

American Broadcasting Cos. v. Aereo, Inc.

United States Supreme Court
2014 U.S. LEXIS 4496 (2014)

Justice BREYER delivered the opinion of the Court.

The Copyright Act of 1976 gives a copyright owner the “exclusive righ[t]” to “perform the copyrighted work publicly.” 17 U.S.C. § 106(4). The Act’s Transmit Clause defines that exclusive right as including the right to

“transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” § 101.

We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.

I.A

For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast. Much of this programming is made up of copyrighted works. Aereo neither owns the copyright in those works nor holds a license from the copyright owners to perform those works publicly.

Aereo’s system is made up of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse. It works roughly as follows: First, when a subscriber wants to watch a show that is currently being broadcast, he visits Aereo’s website and selects, from a list of the local programming, the show he wishes to see.

Second, one of Aereo’s servers selects an antenna, which it dedicates to the use of that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show. The antenna begins to receive the broadcast, and an Aereo transcoder translates the signals received into data that can be transmitted over the Internet.

Third, rather than directly send the data to the subscriber, a server saves the data in a subscriber-specific folder on Aereo’s hard drive. In other words, Aereo’s system creates a subscriber-specific copy — that is, a “personal” copy — of the subscriber’s program of choice.

Fourth, once several seconds of programming have been saved, Aereo’s server begins to stream the saved copy of the show to the subscriber over the Internet. (The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo’s service is not before us.) The subscriber can watch the streamed program on the screen of his personal

computer, tablet, smart phone, Internet-connected television, or other Internet-connected device. The streaming continues, a mere few seconds behind the over-the-air broadcast, until the subscriber has received the entire show. . . .

Aereo emphasizes that the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular antenna allotted to him. Its system does not transmit data saved in one subscriber's folder to any other subscriber. When two subscribers wish to watch the same program, Aereo's system activates two separate antennas and saves two separate copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions — each from the subscriber's personal copy.

B

Petitioners are television producers, marketers, distributors, and broadcasters who own the copyrights in many of the programs that Aereo's system streams to its subscribers. They brought suit against Aereo for copyright infringement in Federal District Court. They sought a preliminary injunction, arguing that Aereo was infringing their right to "perform" their works "publicly," as the Transmit Clause defines those terms.

The District Court denied the preliminary injunction. Relying on prior Circuit precedent, a divided panel of the Second Circuit affirmed. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (citing *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2008)). In the Second Circuit's view, Aereo does not perform publicly within the meaning of the Transmit Clause because it does not transmit "to the public." Rather, each time Aereo streams a program to a subscriber, it sends a *private* transmission that is available only to that subscriber. . . .

II

This case requires us to answer two questions: First, in operating in the manner described above, does Aereo "perform" at all? And second, if so, does Aereo do so "publicly"? . . .

Does Aereo "perform"? *See* . . . § 101 ("To *perform* . . . a work 'publicly' means [among other things] to transmit . . . a performance . . . of the work . . . to the public . . ." (emphasis added)). Phrased another way, does Aereo "transmit . . . a performance" when a subscriber watches a show using Aereo's system, or is it only the subscriber who transmits? In Aereo's view, it does not perform. It does no more than supply equipment that "emulate[s] the operation of a home antenna and [digital video recorder (DVR)]." . . . Like a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives. So it is only the subscribers who "perform" when they use Aereo's equipment to stream television programs to themselves.

Considered alone, the language of the Act does not clearly indicate when an entity "perform[s]" (or "transmit[s]") and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo's performs.

A

History makes plain that one of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act's scope. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the Court considered a CATV system that carried local television broadcasting, much of which was copyrighted, to its subscribers in two cities. The CATV provider placed antennas on hills above the cities and used coaxial cables to carry the signals received by the antennas to the home television sets of its subscribers. . . . A subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." *Id.* at 392. The CATV provider "neither edited the programs received nor originated any programs of its own." *Ibid.*

Asked to decide whether the CATV provider infringed copyright holders' exclusive right to perform their works publicly, the Court held that the provider did not "perform" at all. . . . The Court drew a line: "Broadcasters perform. Viewers do not perform." 392 U.S., at 398 (footnote omitted). And a CATV provider "falls on the viewer's side of the line." *Id.*, at 399.

The Court reasoned that CATV providers were unlike broadcasters:

"Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers." *Id.*, at 400.

. . . Viewers do not become performers by using "amplifying equipment," and a CATV provider should not be treated differently for providing viewers the same equipment. *Id.*, at 398–400.

In *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court considered the copyright liability of a CATV provider that carried broadcast television programming into subscribers' homes from hundreds of miles away. Although the Court recognized that a viewer might not be able to afford amplifying equipment that would provide access to those distant signals, it nonetheless found that the CATV provider was more like a viewer than a broadcaster. *Id.*, at 408–09. It explained: "The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer." *Id.*, at 408. . . .

B

In 1976 Congress amended the Copyright Act in large part to reject the Court's holdings in *Fortnightly* and *Teleprompter*. See H.R. Rep. No. 94-1476, at 86-87 (1976) (hereinafter H.R. Rep.) (The 1976 amendments "completely overturned" this Court's narrow construction of the Act in *Fortnightly* and *Teleprompter*). Congress enacted new language that erased the Court's line between broadcaster and viewer, in respect to "perform[ing]" a work. The amended statute clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to

make the sounds accompanying it audible.” § 101. . . . Under this new language, *both* the broadcaster *and* the viewer of a television program “perform,” because they both show the program’s images and make audible the program’s sounds. *See* H.R. Rep., at 63 (“[A] broadcasting network is performing when it transmits [a singer’s performance of a song] . . . and any individual is performing whenever he or she . . . communicates the performance by turning on a receiving set”).

Congress also enacted the Transmit Clause, which specifies that an entity performs publicly when it “transmit[s] . . . a performance . . . to the public.” § 101; *see ibid.* (defining “[t]o ‘transmit’ a performance” as “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent”). Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this language to cover. *See* H.R. Rep., at 63 (“[A] cable television system is performing when it retransmits [a network] broadcast to its subscribers”); *see also ibid.* (“[T]he concep[t] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public”). The Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers’ ability to receive broadcast television signals.

Congress further created a new section of the Act to regulate cable companies’ public performances of copyrighted works. *See* § 111. Section 111 creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts. . . .

Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act.

C

This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, “perform[s]” (or “transmit[s]”). Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. *See id.*, at 89 (“[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material”). Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users’ homes. By means of its technology . . . , Aereo’s system “receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers.” *Fortnightly*, 392 U.S., at 400. . . .

Aereo’s equipment may serve a “viewer function”; it may enhance the viewer’s ability to receive a broadcaster’s programs. It may even emulate equipment a viewer could use at home. But the same was true of the equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*.

We recognize, and Aereo and the dissent emphasize, one particular difference between Aereo’s system and the cable systems at issue in *Fortnightly* and *Teleprompter*. The systems in

those cases transmitted constantly; they sent continuous programming to each subscriber's television set. In contrast, Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program.

This is a critical difference, says the dissent. It means that Aereo's subscribers, not Aereo, "selec[t] the copyrighted content" that is "perform[ed]," *post*, at 4 (opinion of SCALIA, J.), and for that reason they, not Aereo, "transmit" the performance. Aereo is thus like "a copy shop that provides its patrons with a library card." *Post*, at 5. A copy shop is not directly liable whenever a patron uses the shop's machines to "reproduce" copyrighted materials found in that library. . . . And by the same token, Aereo should not be directly liable whenever its patrons use its equipment to "transmit" copyrighted television programs to their screens.

In our view, however, the dissent's copy shop argument, in whatever form, makes too much out of too little. Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. The subscribers of the *Fortnightly* and *Teleprompter* cable systems also selected what programs to display on their receiving sets. Indeed, as we explained in *Fortnightly*, such a subscriber "could choose any of the ... programs he wished to view by simply turning the knob on his own television set." 392 U.S., at 392. The same is true of an Aereo subscriber. Of course, in *Fortnightly* the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob. Here the signals pursue their ordinary course of travel through the universe until today's "turn of the knob" — a click on a website — activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet. But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."

In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo "perform[s]."

III

Next, we must consider whether Aereo performs petitioners' works "publicly," within the meaning of the Transmit Clause. Under the Clause, an entity performs a work publicly when it "transmit[s] ... a performance ... of the work ... to the public." § 101. Aereo denies that it satisfies this definition. It reasons as follows: First, the "performance" it "transmit[s]" is the performance created by its act of transmitting. And second, because each of these performances is capable of being received by one and only one subscriber, Aereo transmits privately, not publicly. Even assuming Aereo's first argument is correct, its second does not follow.

We begin with Aereo's first argument. What performance does Aereo transmit? Under the Act, "[t]o 'transmit' a performance ... is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Ibid.* And "[t]o 'perform'" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." *Ibid.*

Petitioners say Aereo transmits a *prior* performance of their works. Thus when Aereo retransmits a network's prior broadcast, the underlying broadcast (itself a performance) is the performance that Aereo transmits. Aereo, as discussed above, says the performance it transmits is the *new* performance created by its act of transmitting. That performance comes into existence when Aereo streams the sounds and images of a broadcast program to a subscriber's screen.

We assume *arguendo* that Aereo's first argument is correct. Thus, for present purposes, to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. *Cf. United States v. American Soc'y of Composers, Authors and Publishers*, 627 F.3d 64, 73 (2d Cir. 2010) (holding that a download of a work is not a performance because the data transmitted are not "contemporaneously perceptible"). When an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby "communicate[s]" to the subscriber, by means of a "device or process," the work's images and sounds. § 101. And those images and sounds are contemporaneously visible and audible on the subscriber's computer (or other Internet-connected device). So under our assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

But what about the Clause's further requirement that Aereo transmit a performance "to the public"? As we have said, an Aereo subscriber receives broadcast television signals with an antenna dedicated to him alone. Aereo's system makes from those signals a personal copy of the selected program. It streams the content of the copy to the same subscriber and to no one else. One and only one subscriber has the ability to see and hear each Aereo transmission. The fact that each transmission is to only one subscriber, in Aereo's view, means that it does not transmit a performance "to the public."

In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform "publicly." Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? . . .

The text of the Clause effectuates Congress' intent. Aereo's argument to the contrary relies on the premise that "to transmit ... a performance" means to make a single transmission. But the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions. That is because one can "transmit" or "communicate" something through a *set* of actions. Thus one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once. . . .

The fact that a singular noun ("a performance") follows the words "to transmit" does not suggest the contrary. One can sing a song to his family, whether he sings the same song one-on-one or in front of all together. Similarly, one's colleagues may watch a performance of a particular play . . . whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public "whether the members of the public capable of receiving the performance ... receive it ... at the same time or at different times." § 101. Were the words "to transmit ... a performance" limited to a single act of communication, members of the public could not receive the performance communicated "at different times." Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.

We do not see how the fact that Aereo transmits via personal copies of programs could make a difference. The Act applies to transmissions "by means of any device or process." *Ibid.*... [W]hether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.

Moreover, the subscribers to whom Aereo transmits television programs constitute "the public." Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. This matters because, although the Act does not define "the public," it specifies that an entity performs publicly when it performs at "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Ibid.* The Act thereby suggests that "the public" consists of a large group of people outside of a family and friends.

Neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars "to the public." We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cars to the public, for it sells cars to individuals who lack a pre-existing relationship to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to "the public," whereas an entity like Aereo

that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.

Finally, we note that Aereo’s subscribers may receive the same programs at different times and locations. This fact does not help Aereo, however, for the Transmit Clause expressly provides that an entity may perform publicly “whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” *Ibid.* In other words, “the public” need not be situated together, spatially or temporally. For these reasons, we conclude that Aereo transmits a performance of petitioners’ copyrighted works to the public, within the meaning of the Transmit Clause.

IV

Aereo and many of its supporting *amici* argue that to apply the Transmit Clause to Aereo’s conduct will impose copyright liability on other technologies, including new technologies, that Congress could not possibly have wanted to reach. We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect.

For one thing, the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo “perform[s],” but it does not determine whether different kinds of providers in different contexts also “perform.” For another, an entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work. See Brief for Respondent at 31 (“[I]f a distributor ... sells [multiple copies of a digital video disc] by mail to consumers, ... [its] 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” (emphasis in original)).

Further, we have interpreted the term “the public” to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content. See Brief for United States as *Amicus Curiae* at 31 (distinguishing cloud-based storage services because they “offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired” (emphasis in original)). In addition, an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.

. . . Finally, the doctrine of “fair use” can help to prevent inappropriate or inequitable applications of the Clause. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that “[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.” Brief for United States as *Amicus Curiae* at 34 (quoting *Sony, supra*, at 431 (alteration in original)). And we note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress. . . .

In sum, having considered the details of Aereo’s practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act. Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo’s activities outside the scope of the Act.

For these reasons, we conclude that Aereo “perform[s]” petitioners’ copyrighted works “publicly,” as those terms are defined by the Transmit Clause. We therefore reverse the contrary judgment of the Court of Appeals, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

. . . [W]e are here concerned with a single claim: that Aereo violates the Networks’ “exclusive righ[t]” to “perform” their programs “publicly.” 17 U.S.C. § 106(4). That claim fails at the very outset because Aereo does not “perform” at all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard (“looks-like-cable-TV”) that will sow confusion for years to come.

I. Legal Standard

There are two types of liability for copyright infringement: direct and secondary. As its name suggests, the former applies when an actor personally engages in infringing conduct. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984). Secondary liability, by contrast, is a means of holding defendants responsible for infringement by third parties, even when the defendants “have not themselves engaged in the infringing activity.” *Id.*, at 435. It applies when a defendant “intentionally induc[es] or encourag[es]” infringing acts by others or profits from such acts “while declining to exercise a right to stop or limit [them].” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

Most suits against equipment manufacturers and service providers involve secondary-liability claims. For example, when movie studios sued to block the sale of Sony’s Betamax

videocassette recorder (VCR), they argued that Sony was liable because *its customers* were making unauthorized copies. *See Sony, supra*, at 434–435. Record labels and movie studios relied on a similar theory when they sued Grokster and StreamCast, two providers of peer-to-peer file-sharing software. *See Grokster, supra*, at 920–921, 927.

This suit, or rather the portion of it before us here, is fundamentally different. The Networks claim that Aereo *directly* infringes their public-performance right. Accordingly, the Networks must prove that Aereo “perform[s]” copyrighted works, § 106(4), when its subscribers log in, select a channel, and push the “watch” button. That process undoubtedly results in a performance; the question is *who* does the performing. *See Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008). If Aereo’s subscribers perform but Aereo does not, the claim necessarily fails.

The Networks’ claim is governed by a simple but profoundly important rule: A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act. *See* 3 W. PATRY, COPYRIGHT § 9:5.50 (2013). . . . Every Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted that rule. *See Fox Broadcasting Co. v Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2014); *Cartoon Network, supra*, at 130–31; *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549-50 (4th Cir. 2004). Although we have not opined on the issue, our cases are fully consistent with a volitional-conduct requirement. . . .

The volitional-conduct requirement is not at issue in most direct-infringement cases; . . . [b]ut it comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system. Internet-service providers are a prime example. When one user sends data to another, the provider’s equipment facilitates the transfer automatically. Does that mean that the provider is directly liable when the transmission happens to result in the “reproduc[tion]” of a copyrighted work? It does not. The provider’s system is “totally indifferent to the material’s content,” whereas courts require “some aspect of volition” directed at the copyrighted material before direct liability may be imposed. *CoStar*, 373 F.3d, at 550-51. The defendant may be held directly liable only if the defendant *itself* “trespassed on the exclusive domain of the copyright owner.” *Id.*, at 550. Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers. *See Cartoon Network, supra*, at 131-32.

A comparison between copy shops and video-on-demand services illustrates the point. A copy shop rents out photocopiers on a per-use basis. One customer might copy his 10-year-old’s drawings — a perfectly lawful thing to do — while another might duplicate a famous artist’s copyrighted photographs—a use clearly prohibited by § 106(1). Either way, *the customer* chooses the content and activates the copying function; the photocopier does nothing except in response to the customer’s commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. . . .

Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content*. When a user signs in to Netflix, for example, “thousands of . . . movies [and] TV episodes” carefully curated by Netflix are “avail-

able to watch instantly.” That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.

The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act. *See Cartoon Network*, 536 F.3d, at 132-33. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track. *See* Brief for 36 Intellectual Property and Copyright Law Professors as *Amici Curiae* at 7. Thus, in the example given above, the fact that the copy shop does not choose the content simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules. *See Sony, supra*, at 434-42; *Cartoon Network, supra*, at 132-33.

II. Application to Aereo

So which is Aereo: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card. . . . Like a photocopier or VCR, th[e] system lies dormant until a subscriber activates it. When a subscriber selects a program, Aereo’s system picks up the relevant broadcast signal, translates its audio and video components into digital data, stores the data in a user-specific file, and transmits that file’s contents to the subscriber via the Internet — at which point the subscriber’s laptop, tablet, or other device displays the broadcast just as an ordinary television would. The result of that process fits the statutory definition of a performance to a tee: The subscriber’s device “show[s]” the broadcast’s “images” and “make[s] the sounds accompanying” the broadcast “audible.” § 101. The only question is whether those performances are the product of Aereo’s volitional conduct.

They are not. Unlike video-on-demand services, Aereo does not provide a prearranged assortment of movies and television shows. Rather, it assigns each subscriber an antenna that — like a library card — can be used to obtain whatever broadcasts are freely available. . . . The key point is that subscribers call all the shots: Aereo’s automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. Aereo’s operation of that system is a volitional act and a but-for cause of the resulting performances, but, as in the case of the copy shop, that degree of involvement is not enough for direct liability. . . .

In sum, Aereo does not “perform” for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, it cannot be held directly liable for infringing the Networks’ public-performance right.³ That conclusion does not necessarily mean that Aereo’s service complies with the Copyright Act. Quite the contrary. The Networks’ complaint alleges that Aereo is directly *and* secondarily liable for infringing their public-performance rights (§ 106(4)) *and also* their reproduction rights (§ 106(1)). Their request for a preliminary injunction — the only issue before this Court — is based exclusively on the direct-liability portion of the public-performance claim. . . . Affirming the judgment below would merely return this case to the lower courts for consideration of the Networks’ remaining claims.

³ Because I conclude that Aereo does not perform at all, I do not reach the question whether the performances in this case are to the public.

III. Guilt By Resemblance

The Court’s conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts; (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs. That reasoning suffers from a trio of defects.

First, it is built on the shakiest of foundations. Perceiving the text to be ambiguous, *ante*, at 4, the Court reaches out to decide the case based on a few isolated snippets of legislative history. The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress. . . .

Second, the Court’s reasoning fails on its own terms because there are material differences between the cable systems at issue in [*Teleprompter* and *Fortnightly*], on the one hand and Aereo on the other. The former . . . captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmits only specific programs selected by the user, at specific times selected by the user. The Court acknowledges this distinction but blithely concludes that it “does not make a critical difference.” Even if that were true, the Court fails to account for other salient differences between the two technologies.⁵ . . . At the time of our *Teleprompter* decision, cable companies “perform[ed] the same functions as ‘broadcasters’ by deliberately selecting and importing distant signals, originating programs, [and] selling commercials,” thus making them curators of content — more akin to video-on-demand services than copy shops. . . .

Third, and most importantly, even accepting that the 1976 amendments had as their purpose the overruling of our cable-TV cases, what they were meant to do and how they did it are two different questions — and it is the latter that governs the case before us here. The injury claimed is not violation of a law that says operations similar to cable TV are subject to copyright liability, but violation of § 106(4) of the Copyright Act. And whatever soothing reasoning the Court uses to reach its result (“this looks like cable TV”), the consequence of its holding is that someone who implements this technology “perform[s]” *under that provision*. That greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work. If that test is not outcome determinative in this case, presumably it is not outcome determinative elsewhere as well. And it is not clear what the Court proposes to replace it. . . .

⁵ The Court observes that “[t]he subscribers of the *Fortnightly* and *Teleprompter* cable systems . . . selected what programs to display on their receiving sets,” but acknowledges that those choices were possible only because “the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob.” The latter point is dispositive: The signals were “ready to emerge” because the cable system — much like a video-on-demand provider — took affirmative, volitional steps to *put* them there. As discussed above, the same cannot be said of the programs available through Aereo’s automated system.

Making matters worse, the Court provides no criteria for determining when its cable-TV-lookalike rule applies. Must a defendant offer access to live television to qualify? If similarity to cable-television service is the measure, then the answer must be yes. But [if so,] . . . Aereo would be free to do exactly what it is doing right now so long as it built mandatory time shifting into its “watch” function.⁶ Aereo would not be providing *live* television if it made subscribers wait to tune in until after a show’s live broadcast ended. . . .

Two other criteria come to mind. One would cover any automated service that captures and stores live television broadcasts at a user’s direction. That can’t be right, since it is exactly what remote storage digital video recorders (RS-DVRs) do, *see Cartoon Network*, 536 F.3d, at 124-25, and the Court insists that its “limited holding” does not decide the fate of those devices. The other potential benchmark is the one offered by the Government: The cable-TV-lookalike rule embraces any entity that “operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers.” Brief for United States as *Amicus Curiae* at 20. The Court sensibly avoids that approach because it would sweep in Internet service providers and a host of other entities that quite obviously do not perform.

That leaves as the criterion of cable-TV-resemblance nothing but th’ol’ totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation). It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. . . . The Court vows that its ruling will not affect cloud-storage providers and cable-television systems, but it cannot deliver on that promise given the imprecision of its result-driven rule. . . . On remand, one of the first questions the lower courts will face is whether Aereo’s “record” function, which allows subscribers to save a program while it is airing and watch it later, infringes the Networks’ public-performance right. The volitional-conduct rule provides a clear answer to that question: Because Aereo does not select the programs viewed by its users, it does not perform. But it is impossible to say how the issue will come out under the Court’s analysis, since cable companies did not offer remote recording and playback services when Congress amended the Copyright Act in 1976. . . .

I share the Court’s evident feeling that what Aereo is doing (or enabling to be done) to the Networks’ copyrighted programming ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it. . . . Aereo’s secondary liability for performance infringement is yet to be determined, as is its primary and secondary liability for reproduction infringement. If that does not suffice, then . . . what we have before us must be considered a “loophole” in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. . . .

I respectfully dissent.

⁶ Broadcasts accessible through the “watch” function are technically not live because Aereo’s servers take anywhere from a few seconds to a few minutes to begin transmitting data to a subscriber’s device. But the resulting delay is so brief that it cannot reasonably be classified as time shifting.

NOTES AND QUESTIONS

Secondary Transmissions and the Doctrine of Multiple Performances

(1) *Some background.* *Aereo* concerns one aspect of a longstanding controversy about how to treat secondary transmissions under copyright law. But what are secondary transmissions? The Act is not entirely helpful in defining the term. Throughout § 111, the operative terms are “primary transmission” and “secondary transmission.” These terms are then defined in subsection (f) entirely in relation to each other. In any particular case, the “primary” transmitter is the one whose signals are being picked up and further transmitted by a “secondary” transmitter who, in turn, is someone engaged in “the further transmitting of a primary transmission simultaneously with the primary transmission . . .”

Simply put, secondary transmissions are rebroadcasts, and the possibilities of rebroadcasting a copyrighted work are endless. They range from a local barbershop that plays the radio for its clientele, to a cable system that picks up a primary signal and retransmits it to millions of listeners. Whatever their respective impact on the market for a copyrighted work, both barbershop and cable system are secondary transmitters engaging in a rebroadcast of a primary broadcast.

This raises two basic questions. Is a rebroadcast of a primary transmission a public performance? If so, should a copyright owner be entitled to enforce the performance right for every rebroadcast of a work, or should the right be limited to the first transmission or in some other way? The current Copyright Act considers secondary transmissions to be performances. It has, however, limited the copyright owner’s ability to control the rebroadcast of his work in four ways. Section 110(5) exempts reception “on a single receiving apparatus of a kind commonly used in private homes,” as well as performances of musical works in stores, restaurants and bars under specified conditions. Section 111 imposes a complex statutory licensing system for over-the-air broadcasts by cable television systems, and §§ 119 and 122 impose similar statutory licenses on satellite retransmissions. These provisions are discussed in more detail below.

(2) As noted in *Aereo*, the issue of what constituted an infringing “public performance” (for profit, a qualification which the 1976 Act does not contain) had a long and vexed history under the 1909 Act. The following notes retrace the convoluted doctrinal meandering — one that reflects an inherent ambivalence, if not outright discomfort, about the authority of copyright owners to control secondary transmissions of their works.

The first case was *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931), in which a hotel received an unauthorized broadcast of a copyrighted musical work and transmitted that broadcast to all the rooms in the hotel. In a unanimous opinion by Justice Brandeis, the Court held that the hotel had publicly performed the copyrighted work. Justice Brandeis observed that “the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed is wholly unlike any then in use.” But, he determined, “the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly . . . which Congress has secured . . .”

Whose responsibility is it to mitigate the rigor of the copyright laws if, logically construed, they create practical difficulties or financial hardships for businesses engaged in exploiting copyrighted works by means of inventions not contemplated by Congress when the laws were adopted?

(3) It is fair to say that the decision in *Jewell-La Salle*, whatever its jurisprudential merits, received less than worshipful treatment in the remaining trilogy of “secondary transmission” cases — *Fortnightly*, *Teleprompter*, and *Aiken* — decided under the 1909 Act.

In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the defendant operated cable systems which received broadcast signals of copyrighted motion pictures and retransmitted those signals to its subscribers without authorization. The issue before the Court was whether such activity was or was not a “performance” of the works. As explained in *Aereo*, the Court drew a dichotomy between broadcasters and viewers: “Broadcasters perform. Viewers do not perform.” Applying this framework, the court held that cable “falls on the viewer’s side of the line,” because it merely “enhances the viewer’s capacity to receive the broadcaster’s signals.” *Jewell-La Salle* was dismissed as “a questionable 35-year-old decision that has not been applied outside its own factual context.”

(4) Six years later, in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court confronted a case in which the defendant, rather than simply making local signals more readily available to subscribers, imported “distant signals” from stations outside the subscribers’ immediate area, originated a portion of its programming “in house,” and inserted its own commercials in retransmitted programming. The Second Circuit held that such practices went beyond merely enhancing a viewer’s capacity to receive the original broadcaster’s signal, thereby making the cable operator a “performer.” 476 F.2d 338 (1973). The Supreme Court reversed, holding that as long as the cable system did not edit the programming that it retransmitted, it was acting as a viewer. The majority added, however, that television “simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor [cable] was yet conceived.” Accordingly, “any ultimate resolution of the many sensitive and important problems in this field . . . must be left to Congress.”

(5) Clearly, the decisions in *Fortnightly* and *Teleprompter* foreclosed any application of the “multiple performances” doctrine to cable television. A year after *Teleprompter*, however, the Court virtually buried whatever remained of *Jewell-La Salle*, even as to radio transmissions, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). Aiken, the proprietor of a fast-food restaurant, played radio broadcasts for patrons through four speakers installed in the ceiling. A majority of the Supreme Court held that Aiken’s activity fell on the viewer/listener’s side of the line drawn in *Fortnightly* and *Teleprompter*. Chief Justice Burger, joined by Justice Douglas, dissented, noting: “There can be no really satisfactory solution to the problem presented here, until Congress acts in response to longstanding proposals.”

(6) Finally, in 1976, Congress *did* act, and in so doing breathed new life into the moribund doctrine of multiple performances. The portion of the House Report explicating the § 106(4) performance right under the new Act states clearly:

Under the definitions of “perform,” . . . “publicly,” and “transmit” in section 101, the concept[] of public performance . . . cover[s] not only the initial rendition . . . , but also any further act by which that rendition . . . is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance . . . is transmitted, repeated, or made to recur would itself be a “performance” . . . under the bill, it would not be actionable as an infringement unless it were done “publicly,” as defined in section 101. Certain other performances . . . , in addition to those that are “private,” are exempted or given qualified copyright control under sections 107 through [122].

H.R. Rep. No. 94-1476 at 63 (emphasis added). Thus, Congress concluded, in effect, that *Buck v. Jewell-La Salle* had been rightly decided on the question of what constitutes a performance — but that the harshness of the results produced by that logic needed to be tempered by a series of carefully crafted exemptions for specific activities. Those targeted exemptions are discussed in more detail below.

(7) *The Aereo case*. Viewed in light of this history, the majority opinion in *Aereo* is unsurprising (indeed, almost inevitable). The dissent, however, focuses instead on a second line of cases, in the lower courts, that addressed the potential liability of internet service providers. As explained in § 7.02, that line of cases (beginning with *Religious Technology Center v. Netcom On-Line Comm. Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995)) rejected direct liability for internet service providers whose services were used by others to disseminate copyrighted material. Such service providers might be secondarily liable, in appropriate circumstances (*see* § 9.03), but they would not be *directly* liable for providing technological services that automatically disseminate user messages without discrimination.

Justices Scalia and Thomas, of course, have long rejected reliance on legislative history (at least in the form of committee reports). In rejecting the House Report in *Aereo*, however, they (joined by Justice Alito) also departed from their professed “original understanding” philosophy, rejecting a 1976 understanding of the Copyright Act (based on strict liability) in favor of a line of cases that did not exist until two decades later. Indeed, although secondary liability had been recognized under the 1909 Act, it was severely underdeveloped until the Supreme Court decided *Sony Corp. of America v. Universal City Studios, Inc.*, 417 U.S. 484 (1984). *See* § 9.02, below.

(8) In designing its system, Aereo relied heavily on *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), excerpted in § 7.02. In *Cartoon Network*, the court

considered a “remote storage” DVR system, which allowed customers to make copies of TV programs and store them on hard drives at Cablevision’s premises for later viewing. Among other claims, the plaintiffs contended that transmission of the stored programs to customers violated the public performance right, pointing to the Transmit Clause in the definition of “publicly.” In a portion of the opinion not reproduced above, the Second Circuit rejected this argument, holding that each such transmission was a “private” performance, because the “members of the public capable of receiving the performance” were limited to the household of the customer who recorded it.

Aereo mimicked Cablevision by giving each customer individual RS-DVR capability (in addition to his or her own antenna). There was, however, one important difference between the two services: Cablevision was an *authorized* retransmitter that paid royalties under the statutory license for cable systems in § 111 of the Copyright Act (see below), whereas Aereo paid nothing to copyright owners. Of course, if each individual transmission was a private performance, there was no need for either Cablevision or Aereo to have a license, whether statutory or negotiated. Had Aereo succeeded, cable systems all over the country theoretically could have stopped paying statutory royalties and joined Aereo in retransmitting over-the-air network broadcasts for free.

(9) A number of other technology companies also tried to rely on *Cartoon Network’s* suggestion that a stream from a unique copy controlled by a single viewer is a private performance. In 2011, a company called Zediva attempted to create a virtual video-rental store. Under its model, a customer would rent a physical DVD located at Zediva’s premises. The DVD would remain off the shelf during the “rental” period, and Zediva’s equipment would create a digital file that could be streamed to the customer under the customer’s control. The District Court distinguished *Cartoon Network*, holding that it was Zediva rather than the customer who initiated the transmission because Zediva had purchased the DVD and reused it for multiple customers. On this reasoning, the performance was to the public for reasons analogous to those stated in *Redd Horne* and *Aveco*, discussed in § 7.05[A]. See *Warner Bros. Entm’t, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011).

(10) From the users’ perspective, Aereo simply allowed them to get better reception of local network broadcasts that they could have watched over-the-air for free (much like the CATV system in *Fortnightly*). Cablevision, likewise, simply allows users to record programs for time-shifting purposes (a practice deemed a “fair use” by the Court in *Sony*), but without having to purchase a home VCR (or DVR). So if Aereo was publicly performing copyrighted works, is Cablevision also publicly performing copyrighted works when it allows subscribers to transmit programs they have recorded to themselves? Why should a consumer not be able to pay a service to achieve indirectly what she admittedly could have achieved directly with home equipment?

Perhaps a line should be drawn between transmissions within the home and transmissions from remote locations. If that line is decisive, however, what happens to “cloud storage” systems such as Dropbox? If a user records a program at home and uploads the program to Dropbox to watch at a later time, can Dropbox allow the user to watch (i.e., transmit) that program at a later time? What if multiple users upload the same program to Dropbox and each wants to watch it at a later time? The majority apparently would distinguish this situation, because each user “owned or possessed” the copy before uploading it. (See the penultimate paragraph in Part III and the

third paragraph in Part Four of the majority opinion.) If that is the relevant distinction, however, wouldn't it doom the "remote storage DVR" previously approved in *Cartoon Network*, because the user did not previously "own or possess" the program before recording it? On the other hand, if the Court was referring to *authorized* "possession," one could argue that the users in *Cartoon Network* were "authorized" to record the program (because they were indirectly paying royalties for the retransmission), whereas the users in *Aereo* were not. But again, any user could have recorded the program from the initial over-the-air broadcast for free, if she had recording equipment at home. Why should it matter where the equipment is located?

(11) If *Aereo* is sufficiently like a cable system to fall under the Transmit Clause, why can't it use the statutory license for cable systems in § 111? The definition of "cable system" in § 111(f)(3) is certainly broad enough:

A "cable system" is a facility . . . [that] receives signals transmitted or programs broadcast by one or more television broadcast stations . . . 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.

Ironically, however, the Copyright Office has consistently taken the position that Internet retransmitters are not "cable systems" within the meaning of § 111 (in part because they are not regulated by the FCC), a position previously affirmed by the Second Circuit. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012). Unless courts reconsider that position after *Aereo*, that leaves Internet retransmitters in a "Catch-22": they are sufficiently like cable systems to be liable for publicly performing copyrighted works, but they are not sufficiently like cable systems to use the statutory license. Their only recourse may be to seek relief from Congress, as cable systems and satellite retransmitters previously had to (see below).