

No. 13-461

IN THE
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., ET AL.,

Petitioners,

v.

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

Respondent.

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

**BRIEF OF DISH NETWORK L.L.C. AND
ECHOSTAR TECHNOLOGIES L.L.C. AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*

This *amicus curiae* brief is filed on behalf of DISH Network L.L.C. (“DISH”) and EchoStar Technologies L.L.C. (“EchoStar”).¹ Since its founding in the early 1980s, DISH has reinvented the distribution of television programming. It is an industry leader in developing and bringing to market new technology, and its award-winning innovations include the Hopper with Sling Whole-Home HD DVR, a digital video recorder that gives customers the ability to watch television programs from smartphones, tablets, and computers.

EchoStar designs, develops, and distributes digital set-top boxes and related products and technology for satellite TV service providers, international telecommunication and cable companies, and individual consumers. EchoStar owns and operates Sling Media, a company that makes “place-shifting” technology that gives customers the ability to watch television in any room of their home or any place where there is an Internet connection.

As developers and distributors of technology, *amici* have a strong interest in the copyright law’s

¹ The parties have consented to the filing of this brief by filing letters with the Clerk of the Court granting blanket consent to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

balance between copyright protection and technological innovation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ours is a golden age for consumer convenience. What a time to be a TV-loving couch potato! Actually, hold the couch—today’s technologies liberate viewers from the living room, beaming shows to screens in the bedroom, bathroom, or kitchen. For that matter, forget the TV. A football fan can watch live on his tablet while pounding the treadmill. A *House of Cards* devotee stuck in an airport can binge-watch on her laptop. And it’s not just TV-lovers who have it made. The power of modern computing lets audiophiles, bookworms, and art mavens enjoy their content on their schedules, curling up with it in bed or toting it on the morning commute. Today’s technology providers deliver all this in dizzyingly different ways.

Whether a technology provider is also a copyright infringer used to be a pretty straightforward question. A company made a device like a VCR, sold it to consumers, and consumers used it with the company out of the picture. This Court’s decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984), made the copyright implications of the relationship easy. Under *Sony*, the provider of technology could never be held directly liable for an infringing use. But it could be secondarily liable under certain circumstances for inducing, encouraging, or profiting from the user’s infringement.

This case is emblematic of a technological shift. Nowadays, the device is not always in the consumer's hands. Technology providers often house the device remotely. Ownership of the device does not always change hands either. Often, whether the device is in the physical possession of the provider or the consumer, the provider only leases its use to consumers. And because the very nature of the devices is to permit remote operation, technology providers and consumers in some respects share control. These new configurations have prompted courts, scholars, and commentators to contemplate new fault lines in the copyright law.

Petitioners, various television networks, broadcast digital signals of their programming over the airwaves through local stations. They have been doing so for years. For just as long, any individual has been entitled to set up her own, personalized antenna in her living room, capture the signal, and watch it on her television. And since the advent of the VCR, she could make a copy of that programming for later viewing. This Court recognized that right in *Sony*. The modern viewer uses a digital video recorder ("DVR") to the same effect.

Respondent Aereo, Inc. uses new technology to allow users to do the same old things: direct individualized antennas to receive free broadcast signals, make individualized copies of desired programming, and view that programming privately and for noncommercial purposes. The only difference is that the users do not purchase and maintain the equipment. Aereo does. It owns the

individual antennas and recording equipment and maintains it remotely. It then charges subscribers a fee in exchange for granting them control over dedicated equipment.

Aereo is in some ways novel, but it is also among a host of technologies that uses the Internet to offer consumers the ability to do what they always have more cheaply and conveniently. Another example is Sling. Sling is “place-shifting” technology: Just as “time-shifting” technology like the VCR gives viewers the ability to watch programming at some other time, Sling gives them the ability to watch programming at some other place. A viewer just hooks Sling-capable hardware up to a video source—say, her set-top cable box—and then directs a software program to send her programming to her Internet-capable device over a local network or over the Internet. Nowadays, most major home entertainment device providers offer place-shifting capability: You can stream from your TiVo Roamio to your iPad in your hotel room, from your DIRECTV DVR via “Genie,” or from similar products sold by Netgear, Samsung, Belkin, and others.

Other recent innovations come under the banner of “cloud computing.” Cloud computing, as defined by the U.S. Department of Commerce, is “a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.” Peter Mell & Timothy Grance, *THE NIST Definition of Cloud*

Computing, Recommendations of the National Institute of Standards and Technology, at 2 (U.S. Dep't of Commerce, Special Publ'n 800-145, Sept. 2011), <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

Its applications are diverse. A music fan can store her .mp3s in the cloud. She can then stream her songs back to herself over the Internet with a cloud-based media player. A road warrior can use the cloud to take her office with her too. She is liberated by cloud resources that house and run computer applications and store important files, because she need not bring the powerful but cumbersome hardware with her. All she needs is an Internet-capable device.

Add to these examples plenty more recent innovations in consumer convenience. Cablevision's Remote Storage DVR ("RS-DVR"), for example, which effectively houses a cable subscriber's DVR remotely, and then sends back a signal of the subscriber's recordings when prompted. Or even software-based "devices," like hyperlinks, that point to and then deliver content at a click.

The question presented in this appeal is whether Aereo transgresses the Copyright Act. But the way the Court resolves this question could have implications far beyond Aereo. It will surely shed at least some light on similar technologies such as the Cablevision RS-DVR just mentioned. It could go so far as to touch technologies like Sling and cloud computing. It might even carry implications for a broad swath of well-established functionality on the

Internet—for example, Internet hyperlinks or indexed thumbnails.

Aereo is correct that the one-to-one transmissions made through its technology (1) are not made *by Aereo* under § 106, and (2) are not “to the public,” so therefore are not unlawful public performances under the “Transmit Clause” in the Copyright Act. But if this Court disagrees with Aereo, amici respectfully submit that a narrow ruling is the best way to avoid unintended consequences for the other technologies discussed above. Even if Congress intended to prevent free riding by commercial intermediaries on the public performance right, it never intended to authorize copyright holders to charge the public repeatedly just to access their lawful copy of a work at a different time or place. Such a broad copyright monopoly would offend long-established exhaustion principles in copyright—once a lawful copy has been received or acquired, the monopoly in that copy comes to an end. The set of limitations expressed in §§ 107 through 122, indeed the entire structure of the Copyright Act, make clear that copyright holders cannot control private noncommercial activity. *See generally* Jessica Litman, *Lawful Personal Use*, 85 *Tex. L. Rev.* 1871, 1895-97 & nn.134-54, 1904-06 & nn.186-96 (2007); Pamela Samuelson, *Unbundling Fair Uses*, 77 *Fordham L. Rev.* 2537, 2588-92 (2009).

No matter what happens to Aereo, affirming that bright line is essential.

ARGUMENT

I. AEREO AND OTHER PROVIDERS OF USER-CONTROLLED TECHNOLOGIES ARE NOT DIRECTLY RESPONSIBLE FOR USER CHOICES.

Aereo erected thousands of mini-antennas in Brooklyn and added a piece of software that offered subscribers the ability to pull shows up on the web. Cablevision stores individual copies of programs on giant servers until the viewer beckons. Slingbox, Roamio, or Genie owners can zap shows to their computers, tablets, or mobile phones over their household WiFi or an Internet connection. Using Google Play or Amazon Cloud Player, consumers can buy TV shows and store them in the cloud for streaming or downloading on demand. And a student researching, say, abstract expressionism can search images on Google or Microsoft's Bing to pull up thumbnails of de Koonings from all over the Internet.

None of these devices does anything without an end-user's command. They are like dumbwaiters, incapable of delivering a pail of water without the thirsty person tugging on ropes and pulleys. If an individual uses that dumbwaiter to fetch himself a video he recorded of *Breaking Bad*, the dumbwaiter manufacturer does not infringe a copyright in the show.

Petitioners ask this Court to hold conduits directly liable for the actions of TV consumers who use technology to fetch programs on *their* timetables.

They frame the question presented in this appeal as “[w]hether a company ‘publicly performs’ a copyrighted television program when *it* retransmits a broadcast of that program.” Pet. i (emphasis added). The “it” in Petitioners’ formulation is Aereo. Petitioners’ question thus elides a central issue: When a subscriber uses Aereo, *who* is doing the retransmitting of the networks’ broadcasts—the subscriber or Aereo?

The answer is the subscriber. The text of § 106 of the Copyright Act imposes direct liability on those who “do” one of the acts enumerated in the statute. A provider of technology is not “doing” anything when a user directs the technology to act, any more than the manufacturer of photocopiers or VCRs “does” the copying. The rule is simple: When the alleged infringement would not have occurred but for the volitional actions of an individual end-user of a technology, the technology provider is, at most, secondarily liable for that conduct.

This rule makes good sense, whether the technology that delivers content sits on one’s shelf at home, on a rooftop in Brooklyn, or in a data center in Dallas. It has informed the expectations of innovators for years. It also resolves this case: An Aereo antenna does not do a thing until a viewer tells it to, so Aereo is liable secondarily, if at all. Many cases involving all sorts of technologies have been, or can be, resolved on the basis of this rule.

A. A Technology Provider Is Not Directly Liable for Actions That Would Not Have Occurred but for the Private Choices of an Individual End User.

1. The Copyright Act defines rights and responsibilities of various actors in § 106. Section 106 grants copyright owners the exclusive right “to do and to authorize” any of the enumerated actions. 17 U.S.C. § 106 (emphasis added). Infringement comes in two flavors. First, one can infringe directly, by affirmatively *doing* or *authorizing*. Direct infringement is a strict liability tort—no degree of culpable intent is required, because the unlawful intent is presumed from the act of copying. Copyists know exactly what they are doing when they push the buttons on the dual tape deck and pile up the counterfeit tapes on a table at the flea market.

Or, infringement can occur indirectly. The flea market operator who *knows* counterfeit tapes are being sold in one of his booths and who is getting a cut of the action is also culpable. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261-64 (9th Cir. 1996). “[I]ntentionally inducing or encouraging direct infringement” can give rise to contributory infringement. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). “[P]rofiting from direct infringement while declining to exercise a right to stop or limit it” can permit a finding of vicarious infringement. *Id.* And “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement” is liable for induced infringement. *Id.* at 936-37.

These doctrines of secondary infringement are not strict liability torts, and they do not appear in the Copyright Act. Rather, they “emerged from common law principles and are well established in the law.” *Id.* at 930. They are derived from principles in other legal contexts that define who is liable and assign responsibility among primary and secondary actors. The law of *respondeat superior*, for example, defines when the principal is liable for the agent’s torts, *see generally* W. Keeton, et al., *Prosser and Keeton on Torts* §§ 69-70 (5th ed. 1984), and proximate causation helps identify the scope of any actor’s liability. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Indeed, “the purpose of any causation-based liability doctrine is to identify the actor (or actors) whose conduct has been so significant and important a cause that he or she should be legally responsible.” *Cartoon Network LP v. CSC Holdings, Inc.* (“*Cablevision*”), 536 F.3d 121, 132 (2d Cir. 2008) (quotation marks and brackets omitted).

2. Intellectual property infringement is a tort—an invasion of personal property, albeit intangible. Patent law originally borrowed its (later codified) secondary liability theories from doctrines of civil aiding and abetting. *See Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990); 5-17 Donald S. Chisum, *Chisum on Patents* § 17.02 (2013). Copyright law in turn drew from patent law and from *respondeat superior* for its doctrine of vicarious liability. *See, e.g., Sony*, 464 U.S. at 439 (tracing copyright’s vicarious liability to “the historic kinship between patent law and copyright law”); *A&M Records, Inc. v. Napster, Inc.*,

239 F.3d 1004, 1022 (9th Cir. 2001) (“Vicarious copyright liability is an ‘outgrowth’ of respondeat superior.”); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (same). Trademark law also looked to common law principles of responsibility for the actions of another. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982). This is unsurprising—as this Court has recognized, Congress generally enacts causes of action against the backdrop of traditional common law rules from related or similar contexts. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, No. 12-873, 2014 WL 1168967, at *9-10 (Mar. 25, 2014).

In keeping with many other areas of law, the copyright law recognizes that strict liability will be imposed only on primary actors who “do” the act complained of.² The law further contemplates that others will be secondarily liable based on conduct at some remove from the direct infringement when their thoughts and actions related to an act of direct infringement are impure. The volitional conduct requirement, embraced by courts and by Congress, supplies the line separating direct from secondary infringement, or indeed, from no infringement at all.

² Section 106 also protects a copyright owner’s exclusive right “to authorize” the doing of the enumerated acts. This Court discussed the relationship between doing, authorizing, and secondarily infringing at length in *Sony*, 464 U.S. at 434-35 & n.17, however, and nowhere does that opinion or any other suggest that providing technological capabilities is akin to “authoriz[ing] the use of a copyrighted work without actual authority from the copyright owner,” *id.* at 435 n.17.

It has been 30 years since this Court in *Sony* “ma[de] clear [that] the producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying.” *Grokster*, 545 U.S. at 960 (Breyer, J., concurring) (emphasis in original). Lower courts have followed *Sony*’s lead. “[A] person ha[s] to engage in volitional conduct—specifically, the act constituting infringement—to become a direct infringer.” *CoStar Group, Inc v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (discussing *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995)). As the Second Circuit put it in *Cablevision*, “[i]t seems clear—and we know of no case holding otherwise—that the operator of the VCR, *the person who actually presses the button* to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine.” *Cablevision*, 536 F.3d at 131 (emphasis added).

Congress has followed this Court’s lead too, encoding the above principle in both the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (CDA), which provide liability protections for those who host interactive online media. *See* DMCA, 17 U.S.C. § 512(a)(1)-(5); CDA, 47 U.S.C. § 230(c)(1). As the House Judiciary Committee’s report on the DMCA explained, “[a]s to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another.” H.R. Rep. No. 105-551, at 11 (1998). Similarly, in passing § 230 of the CDA, “Congress made a policy choice ... not to deter harmful online speech through the separate route of

imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997).

3. From all of this has emerged the consensus rule of volitional conduct: A provider of user-controlled technology cannot be held directly liable for infringing conduct that would not have occurred but for the act of an individual end-user. Put another way, if an individual end-user causes the allegedly infringing act, it is the end-user who *does* the act for purposes of § 106. The technological intermediary is at most secondarily liable. When it comes to technologies with the potential to result in infringement, what matters is who is at the controls.

The volitional conduct requirement supplies a clear dividing line between direct and secondary copyright infringement. On one side of the line, direct infringement, stands the most immediate and significant but-for cause of the infringing act. This is the individual who can be reasonably presumed to understand the immediate consequences of her action—a person with at least the general intent to perform an act that violates the law. On the other side of the line, secondary infringement, stand others who may also be found liable based upon some degree of culpability in the absence of immediate control. This culpability may take the form of any of copyright's sub-species of secondary infringement: contributory, vicarious, or induced infringement. *See generally Grokster*, 545 U.S. at 930.

In the case of technologies capable of both infringing and non-infringing uses, or “dual-use” technologies, imposing direct liability on technology manufacturers violates this rule. The problem is that it throws the baby out with the bathwater—it deters not only infringing conduct, but also the very creation of technology that can be used for non-infringing conduct. The copyright law is not so thoughtless. It balances copyright protection with technological innovation. “[T]he 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.” *Id.* at 957 (Breyer, J., concurring).

A readily understood rule of this sort provides the kind of legal certainty that technology manufacturers require to innovate. Everyone benefits from innovation, including copyright owners, who stand to reach ever more ears and eyeballs. The volitional conduct requirement properly allocates the risks and rewards associated with the potential misuse of innovative devices by consumers. And the doctrines that comprise secondary liability are more than up to the task of holding liable those that use technologies to encourage or induce infringement.

B. Aereo and Other Providers of Remotely Controlled User Technologies Cannot Be Liable as Direct Infringers.

1. It is the Aereo subscriber (if anyone) whose conduct may result in direct liability under the

Copyright Act. Aereo's antennas do nothing automatically. They simply wait for the subscriber to compel an act. Only upon the individual subscriber's command do they execute by tuning to the desired signal and sending it to the subscriber. There is no performance until the subscriber shows the program to herself—by initiating an Internet-based transmission and then receiving it on a personal display device. But for the subscriber's actions, the transmission over the Internet would not happen at all. Aereo therefore cannot be a direct infringer.

2. A contrary result might inadvertently signal a departure from the path the law has taken in this context. *Sony* set that trajectory, and by and large the lower courts have adhered to it, time after time, and in various contexts.

For example, the Fourth Circuit confronted the question of who is “doing” the action in the context of subscriber uploading of photos. Even though the provider of the technology reviewed the photos to determine whether they complied with the site's terms and conditions, the court found the user in control. *CoStar Group, Inc.*, 373 F.3d at 547. The website operator's “gatekeeping practice” of reviewing the photos, the court held, “does not amount to ‘copying.’” *Id.* at 556.

Another court addressed the situation where Google hyperlinks to an image of an artistic work and a user clicks that hyperlink to see a copy. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-61 (9th Cir. 2007). The court found that Google

could not be liable for direct infringement by offering the link. *Id.* “Google may facilitate *the user’s access* to infringing images. However, such assistance raises only contributory liability issues, and does not constitute direct infringement.” *Id.* at 1161 (emphasis added and citations omitted); *cf. UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1015-16 (9th Cir. 2011) (embracing the volition requirement in a closely analogous context); *Parker v. Google, Inc.*, 242 F. App’x 833 (3d Cir. 2007) (non-precedential) (using the volitional conduct standard to find no liability for direct infringement where plaintiff claimed Google posted his copyrighted handbook to an online bulletin board).

The question whether a technology provider or the end user did the copying was also at issue in the *Cablevision* case, in which a cable TV provider maintained a “Remote Storage DVR system” that entailed “central hard drives housed and maintained at a ‘remote’ location.” *Cablevision*, 536 F.3d at 124. Broadcast networks argued that Cablevision directly infringed when customers accessed this system to make their copies. *Id.* at 123. The Second Circuit, adopting the volitional conduct standard, held that “the user,” not Cablevision, “does’ the copying.” *Id.* at 132.

And, in a seminal case, a district court encountered a situation where the plaintiff accused an Internet service provider of infringing by copying, displaying, and distributing his work whenever users posted information on an electronic bulletin board. *Netcom*, 907 F. Supp. at 1371. The court held

that the provider of the technology did not directly infringe those rights because it did not exercise volition or human intervention in the display or distribution; it merely provided an “automatic and indiscriminate” system that responded to user commands. *Id.* at 1372.

Together, these results have marked clear lines within which information age technologies have flourished. If Aereo’s novel business does necessitate a departure, *amici* urge this Court to nevertheless make clear that the existing lines are generally sound.

3. A jagged line would also introduce uncertainty as to the future path of the law governing the copyright implications of new technologies. Human ingenuity and consumer demand ensure the arrival of new conveniences, and more and more of those conveniences will manifest in the form of Internet-enabled technologies. The Court should make clear that, whatever Aereo’s status as a direct infringer, the technology providers of the present and future need not worry that the traditional rules governing their industries have been cast aside.

Technologies like Sling and cloud computing stand as easy examples of technologies that are plainly user-operated, and that are therefore controlled by the traditional rule. If a viewer wants to watch the latest episode of *Downton Abbey* on her iPad in bed, instead of on her television in the living room, she must enable the Sling software and direct her Sling-capable hardware to send it to her. In the

past, she would have had to pop a tape into a VCR, record the program, and tote the tape to the bedroom VCR. But the result, and the required volition, is the same. So, Sling is an easy case when it comes to the volitional use requirement. A copyright challenge to it would be virtually indistinguishable from *Sony*.

The same applies to most models of cloud computing. Suppose a music lover on an October trip to New York City finds himself craving a few choice renditions of *Autumn in New York* from his extensive library. In the past, he would be out of luck unless he had the foresight (and luggage) necessary to tote his Billie Holiday CD, his Bing Crosby record, and his Charlie Parker audio cassette with him. But with his library in the cloud, he can travel light and his music comes with him. Cloud storage lockers like Microsoft OneDrive, Amazon Cloud Player, or Google Play make this possible.

Each of these functions as a remote storage server that allows users to stream or download their own music back to their Internet-capable devices. Like many other cloud-based technologies, they do nothing automatically. They wait for the user to store the copy, so they are not the ones doing the copying under § 106, just as the manufacturer is not doing the copying when the user loads a copy onto the .mp3 player the manufacturer sold her. Likewise, Microsoft OneDrive, Amazon Cloud Player, and Google Play wait for the user to press play before streaming (or downloading) the content back. The resulting performance would not happen but for the user's decision. Different right, but same

basic relationship between user, content, and intermediary. And same result—none of the three *does* the transmitting under § 106. The user does, and the lawfulness of the user’s actions is the question for purposes of direct liability. Cloud providers like these are liable secondarily, if at all.

* * *

The volitional conduct requirement is essential to the balance between copyright protection and technological development. Amici respectfully submit that this Court should recalibrate that balance only with utmost care.

II. AEREO’S DISCRETE, INDIVIDUALIZED TRANSMISSIONS ARE NOT “TO THE PUBLIC” WITHIN THE MEANING OF THE TRANSMIT CLAUSE.

Even if Aereo were the one doing the transmitting when its subscribers direct individualized equipment to send themselves a free broadcast TV show on a computer monitor instead of a television, Aereo cannot be liable unless the resulting transmission constitutes a public performance of the copyright owner’s work. It does not. The Aereo technology makes discrete, user-controlled, one-to-one transmissions. It is “unicasting.” The text and history of the Transmit Clause, and the structure of the Copyright Act, make clear that unicasting is not public performance.

1. To “perform ... a work ‘publicly’” under the Transmit Clause, one must “transmit ... a performance ... *to the public.*” 17 U.S.C. § 101.

Thus, “the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after ‘performance.’” *Cablevision*, 536 F.3d at 136. The key is determining which sorts of transmissions are “to the public” and which are not.

Although the Act does not define the word “public,” the provision before the Transmit Clause, the “Public Place Clause,” speaks of “a substantial number of persons outside of a normal circle of a family and its social acquaintances.” 17 U.S.C. § 101. What this conception of the “public” means in the context of the Transmit Clause is that one does not transmit “to the public” merely because it transmits to a single member of the public—to perform publicly, one must transmit to at least two unrelated members of the public. This focus on transmitting from one to more than one is confirmed by the Transmit Clause’s concluding phrase, which references “the *members* of the public capable of receiving the performance” *Id.* (emphasis added).

That phrase, moreover, is naturally understood to reference the potential audience—the “members of the public capable of receiving”—the particular transmission alleged to be to the public. *See id.* (“To ‘transmit’ a performance or display is to communicate it ... whereby images or sounds are received beyond the place from which they are sent.”). In other words, “the performance” in the phrase “members of the public capable of receiving the performance” refers to the singular performance as embodied in a particular transmission. That the Transmit Clause focuses on the singular act of

transmission—as opposed to basing infringement on a nebulous series of aggregated transmissions, as Petitioners contend, *see infra* 25-26—is underscored further by the phrase “any device or process,” which is also rendered in the singular.

The Transmit Clause thus focuses on (i) the single performance as embodied in a particular transmission, (ii) the single device or process by which the transmission occurs, and (iii) the members of the public who are capable of receiving the performance as embodied. At its core, in other words, it covers “multicasting”—one transmission, by one device or process, that goes to many. But “unicasting” is out. One-to-one transmission simply cannot be “to the public.” Otherwise, there would be no such thing as a non-public transmission.

2. The distinction between one-to-one and one-to-many is even plainer when the Transmit Clause is read against its historical backdrop. The Clause’s impetus was the Supreme Court’s decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). Fortnightly operated “community antenna television (CATV) systems” in hilly West Virginia. *Id.* at 391. The hills were blocking broadcast television signals from reaching the cities below, even when the inhabitants used individualized rooftop antennas. *Id.* So, Fortnightly put one big shared antenna on top of the hill, captured the broadcast signal, amplified it, and redirected it contemporaneously to its subscribers down below. *Id.*

The Supreme Court concluded that the public performance right in the Copyright Act of 1909 (“1909 Act”) did not extend to these community antenna multicasts. *Id.* at 398-400. The retransmitting multicaster was more viewer than performer, the Court reasoned. *Id.* And because a viewer did not, under then-existing law, perform when she received a transmission, neither did the multicaster perform when it redirected broadcast signals. The Court used much the same reasoning in *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), where it held that a long-distance cable multicaster did not “perform” under the 1909 Act. *See also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (holding that a restaurant owner does not publicly perform by receiving and playing a radio broadcast in his restaurant).

Congress responded to these decisions by redefining the public performance right in the Copyright Act of 1976. It eliminated the distinction between broadcaster and viewer. Now anyone, from broadcaster, to intermediary, to individual recipient could perform. Just as “[a] singer is performing when he or she sings a song,”

a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or

she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

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

This statement confirms that each act of transmission, retransmission, or receipt is its own discrete performance. But not all of them—or, indeed, any of them—are necessarily public. “Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a ‘performance’ ... it would not be actionable as an infringement unless it were done ‘publicly’ ...” *Id.* So, a singer who sings a song is performing when she sings it in the shower, but performing publicly only when she sings it in a “place open to the public or ... where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered,” 17 U.S.C. § 101. The same goes for an individual who performs by receiving and playing a signal. A man can still drag a big antenna to the top of a hill and string a wire through his backyard to improve the television signal in his basement without violating the Copyright Act—he performs, but not publicly. And similarly, although each retransmission that precedes the end-user is a performance, each is actionable only if it is “to the public” under the Transmit Clause.

The Transmit Clause, then, was drawn up with multicasting firmly in mind—it addressed the sort of indiscriminate capture and retransmission, by one collective device or process, to two or more unrelated

persons, that was at issue in *Fortnightly* and *Teleprompter*. And as the above illustrates, Congress was also mindful when drafting the Transmit Clause to exclude the sorts of discrete, individualized performances that are purely private.

3. This all makes perfect sense within the structure of the Copyright Act. As then-Professor Benjamin Kaplan remarked over half a century ago, “[c]opyright law, precisely because it has taken shape around the model of a book communicated to the public by multiplication of copies, has experienced difficulty, not to say frustration, with cases where communication is by performance or representation.” Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. Pa. L. Rev. 469, 473 (1955). A copyright owner’s fair return is as easy to measure in individual copies as a baker’s is in loaves of bread. It’s as simple as a quid for a quo. The trouble comes in when the work is no longer conveyed to the public in discrete units capable of individual measure.

Hence the Transmit Clause’s focus on multicasting, an act that pays for one and gives to many. And hence the exclusion of unicasting from its ambit. If the individual copies from which unicasts are made have been legally obtained under the Copyright Act, the copyright owner has received all she is entitled to; if they are not, she may sue for infringement. But either way, the reproduction right fully governs the activity in question. There is no need for a Transmit Clause in this situation to provide a return on the individualized transmissions that come from the individualized copies.

Cablevision, 536 F.3d at 139-40; 2 Melville B. Nimmer & David Nimmer, 2 *Nimmer on Copyright* § 8.14(c)(3) (2013).

4. Petitioners reimagine this basic configuration. In their telling, the Transmit Clause covers not just a particular transmission from one to many, but also the aggregate of many discrete, one-to-one transmissions, bundled together and only collectively “to the public.” The fulcrum of this argument is their reading of the word “performance” in the phrase “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101. “Performance,” they argue, cannot refer to the performance as embodied in a particular transmission, because particular transmissions can occur only at a single time. *See* Pet’rs Br. at 34. They argue that a focus on particular transmissions would leave the words “at the same time or different times” with no work to do. *See id.* “Performance,” they conclude, must therefore mean the *initial* performance—the Super Bowl itself, to borrow Petitioners’ example. *See id.* at 34, 37.

It would be surprising indeed for Congress to have minted such a novel theory of copyright infringement, based on an aggregated series of discrete acts, by the mere implication of a few words in the Transmit Clause. The Petitioners’ reading, moreover, renders the text itself even more puzzling than the reading it is meant to avoid. Of what relevance is the entire potential television audience capable of receiving the Super Bowl, from any

source, when determining whether a particular intermediary is transmitting to the public? It would be an utter non sequitur for a retransmitter accused of beaming the Super Bowl to the public to reply, “No way, because some of the hundreds of millions of television viewers across the world must have received the Super Bowl from someone else at a different place or time.” The Petitioners thus understand Congress to have foreclosed an argument no one would ever think to advance. This cannot be right. Plainly, the phrase “members of the public capable of receiving the performance” must refer to the performance in which the alleged infringer is engaging. It is meant to foreclose a multicaster’s reply that *its* multicast is private simply because the recipients receive its images and sounds in different places or at different times.

Petitioners’ other objection is their assessment that “[t]he whole point of the transmit clause was to reject any suggestion that retransmission services fall outside the public-performance right.” Pet’rs Br. at 25-26. The breadth of this notion is staggering. Under Petitioners’ “whole point” reading of the Transmit Clause, copyright owners would have the right to charge repeatedly for exactly the same material simply because that underlying material was once transmitted by someone, and therefore capable of being received by the public. Theirs is a reading shorn of all nuance or context.

Then again, as discussed *infra* 28-29, even Petitioners feel compelled to exempt certain technologies that entail retransmission, like Sling, TiVo Roamio, or DIRECTV Genie, and the various

models that fall under the banner of cloud computing. *Id.* at 37, 46. They recognize that their conception of Congress's "whole point" would threaten a whole field of emergent technology, so they qualify it. This Court should be wary of such a haphazard approach. It was in *Fortnightly*, 392 U.S. at 401-02, where this Court declined the invitation "to render a compromise decision ... that would ... accommodate various competing considerations." While expressing "due regard to changing technology," *id.*, it left Congress to do its job. Congress responded with the 1976 Act. There is no reason to foist Congress's job on the courts now.

* * *

Aereo had a clever idea. It read the Copyright Act and the case law, and realized that nothing prohibited private, one-to-one retransmission of broadcast signals. With the help of a number of fairly recent technological advances, it built a business out of these private retransmissions. The Copyright Act grants copyright owners exclusive rights in certain acts. It does not protect a specific business model. Aereo wanted to compete, and it found a technological solution that allowed it to do so in a way that is perfectly lawful under the Copyright Act. "Sound policy, as well as history, supports ... consistent deference to Congress when major technological innovations alter the market for copyrighted materials." *Sony*, 464 U.S. at 431.

**III. EVEN IF AEREO IS AN INFRINGING
RETRANSMISSION SERVICE, ONE-TO-
ONE TECHNOLOGIES DO NOT OFFEND
THE COPYRIGHT ACT.**

Petitioners' aggregation theory, if not qualified, could be used by others to advocate a rule with enormous sweep. Just pressed play on that episode of *Revenge* you recorded to your RS-DVR earlier this week? If someone you've never met did the same with their RS-DVR last night, you've made an infringer out of Cablevision. On the bus and streaming back that catchy tune you bought online last week? Your cloud storage service could be infringing if the person next to you sent the same song to himself at his housewarming party last Saturday. It might not even matter to these blunt understandings if every single transmission is backed up by its own unique copy, lawfully acquired by the user.

These outcomes cannot be right. They would render the copyright owner's rights virtually limitless. Copyright is a limited monopoly; the advent of digital copies and the Internet did not expand it to provide perpetual control over every single use of copyrighted content, or a right to extract repeated payments for every single use, rather than a single payment for a single copy. Congress has never afforded book publishers the right to charge for re-reading, lending a book to a family member or friend, or selling it at a garage sale. Music publishers likewise enjoy no such monopoly over every single listen to every single copy of a song. Perhaps recognizing as much, and

surely fearful that such an extreme view could tank their entire case, Petitioners rightly walk it back when it comes to one-to-one technologies, like TV place-shifters and cloud computing. “When an individual uses a DVR to record and then retransmit a recording of a broadcast of the Super Bowl to his family in his home, his private performance does not somehow become public just because the broadcast he recorded was to the public in the first instance,” Petitioners explain. Pet’rs Br. at 37. They also say that “[t]here is an obvious difference between a service that merely stores and provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large.” *Id.* at 46.

What Petitioners fail to do, however, is offer any reading of the Act that reveals the appropriate line. One wonders whether their heart is in it. Meanwhile, although Aereo rightly points out the potential scope of Petitioners’ reading, it has little interest in identifying those technologies that are unquestionably legal in the event this Court concludes that Aereo’s service is not.

Amici offer such a line here. It is animated by the common law exhaustion principle long recognized in copyright, *see Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), and marked by the collective set of limitations on the scope of the copyright monopoly found in §§ 107 through 122 of the Copyright Act. These statutory guideposts—emblazoned “Limitations on exclusive rights” or “Scope of exclusive rights”—mark the boundaries of

the copyright owner's limited monopoly. They confirm what must be true: At some point the owner's right to a return for a particular copy ends, and the individual's right to unfettered noncommercial use, or disposal, of that lawful copy must begin. *Sony*, 464 U.S. at 439; *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013). Whenever a technology or service can fairly claim that the individuals using it do so consistent with the limitations on copyrights recognized in §§ 107-122, that technology or service is non-infringing. The Copyright Act demands this line. This Court's decision in *Sony*, 464 U.S. 417, defends it. And it is absolutely essential to both technological innovation and a robust public domain.

A. One-to-One Private Transmission Devices Operate Beyond the Reach of the Public Performance Right.

Consider how this understanding operates in the specific context of the Transmit Clause. That clause governs transmissions "to the public." Generally this consists of multicasts from a single source that reach the members of the public in their respective homes. Once those transmissions get "to the public," though, the particular public performance is at an end. The bits and bytes that make up the transmission are lawfully received and within the possession, however fleetingly, of a private individual. In a very real sense, any public dimension of the content embodied in the transmission, at least in this particular embodiment, has evaporated too.

This Court has recognized that once this happens, the user is free to make any private, noncommercial use she chooses. That is the fair use right, § 107, recognized in *Sony*. There, this Court recognized that once in receipt of “a work which he had been invited to witness free of charge,” the recipient was entitled to make copies for purposes of time-shifting—watching the work later. *Sony*, 464 U.S. at 449. This makes good sense when one reads the Transmit Clause. Whatever that provision’s opacity, its central condition is clear: The transmission must be either “to a place open to the public” or “to the public.” 17 U.S.C. § 101. Once it gets there, the public performance has happened, and the right has reached its end. The copyright owner’s rights stop at the door.

Once a viewer has received a transmission, moreover, the copy retains its private character as long as the viewer’s uses do. Another of the §§ 107-122 limitations, § 110(5), makes this clear by protecting private uses that happen to take place in public. As discussed above, the Copyright Act seems to define public performance to include performance in or transmission to “a place open to the public or ... where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered,” 17 U.S.C. § 101. But § 110(5), known as the “homestyle exemption,” permits “communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes.” Once again, the Copyright Act makes clear that the public performance right ends

once the work enters an individual member of the public's zone of privacy. One's lap is not a "public place" just because it happens to be in an airport with a laptop sitting on it.

Sling, TiVo Roamio, and DIRECTV Genie are perfect examples of technologies that operate only in this private realm. All three connect to a video source in a TV viewer's den. There they sit until activated by the viewer from an Internet-capable device. All these place-shifting devices do, once activated by the user, is take video content that has lawfully arrived at the user's home—say, through the user's cable TV subscription—and retransmit it over the Internet to that same user (or another member of the household). Indeed, as a technical matter, Sling, Roamio, and Genie can transmit *only* to a single individual, so whether that transmission is from living room to bedroom or living room to park bench, it cannot be "to the public" under the Copyright Act. Because they are used only by a private individual for purposes beyond the limits of the Copyright owners' statutorily limited rights, they cannot infringe.

A less obvious example is the RS-DVR at issue in *Cablevision*, 536 F.3d 121. Admittedly, a user makes use of that technology to time-shift content that never physically makes it to her literal door. But again, that content *has* passed a legal boundary delineated in §§ 107-122—specifically, § 111's cable television licensing scheme. The RS-DVR operates on the other side of this boundary, after the content has passed through the statutory licensing framework. The cable subscriber is free to make

private use of the content at this point, so an intermediary like Cablevision is free to offer technology that supports such use. That technology, as far as the Copyright Act is concerned, does nothing more than transmit already received content from the private user to herself.

B. Cloud Computing Models Also Generally Operate Beyond the Reach of § 106 Rights.

The same principles apply with respect to other rights. It would be impossible here to catalog the vast array of cloud computing models and to examine each under the Copyright Act. By and large, though, cloud technologies do nothing more than permit private individuals to manipulate or store content that they already legitimately received or purchased. Just like VCRs, or the more modern DVRs, then, they operate in the sphere of personal, noncommercial uses.

These sorts of uses are beyond the copyright owner's territory. Simply peruse the Copyright Act and the landscape's boundary-markers become apparent. The most prominent is § 107's grand reservoir of fair uses. Each of the copyright owner's § 106 (and § 106A) rights ends at the border. Again, this is *Sony* and its protection of viewer time-shifting. Once broadcast content reaches individual users in the privacy of their own homes, their private decisions and uses are no longer subject to copyright-owner control.

But that's hardly all. Many of the § 106 rights have their own specific limitations. Section 106(3)'s distribution right is truncated by § 109(a)'s "first-sale doctrine." That doctrine permits "the owner of a particular copy or phonorecord lawfully made under this title ..., without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a). As explained *supra* 31-32, § 110(5) limits the public performance right, § 106(4), by exempting viewing or listening in public places so long as it takes place on the kind of equipment normally used in the home. Section 117(a) cuts off the reproduction right, § 106(1), when it comes to certain copies of lawfully obtained software. And compulsory licensing schemes for sound recordings, § 115, cable broadcasts, § 111, and satellite broadcasts, §§ 119, 122, mark the boundary of owners' rights too. Together, these limitations define an area of private, individual use at the edge of which copyright owners' rights stop. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1080 (9th Cir. 1999) (explaining that the purpose of the Audio Home Recording Act of 1992, 17 U.S.C. § 1001 et seq., consistent with *Sony*, is "the facilitation of personal use"); Jessica Litman, *Lawful Personal Use*, 85 Tex. L. Rev. 1871, 1895-97 & nn.134-54, 1904-06 & nn.186-96 (cataloging nearly a dozen examples of congressional protection of private in-home content manipulation); Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2588-92 (2009) (opining that personal uses are presumptively fair under the Copyright Act).

This is the realm of the cloud. Take cloud storage, for example. Fresh off his October trip to New York City, our traveling music fan buys a CD or .mp3 copy of *April in Paris* to get in the mood for his big trip in the spring. Once he has possession or title of the copy, any number of privileges kick in. He can sell his CD under § 109. He can make an additional copy to listen somewhere else under § 106 and § 1001 of the Audio Home Recording Act. See *Sony*, 464 U.S. at 449; *Recording Indus. Ass'n of Am.*, 180 F.3d at 1080. And he can play it back on a park bench through his headphones under § 110(5).

If he uses his cloud storage space to accomplish this, some of it happens remotely. As a technological matter, he transmits the zeros and ones through the Internet to a cloud server, where his place-shifting copy is stored. And when he chooses to listen later, the zeros and ones that make up this particular embodiment of this work are transmitted back to him, wherever he may be. But as far as the Copyright Act is concerned, he is simply storing a copy and transmitting to himself. He has obtained title to a personal copy and made a personal use, and the cloud technology he is using operates only in that dimension.

The same result obtains when a consumer purchases other lawfully made copies such as digital copies of books, photos, or movies from an authorized intermediary. Once the consumer has paid to obtain title to a copy, the material can be remotely housed by a cloud service provider *in the first instance* at the instigation of the consumer, then sent to the consumer whenever she is ready. An authorized

copy has been purchased by the consumer and is being used for private noncommercial purposes. And once again, the same goes for content lawfully obtained—if not physically received—through an intermediary that is a compulsory licensee under §§ 111, 115, 119, or 122. Technology that facilitates private storage or manipulation at this stage is simply beyond the copyright owner’s reach.

* * *

Copyright owners cannot be permitted to enlarge the scope of the copyright monopoly into the realm of private noncommercial activity. Just because a third party intermediary has found a way to give value to consumers in connection with their individual lawful uses of copyrighted material does not mean that the copyright owner is entitled to invade the province of rights reserved to the public. Petitioners recognize this limitation. This Court should too.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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