, unique recordings of those broadcasts for personal use, see *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); and (3) record and play back those unique recordings utilizing a remotely-located digital video recorder (“DVR”) to personal devices. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).”)

<sup>13</sup> See 17 USC § 106. The case against Aereo more broadly claims that it has engaged in direct infringement of the public performance and reproduction rights, and contributory infringement. *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 376 (S.D.N.Y. 2012). However, these claims have not yet proceeded to judgment.

consumers and amount to unremunerable fair uses in accordance with the U.S. Supreme Court's 1984 holding that consumer uses of Sony's Betamax VCR to timeshift free broadcast television programming are lawful.<sup>14</sup>

### **The public performance right**

17 U.S.C. § 106(4) grants the copyright owner in motion pictures and various other works the exclusive right to publicly perform them.

The Copyright Act defines "perform" as "to recite, render, play, dance, or act [the work], 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."<sup>15</sup> The Second Circuit has ruled that a performance must be "simultaneously perceptible," and thus has distinguished delivery of a download from a stream.<sup>16</sup> In the latter instance, the user sees and/or hears the work as it is being communicated to her; in the former, she will not experience the work's contents unless she subsequently summons the work from her computer's memory.

The Act also defines "[t]o perform or display a work 'publicly'" in relevant part as:

by transmitting or otherwise communicating a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>17</sup>

This provision, known as the 'transmit clause', generally applies to electronic transmissions. To "transmit" a performance or display of the work is defined as meaning "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."<sup>18</sup> "Devices" and "processes" expressly include those that were developed after the law came into effect.<sup>19</sup>

### **The *Cablevision* Precedent**

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<sup>14</sup> See Brief for Respondents at 36-37, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461, (Mar. 26, 2014), 2014 WL 1245459, at \*36-37; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>15</sup> 17 U.S.C.A. § 101 (West, current through P.L. 113-66).

<sup>16</sup> *U.S. v. Am. Soc. of Composers, Authors, Publishers*, 627 F.3d 64 (2d Cir. 2010).

<sup>17</sup> 17 U.S.C.A. § 101 (West, current through P.L. 113-66).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



Aereo built its system in reliance on the Second Circuit's interpretation of the transmit clause in *Cartoon Networks v CSC Holdings*. That litigation arose from the March 2006 announcement of cable TV provider Cablevision that it would release a 'Remote Storage DVR System' (**RS-DVR**).<sup>20</sup> The earliest consumer timeshifting technologies were Video Tape or Video Cassette Recorders (**VCRs**). These devices received broadcast signals, recorded them onto magnetic tape and then converted them to enable viewing on TVs.<sup>21</sup> This technology evolved into Digital Video Recorders (**DVRs**), which worked in a similar way, except that they recorded onto hard drives instead of magnetic tape. Cablevision's RS-DVR essentially worked the same way as a regular DVR, but rather than recording the programming onto the hard disk of a device in the consumer's home, Cablevision's automated service would record it onto a hard disk on one of its central servers.<sup>22</sup> Customers would be allocated storage space, and the recordings "would be stored in that hard drive space and available only to that customer."<sup>23</sup> The system permitted customers to record from any channel within their subscription,<sup>24</sup> and they could do so by either scheduling a future program via Cablevision's electronic program guide, or by simply pressing "record" during the one currently showing on the screen.<sup>25</sup>

Before it introduced the RS-DVR system, Cablevision immediately retransmitted the data it received from networks to subscribers.<sup>26</sup> Once it introduced the RS-DVR system however, that single stream of data would be "split" into two.<sup>27</sup> One stream would be immediately retransmitted to customers just as before, and the other would ultimately flow to a server which would check whether any subscribers had requested any of the programs within it to be recorded. If so, a copy would be made from this stream and ultimately stored on the hard drive partition associated with that particular customer.<sup>28</sup>

The system's design resulted in a separate recording being made and stored for each subscriber who requested one.<sup>29</sup> "[I]f 1000 customers want to record a specific episode of HBO's 'The

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<sup>20</sup> *Cartoon Network v. CSC Holdings*, 536 F.3d 121, 124 (2d Cir. 2008).

<sup>21</sup> *See Sony*, *supra* note 12.

<sup>22</sup> Detailed descriptions of the Cablevision RS-DVR are set out at *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 612 (S.D.N.Y. 2007); *see also* *Cartoon Network v. CSC Holdings, Inc.*, 536, 536 F.3d 121, 124-25 (2d Cir. 2008).

<sup>23</sup> *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 612 (S.D.N.Y. 2007) (citations omitted).

<sup>24</sup> *Id.* at 613, 614. The court observed that Cablevision controlled the universe of programming available to subscribers to its remote DVR service: "As for programming content, Cablevision determines the programming that will be available for recording with the RS-DVR. In other words, an RS-DVR subscriber would only be able to record programming made available by Cablevision. Cablevision has elected to make all 170 channels received by Cablevision available to RS-DVR subscribers, but that is Cablevision's decision." *Id.* at 613 (citations omitted).

<sup>25</sup> *Id.* at 614.

<sup>26</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008).

<sup>27</sup> *Id.* at 124.

<sup>28</sup> *Id.* at 124-25.

<sup>29</sup> *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 615 (S.D.N.Y. 2007).

Wire,’ 1000 separate copies of that episode are made, each copy uniquely associated by identifiers with the set-top box of the requesting customer.”<sup>30</sup>

To play the recordings, a customer could select the desired program using her remote control, and the recording stored on her portion of the central hard disk would be streamed to her television via her cable set-top box.<sup>31</sup> The system did not allow the recordings to be copied to local drives or to videotape, although traditional “local storage” DVRs typically include those features.<sup>32</sup>

While the system was analogous to stand-alone DVR technology, all recording took place at the location of Cablevision’s servers, thus dispensing the consumer from mastering or even acquiring any recording devices. As a result, the time-shifting that the service enabled also resembled a video on demand service.<sup>33</sup> The principal difference between the two technologies was that programs accessed via the RS-DVR had to be requested to be recorded in advance of their airtime, whereas video on demand content does not.<sup>34</sup> In essence the RS-DVR required two clicks, one to reserve the content in advance of its broadcast, and a later one to play it, while video on demand typically needs only one, at the time of playback.<sup>35</sup>

Cablevision obtained no licenses for these activities and contended that it was under no obligation to do so.<sup>36</sup> Rightholders disagreed, arguing that Cablevision would infringe their rights by making copies of their works, in violation of their exclusive right to reproduce the work in copies, and by making unauthorized transmissions to the public, contrary to their exclusive right to publicly perform their audiovisual works.<sup>37</sup> By the time the product was announced, many cable companies (including Cablevision) already offered their customers set-top boxes that added DVR functionality to their subscriptions,<sup>38</sup> and none had been sued for doing so.<sup>39</sup> However, rightholders apparently saw the new development of “remote” storage and transmission as a much greater threat. A number of them instituted litigation seeking an injunction prohibiting its distribution.<sup>40</sup> Notably, the parties reached a deal to leave certain

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<sup>30</sup> *Id.* at 615.

<sup>31</sup> *Id.* at 615-16.

<sup>32</sup> *Id.*

<sup>33</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008).

<sup>34</sup> *Id.* at 125.

<sup>35</sup> As a result, in the digital environment the difference between time-shifting and pay-per-view is increasingly evanescent.

<sup>36</sup> *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 609 (S.D.N.Y. 2007).

<sup>37</sup> *Id.* at 617.

<sup>38</sup> *Id.* at 611-12.

<sup>39</sup> *Id.* at 619. Note that copyright owners’ forbearance from suing the cable companies does not imply any concession that the companies’ activities were lawful.

<sup>40</sup> *Id.* at 609.

issues off the table: the plaintiffs did not claim secondary infringement, and in exchange, Cablevision waived any defenses based on its customers' possible fair use.<sup>41</sup>

There was no dispute that performances were occurring as part of the Cablevision process, but the parties disagreed about *who* performed them, and whether or not they were public. Cablevision's contention that the performances were not public turned on its assertion that the source copies for the individual transmissions had been "made" by the subscribers and that, because each playback transmission was launched from each user's private copy, the performances too could only be private.

At trial, Judge Chin (sitting prior to his elevation to the Second Circuit) found that Cablevision's involvement in the process was sufficient to justify a finding that it made the copies stored on its servers as well as the transmissions from those copies, and that the transmissions were "public" within the meaning of the Act.<sup>42</sup> In his view, Cablevision's ongoing and active involvement in the copying process, and its determination of the content that is available for recording, meant that Cablevision was "doing" the copying.<sup>43</sup> He ruled that "the plain language" of the transmit clause mandated rejection of Cablevision's argument that its use of unique copies prevented the transmissions from being "public": "a transmission 'to the public' is a public performance, even if members of the public receive the transmission at separate places at different times. Such is the case here."<sup>44</sup>

He further held that transmissions are "public" where the relationship between the sending and receiving parties is a commercial one.<sup>45</sup>

The Second Circuit reversed. It determined that the copies, albeit created using Cablevision's facilities, and stored on its servers, were "made" by the subscribers who selected the programs from among the offerings proposed by Cablevision.<sup>46</sup> In reaching this decision the Court approvingly cited *Netcom*, a 1995 decision in which a district court declined to hold an ISP directly liable when its facilities automatically reproduced a copyrighted work that had been posted by one of its users.<sup>47</sup> That court reasoned that, despite copyright infringement's strict liability standard, "there should still be some element of volition or causation which is lacking

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<sup>41</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008).

<sup>42</sup> *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 622-23 (S.D.N.Y. 2007).

<sup>43</sup> *Id.* at 617-21.

<sup>44</sup> *Id.* at 622-23.

<sup>45</sup> *Id.* at 623 (*citing* *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991)).

<sup>46</sup> Before determining who "makes" the copies stored on the Cablevision servers, the Second Circuit ruled that the "buffer" copies that Cablevision made in the process of delivering the content from its real-time signal to its subscribers' storage boxes on its servers were not be sufficiently 'fixed' in the buffers to amount to copies. See *Cartoon Network v. CSC Holdings*, 536 F.3d 121, 127-30 (2d Cir. 2008).

<sup>47</sup> *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361 (N.D. Cal 1995).

where a defendant's system is merely used to create a copy by a third party."<sup>48</sup> The Fourth Circuit had subsequently endorsed that distinction in a case involving an internet service provider hosting third-party postings,<sup>49</sup> and here the Second Circuit did too, albeit in a different factual context. The Second Circuit found that *Netcom* rationally directed attention "to the volitional conduct that causes the copy to be made."<sup>50</sup> Reviewing Cablevision's service, the Second Circuit found two instances of volitional conduct: "Cablevision's conduct in designing, housing, and maintaining a system that exists only to produce a copy, and a customer's conduct in ordering that system to produce a copy of a specific program."<sup>51</sup> Although the precedent on which it relied concerned services that further transmitted content whose initial communication originated with their subscribers, the Second Circuit did not address this distinction, nor did it consider whether Cablevision's initial provision of the content constituted a "volitional" act. Rather, it limited its focus to acts subsequent to Cablevision's offer of the programming for remote recording. The Court reasoned that, in the case of a VCR, it would be "the person who actually presses the button to make the recording . . . [who] supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine."<sup>52</sup> In considering the extent to which Cablevision was analogous to a physical photocopying shop, the Court's reasoning would prove crucial for future technology providers:

In determining who actually "makes" a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct.<sup>53</sup>

On that basis, the Court found that "Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises" than a proprietor whose employees actually make the copies.<sup>54</sup> While Cablevision's discretion over the programming that could be recorded made its conduct "more proximate" to the creation of an illegal copy, it was not enough to justify a finding that Cablevision was a "maker" of the copies.<sup>55</sup>

In refusing to find Cablevision made the copies, the Second Circuit seemed concerned with "maintain[ing] a meaningful distinction between direct and contributory copyright

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<sup>48</sup> *Id.* at 1370.

<sup>49</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (*citing* *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)).

<sup>50</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008).

<sup>51</sup> *Id.* at 131.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 132. It is not apparent why the frequently mindless physical labor of undifferentiated photocopying injects greater agency into the process than deploying a computer program to do the task.

<sup>55</sup> *Id.*

infringement,” something it found to have been intended by both the Supreme Court and by Congress.<sup>56</sup> It declined to decide whether a defendant’s “contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy”, but found that was not the case here.<sup>57</sup> Instead, any copies made via the RS-DVR system would be “made” by the individual customer.<sup>58</sup> In essence, the court found no substantive difference between supplying a free-standing recording device that a user operates *at* home and supplying a remote digital recording system that the user operates *from* home.

Having determined that the customers “made” the copies using Cablevision’s instrumentalities, the Second Circuit then considered whether a transmission of a performance from the customer’s individual source copy could be a “public” performance. It first had to identify the “performance” referred to by the transmit clause. This has been the subject of a great deal of controversy, stemming largely from a perceived grammatical ambiguity within the text. By stating that “[t]o perform . . . a work “publicly” means . . . to transmit or otherwise communicate a performance . . . of the work . . . to the public’, the statute defines the act of transmitting a performance as one type of performing, even though the terms “to perform” and “to transmit” are separately defined as well. This creates uncertainty as to whether the relevant performance is the performance created by the act of the transmission, as Cablevision argued, or the performance of the underlying work, the position taken by the broadcaster plaintiffs.

The Second Circuit ultimately held that, in the context of transmitting a performance to the public, Congress was referring “to the performance created by the act of transmission.”<sup>59</sup> Having accepted that the transmission was the relevant performance, the Second Circuit then considered which members of the public were capable of receiving that performance. Hence the dispositive significance of the unique copies made and transmitted to each user:

[I]t seems quite consistent with the Act to treat a transmission made using Copy A as distinct from one made using Copy B, just as we would treat a transmission made by Cablevision as distinct from an otherwise identical transmission made by Comcast. Both factors – the identity of the transmitter and the source material of the transmission – limit the potential audience of a transmission in this case and are therefore germane in determining whether that transmission is made “to the public.”<sup>60</sup>

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<sup>56</sup> *Id.* at 133.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 136.

<sup>60</sup> *Id.* at 138.

On the facts of *Cablevision*, “each RS-DVR transmission is made to a given subscriber using a copy made by that subscriber”, which means the audience of each transmission is just one individual.<sup>61</sup> The Second Circuit then concluded that must mean that the relevant performances were not “to the public”.<sup>62</sup>

The broadcasters sought certiorari, but the Solicitor General, albeit acknowledging flaws in the Second Circuit’s analysis, recommended against the grant: “although scattered language in the Second Circuit’s decision could be read to endorse overly broad, and incorrect, propositions about the Copyright Act, the court of appeals was careful to tie its actual holdings to the facts of this case. The petition for a writ of certiorari therefore should be denied.”<sup>63</sup> The amicus brief of the United States also argued that the parties’ agreement not to litigate the critical secondary liability and fair use issues made the case “an unsuitable vehicle for clarifying the proper application of copyright principles to technologies like the one at issue here.”<sup>64</sup> Ultimately, the Supreme Court declined to hear the case.<sup>65</sup>

*Cablevision* is crucial to understanding why Aereo’s technological design is not just logical, but perhaps even inevitable. Simply, it appears to instruct technology providers that, if they design their systems to enable each user to make a single copy for herself, that structure could, in appropriate cases, effectively immunize the services from any liability under both the reproduction and the public performance rights. Although the Second Circuit expressly cautioned that its holding “d[id] 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,”<sup>66</sup> the Second Circuit’s subsequent decision in *Aereo* demonstrates that this admonition did not in fact confine that court’s reading of the statute.

### ***Aereo*: The Second Circuit follows its *Cablevision* roadmap**

Aereo responded to the broadcasters’ infringement claim by countering that it was not publicly performing the broadcast programming because, under *Cablevision*, the relevant audience is the audience of each transmission, and thus that its performances are non-public: like *Cablevision*’s RS-DVR, “its system creates unique, user-requested copies that are transmitted only to the particular user that created them.”<sup>67</sup> The district court and a majority of the Second

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<sup>61</sup> *Id.*

<sup>62</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008).

<sup>63</sup> Brief for the United States as Amicus Curiae at 6, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009) (No. 08-448), 2009 WL 1511740.

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Cable News Network, Inc. v. CSC Holdings, Inc.* 557 U.S. 946 (2009).

<sup>66</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008).

<sup>67</sup> *Id.* at 385.

Circuit on appeal, in analyses that focused closely on the technical similarities between Aereo and Cablevision's RS-DVR, held for Aereo. The district court described the systems as being "materially identical," "suggesting that the copies Aereo creates are as significant as those created in *Cablevision*."<sup>68</sup> Indeed, it suggested that the copies made by Aereo were even more independent than those made by Cablevision, because they were each created from a separate stream of data.<sup>69</sup> By 2-1 majority, the Second Circuit confirmed this reasoning on appeal. It reiterated its view that "the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted."<sup>70</sup> It also held that there were "two essential facts" which led to the holding that Cablevision's transmissions were not public performances: that its RS-DVR allowed each subscriber to create unique copies of each program, and that the transmission of the recording to a subscriber was from that unique copy.<sup>71</sup> These features meant that "the potential audience of every RS-DVR transmission was only a single Cablevision subscriber, namely the subscriber who created the copy," and that limitation meant that the transmission was not "to the public."<sup>72</sup> Aereo's system had those same two features.<sup>73</sup>

The majority rejected several proposed distinctions from *Cablevision*. That Cablevision had paid license fees for the initial retransmission (but not the RS-DVR service), while Aereo was paying nothing was irrelevant since, if Aereo was not publicly performing the televised content, no license was required.<sup>74</sup> By the same token, the *Cablevision* holding could not be confined to technologies analogous to VCRs. Although the broadcasters argued that Aereo's provision of near-live television programming was distinguishable from Cablevision's service because Cablevision's "RS-DVR copies 'broke the continuous chain of retransmission to the public' in a way that Aereo's copies do not,"<sup>75</sup> the majority rejected the time-shifting/on-demand streaming distinction for two reasons. First, it found that the copies made via the Aereo technology had the same legal significance as the copies at issue in *Cablevision* because, unlike the case with internet streaming, users didn't just choose what they wanted to watch, they exercised volitional control over how and when that content was played.<sup>76</sup> "This second layer of control, exercised *after* the copy has been created, means that Aereo's transmissions from the

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<sup>68</sup> *Id.* at 386.

<sup>69</sup> *Id.* at 387.

<sup>70</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 691 (2d Cir. 2013).

<sup>71</sup> *Id.* at 689.

<sup>72</sup> *Id.* at 689-90 (citations omitted).

<sup>73</sup> *Id.* at 690.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 692.

<sup>76</sup> *Id.* Notwithstanding the courts' distinction, user control over how and when content is played in fact seems the essence of on-demand delivery services.

recorded copies cannot be regarded as simply one link in a chain of transmission.”<sup>77</sup> Second, the majority found that, even if the transmission did travel uninterruptedly from the user’s assigned antenna to the user without any copy being made, the transmission still would not be public:

It is beyond dispute that the transmission of a broadcast TV program received by an individual’s rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna, ensuring that the potential audience of that transmission is only one person. Plaintiffs have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet: it remains the case that only one person can receive that antenna’s transmissions. Thus even without the creation of user-associated copies, which under *Cablevision* means that Aereo’s transmissions are not public, there is significant reason to believe that Aereo’s system would not be creating public performances, since the entire chain of transmission from the time a signal is first received by Aereo to the time it generates an image the Aereo user sees has a potential audience of only one Aereo customer.<sup>78</sup>

Finally, rejecting the contention that, to hold that Aereo’s transmissions were not public performances would be to “exalt[] form over substance, because the Aereo system is functionally equivalent to a cable television provider,”<sup>79</sup> the majority rejoined, “[T]hat Aereo was able to design a system based on *Cablevision*’s holding to provide its users with nearly live television over the internet is an argument that *Cablevision* was wrongly decided; it does not provide a basis for distinguishing *Cablevision*.”<sup>80</sup> It noted that many other technology providers, particularly cloud computing services, have also designed their systems around *Cablevision*’s holdings. “Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court’s decisions . . . held that technical architecture matters.”<sup>81</sup> Acknowledging that it is more difficult to distinguish between public and private transmissions than when Congress enacted the transmit clause in 1976, the majority ultimately concluded that the language of the Act, as previously interpreted in *Cablevision*, dictated the conclusion that Aereo’s transmissions were not public performances.<sup>82</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 693 (citation omitted).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 694.

<sup>81</sup> *Id.*

<sup>82</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 695 (2d Cir. 2013).



## ***Re-Examining the Transmit Clause: Text and Legislative History***

The Second Circuit’s conclusion that the relevant performance under the transmit clause is the particular transmission of the performance of the work both truncates the scope of the public performance right and makes the determination of a public performance all too vulnerable to technological manipulation. When one adds in the Second Circuit’s “particular transmission” interpolation, the clause effectively reads:

To perform or display a work “publicly” means—

...

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

If the “it” in the unadulterated text of the definition is construed to mean a particular transmission of the performance of a work, and only one person can receive this transmission because it derives from an individualized source copy, then, according to the Second Circuit, the transmission is private. The interpolation of “particular transmission,” however, cannot be confined to individualized source copies. If one is going to interpret “a performance of a work” as meaning “a particular transmission of a performance of a work” then “a performance of a work” must mean “a particular transmission of a performance of a work” throughout the “transmit clause.” But consistent application of the Second Circuit’s interpolation not only turns the first phrase of the definition into a tautology (“to transmit . . . a [particular transmission]”)<sup>83</sup>, but also would lead to a finding of a “private” performance whenever only one person can receive that transmission, regardless of the source of the transmission. The Second Circuit attempted to give meaning to the statute’s clear intention to cover asynchronous transmissions by stating that individualized transmissions could be aggregated into a public performance if they emanated from a shared source copy (though not if they proceeded from multiple individual copies).<sup>84</sup> But the Second Circuit’s reading of the statute in fact provides no support for this distinction: the source of a “particular transmission” does not

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<sup>83</sup> The Act’s definition of the verb “to perform publicly” as including “to transmit a performance to the public” may have led the court to equate a performance with a transmission.. *See supra* notes 15-19 and accompanying text.

<sup>84</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 689 (2d Cir. 2013).

make it any less “particular.” Thus, if the individualized transmissions are asynchronous, then no member of the public can receive the particular transmission, because, by definition, the transmissions that go out at different times cannot be the *same* transmissions.

Clever engineering can confer even more anomalous results on the “particular transmission” interpolation. The “transmit clause” covers transmissions of performances separated not only in time (now potentially read out of the statute), but also separated in space. Suppose that the transmission entity, rather than sending out a single transmission simultaneously captured by multiple recipients in multiple places, simultaneously communicated a dedicated transmission to each recipient. In that case, no member of the public would be “capable of receiving” the same particular transmission because each transmission will have been personalized. Of course, the members of the public would be “capable of receiving” *a* transmission of a performance of the work, but only one member of the public is “capable of receiving” *the particular transmission* of that performance. Thus, this reading’s focus on the “particular transmission” leads to outcomes dictated by technological design, rather than by the nature of the use or of the public to which the use is directed.

An interpretation more consonant with the statutory text (but, as we shall see, not completely problem-free) identifies the relevant “performance” transmitted to members of the public as the performance of the underlying work. A reading free of the “particular transmission” interpolation cannot be manipulated in the ways just explored, because it is irrelevant under this reading whether the members of the public receive the performance of the work from multiple individual transmissions emanating from a single source copy, or from multiple individual transmissions derived from multiple individual source copies. District courts in the Ninth, Tenth and DC circuits have followed this approach in applying the transmit clause to Aereo and a copycat competitor.<sup>85</sup> Judge Chin (who had been the district judge in *Cablevision*) also adopted it in his dissents from the Second Circuit’s panel decision in Aereo, and from the subsequent rejection of the petition for rehearing en banc. In his panel dissent, Judge Chin characterized the technical architecture as “a sham”:

The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a 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.<sup>86</sup>

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<sup>85</sup> Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); Cmty. TV Utah, LLC v. Aereo, Inc., 2:13CV910DAK, 2014 WL 642828 (D. Utah Feb. 19, 2014); Fox TV Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013).

<sup>86</sup> WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting).

In his view, “a transmission to anyone other than oneself or an intimate relation is a communication to a ‘member[] of the public,” because it is not in any sense “private.”<sup>87</sup> Thus, Aereo’s transmissions were “to the public” because they were being disseminated to “paying strangers”, and the restriction of the potential audience of each transmission to a single member of the public should make no difference.<sup>88</sup> By accepting Aereo’s argument that Aereo’s design prevented it from falling within the public performance right, “the majority elevate[d] form over substance,”<sup>89</sup> and “provide[d] a blueprint for others to avoid the Copyright Act’s licensing regime altogether.”<sup>90</sup>

As Judge Chin further argued in his dissent from the Second Circuit’s refusal to grant en banc review, the “plain meaning” of the transmit clause supported his analysis:

The system is a ‘device or process,’ which Aereo uses first to receive copyrighted images and sounds and then to transmit them to its subscribers ‘beyond the place’ from which they are sent,’ that is, beyond the point of origination. Its subscribers are strangers—paying ‘members of the public’—and under the statute, it matters not whether they are receiving the images ‘in the same place or in separate places, [or] at the same time or at different times.’ Under any reasonable construction of the statute, Aereo is performing the broadcasts publicly as it is transmitting copyrighted works ‘to the public.’ Therefore, Aereo is committing copyright infringement within the plain meaning of the statute.<sup>91</sup>

In this second dissent, Judge Chin also contended that the Second Circuit’s approach in *Cablevision* “erroneously conflated the phrase ‘performance or display’ with the term ‘transmission,’” thus incorrectly shifting the focus of the inquiry “from whether the transmitter’s audience receives the same content to whether it receives the same transmission.”<sup>92</sup> His parsing of the statute led him to the conclusion that “there is no indication Congress meant anything other than what it said: the public must be capable of receiving the *performance or display*, not the *transmission*.”<sup>93</sup> He also criticized his colleagues for treating transmissions made from the same copy of a work differently than those made from separate copies. “Perhaps when it was more costly to make copies, the use of a unique copy could limit a transmitter’s potential audience, but advancements in technology have rendered such reasoning obsolete.”<sup>94</sup> Even if that was still the case however, he found no intention by

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<sup>87</sup> *Id.* at 698.

<sup>88</sup> *Id.* at 699.

<sup>89</sup> *Id.* at 697.

<sup>90</sup> *Id.* at 705.

<sup>91</sup> *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 504-05 (2d Cir. 2013).

<sup>92</sup> *Id.* at 507 (Chin, J., dissenting from denial of rehearing en banc).

<sup>93</sup> *Id.* at 508.

<sup>94</sup> *Id.* at 509.

Congress for “the definition to turn on whether a unique copy was used.”<sup>95</sup> He further found no basis in the statute for a requirement that each individual transmission must be able to reach the public. “Based on the plain language, it is sufficient if the actor is ‘transmit[ing]’ the same performance or display and his recipients are members of the public.”<sup>96</sup>

The view that the relevant performance is the performance of the underlying work also gains support from the legislative history that led to the adoption of the transmit clause in its current form, a history which is particularly striking when considered against Aereo’s business model. Revisions to the public performance right in the 1976 Act were largely driven by Supreme Court decisions in the cases of *Fortnightly Corp. v. United Artists Television, Inc.*,<sup>97</sup> and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*<sup>98</sup> Those decisions found that community antenna television providers, who mounted antennae in locations which received strong television signals and then retransmitted them to paying subscribers located elsewhere, were not liable for infringement because those transmissions did not amount to legally relevant performances. The definitions of “perform” and “publicly” were subsequently revised “specifically to render the CATV systems’ unlicensed retransmissions illegal.”<sup>99</sup> Given that “cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material”, the House Committee considered that “copyright royalties should be paid by cable operators to the creators of such programs.”<sup>100</sup> However, it found that making cable providers negotiate individually with rightholders would be “impractical and unduly burdensome”, and established a compulsory license system to set the fees for retransmission royalties.<sup>101</sup>

The legislative history suggests that Congress was concerned to ensure that the revised legislation would be broad and technologically neutral. Thus, it explained,

The definition of ‘transmit’ . . . is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 510.

<sup>97</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

<sup>98</sup> *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974).

<sup>99</sup> *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 505 (2d Cir. 2013) (Chin, J., dissenting) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 469 n.17 (1984); H.R. REP. NO. 94-1476, at 63 (1976)).

<sup>100</sup> H.R. REP. NO. 94-1476, at 89 (1976).

<sup>101</sup> *Id.*

conveyed is a ‘transmission,’ and *if the transmission reaches the public in [any] form*, the case comes within the scope of clauses (4) or (5) of section 106.<sup>102</sup>

Moreover, Congress foresaw “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.”<sup>103</sup> Congress thus anticipated the exploitation of copyrighted works by digital on-demand enterprises, and sought to bring those markets within the copyright owners’ exclusive rights of public performance and display.

## **Implications of the Competing Interpretations**

The preceding pages addressed different interpretations of the “transmit clause.” This section now more fully explores the implications of those competing interpretations.

The interpretations clash principally in their characterization of the relevant “performance,” and “the public” that is capable of receiving it. Under the Second Circuit’s view, the consumer’s creation of an intermediate source copy for the transmission means that the communication of the work from that individualized copy to a particular recipient cannot be “to the public.” The relevant question is: who is the *audience for a particular transmission* of the performance of the work? The contrary interpretation disregards the intermediate copies as spurious (and in any event not “made” by the consumer), and instead considers whether a communication of the *performance of the work was offered to the public*. It posits that the subsequent individualized receipt by members of the public of particular transmissions, far from removing the transmission from the ambit of a “public performance,” comes squarely within the statutory definition.

### ***Implications of Aereo’s interpretation***

If Aereo’s interpretation prevails, it would provide a blueprint for other service providers to design their services in ways that fall outside copyright owners’ exclusive rights.

Technology providers who create unique copies of protected works at a user’s request, and then transmit them to those users from those copies, would likely be immunized from any finding of public performance infringement, notwithstanding Congress’ clear intent, expressed in broad, technology-neutral language, that the transmit clause cover activities similar to those

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<sup>102</sup> WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 505 (2d Cir. 2013) (Chin, J., dissenting) (emphasis added) (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 469 n.17 (1984); H.R. REP. NO. 94–1476, at 64 (1976)).

<sup>103</sup> H.R. Rep. No. 90-83, at 29 (1967).

engaged in by Aereo. This immunity would result from the design of the technology, without any scope to consider the purpose of the use.

Not all businesses would be able to take advantage of the *Aereo* blueprint. In most cases, a combination of several crucial factors must exist for *Aereo* to provide them with a liability-avoiding model:

1. The businesses must be able to obtain access to the desired content without having to seek authorization from rightholders, for example via broadcast over public airwaves. If the businesses must instead acquire the desired content from the rightholders, they will be obliged to obtain licences for it.
2. The audience “capable of receiving the transmission” must be limited, probably by making individual copies available to unique subscribers and then transmitting those on request. Thus, a video on demand service which holds open a library of copyrighted content available to anyone willing to pay will still be liable even if the transmission is individualized, so long as the source copy for the transmission is centralized.
3. Any individual copies that are made must not themselves be infringing, otherwise liability will accrue regardless of whether the transmission is public or private. Businesses like Aereo and Cablevision rely heavily on the assumption that the copies are “made” by the user (see point 4, *infra*), and would, at least for the free-to-air broadcasts in *Aereo*, amount to fair use for the purpose of timeshifting.
4. Any copies should be made by the user. The fair use case would be significantly weakened if the service was seen to be making the copies on behalf of the user. If the service exercises sufficient volition to be found to have made the copies, any exception that the user may have been able to rely on may not apply, and liability for infringing the reproduction right may nonetheless accrue.

Where each of these factors are present there is considerable scope to design services in ways that avoid remunerating rightholders while disrupting current and emerging markets for their content. The video on demand market appears to be the most vulnerable to this kind of ‘Aereoizing’ of business models. For example, cable providers currently retransmit broadcast signals under a statutory license, but might be able to adopt an Aereo-style design to offer those signals to their users for free. The plaintiff broadcasters have claimed that Time Warner Cable has already “threatened to develop its own Aereo-like system to avoid compensating copyright owners and broadcasters for the use of their programming.”<sup>104</sup> Since not all TV viewers (particularly those older than the “millennial” generation of “born digital” users, many of whom do not own television sets) would want to watch online (as the Aereo model requires),

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<sup>104</sup> Petition for Certiorari at 34, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461, (Mar. 26, 2014), 2013 WL 5616728.

some value would likely remain in cable providers being able to retransmit all broadcast material live under the compulsory license. However, the ability of individual subscribers to utilize Aereo-style services would certainly lessen the overall attraction of a cable package, thus making cable retransmission rights less valuable.

Businesses that have previously been held liable might also be able to escape future liability by restructuring in accordance with these principles.<sup>105</sup> For example, *WPIX v ivi* considered the liability of a service which transmitted broadcast television signals live over the internet for profit. The service had argued that it was entitled to a statutory retransmission license that would permit these activities. The district court and the Second Circuit on appeal ruled that *ivi* was not a “cable system” within the meaning of the Act and therefore not entitled to the statutory license, and enjoined *ivi* from continuing to transmit these broadcasts.<sup>106</sup> Such a service could be easily redesigned to adopt an Aereo-style architecture utilizing unique copies and unique transmissions from those copies to individual users. In order to maintain the “fair use” essential to avoiding primary or secondary liability for the making of the copies, the service may also have to redesign itself to offering access to localized geographic areas (*ivi*’s original retransmission model also offered programming from remote signals).<sup>107</sup> However, with these modifications, a strict application of *Aereo* would permit *ivi* to provide a retransmission service without any kind of license at all.<sup>108</sup>

While not all previously-liable businesses can readily avoid liability by undergoing a process of Aereoization, some clearly can. If the *Cablevision/Aereo* model of non-public transmissions from user-“made” copies survives, then many streaming-based enterprises will be completely unregulated (by copyright) so long as they can structure the streams as deriving from individualized user-“made” source copies that have been lawfully created, or otherwise

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<sup>105</sup> For a detailed examination of how business models previously held infringing could be re-engineered into legitimacy by following the *Cablevision/Aereo* roadmap, see Megan Larkin, *The Demise of the Copyright Act in the Digital Realm: Re-Engineering Digital Delivery Models to Circumvent Copyright Liability After Aereo*, 37 COLUM. J.L & ARTS (forthcoming 2014), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2410523](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410523).

<sup>106</sup> *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.N.Y. 2011) [hereinafter *WPIX I*]; *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) [hereinafter *WPIX II*].

<sup>107</sup> *WPIX I*, *supra* note 106 at 613 n.26.

<sup>108</sup> By contrast, a business structured like the one at issue in *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011), could not be so readily ‘Aereoized’. The defendant business in that case purchased hundreds of DVDs, put each in an individual player, and provided a directory of titles to subscribers. Upon requesting a particular title, the relevant DVD player would be instructed to commence playback and the system would transmit the images to the user via the internet. The service operator claimed that it was offering ‘electronic rentals’ rather than ‘transmissions’, but the district court held that it was indeed transmitting infringing performances of copyrighted works to the public. This service could not readily be redesigned to take advantage of the Aereo model because there seems to be no way of providing access to a pre-determined library of content without making it generally available seriatim to any member of the public who seeks to enjoy it, which would clearly amount to a public performance even under the Second Circuit’s interpretation. Any attempt by the service to make unique copies of a DVD’s content and then transmit those copies directly to the single requesting individual would not assist, because the making of the copies would not amount to a fair use.

sufficiently mimic free consumer uses. In our view, it is undesirable for the liability of a business to turn so much on its technological architecture rather than on any principled consideration of whether the use ought to be permitted without payment.

We have suggested that in most cases four factors must be present for a business to design their way out of any obligation to remunerate rightholders for the content they supply. Outside those bounds, however, there is also some potential for clever manipulation of the law that might enable a business to provide access to content without paying for it. We offer two potential ways in which a business might be able to follow the Second Circuit's roadmap to reach its desired destination in Copyrightfreeland.

First, recall steps 3 and 4: the user-“made” copies must not be infringing. If the user-“made” copy is not unlawful, then providing the means to make it cannot be contributory infringement.<sup>109</sup> Suppose an *Aereo*-inspired service were to locate the servers that store the user-“made” copies outside of the U.S., for example in Spain. If the copies were made without authorization, the copyright law they infringe may not be the U.S.' Under traditional principles of territoriality,<sup>110</sup> the copy may be localized where it was made, i.e., where the computer that stores it is located. Hence, the users' infringement liability would be determined by Spanish law. If there is no primary infringement in the U.S., then, the Ninth Circuit has held,<sup>111</sup> there can be no contributory infringement under U.S. law either. Liability for contributory infringement would be subject to the same law that determines primary infringement. As it turns out, however, Spanish courts have held that the doctrine of contributory infringement does not exist as a matter of Spanish copyright law.<sup>112</sup> Thus, there may be no recourse with respect to the source copy for the individualized transmissions, and even if the transmissions are deemed to occur where the recipient is located,<sup>113</sup> only one person is “capable of receiving” that transmission, and under the Second Circuit's approach, the off-shore service from whose servers the transmission emanates would not be “publicly performing” the content it communicates to the user.

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<sup>109</sup> See, e.g., *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 12-57048, 2014 WL 260572 (9th Cir. Jan. 24, 2014) (“Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.”) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001)).

<sup>110</sup> See, e.g., *Subafilms, Ltd. v. MGM-Pathé Commun. Co.*, 24 F.3d 1088, 1090 (9th Cir. 1994) (holding that domestic authorization of allegedly infringing acts occurring outside the United States do not state a claim for relief under U.S. copyright law); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2d Cir. 1998) (holding that the law applicable to infringement claims is the *lex loci delicti*, or the law of the place where the wrongful act occurred); ALI PRINCIPLES OF INTELLECTUAL PROPERTY § 301 (2008).

<sup>111</sup> See *Subafilms*, *supra* note 110 (finding no contributory infringement under U.S. law for planning unauthorized exhibitions of motion picture in Mexico).

<sup>112</sup> *S.A.P.*, Apr. 8, 2014 (R.A.J. No. 103/2014) (Spain) (finding no legal basis for contributory copyright infringement).

<sup>113</sup> See, e.g., *Natl. Football League v. PrimeTime 24 Jt. Venture*, 211 F.3d 10 (2d Cir. 2000).



Second, and much more simply, it may be that businesses following the Aereo model can retransmit broadcast signals for free without even resorting to making individual copies. The source of this possibility is the Second Circuit's admitted inability to distinguish between consumer uses of rooftop antennae and their uses of remote ones:

It is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna, ensuring that the potential audience of that transmission is only one person. Plaintiffs have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet: it remains the case that only one person can receive that antenna's transmissions. Thus even without the creation of user-associated copies, which under *Cablevision* means that Aereo's transmissions are not public, there is significant reason to believe that Aereo's system would not be creating public performances, since the entire chain of transmission from the time a signal is first received by Aereo to the time it generates an image the Aereo user sees has a potential audience of only one Aereo customer.<sup>114</sup>

This is the "longer cord" argument – that there is no difference between a consumer's use of a rooftop antenna and her use of a remote antenna except the length of the cable. It also follows from the Second Circuit's emphasis on the number of people "capable of receiving" any "particular transmission," since the "particular transmission" can emanate from an individual receiving device as much as from an individual storage copy. Absent any way of making a principled distinction between consumers transmitting performances to themselves from their own antenna on their roof, and the antenna they rent in a remote array, businesses may potentially be able to retransmit television signals without licence even without any time-shifted copies. The key would simply be to ensure that their system architecture mimics rooftop antennae sufficiently closely.

### ***Implications of the Broadcasters' Interpretation***

While the Second Circuit's interpretation prompts trepidation for its impact on copyright industries, the broadcasters' interpretation raises concerns about its possible effect on other technologies, particularly those providing cloud storage services. In today's world, most content is protected by copyright, and for reasons of security and convenience, a great deal of that material is stored on remote servers which can be accessed by users online. Cloud storage is routinely offered to members of the public, as well as to private companies and educational institutions, by companies such as Dropbox, Amazon, Microsoft and Google.

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<sup>114</sup> WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 693 (2d Cir. 2013) (citation omitted).

Under the broadcasters' interpretation of the transmit clause, the audience of each individual transmission is irrelevant: the focus is instead on whether there has been a public performance of the copyrighted *work*. In this view, the clause effectively reads:

To perform or display a work "publicly" means—

...

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

The concerns of cloud computing users and providers arising from that interpretation can be illustrated by applying it to Dropbox and Amazon.

Dropbox's pitch is simple – it offers "your stuff, anywhere."<sup>115</sup> Dropbox copies and synchronizes content between multiple devices, and has been designed to make those processes as simple as possible for users. The subscriber needs only to install the application, login, and start putting material in a folder. Dropbox then actively monitors that folder, automatically copies and synchronizes the user's files across each of their devices via the internet once new content is added, and encrypts those files when they reach its servers.<sup>116</sup> Subscribers may then access it from phones, tablets and anywhere with an internet connection. Accounts are private: only the account owner or a person he or she has expressly authorized may access the content stored within them. Amazon also offers remote storage facilities. For example, when a customer purchases a song from Amazon's MP3 service, Amazon automatically saves a copy to the user's section of its "Cloud Player" remote storage facility,<sup>117</sup> from which users may download the file to any compatible device, or stream it directly.<sup>118</sup>

Imagine that a user records a broadcast of a particular NFL football game, and, intending to watch it at a more convenient time, uploads that recording to her private Dropbox account. When she later streams the recorded broadcast from her Dropbox, is Dropbox engaging in an infringing public performance? When a subscriber streams the same legitimately-purchased phonorecord of a recorded song from Amazon's Cloud Player, is Amazon triggering the public performance right?

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<sup>115</sup> DROPBOX, [www.dropbox.com](http://www.dropbox.com) (last visited May 25, 2014).

<sup>116</sup> *How do I sync files between computers?*, DROPBOX, <https://www.dropbox.com/help/4/en> (last visited May 25, 2014).

<sup>117</sup> *Get Started with the Amazon MP3 Store & Cloud Player*, AMAZON.COM <http://www.amazon.com/b?node=2658409011> (last visited May 25, 2014).

<sup>118</sup> *Id.*

Under the Second Circuit’s interpretation in *Aereo*, each transmission from Dropbox’s or Amazon’s remote storage to one of their users must necessarily be a private performance, because the potential audience of each *transmission* is that single individual (or in any event is not a ‘substantial number of persons beyond a circle of family and its social acquaintance’, which means the analysis doesn’t change if our Dropbox user has invited friends over to see the time-deferred broadcast of the football game, or for that matter, if she has authorized a limited number of persons to access content directly from her Dropbox storage). Thus, under the Second Circuit’s interpretation, cloud providers like Dropbox and Amazon are not obliged to clear public performance rights in order to provide their services. The Computer & Communications Industry Association and Internet Association describes this interpretation as “critical for cloud computing”.<sup>119</sup> Under an interpretation of the transmit clause that inquires whether a “performance of the work” is transmitted to members of the public, however, Dropbox could potentially be engaged in a public performance. Thus, the broadcasters’ interpretation potentially imposes new public performance liability on providers whose technologies happen to involve transmissions of the same work to members of the public. This is the key reason why some see the *Aereo* case as so controversial and difficult to resolve.

There may be ways of limiting the collateral damage of such a reading. For example, the broadcasters have sought to distinguish *Aereo* from Dropbox on the grounds that Dropbox does not supply or propose the streamed content.<sup>120</sup> Admittedly, the Copyright Act does not specify that the entity which transmits must also be the entity which proposes the content, but that limitation may be argued to emerge from the context of the clause. Moreover, the phrase “by any device or process” should not be divorced from the underlying assumption that the entity availing itself of new means of communication, including on-demand transmissions, would be the entity offering the programming in the first place. All the examples in the legislative history point to the combined role of the “transmitting” entity as both proposing and conveying programming to the public, which could lend support to such a distinction, even though it is not incorporated into the text of the clause.<sup>121</sup>

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<sup>119</sup> Brief Amici Curiae of the Computer & Communications Industry Association and the Internet Association in Support of Affirmance at 5-6, *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 5985681.

<sup>120</sup> Reply Brief for Petitioners at 21-22, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (Apr. 14, 2014), 2014 WL 1430768.

<sup>121</sup> H.R. REP. 94-1476, at 63 (1976) (“Thus, for example: a single [sic] 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.”)

Were such a distinction to be read into the transmit clause, it would preserve free from public performance infringement claims services such as Dropbox that store and playback user-posted content. But what if the service is a hybrid, offering downloads of content to customers' storage lockers as well as subsequent individualized streaming of that content? Purveyors of recorded musical compositions, such as Amazon, sell downloads which they store for their customers in individualized storage spaces on the service's servers, and then offer on-demand streaming from the storage copies. In that case, would Amazon be engaged in a public performance when a user streamed a song, even though Dropbox would not?

According to the subsequent playback different treatment depending on whether the source copy was directly deposited by the seller or whether the user purchased the content as a CD which she subsequently ripped and posted to the storage locker seems at first blush as unconvincing an elevation of form over substance as the Second Circuit's endorsement of routing public performances through thousands of individualized copies in order to "privatize" the transmissions.

Stepping back from the minutiae of the storage arrangement, however, one might inquire whether these hybrid services are in fact streaming-on-demand services, with the price of the download effectively serving as the cost of the streaming service. So that the storage copy, while less spurious than the *Aereo* copies, is essentially the vehicle for the on-demand streaming. But it is not necessary to speculate about the "real" nature of these hybrid services, because the service must in any event obtain authorization to sell the downloads, and one may anticipate that the price of the license for the reproduction right will factor in the subsequent performances. Moreover, at least with respect to musical compositions, these downloads are "digital phonorecord deliveries," which, under the compulsory licensing mechanism established under section 115 of the Copyright Act, not only are compensated, but the rate-setting also takes into account the provision of subsequent playbacks.<sup>122</sup>

However, since this distinction too is based on the way in which a given technology happens to operate, there is a risk that it may simply incentivize a new wave of opportunistic technological design. If the statute were read to require that the content and transmission providers must be one and the same in order for there to be a public performance, businesses would logically seek to separate out those functions in order to provide access without liability.

It has also been argued that in light of the safe harbor against liability contained in § 512(c) of the Copyright Act, it is unproblematic for cloud storage providers such as Dropbox to face prima

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<sup>122</sup> See 37 C.F.R. § 385.20-22 (2014).

facie liability for user streaming.<sup>123</sup> An online service that hosts content posted by third parties has no duty to monitor the lawfulness of its subscribers' postings, and incurs no liability if it lacked specific knowledge of the posted content. It need only "respond expeditiously" to a proper take-down notice.<sup>124</sup> Moreover, as the Second Circuit established in *Viacom v. YouTube*, the immunity applies not only to storage of user-posted content, but also to recoding it and streaming it back.<sup>125</sup>

But consideration of how those safe harbors might apply in this instance raises concerns of its own. Premised on the starting point that the uploaded material is infringing, the safe harbors were designed to protect hosts who expeditiously remove it. In the case of Dropbox et al, the material uploaded by the user may well be non-infringing – created, for example, pursuant to a license or fair use. The language of § 512(c) does, however, appear broad enough to encompass takedowns of content whose initial posting was not infringing, but whose public performance would be infringing: the text covers removal or disabling access to "material that is claimed to be infringing *or to be the subject of infringing activity.*"<sup>126</sup> The statute sets out infringing content and infringing activity in the alternative, and one might therefore contend that unauthorized public performance of the content is indeed an "infringing activity." Nonetheless, imposing new liability upon a host to remove such non-infringing content in order to avoid public performance liability is unprecedented<sup>127</sup> and troubling. Moreover, because the § 512(c) safe harbor contemplates content provided by the user, it would not apply to the activities of services that lawfully distribute downloads to the user's storage locker.<sup>128</sup> Those services therefore would face unmitigated liability for subsequent unlicensed individualized streaming. As a result, neither the existence of such safe harbors, nor a focus on who provides the content to the user avoid all of the collateral damage that cloud providers fear were the broadcasters' interpretation to prevail.

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<sup>123</sup> Douglas Lichtman, *Public Performance in the Cloud*, THE MEDIA INSTITUTE (Apr. 30, 2014), <http://www.mediainstitute.org/IPI/2014/043014.php>.

<sup>124</sup> 17 U.S.C. § 512(c) (notice and take-down for host service providers); *id.* § 512(m) (no duty to monitor).

<sup>125</sup> *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19, 39 (2d Cir. 2012). Thus, Dropbox's interventions to improve storage and playback would also be exempt.

<sup>126</sup> 17 U.S.C. § 512(c)(1)(C) (emphasis added).

<sup>127</sup> Michael Walker, Jr., *A Better Public Performance Analysis for Digital Music Locker Storage*, 87 ST. JOHN'S L. REV. 629, 657.(2013) (Thus far, the only case to analyze the public performance analysis with respect to digital locker services is *Capitol Records, Inc. v. MP3tunes, LLC.*").

<sup>128</sup> Arguably content stored "at the direction of a user" could also include content provided by the service which the user directed the service to store in her locker, but this scenario strays far from the original user generated content context of section 512(c).

## **Is there an alternative reading of the transmit clause that would allow the court to reach a more principled outcome?**

The Second Circuit itself lamented the way in which its reasoning in *Aereo* resulted in technological design determining liability; it admitted: “Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court’s decisions . . . held that technical architecture matters.”<sup>129</sup>

One of the key reasons *Aereo* is so controversial and difficult to resolve is because the interpretations put forward by *both* parties rely so much on technological design, leaving relatively little room for other considerations. *Aereo*’s interpretation dictates there is *no* public performance where the service structures the transmission so that it can be received by only one person, regardless of the nature of the relationship between that person and the content. The broadcasters’ interpretation might result in public performances wherever a service happens to make transmissions of the same works to multiple members of the public, regardless of the nature of the relationship between that person and the content, unless it is understood that the content provider and the transmission entity must be one and the same.

The co-authors of this paper engaged in this collaboration out of shared concern that it is unprincipled and undesirable to read the transmit clause in a way that allows the design of the technology to dictate the result. Notably, we agree that debating the meaning of “performance” in the transmit clause (performance of the work v. particular transmission of a performance of the work) will not resolve the problem of interpreting the clause in a way that rejects the opportunistic technological manipulations of *Cablevision* and *Aereo* without endangering some legitimate cloud storage business models. In considering the text of the transmit clause, one should not only address the meaning of “performance of the work,” but also the meaning of the phrase “to the public.” We believe that focusing on the “public” to which these services communicate copyrighted content may show the way out of the impasse.

Section 101 does not directly define the “public” for the purposes of the public performance right. It does specify that performances in a “place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” occur “publicly.” One might therefore infer that “the public” unites two criteria: (1) “a substantial number of persons” (2) who are not “a normal circle of a family and its social acquaintances.” This language, however, defines “the public” when the work is performed *in* public. In the case of performances transmitted *to the public* for receipt in private places, caselaw and secondary authority establish that a “substantial number of persons” need not in fact have received the

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<sup>129</sup> WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 694 (2d Cir. 2013).

transmission; rather it suffices that the performance of the work be offered to “members of the public.”<sup>130</sup>

This exegesis suggests that, even if one subscribed to the Second Circuit’s understanding of “performance of the work” as restricted to a particular transmission that communicates the performance, that understanding does not necessarily make the transmission private. While “a substantial number of persons” cannot receive the particular transmission, and the transmission might therefore be thought to be private, in fact the requirement of a “substantial number of persons” pertains to performances *in* public, not *to* the public. The statute tells us that a communication of a performance by transmission to the members of the public may be achieved “by means of any device or process.” We should focus our gaze not on how the communication occurs (whether by a single transmission; multiple transmissions from a single source, or multiple transmissions from multiple sources) but to whom it is offered. Where the service is offering performances of copyrighted content to the public by means of individualized transmissions, any particular transmission will therefore be sent to a “member of the public” and may nonetheless be public in nature. The public to which the performances are offered remains the same whatever the “device or process” used to communicate the content.

## **The Way Forward – Giblin’s view**

### **Why *Aereo* is so important – and so controversial**

*Aereo*’s process involves making both copies and transmissions, but the transmit clause is taking center stage in this litigation. That is because the plaintiff broadcasters would prefer not to open the Pandora’s Boxes that stand between them and a successful claim for infringing reproductions. Box #1: *Cablevision*’s “volition” standard suggests that it is *Aereo*’s users who make the copies. Box #2: *Sony* tells us that home time-shifting of free broadcast television is fair use. Overturning either holding, but particularly the latter, would be difficult, and broadcasters may well prefer the existing uncertainty over the risk of a decision that might confirm the reach of these holdings to *Aereo*-like technologies. Understandably, therefore, the broadcasters would prefer to bypass those difficult battles altogether by persuading the Court that *Aereo* is infringing the public performance right instead.

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<sup>130</sup> Some authorities have also pointed out the commercial character of transmissions held to have been made to “members of the public,” *see, e.g.*, *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991). In *Cablevision* and in dissent in *Aereo*, Judge Chin cited the commercial character of the relationship to buttress his determination that the transmissions were to “paying strangers,” and thus “to the public.” *See Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 623 (S.D.N.Y. 2007); *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 505 (2d Cir. 2013) (Chin, J., dissenting). *See discussion infra*, text at notes 159-63.

The broadcasters' analysis in that regard is beguilingly simple. Starting from the assumption that Aereo is the relevant actor, it reasons that Aereo is offering and transmitting performances of works, and that, given its commercial relationship with its users, it is doing so "to the public". Et voilà – the service provider is directly liable without any need to inquire into the nature of the use itself, and whether consumers do – or should – have the right to engage in it for free.

But of course, that analysis doesn't just capture Aereo. Imported wholesale, the broadcasters' interpretation has the potential to threaten all kinds of businesses, technologies and uses. Virtually all content is protected by copyright, and the shift away from local to cloud-based storage means that it is routinely transmitted online. The legal reception for cloud storage providers in particular might have been much less hospitable had the broadcasters' interpretation of the transmit clause prevailed in 2008. That is why so many consumer advocates and technologists are concerned about this case: motivated not necessarily by sympathy for Aereo, but for fear of how the broadcasters' reading would affect other uses and developments.

A number of law professors have argued that the case should be decided on the reproduction right, rather than the public performance right, ensuring that crucial fair use arguments get aired, and avoiding collateral damage for other technologies which happen to transmit content.<sup>131</sup> Though I agree that these considerations are important, the potential for harmful exploitation of the existing law – particularly the Second Circuit's suggestion that there may be no public performance liability for providing online television streaming via individual antenna under the public performance right even where copies are *not* made as part of the process – suggests that this is the right time for the Supreme Court to find a more principled reading of the transmit clause, without necessarily taking on the predicate reproduction right issues. It may do so by revisiting the meaning of the words "to the public", and thereby developing a more nuanced framework for distinguishing between public and private performances.

### **What does it mean to be "to the public"?**

Compared to some other jurisdictions, the U.S. case law regarding what it means for a performance to be "to the public" is surprisingly sparse. Most notably to date, the Northern District of California considered whether the electronic delivery of video signals to hotel rooms from a bank of cassette players in the hotel's equipment room, upon request from a guest, amounted to transmissions to "the public."<sup>132</sup> The hotel at issue in *On Command Video* had structured its service so that no two guests could simultaneously view the content from the same cassette. The district court, following Ninth Circuit precedent, recognized that

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<sup>131</sup> Brief of 36 Intellectual Property and Copyright Law Professors as Amici Curiae in Support of Respondent, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (Apr. 2, 2014), 2014 WL 1348474.

<sup>132</sup> *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal.1991).



performances in hotel rooms did not occur in public places,<sup>133</sup> but held that the video transmissions were indeed “to the public” for the purposes of the transmit clause because “the relationship between the transmitter of the performance . . . and the audience . . . is a commercial, ‘public’ one regardless of where the viewing takes place.”<sup>134</sup> Paul Goldstein has agreed that the relationship between the sender and the recipient is vital in determining whether a transmission is “to the public”: “In the case of a transmission to a guest house, the relationship between the homeowner and the recipients of the transmission is not one between an individual and the public, rather is between an individual and his friends or family. By contrast, the relationship between a trailer court manager and guests in the court is one between an individual and the public, as it is in the case of a hotel and its guests.”<sup>135</sup>

Judge Chin adopted *On Command* when he determined Cablevision at first instance,<sup>136</sup> and further highlighted the importance of the relationship between the parties in his *Aereo* dissent. There he reasoned that “a transmission to anyone other than oneself or an intimate relation is a communication to a ‘member[] of the public,” because it is not in any sense “private.”<sup>137</sup> Thus, *Aereo*’s transmissions were “to the public” because they were being disseminated to “paying strangers”; the fact that the potential audience of each transmission was restricted to a single member of the public was irrelevant.<sup>138</sup> In each of these cases the emphasis has been squarely on the relationship between the sender and recipient of the performance to determine whether it has been made “to the public”.

Although these authorities have focused on commerciality, that factor has not been ruled to be dispositive. Outside these authorities, very little consideration has been given to the meaning of the words, “to the public”. The Second Circuit in *Cablevision* criticized *On Command*’s reading of those words,<sup>139</sup> but did not itself grapple with how to distinguish between public and private performances: in light of its finding that the RS-DVR transmissions were not “public” (because they were transmitted to each subscriber using their own copies) it found that it was not necessary to “analys[e] the contours of that phrase in great detail.”<sup>140</sup> But exploring the contours of that phrase is precisely what we need to do to resolve the current tangle. How might it be read to help us more effectively distinguish between performances that are private and those that are public?

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<sup>133</sup> *Columbia Pictures Industries, Inc. v. Prof. Real Est. Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989).

<sup>134</sup> *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 790 (N.D. Cal.1991).

<sup>135</sup> 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 7.7.2.2, at 7:168.2 (3d ed. Supp. 2012-2).

<sup>136</sup> *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 623 (S.D.N.Y. 2007).

<sup>137</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 699 (2d Cir. 2013) (Chin, J., dissenting).

<sup>138</sup> *Id.* at 699.

<sup>139</sup> *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008).

<sup>140</sup> *Id.* at 138.

## Can the Aussies help?

On this point the Australian approach may be of assistance. Whereas US authorities to date have largely focused on the relationship between the service provider and the audience (and, more recently, the relationship between the source copy of the transmission and the audience), the Australian law targets the relationship between the *owner of the copyright* and the audience.<sup>141</sup> Thus, the relevant question is whether the recipient of the performance is a member of what is described as the “copyright owner’s public”, that is, “the group which the copyright owner would . . . contemplate as its public for the performance of its work.”<sup>142</sup> This approach originates in a line of UK cases which, in determining whether a performance was “in public,” focused on the harm the act causes to the author of the work.<sup>143</sup> Proceeding on the basis that that is the crucial consideration, the Australian law has developed to recognize “the relevant ‘public’ [a]s the group which the copyright owner would otherwise contemplate as its public for the performance of its work.”<sup>144</sup> Thus, the essence of a performance “to the public” in Australian law is that it is occurring in circumstances where the owner is entitled to expect payment for the work’s authorized performance.<sup>145</sup>

The key authority is the 1997 decision in *Telstra v APRA*. There, Australia’s court of ultimate authority was asked to determine whether the streaming of music to individual cell phone callers placed on hold constituted a broadcast “to the public”.<sup>146</sup> In that case, as in *Aereo*, the recipient of each transmission was potentially a single individual. Was the transmission of copyright-protected music a transmission to the copyright owner’s public? Emphasizing the nature of the audience, the High Court held that it was:

Lying behind the concept of the copyright owner's public is recognition of the fact that where a work is performed in a commercial setting, the occasion is unlikely to be private or domestic and the audience is more appropriately to be seen as a section of the public. It is in a commercial setting that an unauthorised performance will ordinarily be to the financial disadvantage of the owner's copyright in a work because it is in such a setting that the owner is entitled to expect payment for the work's authorised performance. In this case it is not so much the preparedness of the audience of music-on-hold to pay to hear the works were it not for their unauthorised performance that is

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<sup>141</sup> *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 199-00.

<sup>142</sup> *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 199.

<sup>143</sup> *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 198-00 (citing *Harms (Inc.) Ltd v Martans Club Ltd* [1927] 1 Ch 526; *Jennings v Stephens* [1936] Ch 469; *Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd* [1943] Ch 167).

<sup>144</sup> *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 199.

<sup>145</sup> See, e.g., *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 198-99.

<sup>146</sup> *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140.

significant. That simple analysis belongs to an age where communications were less technologically advanced and business and marketing techniques were less developed. Rather, it is the preparedness of those who wish the music-on-hold to be played to bear the cost of the arrangement which provides the key, for it reveals the commercial character of the broadcast and the commercial deprivation suffered by the copyright owner. Callers on hold constitute the copyright owner's public, not because they themselves would be prepared to pay to hear the music, but because others are prepared to bear the cost of them having that facility. For the performance of the music to that audience the copyright owner would expect to receive payment, even if not from the members of the audience. For these reasons, we conclude that when the works were transmitted to persons using mobile telephones when placed on hold, in each of the three situations revealed by the evidence, they were broadcast [to the public.]<sup>147</sup>

Thus, the transmissions were indeed to the copyright owner's public – because of the nature of the relationship *between the copyright owner and the audience*, rather than the relationship *between the performer and the audience*.

### **How might this notion of the “copyright owner’s public” operate in US law?**

If the transmit clause's reference to “the public” were to follow the Australian approach of focusing on the relationship between the recipient of the performance and the owner of the copyright, technological design would cease to be determinative, and courts would be able to make more principled distinctions between public and private performances, and a great deal of the collateral damage threatened by the interpretations proposed by Aereo and the broadcasters could be avoided.

If we read the transmit clause as referring to the copyright owner's public, it would require us to examine the nature of the use to identify whether the communication was one for which the copyright owner could reasonably expect a royalty. If, for example, the user has an express or implied license to engage in the copyright-triggering act, or a fair use privilege to do so, the owner could not reasonably expect a royalty, and therefore the performance would not be “public”. If however the user was accessing protected content without the benefit of any license or exception, that would likely to be a circumstance where the copyright owner could reasonably expect a royalty and thus be a communication “to the public”. The same analysis would apply regardless of whether the transmission is limited to a single individual or the public at large.

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<sup>147</sup> *Telstra Corp. v Australasian Performing Right Ass'n* (1997) 191 CLR 140, 157.

The advantages of such a reading become apparent upon application.

When a user uploads content to her Dropbox, and later streams it back to herself, whether or not she is a member of the copyright owner's public would depend on whether she has an express or implied licence to enjoy those performances (or some fair use right to do so). If the use is permitted for any of those reasons, then the copyright owner could not reasonably expect a royalty, and the transmission would not be "to the public". Crucially, an individual may be a member of the copyright owner's public even when she is making a transmission to herself. For example, if the uploaded content is an infringing copy of a television show, that is clearly a circumstance where the copyright owner would be entitled to expect a royalty, and the user would thus be a member of the copyright owner's public. But if she is streaming a song that she has a licence or fair use privilege to play, the different relationship between the audience and the copyright owner results in a finding that the user is not a member of the right holder's public. In these two examples the technology, audience and transmitter are identical, and the different outcomes follow from the different relationships between the copyright owner and the audience.

This formulation allows for identical transmissions to be "to the public" when made to one audience but not to another. For example, if a music talent agent streamed to herself a song shared with her by a prospective client, she would not be a member of that musician's "public", because she would have an implied license to play the track without the payment of any royalty. The analysis on these facts would be identical whether the streaming occurred from her local hard drive, from a storage provider who only provided hosting, or one which also proposed or sold the content. But if the same song was streamed by an individual who had no licence or fair use privilege to do so, she *would* be a member of the copyright owner's public. In each case the focus is on the nature of the use rather than the particular design of the technology that is used to achieve it.

This reading avoids the unsatisfactory and anomalous possibility of storage providers having different liability depending on whether they provided the content and then the storage, or the storage alone, and adapts flexibly to different uses even when the technology remains the same. By focusing on the relationship between the recipient and the copyright owner, it also promotes technological neutrality: the user's right to experience the performance is likely to be the same regardless of whether she streams it from her laptop's hard drive or her private cloud storage. However, this interpretation is also sufficiently flexible to recognise that that might not always be the case. For example, one of the crucial factors considered in any fair use analysis is the effect of the use upon the potential market for, or value of, the copyrighted work. If the added convenience of a cloud-based service results in undue interference with the copyright owner's market, that may tip the balance against the user and potentially result in a different

outcome. In each case however the crucial consideration is the relationship between the audience and the copyright owner, not the technical operation of the system.

What would this reading mean for Aereo? Whether or not the performances are “public” under this reading is likely to come down to whether, in all the circumstances, they amount to fair uses by the recipient. If not, the recipient will be one of the copyright owner’s public and engaged in a public performance. If there is such a right however, the performance will not be “to the public”. Whether or not Aereo usage is “fair” has not yet been developed in the legal record, but it is far from being a slam dunk. Read carefully, *Sony* was far from a blanket authorization of any and all consumer copying of television broadcasts, and Aereo is readily distinguishable on a number of bases including the financial impact its use has on rightholders, its addition of place-shifting functionality that competes with licensed markets, and the general lack of “friction” in the copying process. If Aereo’s users had no fair use right or licence to engage in the performances, they would be public.

The proposed reading finally provides a mechanism to explain why consumer uses of Aereo’s remote antennae might be treated differently from consumer uses of antennae located on their own roofs. It has been argued by some commentators that the only difference between legally enjoying broadcast TV via your home antenna and doing so via Aereo is “the length of the cable”.<sup>148</sup> After all, there is a transmission from the antenna to the receiving device no matter where that antenna is located. As noted above, the majority of the Second Circuit in *Aereo* admitted that it was unable to distinguish between the two cases, leading to that suggestion that online retransmission engineered to give an independent antenna to each individual might be non-remunerable even in the absence of timeshifted copies.<sup>149</sup> However, if the inquiry is whether each of those transmissions is “to the public” within the definition proposed here, those uses may indeed be distinguished in a principled way. Under this conception, users transmitting the free-to-air broadcast signals they receive via their rooftop antennae to their living room television sets could be engaged in a public performance – if, in doing so, they were members of the “copyright owner’s public”. However, since users have a very clear license to engage in that use, the copyright owner has no reasonable expectation of a royalty; thus, those transmissions must not be “to the public”. In the case of signals transmitted by Aereo’s remote antennae however, there may be no implied license from broadcasters and, as sketched above, the fair use case may not hold up. Were it accepted that users had no license or fair use privilege to retransmit signals from remote antennae, such transmissions may be to the

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<sup>148</sup> See, e.g., Mike Masnick, *TV Networks Gang Up To Sue Aereo; Do Copyright Rules Change Based On The Length Of A Cable?*, TECHDIRT (Mar. 2, 2012, 10:39 A.M.), <http://www.techdirt.com/articles/20120302/00190517940/tv-networks-gang-up-to-sue-aereo-do-copyright-rules-change-based-length-cable.shtml>.

<sup>149</sup> WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 693 (2d Cir. 2013).

“copyright owner’s public.” Again, the difference lies in the nature of the use, not the nature of the technology. Broadcasters are willing for individuals to transmit signals from rooftop antennae to their television sets, but see services that offer transmissions from remote antennae to laptops as unduly interfering with the potential market for, or value of, their copyrighted works, particularly with regard to cable retransmission and video-on-demand rights.

In cases where a service has been put to infringing use, the provider may have liability under existing theories of secondary infringement. For example, were consumers who transmitted near-live television via Aereo found to do so in their capacities as members of the copyright owner’s public, those transmissions would amount to infringing public performances. Aereo’s involvement in setting up the transmission system and encouraging its use would likely result in liability for inducing those infringements, and may also give rise to vicarious liability.<sup>150</sup>

There is of course a certain circularity in this analysis. In the event that there is a public performance, that amounts to the doing of one of the copyright owner’s exclusive rights, which ordinarily gives rise to an entitlement to payment. If the way in which we determine whether such a performance has occurred is with reference to *whether* the rightholder is entitled to payment, the analysis may start to look like a snake that is eating its tail. However, that circularity provides us with a mechanism for confirming that it is indeed appropriate to impose an obligation to pay for the use. A law that provides that a performance is public when addressed to “members of the public” in the dictionary sense is a very blunt instrument in our

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<sup>150</sup> Vicarious infringement accrues where a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Though there is some uncertainty as to the extent to which a defendant must have the ability to supervise infringement for the first element to be satisfied. *See, e.g.*, Rebecca Giblin, ‘*A bit liable? A guide to navigating the U.S. Secondary Liability Patchwork*’, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 7, 39 (2008). Aereo clearly satisfies even the stricter approach because it has a genuine practical ability to control the direct infringer’s infringement by simply eliminating the option to watch broadcasts while they’re still airing. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, § 8.2.2 (3d ed. 2005 & Supp. 2008). Discovery would be needed to determine the extent to which the near-live uses impacted on Aereo’s revenue, but it is highly likely that it would have a sufficiently direct financial interest in their users’ infringement for the second element to also be satisfied. Liability for inducement arises where a defendant “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005). The doctrine was recognized for the first time by the U.S. Supreme Court in *Grokster*. *Id.* There the Court found three “particularly notable” indicia of intent to be “unmistakable” evidence of the defendants’ “unlawful objective”: the fact that each “showed itself to be aiming to satisfy a known source of demand for copyright infringement,” their failure to develop any mechanisms to reduce their products’ use for infringement, and the fact that their business models were predicated on infringement. *See Grokster*, 545 U.S. at 939-40. If its users’ near-live transmissions were infringing, Aereo would be clearly liable for inducement under this standard. It has designed its system to facilitate near-live streaming, it has actively encouraged the practice and it has advertised it as a feature. Discovery would be needed to determine the extent to which its business model was dependent on that practice, but per the vicarious infringement analysis above, it would likely have a significant financial interest in that infringement.

transmission-filled, online world. As we have seen in the context of cloud storage providers, a performance might easily be received by members of the public in circumstances where they had a license or fair use privilege to do so, i.e. where they are not members of the copyright owner's public. By re-focusing the analysis on the relationship between the copyright owner and the recipient in determining whether the performance is "public", this reading incorporates a safety check that prevents overreaching by ruling out certain transactions which should not be in the copyright owner's control. Although there is circularity here, it is useful redundancy that encourages fuller consideration of the relevant facts, and transforms a blunt instrument into one capable of much more nuance.

My co-author disagrees about the desirability of incorporating fair use considerations into the public performance analysis. In my view however, such considerations are central to the concept: a copyright owner cannot reasonably expect a royalty in the case of an unremunerated fair use, and thus the user is not a member of their public in the case of that use. In addition, I see this as being a vital feature of this proposed reading in light of the U.S. law's distinction between fair uses *by* users and fair uses *on behalf of* users. The law has traditionally operated less favorably to commercial service providers who do an act on a user's behalf than it would to the user herself.<sup>151</sup> Thus, a copy shop may be liable for making infringing copies, even if the making of those copies would have amounted to educational fair use had it been carried out by the ultimate user on her own behalf.<sup>152</sup> In one such case the Sixth Circuit observed that "courts have ... properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses."<sup>153</sup> In a subsequent case involving the sale of karaoke discs, it reiterated that "the end-user's utilization of the product is largely irrelevant; instead, the focus is on whether alleged infringer's use is transformative and/or commercial."<sup>154</sup> Thus, in defending against an allegation of public performance infringement, a storage provider like Dropbox may not be able to rely on the user having a fair use right to stream the content. As more and more transactions occur online, and users continue to shift from local to cloud-based computing environments, this distinction threatens

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<sup>151</sup> Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?* 17 (Columbia Pub. Law & Legal Theory, Working Paper No. 08158, 2008); WILLIAM F. PATRY, PATRY ON FAIR USE § 7:3 (2014).

<sup>152</sup> See, e.g., *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531-32 (S.D.N.Y. 1991); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996). However, courts have been more willing to find that uses on behalf of third parties are fair where they are done for non-profit purposes. See e.g., *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (in which a Georgia district court held that the creation of electronic coursepacks by a nonprofit educational institution for nonprofit educational purposes was fair use); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (in which it was held that photocopying by the library of the National Institutes of Health of scholarly articles on behalf of members was fair use).

<sup>153</sup> *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (quoting WILLIAM F. PATRY, PATRY ON FAIR USE § 7:3 (2014)).

<sup>154</sup> *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007).

to seriously erode fair use. By requiring courts to consider the relationship between the recipient of the performance and the copyright owner in determining whether a performance is transmitted, those rights continue to be protected.

By developing the meaning of the phrase “to the public”, it is possible to make principled distinctions between public and private performances regardless of how far away the receiving equipment is, who it is owned by, or how individualized the transmission. Such a reading would restore to courts the ability to decide whether the performance is public, and not leave the outcome to technological happenstance.

### **The Way Forward – Ginsburg’s View: Who is “the public” and what is it paying for?**

The two authors agree that the concept of the relevant public “to” which the service offers and transmits the works may be the key to a more principled reading of the transmit clause (which would permit reversal in *Aereo* without endangering legitimate cloud storage models). But we differ on how to ascertain who that public is. Ginsburg does not fully understand the “copyright owner’s public,” finding the concept both circular and horse/cart-inverting because it appears to make prima facie violations of the public performance right turn on a fair use inquiry.

Going back to our common referent in *On Command Video*, however, can lead to another approach to identifying the relevant “public” for public performances by transmission. *On Command* underscored the difference between a performance IN public, and a performance by transmission TO the public. The Ninth Circuit’s decision in *Professional Real Estate* required the *On Command* court to confront the distinction; the appellate court there held that a hotel’s “rental” of videocassettes to its customers for viewing in their rooms was not a public performance because the guest rooms, once occupied, were not “open to the public.”<sup>155</sup> The Northern District of California acknowledged that the hotel’s guests did not view the videocassettes’ content in public, but ruled that the hotel’s communication of the content of the videocassettes to one customer at a time came within the scope of the statute’s second definition of “to perform publicly”:

On Command transmits movie performances directly under the language of the definition. The system “communicates” the motion picture “images and sounds” by a “device or process” -- the equipment and wiring network -- from a central console in a

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<sup>155</sup> *Columbia Pictures v. Professional Real Estate*, 866 F.2d 278, 280 (9th Cir. 1989) (citations omitted).



hotel to individual guest rooms, where the images and sounds are received "beyond the place from which they are sent." The fact that hotel guests initiate this transmission by turning on the television and choosing a video is immaterial.

On Command's video transmissions are also "to the public" for the purposes of the transmit clause. Hotel guests watching a video movie in their room through On Command's system are not watching it in a "public place" but they are nonetheless members of "the public." This is because the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, "public" one regardless of where the viewing takes place. The non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute "the public" under the transmit clause.<sup>156</sup>

Thus, the elements that converged to support the Northern District of California's determination that the hotel had transmitted copyrighted works "to the public" were:

The occupation of the hotel rooms by "members of the public" (the hotel's guests were drawn from the general public, any of whom could have occupied private rooms)

The hotel was transmitting the motion pictures to its guests on their request

The commercial relationship between the hotel and its guests.

The Second Circuit distinguished *On Command* on the ground that the individualized transmissions emanated from a central source copy,<sup>157</sup> but we have seen that this distinction does not withstand textual analysis.<sup>158</sup> Under *On Command*, then, transmissions of performances of works to a paying public, wherever and whenever the members of the public receive the transmissions, are public performances. But if those are the elements of a public performance by transmission, how can *On Command* avoid condemning cloud storage services, such as those provided by Dropbox or Amazon? The answer may lie in what the members of the public are paying for. In *On Command*, members of the public paid to view particular works offered by the hotel. The hotel gave its guests a choice of movies, and then transmitted them individually on request. This is classic pay-per-view. It is very unlikely that the *On Command* court's analysis would have changed if, instead of transmitting from a centralized videocassette, the hotel had purchased a library of videocassettes for each guest room, and confined

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<sup>156</sup> *On Command*, 777 F. Supp. at 789-90.

<sup>157</sup> *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008) ("*On Command* is factually distinguishable, as successive transmissions to different viewers in that case could be made using a single copy of a given work. Thus, at the moment of transmission, any of the hotel's guests was capable of receiving a transmission made using a single copy of a given movie. As a result, the district court in this case erred in relying on *On Command*.").

<sup>158</sup> See *supra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined..**

transmissions from each cassette to its dedicated room – in effect, a lower-tech version of the *Cablevision* roadmap. Whatever the “device or process” by which the hotel offered to transmit the content it offered its guests, the guests were paying to receive that content “in a place beyond the place from which [it was] sent.” In this respect, my analysis approaches my co-author’s focus on the copyright owner’s right to control the offering of the content.

Storage locker models such as Dropbox are also transmitting content to members of the public (their subscribers) when they playback the files requested by the users. But unlike *On Command*-style pay-per-view, the service for which the members of the public are paying is not the opportunity to receive transmissions of particular works offered by the service, but rather to store whatever content the users post, whatever its source, and make it accessible remotely. Dropbox’s customers pay the same subscription fees whatever the content they store and access. The “commercial relationship” between the service and the consumer does not pertain to the delivery of pre-identified content. Thus, while there is a public that pays in dollars or in subjection to advertising<sup>159</sup> (or other costs of “free” commercial services), the public is not specifically paying for any given copyrighted works.

What about hybrid content delivery and storage services, such as that provided by Amazon? When the members of the public purchase a download, they are paying for specific content, but in the US copyright system, which even with respect to digital files separates rights of reproduction and distribution on the one hand from rights of public performance on the other,<sup>160</sup> the rights that the members of the public are paying the service to exercise are reproduction and distribution rights, not public performance rights. When the members of the public request playback of the same files, they are identifying particular content initially provided by the service (unlike pure storage models), but the commercial relationship does not necessarily correspond to the performance of content supplied by the service. That is, if the service stores and plays back not only content that it placed in the customer’s locker, but also content the user acquired or posted from other sources, its playback feature may more closely resemble Dropbox’s, particularly if the price the user pays for playback remains constant whatever the content performed. Admittedly, there is economic value in providing playback together with a download, even when the playback is undifferentiated with regard to content

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<sup>159</sup> The analysis would be different, however, if the service targeted advertising to the played-back content. At that point, the “commercial relationship” between the service and the consumer would focus on particular works; the service would have foregone the content-neutrality that justifies a conclusion that the service is not publicly performing the played-back works.

<sup>160</sup> Many other jurisdictions confine the distribution right to physical copies and treat the delivery of digital files as a form of communication to the public through the making available of works. *See, e.g.*, Directive 2001/29/EC, art. 3(2), of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10-19 [hereinafter EU InfoSoc Directive] (making available); *id.* art. 4 (distribution); *id.* Recital 28 (“Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article”).

not downloaded from the playback service. But, as suggested earlier, that value may be captured in the price negotiated (or set by compulsory license) for the initial download. An approach that inquires “who is the public and what is it paying for” would not, in the case of hybrid services, disaggregate the subsequent playback from the initial content delivery, and thus has the merit of avoiding “double-dipping” - requiring the copyright licensee to pay separately for what, commercially, seems a single act of exploitation.

As applied to *Aereo*, this approach would bring that service’s activities squarely within the public performance right. *Aereo*’s subscribers – members of the public – are paying to receive transmissions of copyrighted works. *Aereo* is offering its subscribers broadcast television programming via an internet connection; however simple or complex the “device or process” by which *Aereo* provides performances of that content, there is no doubt what its customers are paying for. *Aereo* does not (and could not) promote its service as offering “your stuff, anywhere;”<sup>161</sup> it is urging its public to “Watch Live TV Online.”<sup>162</sup>

To sum up, a service that offers performances of copyrighted works to members of the public on an on-demand basis is publicly performing those works by transmission, at least when the service’s customers are paying (in money or in kind, for example, by exposure to advertising or by providing personal data) to receive performances of those works. This solution is technologically neutral: the “device or process” by which performances of the works are communicated to the members of the public, whether the on-demand transmission to a member of the public derives from a centralized or an individual source copy, is irrelevant. Finally, an individual who makes available performances of copyrighted works, either directly or through access to her “cloud” storage, to members of her family or personal friends or colleagues, is not performing those works “publicly” because she is providing access to a defined circle of recipients; she is not offering the content to “members of the public.”<sup>163</sup>

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<sup>161</sup> DROPBOX, [www.dropbox.com](http://www.dropbox.com) (last visited May 25, 2014).

<sup>162</sup> AEREO, <https://aereo.com> (last visited May 27, 2014).

<sup>163</sup> Cf. EU InfoSoc Directive; Case C-607/11, *ITV Broadcasting Ltd v. TVCatchup Ltd*, 2013 CELEX Westlaw No. 611CJ0607 (Mar. 7, 2013) (a “communication to the public” is made to an “indeterminate number” of persons); Case C-306/05 *SGAE v. Rafael Hoteles*, 2006 CELEX Westlaw No. 605J0306 (Dec. 7, 2006); Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, THE MEDIA INSTITUTE (Apr. 23, 2013), <http://www.mediainstitute.org/IPI/2013/042313.php> (“[T]he example given in *Cablevision* of a ‘hapless customer who records a program in his den and later transmits the recording to a television in his bedroom . . . should not require a license from the copyright owner of the recorded work . . . not because the source copy for the in-home transmission was made by Hapless Homeowner from a television broadcast. Rather, there is no copyright violation because Mr. Hapless did not transmit the recording ‘to the public.’”).

## Conclusions

In a world where so many routine transactions involve online transmissions, Aereo presents a serious challenge. The technology has been carefully and cleverly designed to exploit the contours of the copyright law (as interpreted by the Second Circuit in *Cablevision*) to proffer what many have perceived to be an all-or-nothing choice: permit Aereo to design its way out of an obligation to remunerate rightholders, or impose unacceptable collateral damage on essential technologies like cloud storage. These choices are neither palatable nor inevitable. This paper has sought to demonstrate that technological design need not dictate the application of the transmit clause. Rather, developing the meaning of the words, “to the public” produces more principled alternative readings of the transmit clause, either of which allows courts to enable copyright’s exclusive rights to remain effective without discouraging innovation.