No. 13-461

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Aereo "perform[s] . . . publicly," under § 101 and § 106 of the Copyright Act, 17 U.S.C. §§ 101, 106, by supplying remote equipment that allows a consumer to tune an individual, remotely located antenna to a publicly accessible, over-the-air broadcast television signal, use a remote digital video recorder to make a personal recording from that signal, and then watch that recording.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Aereo, Inc. states the following:

Aereo, Inc. has no parent corporation. USANi LLC, a subsidiary of IAC/InterActiveCorp, a publicly traded company, owns 10% or more of Aereo, Inc.'s stock.

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INTRODUCTION

Aereo provides convenient and inexpensive technology that allows consumers to make and watch personal recordings of local over-the-air broadcast television programs using an individually assigned antenna and a digital video recorder ("DVR"). Petitioners do not dispute that (i) the content at issue is delivered for free over the public airwaves with their authorization and (ii) any consumer with an antenna is entitled to receive, watch, and make a personal recording of that content. The evolution of technology from a black-and-white television connected to a rabbit-ear antenna and a Betamax to a high-definition television connected to a digital antenna and DVR has not changed those core principles. This case simply concerns the next technological step: allowing a consumer to access broadcast programming using an Internet-connected device coupled with a remotely located, individually assigned antenna and segregated video storage.

Petitioners ask this Court to ignore Aereo's specific technology and find that Aereo's system violates the Copyright Act. But this Court's jurisprudence recognizes copyright as a limited grant of exclusive rights and mandates technical and analytical precision in any application of those exclusive rights.

As this case comes to the Court, petitioners contend only that use of Aereo's technology violates their right to "perform . . . publicly" their works. That claim fails for two reasons. First, the Second Circuit correctly interpreted the Transmit Clause to extend liability only to *transmissions* made available to the public. The "one-to-one" transmissions from Aereo's equipment – individual transmissions from personal recordings created from data received by individual antennas – do not constitute "public" performances.

Second, with Aereo's technology, the performance embodied in each transmission is the user's playing of her personal recording – not the performance petitioners transmit to the public. The Copyright Act makes clear that the act of playing a recording is a performance *distinct* from any performance from which the recording is made. Because the performance embodied in each transmission from Aereo's equipment – the user's playing of her recording – is available only to the individual user who created that recording, the performance is private, not public.

Petitioners assert that a ruling for Aereo would be "unfair" because it would allow Aereo to avoid paying copyright royalties – which petitioners imply cable systems pay. As a threshold matter, broadcasters have never been able to claim copyright royalties when a consumer accesses or makes a personal recording of their programming using an antenna or recording device. Moreover, under the Copyright Act, petitioners have no right to royalties at all for retransmissions of their content within the original broadcast market. Congress exempted even cable systems from any obligation to compensate copyright holders when they retransmit broadcast programming already available to cable subscribers over the air. Petitioners' analysis flows from a false narrative about Congress's intent.

Moreover, petitioners' construction of the statute imperils the cloud computing industry. Their position depends on aggregation of all the individual transmissions and individual performances of a program by consumers using Aereo's system. That "aggregation" would turn all cloud storage providers into infringers. The government acknowledges the very real threat posed by petitioners' arguments, but its proffered solution – to examine the lawfulness of

the *copy* from which the performance is made – is highly problematic: it ignores consumers' long-established right to make personal copies of free, over-the-air broadcast programming and consigns cloud computing companies to the impossible task of discerning which specific content among millions of terabytes of user data was lawfully acquired. Because that inquiry has nothing to do with a proper understanding of the public-performance right, the government's alternative position should be rejected.

At base, petitioners object that Aereo is a sort of Rube Goldberg device – a clever way to take advantage of existing laws. *See* Pet. Br. 11. But designing technologies to comply with the copyright laws is precisely what companies *should* do. If petitioners believe a technology that operates within existing laws to allow individual consumers to watch television shows petitioners have offered for free is causing them economic harm, they are entitled to ask Congress to change those laws. But this Court should not rewrite the Copyright Act in an effort to protect petitioners from lawful and logical advancements in technology or from the economic consequences of their transmitting works for free over the public airwaves.

STATEMENT OF THE CASE

1. Copyright and the Public Spectrum

Petitioners are broadcasters who have been "granted the free and exclusive use" of radiowave spectrum, "a limited and valuable part of the public domain." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.). In exchange, they have agreed to be "burdened by enforceable public obligations," *id.*, chief among them the obligation to make available without charge their broadcast signals to the public. *See Turner*

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994). Pursuant to that agreement, petitioners disseminate programming using "over-the-air" signals that can be received by anyone with an antenna. *See* JA411-12. That programming includes copyrighted material licensed to petitioners on terms reflecting that it will be made available to the entire public within range of petitioners' signals. *See Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974).

For decades, petitioners' audience could receive their programming only with a home antenna tuned to receive their signals. That changed with the advent of "community antennas" (early "cable" systems), which enhanced viewers' ability to receive local broadcast signals by allowing them to connect directly to a shared antenna positioned for improved signal clarity. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968). The legality of community antennas was tested in *Fortnightly*, in which copyright holders claimed those antennas infringed their right, under the Copyright Act of 1909, to "perform . . . publicly" their copyrighted works. *Id.* at 395. The 1909 Act, however, contained no definition of "perform . . . publicly," and this Court concluded that community antennas did not "perform" at all because they simply conveyed local programming that "ha[d] been released to the public." *Id.* at 400-01. Because it ruled cable systems did not "perform," the Court did not consider whether they performed "to the public."

The Court revisited community antennas in *Teleprompter*, which differed from *Fortnightly* in one important respect: the cable system "imported 'distant' signals from broadcasters so far away . . . that neither rooftop nor community antennae located in or near the locality could normally receive [them]."

415 U.S. at 401. Because that function allowed cable subscribers to receive copyrighted programming that had not been "released" to *them*, *id.* at 410, the broadcasters argued that *Fortnightly* should not extend to such cable systems. As in *Fortnightly*, however, the Court concluded that the system's transmissions were not performances under the 1909 Act. *Id.* at 410-15. It noted that any distortion in the market for copyrighted works caused by distant signal importation "must be left to Congress." *Id.* at 414.

Congress accepted that invitation in the Copyright Act of 1976 ("1976 Act"). To respond to the concern that transmissions might make a work available to an audience to which the copyright holder had not agreed to release it, Congress specified that one who "transmit[s] . . . a performance or display of [a] work . . . to the public" should be treated as "perform[ing]" the work "publicly." 17 U.S.C. § 101.[1] Congress recognized, however, that the public availability of broadcast programming made it a special case: a cable system's retransmission of programming within the original broadcast market "does not injure the copyright owner," who "contracts with the [broadcaster] on the basis of his programming reaching [its audience] and is compensated accordingly." H.R. Rep. No. 94-1476, at 90 (1976). Consequently, Congress enacted a broadcast-specific provision, § 111, which allows a copyright holder to claim royalties only when a cable system retransmits a broadcast of a work to a "distant" audience. 17 U.S.C. § 111(d)(3).

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[1] Congress has always preserved an individual's right to perform *privately* copyrighted works. *See* Copyright Act of 1856, ch. 169, 11 Stat. 138; Copyright Act of 1897, ch. 4, 29 Stat. 481; Copyright Act of 1909, ch. 320, § 1(c)-(e), 35 Stat. 1075, 1075-76; 17 U.S.C. § 106.

Under § 111, copyright holders cannot claim royalties for retransmissions of local or national (network) programming. *Id.*[2]

Since 1976, Congress has amended the copyright laws repeatedly, but always preserved that basic balance of interests. In 1995, when Congress created a digital performance right in sound recordings, it exempted retransmissions of broadcast radio within 150 miles of the original broadcast, *see id.* § 114(d)(1)(B)(i)-(ii), "to permit retransmitters . . . to offer retransmissions to their local subscribers of all radio stations that the retransmitter [can] pick up using an over-the-air antenna." S. Rep. No. 104-128, at 20 (1995). And, in 1999, Congress enacted 17 U.S.C. § 122, which allows satellite systems to retransmit a broadcaster's signals in-market without paying copyright royalties. Satellite carriers should not pay to retransmit such content, Congress concluded, "because the works have already been licensed and paid for with respect to viewers in those local markets." H.R. Conf. Rep. No. 106-464, at 92-93 (1999).

2. Competition Law and Retransmission Consent

Petitioners receive approximately 90 percent of their revenues from sales of broadcast time to advertisers. *See* NAB Br. 20. The price advertisers will

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[2] The broadcasters lobbied for that provision. After *Teleprompter*, CBS's General Counsel told Congress that "cable television systems should have a copyright exemption for retransmission of television broadcasts . . . within the normal coverage area of the [originating] station, . . . [given] the expectation of the broadcaster, and those who license his use of their program material, that the broadcast . . . signal will reach the entire public in [that] area." *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 93d Cong. 578 (1973) (statement of Columbia Broadcasting System, Inc.).

pay depends on the size of a program's audience, as measured by Nielsen. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 452-53 & n.36 (1984). The larger the audience, the more petitioners can charge advertisers. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 208-09 (1997).[3]

Petitioners derive most of their remaining revenues from "retransmission fees" required, not by the Copyright Act, but by a cable-specific competition statute, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act"). *See* NAB Br. 21 n.55. The Cable Act allows broadcasters either to require cable companies to retransmit their broadcast programming ("must-carry") or to prohibit them from doing so ("retransmission consent"). *See* 47 U.S.C. §§ 325(b), 534(a), (b)(10); 47 C.F.R. §§ 76.62(a), 76.64; JA307.[4] In large markets, broadcasters generally invoke the second option and use the right to withhold their signals to extract "retransmission fees." Note, *Tilling the Vast Wasteland: The Case for Reviving Localism in Public Interest Obligations for Cable*

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[3] When the district court ruled, Nielsen did not yet measure viewership through platforms like Aereo's – just as it did not, for years, measure viewership through DVRs. *See* JA632-33. In late 2013, however, Nielsen announced that it would begin incorporating such viewership into its ratings for the 2014-2015 television season. *See* Nielsen, *Any Way You Watch It: Nielsen To Incorporate Mobile Viewing Into TV Ratings And Dynamic Digital Ratings* (Oct. 28, 2013); *see also* D.C. Bar Ass'n Br. 7 n.5; *Hearst Stations Inc. v. Aereo, Inc.*, Civil Action No. 13-11649-NMG, 2013 WL 5604284, at *8 (D. Mass. Oct. 8, 2013) ("Hearst's claim that WCVB will not be able to measure viewers who access its programming through Aereo is simply not true.").

[4] Prior to 1992, cable systems generally were required to carry the signals of local broadcasters without any payment. *See* JA304.

Television, 126 Harv. L. Rev. 1034, 1050-51 (2013). Cable companies must pay those fees regardless of whether the broadcasters' signals are retransmitted from local or distant markets, and regardless of whether they carry copyrighted content. *See generally* 47 U.S.C. § 325(b).

In the Cable Act, Congress noted that cable systems "appropriate[ly]" retransmitted local broadcasters' signals "without . . . any copyright liability," but that "a competitive imbalance between the 2 industries" had resulted from cable systems' new practice of "compet[ing] with local broadcasters for programming, audience, and advertising." § 2(a)(19), 106 Stat. 1462-63; JA318-19. To restore "competitive []balance," Cable Act § 2(a)(19), 106 Stat. 1462-63, Congress gave broadcasters the right to withhold their signals from cable providers, but not a general property right in those signals. *See* 47 U.S.C. § 325(b)(1). Congress also noted that it had been "careful to distinguish" broadcasters' interest in their signals "and the interests of copyright holders in the programming contained on the signal." S. Rep. No. 102-92, at 36 (1991) (JA321). It emphasized that "[t]he principles that underlie the compulsory copyright license of section 111 . . . are undisturbed by this legislation," H.R. Conf. Rep. No. 102-862, at 76 (1992), and that the Act was not "intended to affect Federal copyright law," S. Rep. No. 102-92, at 84.

3. Home Recording and Fair Use

In *Sony*, owners of copyrights for programs "broadcast on the public airwaves" sued to enjoin Sony's distribution of video tape recorders ("VTRs") used by consumers to record programming for "time-shifted" viewing – a practice the plaintiffs claimed infringed their right, under 17 U.S.C. § 106(1), to

"reproduce" their works. 464 U.S. at 419-20. This Court held that Sony was not liable for contributory infringement because there was no direct infringement: consumers' creation of recordings was a non-infringing "fair use," as it "merely enable[d] a viewer to see . . . a work which he had been invited to witness in its entirety free of charge." *Id.* at 450. The Court noted that, "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits." *Id.* at 454.

4. Aereo's Equipment

a. Aereo is a technology company that makes available to consumers two types of equipment: antennas and DVRs. *See* JA167, 170, 592.[5] Using Aereo's equipment, a consumer can record and watch free local broadcast television programming. *See* Pet. App. 62a; JA199, 427-28, 435, 593.[6]

Aereo's equipment differs from traditional antennas and DVRs in that it is remotely located and accessible via the Internet "cloud," rather than located in the user's home. *See* Pet. App. 62a; JA560, 716; *cf.* BSA Br. 7. Like other "cloud computing" companies, Aereo capitalizes on widespread access to high-speed Internet connections. *See* Pet. App. 63a-64a; BSA Br. 2.

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[5] After *Sony*, VTRs were replaced by DVRs. Forty-five percent of American households now use a DVR. *See* JA635.

[6] Aereo imposes several geographic controls to ensure consumers can make and access their recordings only when they are physically located within the original broadcast area. Those include: confirming a home address within the market through credit card checks, *see* JA562, 739; IP address verification, *see id.*; further checks using GPS, cell tower triangulation, and other methods, *see id.*; and reminders that Aereo's Terms of Use prohibit attempting to access a recording outside the original broadcast area, *see* JA563-64, 740-42; *see also* JA593-94.

A user accesses Aereo's equipment by logging into her account on an Internet-connected device, such as an iPhone or tablet. *See* Pet. App. 62a; JA428, 560-61. A DVR guide containing programming information for the broadcast channels available in her market then appears. *See* Pet. App. 62a; JA428, 560-61. That guide allows the user to select a program broadcast for free over-the-air reception and to record and play it back in the same manner as a home-based DVR. *See* Pet. App. 62a-63a.

The user can schedule a future recording by pressing "Record" within the guide. *See id.* For a program currently airing, the user can press "Record" to make and save a recording (which can be watched later or while the program is still airing) or press "Watch" to make a recording and begin playing it while later portions are still being copied. *See id.* The user's selection of a program activates and tunes an antenna assigned solely to that user, which picks up the signal for the local station broadcasting the program. *See id.* at 65a; JA432-33.[7] The user's remote DVR hard drive then records an individual copy of the data received by the antenna assigned to her, in the same manner as a home-based DVR. *See* Pet. App. 6a-7a. She can then view that recording over the Internet by pressing "Play." *See id.* at 7a, 66a; JA233, 580. Aereo's equipment does not receive or record any broadcast programming except in response to user commands; when not in use by consumers, it is dormant. *See* JA429, 566, 576.

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[7] Hundreds of these miniature antennas can be stored in a single housing. *See* Pet. App. 67a-68a; JA430, 566, 569-70. In factual findings unchallenged on appeal, the district court determined that each antenna could be used only by a single user at any given time and that "each antenna functions independently." Pet. App. 71a, 73a.

A user who selects a currently airing program to record and watch experiences a delay of at least several seconds, and up to several minutes, before the program appears on her device. *See* JA201, 230, 582, 686. That delay occurs because the user is watching the playback of her personal recording – even when she watches it while the program is still airing and later portions of the recording are still being made.[8] A consumer using Aereo's DVR – or any other DVR – cannot watch content simultaneously with the over-the-air broadcast. *See* Pet. App. 66a; JA429, 561, 582, 858.[9] And to switch to a new program, the consumer must start the recording process over, by navigating to the guide, selecting a program, pressing "Watch," pressing "Play," and then waiting for enough of the program to be recorded to begin playback. *See* JA233, 580.

The "Watch" and "Record" modes work in the same way, *see* Pet. App. 67a; JA560-61: the user's selection of a program causes a personal recording to be made from the data received by the individual antenna. *See* Pet. App. 6a-7a. The user then watches the program by playing her recording. *See* JA169, 432-33, 560, 582. The two modes differ only in that a recording made in "Watch" mode is not permanently retained in storage unless the user later presses "Record." *See* Pet. App. 5a, 67a; JA237, 560-61, 580.

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[8] The recording is necessary to enable the consumer to pause and rewind currently airing television – exactly like an in-home DVR. *See* Pet. App. 29a-30a & n.15.

[9] When a consumer presses "Watch," she receives a message: "Please note: When you press 'Watch' you will start recording this show, allowing you to pause and rewind the program. You may notice a slight delay as a result." JA506; *see also* JA507.

From beginning to end, the data received by an antenna are available only to the individual user. *See* Pet. App. 8a, 65a; JA432-34, 469, 560, 577-80, 858-59. The digital recording can be accessed and played only by that user; it cannot be further copied or transferred. *See* Pet. App. 8a, 65a; JA469, 560, 578-79. Even if two users record and watch the same program at essentially the same time, they will never share an antenna or recording – just as two neighbors each using a rooftop antenna and in-home DVR would not. *See* JA180-81, 579, 584.

b. The district court's factual findings establish that Aereo's equipment is functionally equivalent to home-based equipment, but less expensive and more efficient. First, it enables a consumer not physically proximate to the equipment to access the same functionalities over the Internet, using a variety of devices, from anywhere within her home television market. *See* Pet. App. 63a-64a; JA221. Second, a consumer need not purchase and install multiple pieces of equipment (including an antenna, DVR, and television) or dedicate space at home to it; she simply purchases access to equipment already installed elsewhere. *See* Pet. App. 64a; BSA Br. 10; JA221, 493. Third, like all cloud-based platforms, Aereo allows some of the same physical equipment to be used independently by multiple consumers, which decreases waste and cost. *See* BSA Br. 7-8. For instance, although an Aereo antenna can never be used by multiple consumers at the same time, a single antenna can be independently operated by different consumers at different times. *See* Pet. App. 64a-65a.[10] Fourth, Aereo's equipment can be serviced

[10] Some of Aereo's antennas, however, are "static[ally]" (permanently) assigned to particular users. *See* Pet. App. 64a.

and maintained more cheaply and efficiently than home-based equipment; if it breaks down, it can be replaced with little or no interruption. *See* BSA Br. 10.

5. The District Court Decision

a. Petitioners brought suit against Aereo and sought a preliminary injunction on the sole ground that Aereo directly infringed their right to "perform . . . publicly" the copyrighted content they broadcast for public reception. 17 U.S.C. § 106(4).[11] They declined to assert, as a basis for that injunction, any claim that Aereo violated their right "to reproduce . . . in copies" the programming, *id.* § 106(1), or any contributory or vicarious theory of infringement. *See* JA820, 823, 826 ("Our claim is based on . . . the public performance right, as distinguished from making copies, which is a reproduction right."). Following 11 weeks of discovery, the district court held a two-day evidentiary hearing. *See* Pet. App. 61a.

The district court denied petitioners' motion, relying on the Copyright Act's text, its legislative history, and *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), *cert. denied*, 557 U.S. 946 (2009). *Cablevision* concerned a cable provider that offered subscribers a "remote storage" DVR ("RS-DVR") located at Cablevision's facility. *Id.* at 124-25. Cablevision's RS-DVR, like Aereo's equipment, allowed a consumer to create a personal recording of programming on a remote hard drive. *Id.* at 124. Only the user who created the recording could access and play it. *Id.* at 135.

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[11] Petitioners asked the district court to enjoin only consumers' use of Aereo's equipment to watch a recording of a broadcast program while it airs (the same functionality available with a traditional DVR). *See* Pet. App. 15a n.9, 61a; JA 824.

The copyright holders in *Cablevision* sought an injunction, arguing that Cablevision infringed their reproduction right and "engag[ed] in unauthorized public performances of their works through the playback of the RS-DVR copies." *Id.* at 134. After the district court granted the injunction, the Second Circuit reversed. It first determined that consumers, not Cablevision, created the allegedly infringing copies, rejecting the argument that Cablevision could be directly liable for infringement because it designed, owned, and maintained the equipment. *Id.* at 131.

To address the claim that Cablevision performed "publicly," the Second Circuit turned to the Copyright Act's definition: "'[t]o perform . . . "publicly" means . . . to transmit . . . a performance . . . of the work . . . to the public.'" *Id.* at 134 (quoting 17 U.S.C. § 101). The court concluded that "to transmit . . . a performance" is one way "to perform" the work – "a transmission of a performance is itself a performance." *Id.* To determine whether the transmission was a *public* performance, the court examined whether the transmission was "to the public" – "who precisely [was] 'capable of receiving'" the transmission. *Id.* at 135 (quoting 17 U.S.C. § 101). It held that, because "each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, . . . such transmissions are not performances 'to the public.'" *Id.* at 139.

b. The district court below found that Aereo's equipment fell "within the core of what *Cablevision* held lawful" based on three facts: (1) each time a user records a program, a unique copy is saved to DVR storage accessible only to that user; (2) each transmission is made from such a copy; and (3) each transmission from a "unique copy is made *solely* to the subscriber who requested it; no other subscriber

is capable of accessing that copy and no transmissions are made from that copy except to the subscriber who requested it." Pet. App. 83a-84a (footnote omitted).

The district court rejected petitioners' argument that it should ignore whether a consumer's playback of her copy is a performance "to the public" and instead "look back . . . to the point at which Aereo's antennas obtain the broadcast content." *Id.* at 85a-86a. It noted that *Cablevision* had rejected the same argument, finding a "dividing line" between the "transmissions made by the content providers" and the transmissions made by consumers using Cablevision's equipment. *Id.* at 86a. It concluded that the individual antennas were not necessary to its finding of non-infringement; however, because "each antenna functions independently," Aereo had a "stronger case" than Cablevision given that "each copy . . . is created from a *separate* stream of data." *Id.*

After determining that Aereo's equipment was not used to transmit "to the public," the district court declined to address whether Aereo could be held directly liable for infringement notwithstanding that "it is the user, rather than Aereo, that controls the operation of Aereo's system and 'makes' the performances at issue." *Id.* at 60a n.1. The court's factual findings, however, establish that Aereo merely "allows users to access free, over-the-air broadcast television through antennas and hard disks located at Aereo's facilities." *Id.* at 62a. By "press[ing] the 'Record' button," the user "schedule[s] a recording of a program that will be broadcast at a later time or that is currently being aired." *Id.* at 63a. Alternatively, "users can direct Aereo's system to begin a recording and then immediately begin playback." *Id.*

"Thus, from the user's perspective, Aereo's system is similar in operation to . . . a [DVR] . . . although Aereo users access their programming over the internet." *Id.* Aereo "effectively rents to its users remote equipment comparable to what these users could install at home." *Id.* at 74a-75a.[12]

6. The Court of Appeals Decision

The Second Circuit affirmed. It rejected petitioners' claim that the individual transmissions should "'be aggregated and viewed collectively as constituting a public performance.'" Pet. App. 25a-26a. "[W]e cannot accept . . . that Aereo's transmissions to a single Aereo user, generated from a unique copy created at the user's request and only accessible to that user, should be aggregated." *Id.* at 26a-27a. The court also rejected petitioners' attempt to criticize Aereo for choosing a business model that complied with copyright law, noting that Aereo was not "alone in designing its system around *Cablevision*, as many cloud computing services . . . have done the same." *Id.* at 32a-33a.

Like the district court, the Second Circuit did not address whether Aereo could be directly (rather than contributorily or vicariously) liable for infringement based on actions performed by its users. It too, however, emphasized that users – not Aereo – control the equipment's operation: "If the user selects 'Watch,' the program he selected begins playing . . . . [T]he user [also] can select the 'Record' button, which will cause Aereo's system to save a copy of the program." *Id.* at 4a-5a.

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[12] The court also cautioned that "any description of Aereo as providing a 'service' or of Aereo 'doing' any particular acts should not be viewed as a decision" that Aereo controls the system's operation. Pet. App. 60a n.1.

Judge Chin, whose decision as a district judge was reversed in *Cablevision*, dissented. Without addressing the district court's factual findings, Judge Chin asserted that "Aereo still is transmitting . . . programming 'to the public.'" *Id.* at 44a.

The Second Circuit denied petitioners' request for rehearing en banc. *See id.* at 127a-128a.

SUMMARY OF ARGUMENT

I. Aereo does not publicly perform copyrighted works. The Transmit Clause defines "[to] perform . . . publicly," in pertinent part, as "to transmit . . . to the public" such that "members of the public" are "capable of receiving the performance." 17 U.S.C. § 101. For two independent reasons, Aereo's technology enables completely lawful *private* performances, not infringing *public* performances.

First, the Second Circuit correctly interpreted the Transmit Clause to extend liability only to transmissions "to the public." Under the Clause's plain text, as the government concedes, "the transmission of a performance is itself a performance." U.S. Br. 26 (internal quotations omitted). And a transmission is a *public* performance only if it is available "to the public." 17 U.S.C. § 101. Aereo's equipment facilitates only "one-to-one" transmissions: individual transmissions from individual recordings created from separate streams of data, made possible by the ubiquitous nature of over-the-air broadcasting. Those transmissions do not constitute "public" performances. Each one is available to no one but the consumer who used Aereo's equipment to create a personal recording of the broadcast program she selected and to play that recording over the Internet. There is no statutory basis for petitioners' request

that multiple private performances be "aggregated" into a public performance.

Second, even if one accepts petitioners' view that the "performance" referenced in the Transmit Clause is not the transmission itself, but the performance *embodied* in the transmission, their claim still fails. When an Aereo user plays her personal recording of a broadcast work and views its images and sounds over the Internet, the "performance" she transmits and receives is that playback – not the broadcaster's prior performance. The Copyright Act makes clear that playing a recording is a performance separate from the one from which the recording is made – a position that the government consistently (and correctly) has embraced in its treatment of performances from downloaded digital copies.

That distinction is further supported by § 111, which distinguishes between retransmitting the "*performance* . . . embodied in a [broadcaster's] transmission" – as when a cable system simply passes on the broadcaster's signal – and transmitting "the program" (work) from a recording – as when a cable system transmits the broadcast work from "a videotape." 17 U.S.C. § 111 (emphasis added). Because Aereo's technology cannot be used to transmit content *other than* from a user's personal recording, it does not transmit the performance embodied in petitioners' broadcasts.

Petitioners repeatedly ask (at 6, 8, 19, 35) the Court to disregard these "technical details," and assert (at 19, 25, 30) that the user-created and user-controlled copies around which Aereo's system is built are "gratuitous" – even though they are functionally indispensable. Instead, they argue (*e.g.*, at 23, 25), the Court should treat users' playing of

copies as a mere "device or process" for transmitting petitioners' performances. The government reaches even further, asserting (at 26-27) that transmissions from Aereo's equipment "contain" all "underlying performance[s]." Both positions, however, would lead to untenable results. They would require, for instance, treating all downloads as "performances" (a result the government repeatedly has disclaimed). They also would undermine the § 115 compulsory license for digital distributions of sound recordings, because one who distributed a copy under a statutory license to do so would nonetheless be guilty of "performing" the work by distributing it.

II. This Court should affirm for the additional reason that Aereo's users – not Aereo – create, play, and transmit their recordings of broadcast content and therefore "perform" within the meaning of the Copyright Act. It is well settled that, to impose direct liability under the Copyright Act, the alleged infringer must engage in affirmative ("volitional") action that renders the copyrighted work capable of being perceived. This Court's decisions in *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984), and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), confirm that bedrock principle. Because the undisputed facts found below establish that nothing goes into or comes out of Aereo's equipment except in response to a user's commands, Aereo cannot be directly liable for infringement.

The government acknowledges (at 18-19) that the "identity" of the person who "directs that a performance occur" is "*relevant*" to the scope of direct liability and that "ownership of the physical equipment" does not always determine "who performs a copy-

righted work." But it errs in contending (at 20-21) that the "integrated" nature of Aereo's equipment transforms Aereo into a direct infringer. That position is inconsistent with the government's acknowledgement – here and elsewhere – that systems technologically indistinguishable from Aereo's do not directly infringe, and it would permit strict liability to be imposed on cloud computing companies that fail to monitor perfectly their users' actions.

III. Considerations of copyright policy strongly support affirmance. First, any ambiguity in the statute must be resolved *against* liability. The Constitution delegates to Congress the power to balance the rights of authors and society's interest in the free flow of ideas, and accordingly this Court has been "reluctan[t]" "to expand the protections afforded by the copyright without explicit legislative guidance." *Sony*, 464 U.S. at 431.

That reluctance is especially appropriate here, because petitioners' position would limit consumers' access to local over-the-air broadcasts. It also would expose a wide variety of cloud computing businesses to strict, and potentially ruinous, liability. Petitioners refuse to acknowledge this issue, asserting (at 46) only that "[t]here is an obvious difference" between Aereo and other cloud-based providers. The government, to its credit, acknowledges the problem, but its proposed solution – to treat "a consumer's streaming of her own *lawfully acquired* copy [as] a private performance," U.S. Br. 32 (emphasis added) – is unsustainable. As this case comes to the Court, petitioners have not pursued – much less proved – any claim that the personal recordings made by Aereo's users are unlawful, and the government has acknowledged that they are presumptively lawful under fair-use

principles. *E.g.*, *id.* at 33. Moreover, the government offers no statutory basis for its position that *public-performance* liability should turn on whether the copy from which the performance is made was "lawfully acquired."

Finally, nothing in the Copyright Act suggests that Congress would have wanted petitioners to be able to extract copyright royalties here. Because petitioners' free, over-the-air broadcasts are supposed to be accessible to the entire public, they are not entitled to royalties when a consumer uses an antenna and DVR to access the content carried by their signals. And, under the Copyright Act, no one – even cable and satellite companies – must pay copyright royalties to retransmit a broadcaster's signal within the broadcaster's market. Congress codified that principle in the 1976 Act, and has repeatedly affirmed it, relying each time on the fact that in-market retransmissions "do[] not injure the copyright owner." H.R. Rep. No. 94-1476, at 90 (1976).

Without ever acknowledging the difference, petitioners repeatedly refer, not to copyright royalties, but to the "retransmission fees" some cable systems pay under the Cable Act. Those fees are not a creature of copyright law and are not paid to copyright holders – except insofar as certain broadcasters, like petitioners, happen to wear two hats. Congress was "careful to distinguish" copyright royalties from retransmission fees, S. Rep. No. 102-92, at 36 (1991) (JA321), and warned that the Cable Act should not be construed "to affect Federal copyright law," *id.* at 84. Petitioners' primary reliance on retransmission fees to justify their copyright analysis shows just how far afield they are from any result Congress would have intended.

ARGUMENT

I. AEREO DOES NOT PUBLICLY PERFORM COPYRIGHTED WORKS

Although a "performance" occurs when a consumer uses Aereo's technology, that performance is "private" and therefore lawful; petitioners' contrary arguments have no merit.

A. The Transmissions From Aereo's Equipment Are Not "Public" Performances

The Second Circuit correctly concluded that, to determine whether an accused infringer *publicly* performs by means of a transmission, the relevant performance is the transmission itself. Because each transmission from Aereo's equipment is available only to a specific user, each is a private performance. And, because the statute does not restrict private performances, the Court should affirm.

1. The Copyright Act grants to creators the exclusive right, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. § 106(4). It further specifies:

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

> or display receive it in the same place or in separate places and at the same time or at different times.

Id. § 101. The statute thus indicates that "to transmit . . . a performance . . . of [a] work" is itself to "perform." *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[B][1], at 8-190 (rev. ed. 2013) ("[T]he act of broadcasting a work is itself a performance of that work."). The government concedes that "the Transmit Clause . . . make[s] clear that the 'transmission of a performance is itself a performance.'" U.S. Br. 26 (citation omitted).

Not all performances of copyrighted works infringe; the copyright holder's exclusive right is to perform "publicly." The act of transmitting is not necessarily a *public* performance, because the transmission may be available to only a particular individual. *See* Pet. Br. 37; U.S. Br. 5. If a parent uses Skype to livestream data that convey the sounds and images of a school play to a spouse out of town, the parent is "performing" privately, because only the spouse can receive the transmission. *See* 2 *Nimmer on Copyright* § 8.14[C][2], at 8-192.6 ("[i]f a transmission is only available to one person, then it clearly fails to qualify as 'public'").

The statute provides that a transmission is a public performance if it is "to the public" – that is, if "members of the public [are] capable of receiving the performance." 17 U.S.C. § 101. Because "to transmit" is one way "to perform," the "performance" that the public must be capable of receiving is the transmission itself.

2. That reading is consistent with the Act's careful distinction between private and public performance, because it requires a copyright holder to show

that the accused infringer – not someone else – made the transmission available to the public. Precisely because "perform" is broadly defined, Congress chose language focusing on the public nature of the challenged transmission itself, not some other performance – whether a prior performance by a broadcaster or a later performance by the viewer. *Cf.* U.S. Br. 5 (noting that "'perform' is defined broadly enough to include even the act of turning on a television"). That reading is further supported by the Transmit Clause's distinction between transmissions to a *public place* – i.e., "a place specified by clause (1)" – and transmissions "*to the public*." Under petitioners' reading, the cross-reference to Clause (1) in Clause (2) is superfluous, because every transmission to a public place is also a transmission "to the public."

The Second Circuit's construction correctly imposes liability only on those who perform publicly. A theater company's performance of "Rent" in a locked and empty theater would not be a public performance, but, if it were broadcast to the public live, the transmission would be a public performance. If a transmission encoding the images and sounds were further transmitted by Defendant A to Defendant B, that would be a private performance; if Defendant B retransmitted the sounds and images to the public, that transmission would be a public performance. In each case, the audience capable of receiving a particular transmission is what determines whether the transmission is a "public performance."

3. As both courts below correctly found, Aereo's equipment enables only private performances, because each transmission is available only to a specific user. *See supra* pp. 10-12. An individual antenna receives a broadcast signal only when activated and tuned by

the user; the antenna picks up a "*separate* stream of data" (Pet. App. 86a); and the consumer records that data stream to private electronic storage. When the user decides to watch the program, she transmits those data only to herself; she cannot download the program or transmit it to anyone else. *See supra* p. 12; U.S. Br. 7 ("Respondent's system is engineered to ensure that the data streams and recordings associated with each user remain separate.").

A public performance does not occur simply because many of Aereo's users record and watch the same program. As the Second Circuit correctly observed, nothing in the Transmit Clause authorizes the aggregation of "private transmissions . . . not capable of being received by the public." Pet. App. 22a. Moreover, it is not surprising that thousands of "strangers" may use Aereo's antennas and DVRs to watch the same broadcast program without any transmission to the public. Broadcasters transmit their programming to the public using a signal that can be received by anyone with appropriate equipment. Aereo's users simply use an individual antenna and DVR to make and play a recording of that over-the-air programming. The equipment's remote location does not alter the individual character of each transmission. If Aereo rented, installed, and maintained thousands of separate roof-top antennas and in-home DVRs, it would have the same copyright status.

4. Petitioners incorrectly assert (at 32-33) that Aereo's construction of the statute cannot be reconciled with the "different times" language of the Transmit Clause. The statute provides that a transmission is a public performance if "members of the public [are] capable of receiving the performance," regardless of whether they "receive it . . . at

the same time or at different times." 17 U.S.C. § 101. The evident purpose of that language is to ensure that liability turns on the *potential* – not the actual – recipients of any given transmission.

Although a particular transmission (whether to one recipient or many) cannot be received at different times, it does not follow that members of the public cannot be *capable* of receiving a transmission at different times. For example, in the case of stored data made available to the public on demand, the potential audience for a transmission includes any member of the public – even though only one person might request and receive a particular transmission. *See* Cablevision Br. 9 ("[W]hat matters is the potential audience for a transmission at the time the service provider holds out its content and offers to transmit it, before any particular transmission is sent."). The legislative history discusses that scenario in explaining the "different times" language:

> A performance made available by transmission to the public at large is "public" even though . . . *the transmission* is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.

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

Transmissions made using Aereo's system are not public under this standard, because the system does not contain stored content members of the public can request; rather, each stored copy is available only to the user who created it.

B. Aereo's Users Transmit A New Performance From A Recording Of The Broadcast, Not The Same Performance Embodied In The Broadcast

Because *Cablevision* was governing precedent, the Second Circuit had no occasion to consider additional reasons why the Transmit Clause forecloses petitioners' public-performance claim. But, even accepting petitioners' view that the "performance" referenced in the Clause is not the transmission, but the performance *embodied* in the transmission, their claim still fails. The transmission made by an Aereo user is generated from her individual recording of broadcast programming, not the broadcast itself. The "performance" embodied in the transmission is thus the playing of that individual recording. That performance is never transmitted "to the public," because it can be transmitted only to the user who created the copy and initiated the playback.

1. The playing of a copy is a performance distinct from the performance from which the copy was made

The Copyright Act provides that "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101.[13] A "performance" of an audiovisual work is thus the *act* of sequentially showing a portion of its images or making the sounds accompanying it

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[13] An "audiovisual work" is a "work[] that consist[s] of a series of related images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds." 17 U.S.C. § 101.

audible. *Accord* 2 *Nimmer on Copyright* § 8.14[B][1], at 8-190.

This definition makes clear that each new act of showing a work is a separate performance, because each makes the work's images and sounds perceptible. That is true even where multiple performances are derived from the same copy of a work. For example, if two individuals each bought a DVD of a copyrighted movie and each played back her personal copy, each would "perform" the copyrighted work. If only one person purchased the DVD, watched it, and then lent it to a friend to watch, there would still be two separate acts of showing, and thus two distinct performances. A broadcaster could perform a movie by showing its images and sounds to the audience by means of a transmission; an individual could record the movie and play it the next day, thereby separately performing the work. *See id.* § 8.18[A], at 8-208.21 ("One performance occurs at the time [a] rendition is recorded. . . . It is clear under the present Act that if and when the [recording] thus created is 'played' an additional performance of the same rendition occurs, which will constitute an infringement if it is unauthorized and is public.").

Those principles do not change simply because the recording is made with a DVR. Using current DVR technology, a separate performance of a movie broadcast on television can begin before the broadcast is finished, because the DVR can be used to play back earlier portions of the recording while continuing to record later portions. *See* JA429. In other circumstances as well, an individual who obtains a copy of digital content can perform the work shortly after receiving it. For example, a consumer who downloads a song often may begin to play the copy being

downloaded even before the download is complete. *See United States v. ASCAP*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007), *aff'd*, 627 F.3d 64 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011); JA487. Nevertheless, because the performance is rendered by playing the downloaded copy, the purchaser is performing and the seller is not. *See* Brief for the United States at 24, *United States v. ASCAP*, Nos. 09-0539-cv(L), et al. (2d Cir. filed Aug. 10, 2009) ("U.S. 2d Cir. *ASCAP* Br."), 2009 WL 7481343.

2. Aereo's users do not receive the performances embodied in broadcasters' transmissions

When a consumer plays a personal recording using Aereo's DVR and transmits it to her device, the "performance" transmitted is the playback, not the broadcaster's prior performance of the program. With Aereo's technology, a consumer first sends a command that activates an individual antenna to access a broadcast transmission for the selected program and then makes a recording from the data received by that antenna. The user then plays that recording and streams that performance to herself over the Internet. Even in "Watch" mode – when a user is watching a program "live" – she is watching the playback of her individual recording. *See* JA429. That playback, not the broadcast, supplies the sequence of images and sounds that is transmitted.

As with the two friends who each play a DVD straight through, the difference between the user's playback and the broadcaster's performance may not be apparent when the user simply plays her recording without interruption as it is being made. The difference becomes obvious, however, the moment the user hits "pause" (or "rewind"): the user *controls* the

images and sounds she receives – it is her *act of showing* that she views through a transmission from Aereo's equipment to her device. *See* Pet. App. 28a-29a.[14] Even where she chooses to play the recording without employing those capabilities, her act of pressing "Play" causes the work's images to be shown and renders its sounds audible. *See supra* pp. 10-11; Pet. App. 29a n.14 ("because the Aereo user can exercise such control if he wishes to, . . . the copy Aereo's system generates is not merely a technical link in a process of transmission"). Because the user is the only person "capable of receiving" a transmission of her playback, there is no public performance.

Moreover, because the playing of a recording is itself a performance, the two steps of (1) making a recording from a first performance, and (2) transmitting a playback of that recording cannot be treated as a "device or process" for "retransmitting" the first performance. *See* 17 U.S.C. § 101 (defining "transmit" to include the use of "any device or process" to

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[14] The user's ability to pause and rewind conclusively rebuts petitioners' repeated assertion (at 19, 25, 30) that the copies are "gratuitous." They are, in fact, fundamental to the user experience. *See* Pet. App. 30a n.15. The act of copying also meaningfully affects the user's experience. As with any other DVR, a delay occurs as compared with receipt of a performance over the air. There is always the risk of hearing cheers from the next apartment moments before the big play. And Aereo's technology does not readily facilitate "channel surfing": because programming is not constantly transmitted (as with broadcast and cable), the user must return to the DVR guide, select a new program, and make a new recording before she can watch the new program. Quite different from the virtually instantaneous change of channels on a television, the Aereo user has to take those additional steps and wait for the recording to be generated before she is able to view the new program by playing the recording.

"communicate" "a performance . . . whereby images or sounds are received beyond the place from which they are sent"). The Transmit Clause makes clear that a single performance is embodied in a transmission, by using the indefinite article "a" in the first part of the Clause and the definite article "the" in the second part. The definition of "perform" confirms that reading. A "performance" is not a sequence of images and sounds – that is the definition of an "audiovisual *work*," *see supra* note 13 – but rather the transitory *act* of showing them.

Any other interpretation leads to absurd results. For instance, if a distributor makes multiple copies of a DVD from a master copy, then sells them by mail to consumers, in some sense it "communicate[s]," 17 U.S.C. § 101, the contents of the performance from which the master copy is made. But the distribution of the DVDs merely makes it possible for the recipients to perform the work themselves – it is not a "device or process" by which the *distributor* publicly performs the work. *Cf.* U.S. 2d Cir. *ASCAP* Br. 21 ("Amazon.com . . . does not publicly perform a copyrighted work whenever it mails a compact disc containing that work, notwithstanding that a digital copy has been 'transmitted or otherwise communicated.'"); Menell Br. 8 ("It is absurd to suppose that under the current Act it has become necessary for private purchasers of phonorecords to obtain a performing rights license from ASCAP or BMI before they may lawfully play such phonorecords within their homes.") (internal quotations omitted). A contrary interpretation also would undermine the statute's "first sale" provision, which entitles "the owner of a particular copy" to sell it "without the authority of the copyright owner." 17 U.S.C. § 109(a).

The incongruity of the government's reading is particularly pronounced when copies of copyrighted content are distributed through transmissions – i.e., downloads. The government consistently has taken the position that distribution through downloads is not a performance. *See* U.S. Br. 7 n.2. As it has explained, when a song is downloaded, the purchaser obtains a fixed copy of the song and then performs the copy. The digital music vendor does *not* perform the song by transmitting the data embodied in the consumer's copy. *See* U.S. 2d Cir. *ASCAP* Br. 24; Brief for the United States in Opposition at 9, *ASCAP v. United States*, No. 10-1337 (U.S. filed July 12, 2011) ("U.S. Cert. *ASCAP* Br."), 2011 WL 2908556 ("Performance of the work occurs only when (and if) the recipient undertakes the subsequent act of playing the disc or downloaded music file, *e.g.*, in a stereo at home (a private performance) or through the sound system of a theater (a public performance)."). On petitioners' theory here, however, the vendor's transmission could be treated as a "device or process" for communicating the performance from which the copy is made – as their own *amici* acknowledge.[15] *See* Cablevision Br. 16 ("[o]n petitioners' theory, . . . [a] download of a recorded

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[15] The government attempts to distinguish the copies made using Aereo's equipment by suggesting (at 7 n.2) that "[o]rdinarily" a work contained in a downloaded copy "cannot be seen or heard during the download process." That position is contrary to the expert testimony in this case, *see* JA429; moreover, in *ASCAP*, the government successfully defended the district court's judgment that "the mere fact that a customer's online purchase is conveyed to him in a piecemeal manner, each segment of which is capable of playback as soon as the transmission is completed, does not change the fact that the transaction is a data transmission rather than a musical broadcast." *ASCAP*, 485 F. Supp. 2d at 446.

performance . . . would constitute a public performance").

For similar reasons, treating the creation and playback of an Aereo user's fixed copy as a "process" for transmitting an underlying performance would undercut the compulsory license for digital distribution of sound recordings in § 115(c)(3). That provision grants any person a compulsory license – under § 106(1) and § 106(3) only – to distribute music files ("phonorecords") "to the public" through downloads. 17 U.S.C. § 115(c)(1), (3).[16] As the government argued in *ASCAP*, if a download could be treated as a "device or process" for transmitting the performance from which the file is made, music vendors would need to negotiate separate performance licenses under § 106(4) – which would destroy the utility of the compulsory license provisions. *See* U.S. 2d Cir. *ASCAP* Br. 28. Congress could not have intended that result.

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[16] Section 115 specifies that the compulsory license is available "regardless of whether the digital transmission is also a public performance of the sound recording." 17 U.S.C. § 115(d). As the government explained in opposing certiorari in *ASCAP*, that clarification addresses transmissions from which a performance may be directly perceived at the same time a fixed copy is separately saved to the purchaser's device. *See* U.S. Cert. *ASCAP* Br. 14. The fact that the statute contemplates digital transmissions of sound recordings that are *not* public performances is contrary to the logical consequence of petitioners' theory.

3. Section 111 reflects the distinction between the performance embodied in a broadcaster's transmission and a performance from a recording of the broadcast

The distinction between retransmission of a broadcaster's performance and transmission of a performance from an individual copy of the broadcast is strongly reinforced by § 111, which draws that very distinction. Section 111 establishes the rules to govern "secondary transmissions" of "primary transmissions" – such as television broadcasts. It establishes the compulsory license for retransmission of broadcasts to distant markets and makes clear that cable systems can retransmit local broadcasts for free. *See* 17 U.S.C. § 111(c), (d).[17] The section generally defines "secondary transmission" as the "simultaneous[]" retransmission of broadcast signals. *Id.* § 111(f)(2).[18] And it indicates that, when a broadcast signal is simply passed through by a cable system to its subscribers, what is contained in the secondary

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[17] Petitioners do not argue that Aereo is a "cable system" under § 111, and Aereo is not one. The Copyright Office repeatedly has refused to treat Internet-based platforms as "cable systems" under § 111 on the ground that they are not "facilit[ies]"-based providers. 17 U.S.C. § 111(f)(3); *see Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 25-26 (2000) (statement of Marybeth Peters, The Register of Copyrights); 57 Fed. Reg. 3284, 3292 (Jan. 29, 1992) (codified at 37 C.F.R. § 201.17); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 283 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013).

[18] The Federal Communications Commission ("FCC") defines "[s]econdary transmission" as the "further transmitting of a primary transmission simultaneously with the primary transmission." 47 C.F.R. § 76.66(a)(2).

transmission is the "performance . . . embodied in [the] primary transmission," *id.* § 111(a), (c).

Section 111(e), however, also includes a limited category of secondary transmissions that are "nonsimultaneous" because they are derived from the playback of a "videotape" (broadly defined to include any "reproduction of the images and sounds of a program or programs broadcast by a television broadcast station," *id.* § 111(e)(4)). The statute refers to the content transmitted through such a "non-simultaneous" secondary transmission *not* as the transmission "of a performance . . . embodied in [the] primary transmission," *id.* § 111(a), but as "the copyrighted program, episode, or motion picture videotape," *id.* § 111(e)(1)(B). The statute uses that different formulation precisely because the playback of a videotape is *not* the same performance as the one embodied in the primary transmission – it is a new and different performance.[19] *Accord* 2 *Nimmer on Copyright* § 8.18[A], at 8-208.28-.29 ("[I]f a cable television system recorded on video tape a program picked up 'off the air,' and thereafter transmitted the tape over its cable facilities, . . . there was an 'originated' program and hence a performance by the further transmission over the cable facilities."). Because Aereo's equipment does not – ever – transmit broadcast content *other than* from an individual user's reproduction, it never transmits the performance embodied in the broadcast.

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[19] The government's discussion (at 23-27) of § 111 ignores secondary transmissions from recording media.

4. There is no justification for disregarding the fact that all transmissions using Aereo's equipment are derived from individual recordings

Neither petitioners nor the government can dispute that the "performance" transmitted by an Aereo user is the playback of her recording. Accordingly, petitioners' public-performance claim fails.

a. The government argues (at 26-27) that transmissions to Aereo's users "contain[]" the prior broadcast performance. To the extent the government's theory conflates the performance from a copy with the performance from which the copy is made, it does not avoid any of the problems of petitioners' theory. Moreover, the government acknowledges (at 33) that the playback of a copy is *not* a public performance in the case of a remote-storage DVR (like the one in *Cablevision*). In the respects germane to the government's test, however, Aereo's technology works the same way as Cablevision's. *Id*. Indeed, the same expert who testified for Cablevision in that case testified below that the only pertinent difference between the systems was the manner in which Cablevision's content was "split and copied to make . . . multiple subscriber recordings." JA436. The government offers no evidence of a material distinction between Cablevision's RS-DVR and Aereo's.

b. The distinction between performance from a copy and pure retransmission reflects the practical reality that § 106(1) also gives the copyright owner the right to prevent unlawful *copying*. Aereo's technology permits consumers *only* to make personal copies of local broadcast television – a quintessential

fair use under *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984).[20]

By contrast, if petitioners had a legitimate challenge to the use of Aereo's system to *copy* their copyrighted works, they would not need to rely on their (unavailing) public-performance theory at all. This case, however, does not involve the use of an Aereo-like system to access HBO programming, *see* Menell Br. 29, or the substitution of new commercials for those included in the broadcasts, *see id.* at 28-29. Such hypotheticals present copyright reproduction right issues very different from the actual technology at issue in this case.

5. Rejection of petitioners' misreading of the statute would not affect the copyright liability of video-on-demand systems

A ruling in Aereo's favor would not allow video-on-demand ("VOD") companies like Hulu and Netflix to provide copyrighted content without paying royalties. The Transmit Clause requires consideration of whether the public – any broader audience than "a normal circle of a family and its social acquaintances" – is "capable of receiving" a performance. 17 U.S.C. § 101. The only person capable of receiving a performance from a personal recording housed in Aereo's DVR is the user who created the recording. A VOD system that uses a master copy, by contrast, "transmit[s] . . . to the public," *id.*, because anyone may elect to receive a performance (the playback of

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[20] *See* JA830-31 (counsel for petitioners acknowledging that petitioners would not seek a preliminary injunction based on the reproduction right because "[t]here are two cases, both authoritative, it's the Supreme Court and the Second Circuit, that specifically address the question of time shifting").

the master copy). And a VOD system cannot avoid liability by making individual copies for viewers without implicating the copyright owner's *reproduction* right. *See* Brief for the United States as Amicus Curiae at 21, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (U.S. filed May 29, 2009) ("U.S. *Cablevision* Br."), 2009 WL 1511740 ("[T]he legality of [such a system] would be suspect at best, because [the VOD subscriber] would be not simply time-shifting but instead copying programs that he was not otherwise entitled to view.").

One commentator, analyzing Clause (1), has noted that

> [r]eal property law, which confers the right to exclude on some occupiers of land . . . , offers a useful benchmark . . . . Whether a place is "open to the public" effectively turns on whether the viewer or listener can exclude the public from the particular space in which he is viewing or listening to the performance.

2 Paul Goldstein, *Goldstein on Copyright* § 7.7.2.2.a (3d ed. Supp. 2013). By analogy, as the government previously has acknowledged, the performances transmitted using Aereo's equipment are not "public" because no user may ever access the recording made by another. U.S. *Cablevision* Br. 21 ("By limiting its holding to circumstances in which [each transmission would be made solely to the person who had previously made that unique copy], the Second Circuit sustained the legality of respondents' [system] without casting doubt on the widespread premise that VOD and similar services involve public perfor-

mances.").[21] By contrast, it would not make a difference if a VOD provider actually transmitted a performance from a master copy only to a single user, if such a performance were available to anyone who requested it. *See*, *e.g.*, *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986); Cablevision Br. 9 ("A hotel offers rooms 'to the public' because anyone willing to pay can occupy a room – even though, once a particular guest pays . . . , he is the only one who can use it. The same is true for [VOD] and Netflix.").[22]

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[21] Implicitly, this is why courts and commentators have focused on whether a single copy is used to transmit *seriatim* to multiple viewers – it is strong evidence that the audience is not constrained to an individual or "a normal circle of a family and its social acquaintances." *See Cablevision*, 536 F.3d at 138.

[22] Petitioners also halfheartedly suggest (at 44) that a ruling in Aereo's favor might place the United States out of compliance with its "international obligations." But the international agreements that petitioners cite, like 17 U.S.C. § 106(4), expressly relate only to "public performance[s]." Berne Convention for the Protection of Literary and Artistic Works art. 11, revised at Paris July 24, 1971, *as amended* Sept. 28, 1979, 25 U.S.T. 1341; *see id.* ("communication to the public of the performance"); World Intellectual Property Organization Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65, 70 ("making available to the public"). A ruling that Aereo's equipment enables only *private* performances would not be in tension with those agreements. Notably, the government appears not to share petitioners' concern – its brief makes no mention of international law.

II. AEREO'S USERS, NOT AEREO, "PERFORM" BY USING THE EQUIPMENT

This Court should affirm for the additional reason that Aereo's users, not Aereo, play and transmit the recordings of broadcast content and therefore "perform" within the meaning of the Copyright Act. Petitioners assert only a claim for direct infringement here – not claims for contributory or vicarious infringement. The statutory text and this Court's decisions demonstrate that direct liability for infringement may be imposed only on one who engages in "volitional conduct" that directly implicates a copyright owner's exclusive rights. By contrast, defendants like Aereo, which allegedly supply the means for another to infringe, can be held liable only on a contributory theory, and only if the other elements of such a claim are proved.

A. Aereo Does Not Meet The Statutory Standard For Direct Infringement

The Copyright Act imposes direct liability for infringement on one who "violates any of the exclusive rights of the copyright owner as provided by section[] 106," 17 U.S.C. § 501(a) – here, the right "to perform the copyrighted work publicly," *id.* § 106(4).[23] To "perform" a work, one must "recite, render, play, dance, or act it," "show its images in any sequence or . . . make the sounds accompanying it audible," or "transmit" a performance of the work, *id.* § 101 – that is, engage in affirmative action that renders the copyrighted work capable of being perceived.

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[23] Section 106's "[u]se of the phrase 'to authorize' is intended to [address] the liability of *contributory* infringers." H.R. Rep. No. 94-1476, at 61 (1976) (emphasis added).

Aereo's users, and not Aereo, "perform" the copyrighted works. Aereo's equipment is designed to emulate the operation of a home antenna and DVR, and thus to allow a user to control every aspect of the receipt, recording, and transmission of the programming. The undisputed facts make clear that each challenged performance is the result of user commands that cause Aereo's equipment to operate in a particular way. *See supra* pp. 10-12. In that circumstance, only the user, not Aereo, may be held directly liable for infringement.[24]

B. This Court's Cases Confirm Aereo Cannot Be Liable For Direct Infringement

Because Aereo's role is to make antennas and DVRs available for others' use, its position is comparable to that of other defendants that provide equipment or software allegedly used to engage in infringing conduct. *See Sony*, *supra*; *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Such conduct can support liability under the Copyright Act, if at all, only for contributory infringement.

In *Sony*, this Court addressed whether a VTR manufacturer could be held liable for *contributory* infringement for distributing the machines knowing

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[24] As lower courts have held, to be directly liable, an accused infringer must have engaged in "actual infringing conduct with a nexus sufficiently close and causal to the illegal [result] that one could conclude that [he] himself trespassed on the exclusive domain of the copyright owner." *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *see Cablevision*, 536 F.3d at 131-32 ("[T]he purpose of any causation-based liability doctrine is to identify the actor . . . whose 'conduct has been so significant and important a cause that [he] should be legally responsible.'") (citation omitted); *Fox Broad. Co. v. Dish Network, L.L.C.*, No. 12-57048, 2014 WL 260572, at *5 (9th Cir. July 24, 2013); *Parker v. Google, Inc.*, 242 F. App'x 833, 836-37 (3d Cir. 2007).

that consumers would use them in a manner alleged to infringe the respondents' copyrights. 464 U.S. at 434. The Court described this question as one of the scope of "liability for parties . . . *who have not themselves engaged in the infringing activity*." *Id.* at 435 (emphasis added). Similarly, in *Grokster*, the Court held that one who "intentionally induc[es] or encourag[es] direct infringement" by "distribut[ing] a device with the object of promoting its use to infringe copyright" is *contributorily* liable for "the resulting acts of infringement by third parties." 545 U.S. at 930-31, 936-37.

The focus on the scope of contributory liability in these cases makes clear that *strict* liability is reserved for the actor who directly engages in conduct prohibited by § 106. *See*, *e.g.*, *CoStar*, 373 F.3d at 546 (analyzing *Sony*); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (same). The cases also illustrate that "the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works" in cases involving intentional facilitation. *Cablevision*, 536 F.3d at 132; *see* 3 William F. Patry, *Patry on Copyright* § 9:5.50, at 9-23 (2012) ("[t]he requirement of volitional conduct does not undermine the strict liability nature of copyright").

C. Aereo's Provision Of Remote Equipment To Consumers Does Not Render It Directly Liable For Infringement

Relying on the statutory text and this Court's precedents, federal courts have rejected attempts to impose direct liability on those who merely provide equipment used by others in an allegedly infringing manner. These lower court cases persuasively reject the argument that direct liability can be premised on

"ownership, operation, or maintenance" of equipment used for an infringing activity. *CoStar*, 373 F.3d at 551; *see Cablevision*, 536 F.3d at 131 ("[T]he person who actually presses the button to make the recording[] supplies the necessary element of volition, not the person who manufactures, maintains, or . . . owns the machine."); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995).

Lower court cases likewise support the sound principle that direct liability is inappropriate where a defendant programs equipment to respond "automatically" to a user command that results in alleged infringement. *CoStar*, 373 F.3d at 550; *Cablevision*, 536 F.3d at 131-32; *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1309-10 (S.D. Fla. 2010) ("[C]ourts have repeatedly held that the automatic conduct of software, unaided by human intervention, is not 'volitional.'"); *Netcom*, 907 F. Supp. at 1368-69. These courts have emphasized that this limitation "is especially important" in light of the expansive liability that might otherwise result from networked communications and storage systems. *CoStar*, 373 F.3d at 551; *see Netcom*, 907 F. Supp. at 1369.

Post-*Sony* amendments to the copyright law confirm that these judicial interpretations are consistent with Congress's intent. For instance, in the Digital Millennium Copyright Act, Congress enacted a series of safe harbors that codified, in the context of Internet service providers, the "leading and most thoughtful judicial decision" on the distinction "between direct infringement and secondary liability" – the *Netcom* case, which was interpreted to "rule[] out [liability] for passive, automatic acts engaged in through a technological process initiated by another." H.R. Rep. No. 105-551, pt. 1, at 11 (1998).

D. The Government's "Integrated System" Argument Is Unpersuasive

The government effectively concedes (at 20-21) that Aereo cannot be held directly liable for infringement if its *users* "actively control[]" the allegedly infringing transmissions. It also acknowledges (at 18-19) that "[t]he identity of the person who directs that a performance occur" is "*relevant* in deciding who has performed copyrighted material" and that "ownership of the physical equipment . . . does not always determine who performs a copyrighted work." And it has acknowledged that, insofar as Aereo's equipment operates like an RS-DVR, Aereo does not directly infringe: its *Cablevision* invitation brief argued that the Second Circuit had "reasonably concluded that the subscriber – who would both select the programs to be copied and press the button triggering the actual recording – would 'make' the copies . . . stored in the RS-DVR system" and that the "shift from local to network-based recording and playback . . . appears largely irrelevant to the determination of who would 'make' the copies." U.S. *Cablevision* Br. 18. The government reaffirms those conclusions here. *See* U.S. Br. 33 ("The court in *Cablevision* reasonably concluded that the copies so created were made by the subscribers rather than by the cable company itself.").

The government seeks to distinguish this case on the ground that Aereo "operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers." *Id.* at 20. But the government does not and cannot justify this distinction by reference to the statute or case law, because it cites neither. Nor is the distinction supported by logic or facts: from the perspective of the user – the person who "both select[s] the pro-

grams to be copied and press[es] the button triggering the actual recording," U.S. *Cablevision* Br. 18 – Aereo's equipment is indistinguishable from the RS-DVR in *Cablevision*. *See* Pet. App. 63a, 75a. Under the hood, the only difference is that Cablevision's system split a common stream of data for its subscribers without their prior request; Aereo's equipment does not do that, because the only data a user may record come from an antenna individually assigned to and actively controlled by that user. Aereo's addition of a remote antenna cannot make a principled difference.

The internal inconsistencies in the government's position mean there is no "clear[]" standard for determining when a technology company, rather than its customer, has engaged in volitional conduct. Instead, the government offers an indeterminate line, with most cloud computing companies apparently on the wrong side. *Compare* U.S. Br. 20 (Aereo operates "an integrated system") *with id.* at 31 n.8 (cloud computing companies use "shared pool[s] of configurable computer resources"). Indeed, the government's position permits imposition of *strict* liability for infringement, not only on all cloud computing businesses, but also on traditional businesses, like copy shops, that long have been regarded as immune from direct liability when they merely provide "shared equipment" for use by others – a problem the government previously has acknowledged. *See* U.S. *Cablevision* Br. 18-19. As other *amici* demonstrate, the government's new approach leaves unclear how cloud computing companies should configure their equipment to avoid being directly liable for their consumers' use of that equipment. *See* CDT Br. 17-20; BSA Br. 20, 28.

The government's position appears colored by its incorrect assumption that all uses of Aereo's equipment are infringing. *See* U.S. Br. 31-33 (attempting to distinguish RS-DVR and other cloud technologies on the basis that the copies transmitted were "lawfully acquired" or "licensed"). But that is obviously untrue, given that Aereo's equipment also can be used to access non-copyrighted broadcast material. Moreover, the status of rights in a copy has no logical bearing on the identification of the actor responsible for transmitting it. *See* BSA Br. 21.

E. The Supposed Analogy Between Aereo And Cable Systems Has No Merit

The government also incorrectly asserts (at 22-23) that Aereo's contention that its users, not Aereo, "perform" is comparable to the analogy this Court drew in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), between a community antenna and a home antenna. The government further maintains (at 22) that, because Congress supposedly rejected that analogy in enacting the Transmit Clause, it must have intended direct liability to be imposed on Aereo here.[25] But Congress evinced no intent to impose direct liability on the provider of a different technology that facilitates access to over-the-air broadcasts or that technology's users.

Cable systems actively "transmit"; Aereo does not. Cable systems receive all broadcast frequencies at all times, and retransmit all channels to all subscribers

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[25] Petitioners argue vigorously (at 27) that Congress "overturn[ed]" *Fortnightly*, but a proper understanding of the legislative actions following this Court's decision belies that assertion. Congress, in fact, *codified* the outcome of *Fortnightly*, if not its reasoning, by enacting § 111, which permits cable systems to retransmit local broadcast signals without paying any copyright royalties. *See supra* pp. 4-6.

at all times, whether or not any particular subscriber has requested them. *See* JA588. A cable subscriber exercises no control over the cable system's equipment; instead, through her television's tuner, she selects an individual channel from the cable system's feed. *See id.* Aereo's antennas and DVRs, by contrast, do *nothing* except as directed by a user. *See* JA429, 566, 576, 588. Once activated, an antenna receives only the specific signal requested by the user. *See* JA588. The data stream received by the antenna is associated with that user's account and is recorded to a portion of a hard disk accessible only to that user. *See* Pet. App. 8a, 65a; JA432-34, 469, 560, 577-80, 858-59. Finally, the user streams the recording to her device when she chooses to view it, and she can initiate or terminate that transmission at will. *See* Pet. App. 66a; JA169, 233, 432-33, 560, 580-81. In short, nothing goes into or comes out of Aereo's equipment other than at the specific direction of a user.

III. CONSIDERATIONS OF COPYRIGHT POLICY STRONGLY SUPPORT THE DECISION BELOW

A. Any Statutory Ambiguity Should Be Resolved Against Liability

Any ambiguity about applying the 1976 Act to Aereo's 21st-century technology should be resolved against infringement. The Constitution assigns to Congress "the task of defining the scope of the limited monopoly that should be granted to authors" – a task that "involves a difficult balance between the interests of authors . . . in the control and exploitation of their writings . . . and society's competing interest in the free flow of ideas, information, and commerce." *Sony*, 464 U.S. at 429. When applying the Copyright Act to "new technology," this Court has

been "reluctan[t]" "to expand the protections afforded by the copyright without explicit legislative guidance." *Id.* at 431;[26] *see id.* at 432 ("When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose" – to promote "the general benefits derived by the public from the labors of authors.") (internal quotations omitted).[27]

"*Sony* . . . recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently." *Grokster*, 545 U.S. at 957 (Breyer, J., concurring).[28] That concern could hardly be more strongly implicated than

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[26] This approach is particularly appropriate in view of the fact that, in certain circumstances, *criminal* liability may be imposed on those adjudged to have violated copyright law. *See* 17 U.S.C. § 506; *cf. Maracich v. Spears*, 133 S. Ct. 2191, 2222 (2013) (Ginsburg, J., dissenting).

[27] Congress has not hesitated to amend the Copyright Act to extend copyright protections. *See* Christina Bohannan & Herbert Hovenkamp, *Creation without Restraint* 134 (2012) ("In the last thirty-five years, both the size of the copyright statute and the rights it grants copyright holders have grown by leaps and bounds."). Congress has amended Title 17 on 54 separate occasions in the 38 years since it passed the 1976 Act. *See*, *e.g.*, http://www.copyright.gov/legislation/archive.

[28] Petitioners' attempted misuse of the copyright laws to squelch Aereo's technology looks suspiciously like an attempt to extend their monopoly: petitioners are developing a system to allow consumers to view over-the-air content on their mobile devices. *See* JA311-12. That system would use public spectrum, but embed *encoded* signals to limit access to those who pay. *See* About Dyle, http://www.dyle.tv/about/mcv/; JA311-12. As one CBS executive noted, the most significant "threat" Aereo poses is reminding the public that "network content is . . . readily accessed" for free with an antenna. JA624.

in this case, given the stakes for cloud computing technologies. Consumers increasingly rely on remote equipment to store files – including personal copies of copyrighted content like songs and videos – and access those files via transmissions over the Internet. Cloud technologies generate "enormous efficiencies through economies of scale, allowing users to benefit from reduced cost and increased reliability," and "provide[] substantial data portability, permitting a user access to his or her data via any device with an Internet connection." BSA Br. 3; *see supra* pp. 12-13. Cloud technologies also are widespread and quickly growing; annual spending has surpassed $50 billion, delivering savings to U.S. businesses projected to reach $625 billion over the next five years. *See* BSA Br. 11-12; *see also* Cablevision Br. 14.

Petitioners' argument (at 23, 34) that the relevant "performance" for purposes of the Transmit Clause is the original broadcast, rather than the consumer's performance from her personal copy, would pervasively threaten the use of cloud technologies to store and access copyrighted content. On petitioners' view, whenever two users of a cloud-based "virtual locker" service – such as Google Drive – separately play a song stored on the provider's servers, the provider is publicly performing by transmitting the same "underlying" performance to multiple members of the public. As *amici* have explained, were petitioners' argument accepted, it would gravely threaten cloud computing. *See*, *e.g.*, Cablevision Br. 13-15; BSA Br.; CDT Br. Petitioners, however, hardly acknowledge, much less address, this concern.

The government argues that "reversal of the decision below need not call into doubt the general legality of cloud technologies" because "a consumer's

streaming of her own *lawfully acquired* copy to herself would effect a private performance." U.S. Br. 31-32 (emphasis added). Similarly, it asserts that the RS-DVR service at issue in *Cablevision* was not infringing because there "the cable company already possessed [a] license[] to transmit copyrighted television programs to its subscribers." *Id.* at 33. Under *Sony*, it reasons, consumers have a fair-use right to make a personal copy of televised content for time-shifted viewing, and "[t]here is no evident reason to reach a different result . . . merely because the relevant personal copy is created and stored remotely in digital form." *Id.*

Properly understood, the government's reasoning compels dismissal of petitioners' claim. The recordings made by Aereo's users are equally lawful under fair-use principles – a fact petitioners effectively conceded by adverting to *Sony* in explaining why they did not seek an injunction on reproduction grounds. *See* JA928-29. Indeed, when it urged this Court to deny certiorari in *Cablevision*, the government's assumption that the copies made by *cable* subscribers were non-infringing depended on an analogy to the copies made from *broadcast* signals in *Sony*. *See* U.S. *Cablevision* Br. 21. As this case comes to the Court, there is simply no basis for the government's assertion that the recordings made by Aereo's users are unlawful.

Moreover, the government's position is internally inconsistent. In the government's view (at 27), a public performance occurs "when *either* the allegedly infringing transmission itself *or* some underlying performance is transmitted to the public." It never explains why the performances enabled by cloud storage services are "private" under this reading.

And it offers no statutory basis for its position that liability for infringement of the *public-performance* right – the determination whether a performance is public or private – turns on whether the copy from which the performance is made was "lawfully acquired." *Id.* at 32. "The nature of the *transmission* does not turn on the allocation of rights in the work being transmitted." BSA Br. 21.

The government's proffered solution also is unworkable. By its logic, if a consumer uploads an unlawfully obtained copy of a movie to a remote computer and then streams it to herself, the company that provides the storage is liable for a public performance. To avoid *strict* liability based on its customers' actions, the company would have to monitor all of the content stored on its system to make sure it was "licensed" or otherwise "authorized." *See* CDT Br. 9-22. No industry could operate under such an obligation.

B. Nothing In The Copyright Act Suggests That Congress Would Have Wanted Petitioners To Be Able To Extract Copyright Royalties Here

Petitioners' argument contravenes copyright policy for the additional reason that Congress has determined copyright holders should not be able to demand copyright royalties for consumers' viewing of local broadcast programming. Petitioners (*e.g.*, at 39) imply that cable and satellite providers must pay copyright royalties to retransmit local broadcasts, but that is not true. In fact, the Copyright Act grants broadcasters no royalties even when a third party retransmits local broadcast programming to its subscribers.

1. Broadcasters make programming available over the airwaves for "free" by selling broadcast time to advertisers. *Sony*, 464 U.S. at 446 n.28; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994). The more consumers who view a broadcast program, the more valuable the advertising time. *See supra* pp. 6-7.[29]

Because broadcasters are directly compensated (and copyright holders indirectly compensated) by advertisers, a third party that simply provides technology that allows consumers to access content they could receive over the air is *not* required to compensate copyright owners. That is true even for third parties that (unlike Aereo) actually retransmit petitioners' broadcasts "to the public." In the case of cable systems, § 111(d) sets forth a compulsory licensing scheme for copyrighted content whereby cable systems pay no royalties for local content they retransmit within the service area of the broadcaster.[30] *See supra* pp. 5-6. The same approach is

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[29] To that extent, it is surprising that petitioners seek to *block* consumers from watching their over-the-air broadcasts over the air using Aereo's technology. *See* JA647 ("Q. . . . If consumers increase the use of antennas to capture over-the-air signals, does that create harm to CBS? A. No, it actually helps us.").

[30] Petitioners ignore this fact; many of their *amici* – including the government – not only ignore it, but analyze § 111's royalty provisions without mentioning it. *See*, *e.g.*, U.S. Br. 29 (§ 111 reflects a "nuanced scheme . . . including detailed exceptions and a reticulated statutory licensing scheme with a carefully calibrated system of royalties"); Menell Br. 23; ICLE Br. 12 n.9. Several *amici* similarly quote the House Report's statement that "copyright royalties should be paid by cable operators to the creators of [copyrighted] programs," H.R. Rep. No. 94-1476, at 89, while ignoring the very next page, which says that "the copyright liability of cable television systems . . . should be

reflected in § 122(a), which creates a royalty-free "statutory license"[31] for satellite carriers that retransmit a broadcaster's signals within its local market. *See supra* p. 6. Petitioners' claim that Congress "mandated that the providers of [retransmission] services *compensate* copyright holders for the statutory privilege of exploiting their public-performance rights," Br. 29 n.4, is simply incorrect.

2. Copyright law is designed to reward creators only to the extent necessary "to induce [them to] release to the public . . . the products of [their] creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). There is no plausible claim that stretching the Copyright Act to force consumers to pay twice to watch the same over-the-air broadcast programming would encourage the creation of new works. *See* Bohannan & Hovenkamp, *Creation without Restraint* 167-68 & n.18. When a copyright holder has authorized a particular use of a work in return for an acceptable reward, the secondary function of the law has been satisfied. Accordingly, this Court has rejected efforts by a statutory monopolist to extract a second round of compensation for the public's enjoyment of a use once authorized, by finding that the use is "no longer within the monopoly." *Adams v. Burke*, 84 U.S. (17 Wall.) 453, 456 (1873); *see Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct.

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limited to the retransmission of *distant* non-network programming," *id.* at 90 (emphasis added). *See*, *e.g.*, U.S. Br. 29; NYIPLA Br. 8; SAG Br. 17-18; Media Inst. Br. 17.

[31] In his treatise, Prof. Nimmer describes this "royalty-free" license as "in operation . . . an exemption." 2 *Nimmer on Copyright* § 8.18[G][1][b], at 8-268.42(2)-.42(3). In his brief here, he describes it only "[i]n broad stroke[s]" as imposing an "obligation to remit royalties to copyright owners." Menell Br. 31-32.

1351, 1363-64 (2013); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 497 (1964).

The Court adverted to that principle in *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931), a case that petitioners' *amici* claim was "resurrect[ed]" by Congress in the 1976 Act. Media Inst. Br. 15. There, the Court found that a hotelier's retransmission of a radio broadcast that was itself unauthorized by the copyright holder constituted an infringement. It noted, however, that, if the original broadcast had been lawful, "a license for its [retransmission] by the hotel company might possibly have been implied," and cited a district court case where that result had been reached. 283 U.S. at 199 n.5 (citing *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929)).

In its *Fortnightly amicus* brief – in stark contrast to the position it takes here – the government argued that a copyright holder who authorizes a public performance of its work by broadcast has already been compensated for the public receipt of the performance "in those areas where the signals . . . could be directly received off-the-air by potential viewers." Mem. for the United States as Amicus Curiae at 11, *Fortnightly*, No. 618 (U.S. filed Jan. 31, 1968). Accordingly, in view of "underlying considerations of public policy, such as the limited nature of copyright protection and the consequences of extending copyright protection unduly," *id.* at 8, the government argued that "an implied-in-law license" existed for retransmissions of over-the-air broadcasts within the original broadcast area, *id.* at 11, 15.

3. Petitioners protest (at 39) that, "[a]lthough they have agreed to make [their] content available to the public over the air for free, they can afford to do so only if they retain the ability to recoup their sub-

stantial investments by, among other things, generating critical revenue when that content is retransmitted to the public." But the retransmission fees to which petitioners refer have nothing to do with *copyright* law; they are mandated by the separate regulatory regime established in the Cable Act and administered by the FCC. *See supra* pp. 7-8.

Under that regime, a broadcaster can require a cable system to pay retransmission fees any time it "retransmit[s] the [broadcaster's] signal." 47 U.S.C. § 325(b)(1). Liability for retransmission fees depends on the cable system's status, not the way it delivers content to subscribers. Accordingly, the claim that a ruling by this Court in Aereo's favor might allow cable companies to bargain for lower retransmission fees or avoid paying them altogether by "devising their own Aereo-like workarounds," Pet. Br. 21, has no merit. They would still be cable systems and therefore still liable for retransmission fees.

Petitioners' public statements, moreover, contradict the dire predictions in their brief. Leslie Moonves, the CEO of petitioner CBS, announced in February 2014 that the network had almost doubled its predictions for retransmission fees in the next few years, and specifically told investors that an affirmance of the Second Circuit's ruling here would have no effect on that forecast: "[W]e are *not* going to be financially handicapped *at all*." US News, *CBS Says Aereo Can't Stifle Broadcast Profits* (Feb. 13, 2014) (emphases added). That representation belies petitioners' hyperbolic warnings (at 39) about threats to "the very existence of broadcast television as we know it."

CONCLUSION

The court of appeals' judgment should be affirmed.

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STATUTORY ADDENDUM

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STATUTORY PROVISIONS INVOLVED

The Copyright Act of 1976 (17 U.S.C.) provides in relevant part:

17 U.S.C. § 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

* * *

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

* * *

A "device", "machine", or "process" is one now known or later developed.

* * *

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

* * *

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

* * *

To perform or display a work "publicly" means—

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

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

* * *

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

* * *

17 U.S.C. § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 111. Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable

(a) Certain secondary transmissions exempted.—The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by paragraph (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this paragraph extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions;

(4) the secondary transmission is made by a satellite carrier pursuant to a statutory license under section 119 or section 122;

(5) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) Secondary transmission of primary transmission to controlled group.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a performance or display of a work embodied in a primary transmission is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided*, however, That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) Secondary transmissions by cable systems.—

(1) Subject to the provisions of paragraphs (2), (3), and (4) of this subsection and section 114(d), secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of paragraph (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, the secondary transmission to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or

Mexico is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States—Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) Statutory license for secondary transmissions by cable systems.—

(1) Statement of account and royalty fees.—Subject to paragraph (5), a cable system whose secondary transmissions have been subject to statutory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation the following:

(A) A statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for

the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may from time to time prescribe by regulation. In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions pursuant to section 119. Such statement shall also include a special statement of account covering any non-network television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage.

(B) Except in the case of a cable system whose royalty fee is specified in subparagraph (E) or (F), a total royalty fee payable to copyright owners pursuant to paragraph (3) for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during such period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 1.064 percent of such gross receipts for the privilege of further transmitting, beyond the local service area of such primary transmitter, any non-network programming of a primary

transmitter in whole or in part, such amount to be applied against the fee, if any, payable pursuant to clauses (ii) through (iv);

(ii) 1.064 percent of such gross receipts for the first distant signal equivalent;

(iii) 0.701 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents; and

(iv) 0.330 percent of such gross receipts for the fifth distant signal equivalent and each distant signal equivalent thereafter.

(C) In computing amounts under clauses (ii) through (iv) of subparagraph (B)—

(i) any fraction of a distant signal equivalent shall be computed at its fractional value;

(ii) in the case of any cable system located partly within and partly outside of the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located outside of the local service area of such primary transmitter; and

(iii) if a cable system provides a secondary transmission of a primary transmitter to some but not all communities served by that cable system—

(I) the gross receipts and the distant signal equivalent values for such secondary transmission shall be derived solely on the basis of the subscribers in those communities where the cable system provides such secondary transmission; and

(II) the total royalty fee for the period paid by such system shall not be less than the royalty fee calculated under subparagraph (B)(i) multiplied by the gross receipts from all subscribers to the system.

(D) A cable system that, on a statement submitted before the date of the enactment of the Satellite Television Extension and Localism Act of 2010, computed its royalty fee consistent with the methodology under subparagraph (C)(iii), or that amends a statement filed before such date of enactment to compute the royalty fee due using such methodology, shall not be subject to an action for infringement, or eligible for any royalty refund or offset, arising out of its use of such methodology on such statement.

(E) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters are $263,800 or less—

(i) gross receipts of the cable system for the purpose of this paragraph shall be computed by subtracting from such actual gross receipts the amount by which $263,800 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $10,400; and

(ii) the royalty fee payable under this paragraph to copyright owners pursuant to paragraph (3) shall be 0.5 percent, regardless of the number of distant signal equivalents, if any.

(F) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of provid-

ing secondary transmissions of primary broadcast transmitters are more than $263,800 but less than $527,600, the royalty fee payable under this paragraph to copyright owners pursuant to paragraph (3) shall be—

(i) 0.5 percent of any gross receipts up to $263,800, regardless of the number of distant signal equivalents, if any; and

(ii) 1 percent of any gross receipts in excess of $263,800, but less than $527,600, regardless of the number of distant signal equivalents, if any.

(G) A filing fee, as determined by the Register of Copyrights pursuant to section 708(a).

(2) Handling of fees.—The Register of Copyrights shall receive all fees (including the filing fee specified in paragraph (1)(G)) deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Librarian of Congress upon authorization by the Copyright Royalty Judges.

(3) Distribution of royalty fees to copyright owners.—The royalty fees thus deposited shall, in accordance with the procedures provided by clause1 (4), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) Any such owner whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter.

(B) Any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (1)(A).

(C) Any such owner whose work was included in non-network programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(4) Procedures for royalty fee distribution.—The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the Copyright Royalty Judges, in accordance with requirements that the Copyright Royalty Judges shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Copyright

Royalty Judges determine that no such controversy exists, the Copyright Royalty Judges shall authorize the Librarian of Congress to proceed to distribute such fees to the copyright owners entitled to receive them, or to their designated agents, subject to the deduction of reasonable administrative costs under this section. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall have the discretion to authorize the Librarian of Congress to proceed to distribute any amounts that are not in controversy.

(5) 3.75 percent rate and syndicated exclusivity surcharge not applicable to multicast streams.—The royalty rates specified in sections 256.2(c) and 256.2(d) of title 37, Code of Federal Regulations (commonly referred to as the "3.75 percent rate" and the "syndicated exclusivity surcharge", respectively), as in effect on the date of the enactment of the Satellite Television Extension and Localism Act of 2010, as such rates may be adjusted, or such sections redesignated, thereafter by the Copyright Royalty Judges, shall not apply to the secondary transmission of a multicast stream.

(6) Verification of accounts and fee payments.—The Register of Copyrights shall issue regulations to provide for the confidential verification by copyright owners whose works were embodied in the secondary transmissions of primary transmissions pursuant to this section of the information reported on the semiannual statements

of account filed under this subsection for accounting periods beginning on or after January 1, 2010, in order that the auditor designated under subparagraph (A) is able to confirm the correctness of the calculations and royalty payments reported therein. The regulations shall—

(A) establish procedures for the designation of a qualified independent auditor—

(i) with exclusive authority to request verification of such a statement of account on behalf of all copyright owners whose works were the subject of secondary transmissions of primary transmissions by the cable system (that deposited the statement) during the accounting period covered by the statement; and

(ii) who is not an officer, employee, or agent of any such copyright owner for any purpose other than such audit;

(B) establish procedures for safeguarding all non-public financial and business information provided under this paragraph;

(C)(i) require a consultation period for the independent auditor to review its conclusions with a designee of the cable system;

(ii) establish a mechanism for the cable system to remedy any errors identified in the auditor's report and to cure any underpayment identified; and

(iii) provide an opportunity to remedy any disputed facts or conclusions;

(D) limit the frequency of requests for verification for a particular cable system and the number of audits that a multiple system operator can be required to undergo in a single year; and

(E) permit requests for verification of a statement of account to be made only within 3 years after the last day of the year in which the statement of account is filed.

(7) Acceptance of additional deposits.—Any royalty fee payments received by the Copyright Office from cable systems for the secondary transmission of primary transmissions that are in addition to the payments calculated and deposited in accordance with this subsection shall be deemed to have been deposited for the particular accounting period for which they are received and shall be distributed as specified under this subsection.

(e) Nonsimultaneous secondary transmissions by cable systems.—

(1) Notwithstanding those provisions of the subsection (f)(2) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and section 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers;

(B) the copyrighted program, episode, or motion picture videotape, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing;

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system

if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to paragraph (2), erases or destroys, or causes the erasure or destruction of, the videotape;

(D) within forty-five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to paragraph (2), to the erasure or destruction of all videotapes made or used during such quarter;

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to paragraph (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations, and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this subparagraph shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject

to the remedies provided by sections 502 through 506, except that, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it, in accordance with paragraph (1), may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Republic of Palau, or the Republic of the Marshall Islands, to another cable system in any of those five entities, if—

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within thirty days after such contract is entered into, with the Copyright Office (which Office shall make each such contract available for public inspection);

(B) the cable system to which the videotape is transferred complies with paragraph (1)(A), (B), (C)(i), (iii), and (iv), and (D) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with paragraph (1)(D) to each cable system making a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which

the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape" means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or films, in which the reproduction is embodied.

(f) Definitions.—As used in this section, the following terms mean the following:

(1) Primary transmission.—A "primary transmission" is a transmission made to the public by a transmitting facility whose signals are being received and further transmitted by a secondary transmission service, regardless of where or when the performance or display was first transmitted. In the case of a television broadcast station, the primary stream and any multicast streams transmitted by the station constitute primary transmissions.

(2) Secondary transmission.—A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a cable system not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided*, however, That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible

under the rules, regulations, or authorizations of the Federal Communications Commission.

(3) Cable system.—A "cable system" is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

(4) Local service area of a primary transmitter.—The "local service area of a primary transmitter", in the case of both the primary stream and any multicast streams transmitted by a primary transmitter that is a television broadcast station, comprises the area where such primary transmitter could have insisted upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47, Code of Federal Regulations, or within the noise-limited contour as defined in 73.622(e)(1) of title 47, Code of Federal Regulations, or in the case of a television

broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. In the case of a low power television station, the "local service area of a primary transmitter" comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 20 miles. The "local service area of a primary transmitter", in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

(5) Distant signal equivalent.—

(A) In general.—Except as provided under subparagraph (B), a "distant signal equivalent"—

(i) is the value assigned to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming; and

(ii) is computed by assigning a value of one to each primary stream and to each multicast stream (other than a simulcast) that is an independent station, and by assigning a value of one-quarter to each primary stream and to each multicast stream (other than a simulcast)

that is a network station or a noncommercial educational station.

(B) Exceptions.—The values for independent, network, and noncommercial educational stations specified in subparagraph (A) are subject to the following:

(i) Where the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, or where such rules and regulations in effect on the date of the enactment of the Copyright Act of 1976 permit a cable system, at its election, to effect such omission and substitution of a nonlive program or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional program.

(ii) Where the rules, regulations, or authorizations of the Federal Communications Commission in effect on the date of the enactment of the Copyright Act of 1976 permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent

multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year.

(iii) In the case of the secondary transmission of a primary transmitter that is a television broadcast station pursuant to the late-night or specialty programming rules of the Federal Communications Commission, or the secondary transmission of a primary transmitter that is a television broadcast station on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals that it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth in subparagraph (A), as the case may be, shall be multiplied by a fraction that is equal to the ratio of the broadcast hours of such primary transmitter retransmitted by the cable system to the total broadcast hours of the primary transmitter.

(iv) No value shall be assigned for the secondary transmission of the primary stream or any multicast streams of a primary transmitter that is a television broadcast station in any community that is within the local service area of the primary transmitter.

(6) Network station.—

(A) Treatment of primary stream.—The term "network station" shall be applied to a primary stream of a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the

United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of the primary stream's typical broadcast day.

(B) Treatment of multicast streams.—The term "network station" shall be applied to a multicast stream on which a television broadcast station transmits all or substantially all of the programming of an interconnected program service that—

(i) is owned or operated by, or affiliated with, one or more of the television networks described in subparagraph (A); and

(ii) offers programming on a regular basis for 15 or more hours per week to at least 25 of the affiliated television licensees of the interconnected program service in 10 or more States.

(7) Independent station.—The term "independent station" shall be applied to the primary stream or a multicast stream of a television broadcast station that is not a network station or a noncommercial educational station.

(8) Noncommercial educational station.—The term "noncommercial educational station" shall be applied to the primary stream or a multicast stream of a television broadcast station that is a noncommercial educational broadcast station as defined in section 397 of the Communications Act of 1934, as in effect on the date of the enactment of the Satellite Television Extension and Localism Act of 2010.

(9) Primary stream.—A "primary stream" is—

(A) the single digital stream of programming that, before June 12, 2009, was substantially duplicating the programming transmitted by the television broadcast station as an analog signal; or

(B) if there is no stream described in subparagraph (A), then the single digital stream of programming transmitted by the television broadcast station for the longest period of time.

(10) Primary transmitter.—A "primary transmitter" is a television or radio broadcast station licensed by the Federal Communications Commission, or by an appropriate governmental authority of Canada or Mexico, that makes primary transmissions to the public.

(11) Multicast stream.—A "multicast stream" is a digital stream of programming that is transmitted by a television broadcast station and is not the station's primary stream.

(12) Simulcast.—A "simulcast" is a multicast stream of a television broadcast station that duplicates the programming transmitted by the primary stream or another multicast stream of such station.

(13) Subscriber; subscribe.—

(A) Subscriber.—The term "subscriber" means a person or entity that receives a secondary transmission service from a cable system and pays a fee for the service, directly or indirectly, to the cable system.

(B) Subscribe.—The term "subscribe" means to elect to become a subscriber.

17 U.S.C. § 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

* * *

(c) Royalty Payable under Compulsory License.—

* * *

(3)(A) A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under section 106(6) of this title or of any nondramatic musical work embodied therein under section 106(4) of this title. For every digital phonorecord delivery by or under the authority of the compulsory licensee—

(i) on or before December 31, 1997, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (2) and chapter 8 of this title; and

(ii) on or after January 1, 1998, the royalty payable by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through (E) and chapter 8 of this title.

* * *

(d) Definition.—As used in this section, the following term has the following meaning: A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.