

We (Still) Need to Talk About *Aereo*: New Controversies and Unresolved Questions After the Supreme Court's Decision*

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INTRODUCTION

Recent judicial interpretations of U.S. copyright law have prompted businesses to design technologies in ways that enable the making and transmission of copies of works to consumers while falling outside the scope of the owner's exclusive rights. The archetypal example was Aereo, Inc.'s system for providing online access to broadcast television. Aereo allowed users to tune into individual antennae to stream near-live TV to themselves, online. If this activity fell within the scope of the exclusive right of public performance, then it required the permission of right holders.¹ The "Transmit Clause" of the U.S. Copyright Act's definition of "to perform publicly" brings within the scope of the public performance right:

[T]ransmitting or otherwise communicating a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²

Holdings from the Second Circuit that the relevant performance was the specific

* Some parts of this paper have been developed or drawn from the authors' previous work on the topic. See Rebecca Giblin & Jane C. Ginsburg, *We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the "Transmit" Clause* (Columbia Law Sch. Ctr. for Law & Econ., Working Paper No. 480, 2014), available at <http://perma.cc/TA7Y-T7CG>; Jane C. Ginsburg, *Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms*, 241 REVUE INTERNATIONALE DU DROIT D'AUTEUR (forthcoming July 2014). Many thanks for research assistance to Taylor Jones, J.D., 2014, Columbia Law School, and to Nell Ethridge, J.D., 2015, Columbia Law School.

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1. The process also implicated the exclusive right of reproduction, see 17 U.S.C. § 106(1) (2012), since copies of broadcasts are made when users instruct Aereo's system that they wish to "watch" or "record" a show. However, Aereo argued that the copies are made by consumers and amount to unremunerable fair uses in accordance with the U.S. Supreme Court's 1984 holding that consumer uses of Sony's Betamax VCR to timeshift free broadcast television programming are lawful. See Brief for Respondent at 36–37, *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1245459 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)). Those copies were not the subject of the current litigation and so the merits of that argument will not be discussed further in this Article.

2. 17 U.S.C. § 101 (2012).

transmission from each copy, and that those performances could not be public if made to only a single user, gave Aereo a blueprint for avoiding liability.³ It took up the invitation by designing a system incorporating thousands of dime-sized antennas.⁴ By temporarily assigning one to each user, from which she could access only the signals she could freely pick up from her own rooftop, Aereo's service enabled individual copies to be made of each program and then transmitted on request to the user.⁵ Since each transmission was directed only to the single requesting user, Aereo argued it could not be considered made "to the public."⁶

Broadcasters sought a preliminary injunction against Aereo on the grounds that its near-live transmissions were indeed infringing public performances.⁷ The broadcasters principally contended that under the statute, the relevant performance was not the unique transmission, but the performance of the underlying work.⁸ The Southern District of New York and the Second Circuit adopted Aereo's interpretation; the Supreme Court granted certiorari and reversed, six to three.⁹

At their broadest, the implications of both parties' contentions were equally unpalatable. Aereo's interpretation focused attention on the audience of a particular transmission of a performance of the work. This approach, if given the imprimatur of the Supreme Court, would have encouraged others to design similar technologies to involve unique copies and transmissions, in order to immunize themselves from any finding of infringement of the public performance right.¹⁰ Moreover, by effectively reading the coverage of asynchronous transmissions out of the statute, Aereo's construction might also have placed the United States in violation of its international obligation to implement the exclusive right to make works available "in such a way that members of the public may access them from a place and at a time individually chosen by them."¹¹

The broadcasters' focus on the communication of the performance of the underlying work,¹² taken to its own extreme, had the potential to impose public performance liability on any provider, including cloud storage providers such as Dropbox, whose technology happened to involve transmissions of the same work to multiple members of the public, and regardless of whether or not the service had initially proposed to transmit the work to the consumer.¹³

3. See *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 124–25 (2d Cir. 2008); *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (Cablevision I)*, 478 F. Supp. 2d 607, 612 (S.D.N.Y. 2007); see also discussion *infra* Part I.B.1.a.

4. *Aereo III*, 134 S. Ct. at 2503.

5. See *id.*

6. *Id.* at 2508.

7. *Id.* at 2503–04.

8. See *id.* at 2504.

9. *Id.* at 2503–04.

10. Not all technology providers would be able to "Aereoize" themselves: several factors would need to be present to make it possible to do so. Giblin & Ginsburg, *supra* note *, at 20.

11. World Intellectual Property Organization Copyright Treaty art. 8, Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), 2186 U.N.T.S. 121.

12. See *Aereo III*, 134 S. Ct. at 2508.

13. This is an illustration of the broadest interpretation of the broadcasters' argument. There were potential ways of reading the clause more narrowly to avoid the worst of the threatened collateral

A majority of the Supreme Court held that Aereo's near-live transmissions were indeed performances that Aereo made to the public, and Aereo has now been enjoined from engaging in any transmissions while broadcasts are airing.¹⁴ However, the Court crafted those holdings narrowly in an explicit attempt to limit their implications for other technology providers.¹⁵ In so doing, it resolved the controversy over which is the statutorily relevant performance, but raised a number of puzzling new questions. After setting out the factual context and outlining the scope of the Supreme Court's decision, we consider the ramifications of the decision for other technology providers and users, and debate the merits and weaknesses of the decision.

I. THE CONTROVERSY

A. AEREO'S DESIGN

Aereo launched its online television service in 2012. Tapping into perceived consumer frustration with high cable prices and inflexible "bundling" models,¹⁶ it enabled individuals to access recorded broadcast content over the Internet from computers and mobile devices, in a way that obviated consumers' need for any physical recording device—or even a TV set.¹⁷ Subscribers could use Aereo's technology to watch broadcast television either near-live or at their later convenience from a variety of Internet-connected screens, including phones and tablets.¹⁸ By adding geographic and temporal flexibility while still preserving the ability to watch TV live, Aereo provided what for many users was a better-than-perfect substitute for live TV viewership.¹⁹

As indicated above, the technology worked by combining thousands of thumbnail-sized, independently-functioning antennas with cloud-based recording and storage functionality.²⁰ The system was based around copies, which were made regardless of whether a subscriber requested to "watch" a broadcast (for near-live viewing) or "record" it (for future consumption). When a subscriber launched

damage. GIBLIN & GINSBURG, *supra* note *, at 25.

14. See *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo IV)*, Nos. 12-cv-1540 & 12-cv-1543, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014). Aereo has since filed for Chapter 11 bankruptcy protection. See *The Next Chapter*, AEREO (Nov. 21, 2014), <http://perma.cc/GUF6-YJVL>.

15. See *Aereo III*, 134 S. Ct. at 2510–11; see also text quoted *infra* note 142.

16. Jeff John Roberts, *Aereo's Big Bet to Break the TV Industry: CEO Chet Kanojia Explains*, GIGAOM (Feb. 7, 2013), <http://perma.cc/E3B3-N3EC?type=source>.

17. See Press Release, Aereo, Aereo Announces \$20.5M Series A Financing Led by IAC; New Technology Platform Allows Consumers Access to Live TV over the Internet (Feb. 14, 2012), <http://perma.cc/H3M4-JPYJ>.

18. See *id.*

19. Aereo emphasized this in a press release, announcing: "Now you have the gift of portability. And when it comes to sports, the only thing better than portability is LIVE access . . . and there is no arguing that sports are best live." *Gaining Yards*, AEREO (Feb. 24, 2012), <http://perma.cc/DP5H-NVVJ>.

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

a request for either service, by clicking on a program in the electronic programming guide that Aereo offered its customers, Aereo's servers would allocate a personal antenna and transcoder to the requesting user.²¹ The servers would then instruct the antenna to tune in to the relevant broadcast frequency and create a new directory in which to store the recording.²² Since users were typically assigned a new antenna for each transaction, many different individuals accessed the same antenna over time.²³ However, no two users were ever assigned the same antenna simultaneously, and recordings made while an antenna was assigned to a particular user were never available to any other subscriber.²⁴ This system meant that if 10,000 users all requested the same program to be recorded, 10,000 antennas would separately tune in to it, and unique copies would be made for each.²⁵ If a user had selected "watch," the recording would be discarded once she finished watching (unless she chose to keep it); "recorded" programs would not be automatically discarded.²⁶ Users of either method were able to commence playback of the recording as it was being made, and the recording enabled them to pause and rewind "live" broadcasts.²⁷

B. WHAT MADE THE LAW VULNERABLE TO AEREO'S CHALLENGE?

Viewed in technical isolation, Aereo's design looks clumsy and wasteful. Why utilize thousands of antennae and copies when just one of each could achieve the same end? Why make copies at all for subscribers who simply want to watch a program live? Viewed through the lens of recent judicial interpretation of the U.S. copyright law, however, the design comes into focus as logical and even rather elegant. Aereo's service implicated two of the copyright owner's exclusive rights—those concerning public performance and reproduction—but was designed to fall outside the scope of those rights as recently interpreted by U.S. courts.²⁸

21. *Aereo I*, 874 F. Supp. 2d at 377.

22. *Id.* at 378.

23. Note, however, that users with 'static' subscriptions are generally assigned the same antennas on an ongoing basis. *See id.* at 377–78.

24. *Id.* at 378.

25. It appears that three different copies of each program are actually made, of different quality, allowing a user to choose the one best suited to the Internet connection she is using. *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 35 (D. Mass 2013).

26. *Aereo I*, 874 F. Supp. 2d at 377–78.

27. *Id.* at 377.

28. Amended Answer and Counterclaim at 1, *WNET v. Aereo, Inc.*, 871 F. Supp. 2d 281 (S.D.N.Y. 2012) (Nos. 12-cv-1540 & 12-cv-1543), 2012 WL 3019466 ("Aereo merely provides the Aereo Technology that consumers may use to do what they are legally entitled to do: (1) access free and legally accessible over-the-air television broadcasts using an antenna; (2) create individual, unique recordings of those broadcasts for personal use, *see Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); and (3) record and play back those unique recordings utilizing a remotely-located digital video recorder ("DVR") to personal devices. *See Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).") This paper focuses on the ways in which Aereo was designed to skirt the contours of the public performance right. For a more detailed discussion of how it also sought to sidestep the reproduction right, *see Giblin & Ginsburg, supra* note *, at 5–6.

1. The Public Performance Right

Section 106(4) of the Copyright Act grants the copyright owner in motion pictures and various other works the exclusive right to perform them publicly.²⁹ The Act defines “perform” as “to recite, render, play, dance, or act [the work], either directly or by means of any device or process, or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”³⁰ Performances must be “contemporaneously perceptible”; this requirement distinguishes delivery of a download from the delivery of a stream.³¹ In the latter instance, the user sees and/or hears the work as it is being communicated to her; in the former, she will not experience the work’s contents unless she subsequently summons the work from her computer’s memory.

The Act also defines “[t]o perform or display a work “publicly” in relevant part as:

[B]y transmitting or otherwise communicating a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.³²

This provision, known as the Transmit Clause, generally applies to electronic transmissions. The Copyright Act defines to “transmit” a performance or display of the work as “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”³³ “Devices” and “processes” expressly include those developed after the law came into effect.³⁴

a. *The Cablevision Precedent*

Aereo built its system in reliance on the Second Circuit’s interpretation of the Transmit Clause in *Cartoon Network v. CSC Holdings*. That litigation concerned the legality of Cablevision’s “Remote Storage DVR System” (RS-DVR), which worked the same way as a regular digital video recorder (DVR), except that, instead of the consumer recording the programming onto the hard disk of a device in her home, Cablevision’s service would record it onto a customer’s allotted storage space on one of the company’s central servers.³⁵ Separate recordings

29. 17 U.S.C. § 106(4) (2012).

30. *Id.* § 101.

31. *United States v. Am. Soc. of Composers, Authors, Publishers*, 627 F.3d 64, 74 (2d Cir. 2010). The Supreme Court in *Aereo* confirmed the requirement that the work be contemporaneously visible or audible at the time of its transmission. *See Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2508 (2014).

32. 17 U.S.C. § 101 (2012).

33. *Id.*

34. *Id.*

35. Detailed descriptions of the Cablevision RS-DVR are set out in *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 124–25 (2d Cir. 2008), and *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (Cablevision I)*, 478 F. Supp. 2d 607, 612 (S.D.N.Y. 2007).

would be made for each subscriber who requested one.³⁶ To play the recordings, a customer could select the desired program using her remote control, and the recording stored on her portion of the central hard disk would be streamed to her television via her cable set-top box.³⁷ This system closely replicated the functionality of a traditional DVR—but also resembled a video-on-demand service.³⁸ The principal difference between the two technologies was that users accessing programs via the RS-DVR had to request to record them in advance of airtime, whereas video-on-demand content does not such requests.³⁹

Cablevision obtained no licenses for these activities and contended that it was under no obligation to do so.⁴⁰ Right holders disagreed, arguing that Cablevision infringed their exclusive rights to perform publicly and reproduce their works. Notably, the parties reached a deal to leave certain issues off the table in the resulting litigation: the plaintiffs did not claim secondary infringement, and in exchange, Cablevision waived any defenses based on its customers' possible fair use.⁴¹

There was no dispute that performances were occurring as part of the Cablevision process, but the parties disagreed about *who* performed them, and whether or not they were public. Cablevision's contention that the performances were not public turned on its assertion that the source copies for the individual transmissions had been "made" by the subscribers and that, because each playback transmission was launched from each user's private copy, the performances too could only be private.⁴²

At trial, Judge Chin (sitting prior to his elevation to the Second Circuit) found that Cablevision's involvement in the process was sufficient to justify a finding that it "made" the copies stored on its servers as well as the transmissions from those copies, and that the transmissions were "public" within the meaning of the Act.⁴³

The Second Circuit reversed. It determined that the copies, albeit created using Cablevision's facilities and stored on its servers, were "made" by the subscribers who selected the programs from among the offerings proposed by Cablevision.⁴⁴ In reaching that decision, the court approvingly cited *Netcom*, a 1995 Northern District of California decision that declined to hold an Internet service provider (ISP) directly liable when its facilities automatically reproduced a copyrighted work that had been posted by one of its users.⁴⁵ The *Netcom* court reasoned that,

36. *Cablevision I*, 478 F. Supp. 2d at 615.

37. *Id.* at 615–16.

38. *Cablevision II*, 536 F.3d at 125.

39. *Id.*

40. *Cablevision I*, 478 F. Supp. 2d at 609.

41. *Cablevision II*, 536 F.3d at 124.

42. *Id.* at 126.

43. *Cablevision I*, 478 F. Supp. 2d at 622–23.

44. Before determining who "makes" the copies stored on the Cablevision servers, the Second Circuit ruled that the "buffer" copies that Cablevision made in the process of delivering the content from its real-time signal to its subscribers' storage boxes on its servers were not sufficiently "fixed" in the buffers to amount to copies. See *Cablevision II*, 536 F.3d at 127–30.

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

despite copyright's strict liability standard, "there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."⁴⁶

Having determined that the customers "made" the copies using Cablevision's instrumentalities, the Second Circuit then considered whether a transmission of a performance from the customer's individual source copy could be a "public" performance. It first had to identify the "performance" referred to by the Transmit Clause. This has been the subject of a great deal of controversy, stemming largely from a perceived grammatical ambiguity within the text.⁴⁷ By stating that "[t]o perform . . . a work 'publicly' means . . . to transmit or otherwise communicate a performance . . . of the work . . . to the public," the statute defines the act of transmitting a performance as one type of performing, even though the terms "to perform" and "to transmit" are separately defined as well.⁴⁸ This overlap creates uncertainty as to whether the relevant performance is the performance created by the act of the transmission, as Cablevision argued, or the performance of the underlying work, the position taken by the broadcaster plaintiffs.⁴⁹

The Second Circuit ultimately held that, in the context of transmitting a performance to the public, Congress was referring "to the performance created by the act of transmission."⁵⁰ Having accepted that the transmission was the relevant performance, the Second Circuit reasoned that, since each RS-DVR transmission is made from a unique copy to a single subscriber, those performances could not be "to the public."⁵¹ Certiorari was sought and denied.⁵²

Cablevision is crucial to understanding why *Aereo*'s technological design is not just logical, but perhaps even inevitable. Simply, it appears to instruct technology providers that if they design their systems to enable each user to make unique personal copies, that structure could, in appropriate cases, effectively immunize the services from any liability under both the reproduction and the public performance rights. Although the Second Circuit expressly cautioned that its holding "d[id] not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies,"⁵³ the Second Circuit's subsequent decision in *Aereo* demonstrates that this admonition did not, in fact, confine that court's reading of the statute.

46. *Id.* at 1370.

47. *Cf. Cablevision II*, 536 F.3d at 135–39 (discussing and comparing differing interpretations of the Transmit Clause).

48. *See* 17 U.S.C. § 101 (2012).

49. *Cablevision II*, 536 F.3d at 134.

50. *Id.* at 136.

51. *Id.* at 138.

52. *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

53. *Cablevision II*, 536 F.3d at 139.

b. Aereo's Treatment in the Lower Courts

The district court ruled that *Cablevision* controlled, and that Aereo had therefore not “publicly performed” the television programs.⁵⁴ A divided Second Circuit affirmed. The Second Circuit majority reiterated its view that “the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted.”⁵⁵ It also held that there were “two essential facts” that had led to the holding that *Cablevision*’s transmissions were not public performances: (1) that its RS-DVR allowed each subscriber to create unique copies of each program and (2) that the transmission of the recording to a subscriber was from that unique copy.⁵⁶ These features meant that “the potential audience of every RS-DVR transmission was only a single *Cablevision* subscriber, namely the subscriber who created the copy,” and that limitation meant that the transmission was not “to the public.”⁵⁷ Aereo’s system had those same two features.⁵⁸

In dissent, Judge Chin (since elevated to the Second Circuit) charged that Aereo’s technical architecture was “a sham”:

The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.⁵⁹

Rejecting the contention that holding that Aereo’s transmissions were not public performances would be “exalt[ing] form over substance, because the Aereo system is functionally equivalent to a cable television provider,”⁶⁰ the majority nonetheless rejoined, “[T]hat Aereo was able to design a system based on *Cablevision*’s holding to provide its users with nearly live television over the internet is an argument that *Cablevision* was wrongly decided; it does not provide a basis for distinguishing *Cablevision*.”⁶¹ The majority noted that many other technology providers, particularly cloud computing services, had also designed their systems around *Cablevision*’s holdings.⁶² “Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court’s decisions . . . held that technical architecture matters.”⁶³ Acknowledging that it is more difficult to distinguish between public and private transmissions today than when Congress enacted the Transmit Clause

54. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo I)*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

55. *WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 691 (2d Cir. 2013).

56. *Id.* at 689.

57. *Id.* at 689–90 (internal citations omitted).

58. *Id.* at 690.

59. *Id.* at 697 (Chin, J., dissenting).

60. *Id.* at 693 (majority opinion).

61. *Id.* at 694.

62. *Id.*

63. *Id.*

in 1976, the majority ultimately concluded that the language of the Act, as previously interpreted in *Cablevision*, dictated the conclusion that Aereo's transmissions were not public performances.⁶⁴

II. THE SUPREME COURT'S DECISION

The Supreme Court reversed, with a six-to-three majority (Breyer, joined by Roberts, Kennedy, Ginsburg, Sotomayor and Kagan) holding that Aereo's near-live service infringed the broadcasters' exclusive right of public performance.⁶⁵ Three justices dissented.

The Court articulated two questions:

- A. Did Aereo perform at all?
- B. If yes, did it do so "to the public"?

A. DID AEREO PERFORM?

One of the crucial questions before the Court was *who* performed the works—Aereo, or the individual subscribers who requested that the recordings of the broadcasts be made and streamed? That question was the source of the judicial split. The dissent (Scalia, joined by Thomas and Alito) argued that Aereo did not perform at all since it lacked the requisite volition.⁶⁶ The dissenters distinguished video-on-demand services, which exercise volition in the selection of content offered to consumers, from automated retransmission services, which simply relay an upstream transmission entity's selection of programming proposed to users.⁶⁷ The majority, however, reached the opposite conclusion. While noting that the language of the Act alone does not provide any demarcation between entities that themselves "perform" and those that merely supply equipment enabling others to do so, the majority found that, "read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo's performs."⁶⁸ In an analysis that did not mention the concept of volition at all, the majority reasoned that Aereo's activities were essentially akin to the activities of the community antenna television (CATV) providers that Congress had intended to cover in the 1976 Act:

Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. . . . 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 (antennas, transcoders, and servers), Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional

64. *Id.* at 695.

65. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498 (2014).

66. *Id.* at 2512–15 (Scalia, J., dissenting).

67. *Id.* at 2514.

68. *Id.* at 2504 (majority opinion).

viewers.”⁶⁹

This holding is a narrow one. It instructs that a service will not be deemed a mere “equipment provider” when it is sufficiently analogous to a CATV operator, but the decision provides little guidance about whether and when a technology provider will be sufficiently involved in the infringement to justify the imposition of direct liability outside those circumstances.⁷⁰

B. WERE THOSE PERFORMANCES “TO THE PUBLIC”?

The majority next considered whether those performances were “to the public” within the meaning of the Act.

Congress defined two different kinds of public performances. One type is defined in the Transmit Clause, discussed above.⁷¹ The Act also provides that “[t]o perform or display a work “publicly” means . . . to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”⁷²

The two discrete limbs of the definition aim at very different activities. The first seeks to capture performances that are *in* public. The second targets performances transmitted to places that may be public or private but, in either event, are to be received by “members of the public” and therefore are *to* the public. In the case of performances transmitted to the public for receipt in private places, case law and secondary authority establish that a “substantial number of persons” need not, in fact, have received the transmission; rather it suffices that the performance of the work be offered to “members of the public.”⁷³

The decision of the Northern District of California in *On Command Video* most squarely confronts the distinction between the two limbs. The court analyzed whether the electronic deliveries, upon request from a guest, of video signals to hotel rooms from a bank of cassette players in the hotel’s equipment room amounted to transmissions to “the public.”⁷⁴ The hotel had structured its service so that no two guests could simultaneously view the content from the same cassette. The district court, following Ninth Circuit precedent,⁷⁵ recognized that

69. *Id.* at 2506.

70. *Cf. id.* at 2511 (“We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us.”).

71. *See supra* note 2 and accompanying text.

72. 17 U.S.C. § 101 (2012).

73. Some authorities have also pointed out the commercial character of transmissions held to have been made to “members of the public.” *See, e.g., On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991). In *Cablevision I* and in his dissent in *Aereo II*, Judge Chin cited the commercial character of the relationship to buttress his determination that the transmissions were to “paying strangers,” and thus “to the public.” *See WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 722 F.3d 676, 699 (2d Cir. 2013) (Chin, J., dissenting); *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (Cablevision I)*, 478 F. Supp. 2d 607, 623 (S.D.N.Y. 2007); *see also* Giblin & Ginsburg, *supra* note *, at 28–29; *infra* text accompanying notes 158–162.

74. *On Command Video*, 777 F. Supp. 787.

75. The Ninth Circuit had held that a hotel’s “rental” of videocassettes to its customers for viewing in their rooms was not a public performance because the guest rooms, once occupied, were not

performances in hotel rooms did not occur “in” public places,⁷⁶ but held that the video transmissions were nonetheless “to the public” for the purposes of the Transmit Clause because “the relationship between the transmitter of the performance . . . and the audience . . . is a commercial, ‘public’ one regardless of where the viewing takes place.”⁷⁷ The relationship was “a commercial, ‘public’ one” because, while only one or two persons would occupy the room at any given time, members of the public were generally invited to become paying guests of the hotel.⁷⁸

In *Aereo*, the Supreme Court majority departed from this delineation by using the text of the first limb to help it define “the public” for the purposes of the second. It explained that, 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.”⁷⁹ After repeatedly emphasizing the importance of transmissions directed to a “large” group of people in order to be “to the public,” the Court concluded that “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.”⁸⁰

Thus, the Court’s treatment of “the public” for purposes of the Transmit Clause might be read as requiring actual transmission “to a substantial number of people outside of a family and its social circle,” implying both that a transmission must have been made, not merely offered, and that the audience receiving the transmission must be comprised of many persons.⁸¹ Such a reading would have serious and troubling implications. Imagine a situation in which an entity offers to transmit the work to the public at large, or to the relevant public for the work, but few members of that public actually choose to listen or watch. Does it follow that only those entities that cross an unspecified threshold of actual transmissions are “publicly performing”? If so, then the “public” nature of a performance by transmission could not be ascertained without post-hoc head counting. Not only would such an interpretation introduce uncertainty for copyright owners and exploiters alike, but it would also promote the kinds of baroque copyright-avoiding business models the *Aereo* Court discredited. Given the Copyright Act’s inclusion in the public performance right of discrete transmissions to the public that are separated in time, were the public performance right to turn on receipt of the transmission by a substantial number of persons, then the service might be permitted to make an “insubstantial” number of on-demand transmissions before the number of transmissions tipped over into communicating the performance of

“open to the public.” *Columbia Pictures Indus. Inc. v. Prof'l. Real Estate Invs., Inc.*, 866 F.2d 278, 281 (9th Cir. 1989) (citations omitted).

76. *Id.* at 282.

77. *On Command Video*, 777 F. Supp. at 790.

78. *See id.*

79. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2509–10 (2014).

80. *Id.* at 2510–11.

81. *Aereo III*, 134 S. Ct. at 2511.

the work to a “substantial” number of unrelated persons. If the service is in effect allowed up to, say, fifty “free” transmissions, then one might imagine the creation of a plethora of separately constituted subsidiary services each catering to no more than fifty members of the public.

However, we do not believe that the Court’s judgment leads to this outcome. While the definition of “transmit” speaks in terms of actual communications of performances, the Transmit Clause itself refers to “members of the public *capable* of receiving the performance or display.”⁸² The “members of the public” capable of receiving the performance could be the public at large, or smaller subsets, such as devotees of cooking shows, or the fans of even a particularly obscure performer; what matters is that the *potential* audience be otherwise unrelated to the copyright owner or to each other. By the same token, even if a service structures the transmission so that only one person may ever receive it (for example, as a “private” live stream from a concert performance), but solicits members of the public to attempt to be the lucky winner, the performance still would be made to a “member of the public.” The statutory language of the second limb focuses on whether the transmission is offered to people in their capacity as members of the public, rather than on the number of actual recipients.

Significantly, the *Aereo* Court did not in fact engage in the head-counting exercise its analysis could be read as requiring. It did not inquire into how many of Aereo’s users actually accessed each broadcast, nor did it suggest that those numbers may be significant to its finding of infringement. As recent data show, Aereo had less than 80,000 subscribers across ten cities as of late 2013.⁸³ Presumably then, at least some protected works would have been streamed by just one or a handful of users. Perhaps some works attracted no users at all. Had the Court really intended public performance liability to turn on numerous actual recipients rather than on an offer of transmissions to members of the public, the Court could have been expected to differentiate between content merely offered and content actually transmitted in making its determination of liability.

Justice Breyer’s statement of the controversy at the beginning of his judgment may also suggest that it is the offering of the content rather than its actual receipt that is legally significant:

We must decide whether respondent Aereo, Inc., infringes this exclusive right [of public performance] 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.⁸⁴

82. The legislative history of the 1976 Act indicates that Congress anticipated the possibility that individual users would initiate on-demand performances by transmission; the relevant characteristic of the performance is that it is to “members of the public,” not that the number of “individual members” be substantial. See H.R. REP. NO. 90-83, at 29 (1967) (foreseeing “the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.”).

83. Dwight Silverman, *Aereo Reveals Some Subscriber Numbers, and They’re Tiny*, SEATTLE PI, Jul. 22, 2014, <http://perma.cc/L4MV-7ZWN>.

84. *Aereo III*, 134 S. Ct. at 2503. Similarly: “Considered alone, the language of the Act does not

This language suggests that what triggers the infringement is the provision of a service that “allows” subscribers to view the programs, not the viewings themselves. This interpretation would be consistent with the United States’ international obligations. Article 8 of the World Intellectual Property Organization (WIPO) Copyright Treaty obliges member states to protect the copyright holders’ right of communication to the public, “including the *making available* to the public of their works in such a way that members of the public *may access* these works from a place and at a time individually chosen by them.” In Europe, in construing the EU Information Society Directive’s identical language, the Court of Justice of the European Union has ruled that the “public” character of the “making available” right turns on whether the defendant has *offered* the work to a “large number of persons”—not whether it has in fact been received.⁸⁵ Thus, “a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity.”⁸⁶

For all of these reasons, the *Aereo* Court’s holding is likely to be more nuanced than an initial reading might suggest. Providers will not be liable for damages for merely making available a service that might be used to transmit content. There would be no monetary relief for public performances of works that have not actually been communicated to someone because in those cases there would be no “performance.” However, once a performance *has* occurred, it should not matter how many individuals actually received it, only whether it was available to a “large” or “substantial” number.⁸⁷ And, of course, to enjoin *prospective* performances, it is not necessary that the performance have occurred; the author would have an action to prevent the on-demand transmission to the public of streams of copyrighted works even if no member of the public has yet requested the transmission. But while we find the Court’s requirement that the audience be large necessarily refers to the *potential* audience, any size criterion is still likely to be problematic for reasons we explore more fully below.

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.” *Id.* at 2504. Those activities include not only transmitting the content, but also offering the service to subscribers. *See id.* at 2506–07.

85. Case C-466/12, *Svensson v. Sverigen*, 2014 EUR-Lex CELEX 62012CJ0466, ¶¶ 19, 21 (Feb. 13, 2014).

86. *Id.* ¶ 19.

87. Under U.S. law, at least one actual transmission may have to be made in order for the work to have been publicly *performed*. The difference in terminology between the “making available” right stated in the WIPO treaties, and the U.S. right “to perform the work publicly” may mean that while the international right is triggered regardless of any actual transmission, the U.S. right is articulated in terms that call for separate interpretation of “to perform” and “to perform publicly.” *See* 17 U.S.C. § 101 (2012). Offering a performance to the public meets the second element of “to perform publicly,” but the first element, that there be a “performance,” remains. (Proof of the occurrence of at least one performance might potentially be obtained from the transmitting entities’ server logs, records detailing subscriber use of the service or by subpoenaing members.)

C. CONSIDERATIONS COUNTERING A FINDING OF “PUBLIC” PERFORMANCE

Two additional wrinkles in the majority’s analysis of what it means for a performance to be “to the public” prompt further queries. First, it stated that “those who act as owners or possessors of the relevant product” do not constitute “the public.”⁸⁸ Second, the majority noted, without further explanation, that “the doctrine of ‘fair use’ can help to prevent inappropriate or inequitable applications of the Clause.”⁸⁹

1. “Owners or Possessors”

The Court accompanied its observation that “those who act as owners or possessors of the relevant product” do not constitute “the public” with the further explanation that, “when an entity performs to a set of people, whether they constitute ‘the public’ often depends upon their relationship to the underlying work.”⁹⁰

To the best of our knowledge, this is the first time a U.S. court has recognized the relevance of the nature of the relationship between the copyrighted work or copyright owner and the audience. Case law considering the meaning of “the public” in this context has been surprisingly sparse, but what authorities exist have, until now, focused on the relationship between the *performing entity* and the audience. For example, as described above, the court in *On Command Video* held that the video transmissions were indeed “to the public” for the purposes of the Transmit Clause because “the relationship between the transmitter of the performance . . . and the audience . . . is a commercial, ‘public’ one regardless of where the viewing takes place.”⁹¹ Paul Goldstein agrees that the relationship between the sender and the recipient is vital in determining whether a transmission is “to the public”:

In the case of a transmission to a guest house, the relationship between the homeowner and the recipients of the transmission is not one between an individual and the public, rather is between an individual and his friends or family. By contrast, the relationship between a trailer court manager and guests in the court is one between an individual and the public, as it is in the case of a hotel and its guests.⁹²

Judge Chin adopted *On Command* when he decided *Cablevision* at first instance,⁹³ and further highlighted the importance of the relationship between the transmitter and the audience in his *Aereo* dissent. There, he reasoned that “a transmission to

88. *Aereo III*, 134 S. Ct. at 2510.

89. *Id.* at 2511.

90. *Id.* at 2510.

91. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 778, 790 (N.D. Cal. 1991).

92. 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 7.7.2.2, at 7:168.2 (3d ed. Supp. 2012-2) [hereinafter *GOLDSTEIN ON COPYRIGHT*].

93. *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (Cablevision I)*, 478 F. Supp. 2d 607, 623 (S.D.N.Y. 2007).

anyone other than oneself or an intimate relation is a communication to a ‘member[] of the public,’ because it is not in any sense ‘private.’”⁹⁴ Thus, Aereo’s transmissions were “to the public” because they were being disseminated to “paying strangers”; it was irrelevant that the potential audience of each transmission was restricted to a single member of the public.⁹⁵

While pre-*Aereo* authorities squarely emphasized the relationship between the sender and recipient of the performance to determine whether it has been made “to the public,” we have previously argued that the relationship between the recipient of the transmission and a copy of the copyrighted work is crucial.⁹⁶ The Supreme Court’s observation that whether or not recipients of a transmission are “the public” often depends upon their relationship to the underlying work suggests that this heretofore neglected consideration is now indeed an important part of the analysis.

Unfortunately, however, the significance of that factor is not yet clear. The Court’s reference to “owners or possessors” is, at best, very imprecise; the service’s customer is unlikely to be an owner of “the work” because “the work” is the incorporeal object whose “owner” is the author or other copyright owner. Presumably, based on the submissions by the amicus curiae briefs, including the United States,⁹⁷ the Court was positing the request by a customer of a remote storage service to play back a digital copy that she was entitled—by express or implied license, or under the fair use doctrine—to deposit in a digital storage locker. In that event, even if multiple customers separately stored the same content with the service, the latter’s subsequent on-demand playback of performances of the same work to those customers would not be a transmission to “the public” by the service or the customer: “the term ‘the public’ . . . does not extend to those who act as owners or possessors of the relevant product.”⁹⁸ “Product” in this context apparently includes a license to access the stored content, whether by uploading it from a physical copy that its owner lawfully digitized, or by purchasing a download subsequently stored on a remote source.⁹⁹ When a digital storage service plays content acquired and stored by customers back to those customers, then, there is no public performance.

Moreover, in addition to the customer’s entitlement to access (which the Court treated as a possessory relationship) the customer-stored content, the Court introduced a further consideration: “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.”¹⁰⁰ There, the Court appears to be focusing on the nature of the

94. WNET, *Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 699 (2d Cir. 2013) (Chin, J., dissenting).

95. *Id.* at 698.

96. See Giblin & Ginsburg, *supra* note *, at 33–41.

97. Brief for the United States as Amicus Curiae Supporting Petitioners, *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079.

98. *Aereo III*, 134 S. Ct. at 2510.

99. *Cf. id.* at 2510–11 (distinguishing situations where a user receives a performance through a service provider in the user’s capacity as owner or possessor of the underlying work).

100. *Id.* at 2511.

commercial relationship between the customer and the transmitting service. Remote storage services transmit content to members of the public (their subscribers) when files hosted on their servers are played back to users on request.¹⁰¹ Unlike pay (or listen) on demand, however, the service for which the members of the public are paying is not the opportunity to receive transmissions of performances of particular works offered by the service, but rather to store whatever content the users post—whatever its source—and make it accessible remotely. The customers pay the same subscription fees whatever the content they store and access. Thus, while there is a public that pays in dollars or by being subjected to advertising (or other costs of “free” commercial services),¹⁰² the public is not specifically paying for transmissions of performances of any given copyrighted works.

Whether a service is performing “publicly,” then, appears to turn on the nature of the service for which customers are paying. Any service’s customers are likely to be members of the public, but the same act by the service—transmitting a performance of a given work—may or may not be a public performance depending on the existence of some kind of possessory relationship between the individual members of the public and a copy of or a license to use the content, and depending on whether the service is primarily offering streaming access to service-specified copyrighted works.

2. Fair Use

The majority also posited that in appropriate cases, even if the service is deemed to be “publicly performing” third party content, the fair use doctrine might excuse the transmission and thus “prevent inappropriate or inequitable applications of the Clause.”¹⁰³ The majority did not, however, go on to apply that doctrine to the *Aereo* facts, thereby indicating that it did not think *Aereo* presented even an arguable case for fair use. As a result, whether other, less cable-like, storage and transmission services might be engaging in fair use is left to future controversies.

III. QUESTIONS AND IMPLICATIONS

The Court’s narrowly-phrased decision leaves the precise scope of the Transmit Clause uncertain. Among the questions the opinion raises, we analyze the

101. Arguably, if the customer is requesting playback of content she selected and stored in “her” cloud locker, the service’s role in the communication might be too passive, limited to the technical relay of the content, to be deemed the party who “performs” the content. *See id.* at 2507 (“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.”).

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

103. *Aereo III*, 134 S. Ct. at 2511.

following:

A. What does the Court’s decision mean for the “volition” predicate introduced by the Second Circuit? Who “makes” the copies and transmissions?

B. Would otherwise identical services that offer delayed time shifting (and no near-live transmissions) also be “performing publicly”?

C. What are the implications of the decision for other technology providers, including cloud storage providers, that look less like cable TV operators?

A. WHAT DOES *AEREO* MEAN FOR “VOLITION”? WHO “MAKES” THE COPIES AND TRANSMISSIONS?

1. Volition and Transmission

Remarkably, the *Aereo* majority did not mention the concept of volition at all. That silence in the face of the dissenters’ emphatic interpolation of a “volition” predicate might suggest that the majority considers volition irrelevant to the assessment of whether the defendant has publicly performed a work. The majority’s analysis of whether *Aereo* “perform[s] at all” distinguishes between the mere provision of equipment and “engag[ing] in activities like *Aereo*’s.”¹⁰⁴ The majority underscored Congress’ rejection in the 1976 Act of the Court’s *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.* precedents.¹⁰⁵ In those decisions, the Court had held that traditional cable TV retransmission services were not “performing” the works that the services retransmitted to their customers because the customers chose which programs to watch, and the services were merely providing equipment that the customers might themselves have installed (given the Court’s rather fanciful evocation of the customers’ acts, such as placing an aerial on a mountaintop and stringing a wire from the mountaintop to the customer’s home).¹⁰⁶ Congress’ subsequent amendment of the Copyright Act was intended to ensure that cable operators were considered “perform[ers]” of the retransmitted works and therefore fell within the scope of the Act.¹⁰⁷ According to the *Aereo* Court, a service “performs” copyrighted works, rather than simply supplies equipment, when it “uses its own equipment, housed in a centralized warehouse, outside of its users’ homes,” to transmit performances of works to viewers, even when that equipment “may . . . emulate equipment a viewer could use at home,” and even when the customers selected which particular programs to watch from among the

104. *Id.* at 2504 (internal quotation marks omitted).

105. *Id.* at 2504–05 (citing *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968)).

106. See *Teleprompter*, 415 U.S. at 308–09; *Fortnightly*, 392 U.S. at 398–400.

107. See H.R. REP. NO. 94-1476, at 63 (1976) (“[A] cable television system is performing when it retransmits [a network] broadcast to its subscribers.”). The *Aereo* Court elaborated that “[t]he [Transmit] 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.” *Aereo III*, 134 S. Ct. at 2506.

totality of the broadcasts the service made available for retransmission.¹⁰⁸ The majority therefore appears to stress the service's active engagement in the transmission, and its similarity to the CATV providers whose activities the Act was intended to cover, rather than any specific "volition" with respect to the particular content transmitted.

Indeed, the majority's rejection of the dissent's characterization of Aereo's service as "a copy shop that provides its patrons with a library card,"¹⁰⁹ underscores the irrelevance of the customer's program selection to the determination of whether the service has "performed" the works it transmits. The Court also declined to attribute any significance to the additional layer of consumer intervention involved in Aereo's system relative to cable systems: while cable systems retransmit sua sponte, Aereo does not activate the subscriber's antenna without the subscriber's request. Adopting a pragmatic perspective, the Court announced that "this difference means nothing to the subscriber. It means nothing to the broadcaster."¹¹⁰

Nonetheless, the Court did not completely discount the role of the user in the determination of "who performs" a work: "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."¹¹¹ This statement is a far cry from adopting the kind of "volition" predicate urged by the dissent (or, for that matter, by the Second Circuit in *Cablevision*), but it nonetheless suggests that when the service is less "cable-like" than Aereo, the majority's distinction between providing the equipment that enables a performance, and actually "performing," remains uncertain.

In any event, it should be clear, even under the dissent's characterization, that specific "volition" as to the transmission of particular content is not required for the communication to be considered a "public performance." All justices agreed that video on-demand services are "performing," and it should not matter how automated the process: once the service assembles the selection of the programs from which the consumer may choose and then offers them commercially to the public, the service has gone beyond merely providing transmission facilities. For the majority, cable and cable-like services still "perform" even though they did not originate the selection of programming offered to the users (the broadcasters did, though the cable operators select the source broadcast stations whose content they retransmit), and even though the users ultimately choose which programs to watch, by turning a knob on the television, or clicking on a website. (Of course, the last feature of user involvement is common to on-demand transmissions, too.) If on-demand services occupy one end of the "who performs" continuum, and cable-like

108. *Aereo III*, 134 S. Ct. at 2506–07.

109. The dissent's analogy, and its purported distinction from pay-per-view services (which the dissent acknowledges do "perform" the user-selected works) is in any event highly problematic. *Id.* at 2514 (Scalia, J., dissenting). The key distinction, for the dissent, is that video-on-demand services "choose the content." *Id.* at 2513 (emphasis in original). But that distinction in fact fails: libraries (other than the Library of Congress) do not acquire every book published; they choose the books that comprise their collections.

110. *Id.* at 2507 (majority opinion).

111. *Id.*

services stand at an intermediate—but still “performing”—point, services that offer remote storage (but are entirely agnostic as to the content users store) might be located at the other end.

2. “Volition” and the Reproduction Right

While *Aereo* addressed only the public performance right, the majority’s opinion raises questions about the continued application of the “volition” standard to the reproduction right. The majority provided no explicit guidance about the circumstances in which a technology provider will be taken to have engaged in the relevant act *except* where they are closely analogous to CATV providers. The dissent criticized the majority’s reasoning on this point for, among other things, bypassing the volitional conduct test without providing any useful framework to replace it.¹¹² In the absence of any such guidance, future courts may adopt a hybrid standard: that *Aereo* applies where the defendant is sufficiently cable-like, and the volition standard prevails in other cases. We consider the implications of the majority decision for the future operation of “volition” in the technical analysis below and in our debate about the merits of the decision.

B. WOULD OTHERWISE IDENTICAL SERVICES THAT OFFER DELAYED TIMESHIFTING (AND NO NEAR-LIVE TRANSMISSIONS) ALSO BE “PERFORMING PUBLICLY”?

The Supreme Court’s decision covered only *Aereo*’s near-live offering. It did not address *Aereo*’s timeshifting facility, which enables users to record a program for viewing at a more convenient time.¹¹³ In the remand proceedings, *Aereo* argued that any injunction should exclude that aspect of its service, and that transmissions would be sufficiently delayed to fall outside the scope of the Supreme Court’s ruling if they started streaming as little as ten minutes after the original broadcast commenced airing.¹¹⁴ The district court instead issued an injunction barring *Aereo* from transmitting any program while it was still being broadcast, reserving for determination at trial questions about the legality of transmissions made after broadcast.¹¹⁵ *Aereo* has now filed for Chapter 11 bankruptcy protection, and it appears unlikely that there will be any such trial.¹¹⁶

Whether or not *Aereo* would have been liable for transmitting pre-recorded programs after they finished airing would have depended on whether *Aereo* was found to be the performer of those transmissions, and, if so, whether the performances are “to the public.” The answer to those questions would apply equally to neighboring technologies like Cablevision’s RS-DVR, which similarly

112. *Id.* at 2515–16 (Scalia, J., dissenting).

113. *See id.* at 2503 (majority opinion).

114. *See* Am. Broad. Cos., Inc. v. *Aereo*, Inc. (*Aereo IV*), Nos. 12-cv-1540 & 12-cv-1543, 2014 WL 5393867, at *2 (S.D.N.Y. Oct. 23, 2014).

115. *Id.* at *8–10.

116. *See The Next Chapter*, *supra* note 14.

utilizes remotely hosted equipment to make recordings that are later transmitted to the user for watching at a more convenient time. In determining the legality of that product in 2008, the Second Circuit had ruled that the relevant performance was the specific transmission made from each unique copy and reasoned that, since the audience of that transmission could only be a specific individual, the transmission could not be “to the public.”¹¹⁷ The Second Circuit did not consider who *engaged in* those performances, because its finding that the performances were not “public” obviated that issue.¹¹⁸ Now that the Second Circuit’s analysis of the “public” character of the performances is no longer good law post-*Aereo*, it is useful to consider whether the Supreme Court’s holdings mean that other kinds of providers of remote timeshifting services would be “performing publicly.”

The technology that underpins Aereo’s near-live and prospective delayed offerings is exactly the same.¹¹⁹ In both instances, recordings are made and then streamed online to the requesting viewer. The only real difference is that the timeshifting viewer watches those recordings at a later time. But even though nothing changes other than the lapse of time between the original broadcast and its subsequent retransmission by the service that recorded the broadcast, the majority’s reasoning could yield a different answer to the questions both of “who performs” the work, and of whether the performance is “to the public.” The following analysis attempts to answer those questions based on a hypothetical version of Aereo that would permit users to stream back their requested recordings only after the programs finish airing.

1. Who “Performs” the Timeshifted Transmissions?

The Supreme Court majority held Aereo to be the performer of the near-live transmissions because its activities in that regard were so similar to those of the cable companies the Act was amended to reach. The majority did not perceive sufficient pertinence in the “sole technological difference” between cable retransmission systems and Aereo itself—that Aereo’s system did not transmit until activated by the subscriber: “this difference means nothing to the subscriber. It means nothing to the broadcaster.”¹²⁰ By contrast, the majority acknowledged that “[i]n 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.”¹²¹ But the majority did not elaborate on what these “other cases” might be.

In the case of the delayed timeshifting services provided by both Aereo

117. See *supra* text accompanying notes 44–53.

118. *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 134 (2d Cir. 2008).

119. See *WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 681 (2d Cir. 2013); Transcript of Hearing on Preliminary Injunction at 12, *Aereo IV*, 2014 WL 5393867 (Nos. 12-cv-1540 & 12-cv-1543) [hereinafter *Aereo IV* Hearing Transcript].

120. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2507 (2014).

121. *Id.*

(hypothetically) and Cablevision (in fact), the system neither transmits until activation by a subscriber, nor permits subscribers to watch recordings of programs as they are simultaneously being broadcast, nor determines when the subscriber may watch the programs.¹²² Thus, the parallel to the CATV providers of the 1970s arguably reduces to the services' common use of their own equipment (stored in centralized warehouses). Would that factor in itself be sufficient to support a finding that the service was the performer? It is our view that a service provider might be considered closely analogous to a cable provider even where it transmits content only after it has finished airing. For example, were Aereo to offer to automatically begin its timeshifted transmissions directly after the initial broadcast, so that subscribers could in effect continuously stream TV with a slight delay, a court may find that Aereo still looks sufficiently analogous to such a provider.

Once the cable TV provider analogy fails, however, perhaps because of too great a lapse of time between the original broadcast and its subsequent retransmission (how great is "too great" remaining undefined), *Aereo's* reliance on kinship to cable provides only limited comfort to plaintiffs wishing to make a case that remote DVR providers themselves "perform." The *Aereo* Court carefully avoided giving any explicit guidance about "who performs" in circumstances outside the cable TV analogy.¹²³ The Court left the scope of its decision ambiguous by stating that "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.'"¹²⁴

This remark does not warrant a negative inference that different providers in different contexts do *not* perform. It does not necessarily follow that *only* those remote transmission services that can be assimilated to cable services are "performing" the works they transmit. We can identify some additional factors that might in future cases be deemed relevant to determining who "performs." As discussed above, in finding Aereo to be the performer in the case of its near-live TV service, the Court focused on Aereo's active engagement in the transmissions.¹²⁵ The timeshifting services supplied by Aereo and Cablevision not only store and play back works, but also initially propose that content to their subscribers.¹²⁶ As a result, they closely resemble video-on-demand services. The

122. In the case of Cablevision's RS-DVR, we make this assumption on the basis of the Second Circuit's explanations of that technology in its 2008 judgment. There it was explained that Cablevision would split the stream of data received from various content providers into two—one of which would be immediately routed to customers in the same way as before the RS-DVR existed, and the other of which would be diverted to a different server and from which copies would be made upon request from subscribers. It may well be possible for a user to both view a program and record it at the same time. However, the signals that the user is watching live would seem to fall within Cablevision's retransmission license. The public would not be able to watch the recorded copy as it was being made—only play it back after broadcast. Accordingly, in this scenario (as for the case of Aereo's hypothetical timeshifting service) timeshifted copies could not be viewed until after the recording is completed.

123. *Aereo III*, 134 S. Ct. at 2510–11.

124. *Id.* at 2510.

125. *See id.* at 2506; *see also supra* notes 69, 108 and accompanying text.

126. *See Aereo III*, 134 S. Ct. at 2506–07; *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 125 (2d Cir. 2008).

principal difference is the constitution of the selection of programming offered to subscribers; rather than assembling the offered repertoire itself, the services act as conduits for the broadcasters' selections. Third party origination of the selection of programming suggests that timeshifting services have less "volition" than a traditional video-on-demand provider, but nonetheless still have a significant degree of active participation in the activity, particularly if the services select among the broadcast channels whose programs the services record and retransmit. Whether the addition of this conduct to the remote storage and transmission activities suffices to characterize those services as "performing" the works is yet to be seen, but will no doubt be vigorously argued by future plaintiffs.¹²⁷

2. If the Remote Timeshifting Service Performs, Does It Do So "to the Public"?

Even if Aereo and Cablevision were found to be the performers of the timeshifted transmissions, the majority's analysis raises the further question whether, in the case of delayed transmissions for the purpose of timeshifting, the services are performing "to the public."

The majority held that Aereo made its near-live transmissions "to the public" because it transmitted them to large numbers of subscribers who lacked any prior relationship to the works, and who were paying primarily to watch broadcast television programs.¹²⁸ However, Aereo's and Cablevision's timeshifting services record full copies of works to users' individual storage lockers prior to the eventual delayed transmission,¹²⁹ thus giving the users some "prior relationship" to the works. If those users then receive the transmissions in their capacities as lawful owners or possessors of the underlying works, that will be relevant to whether they constitute "the public" for purposes of the subsequent transmission.¹³⁰ In addition, those timeshifters are not paying primarily to watch near-live TV, but for the ability to watch televised content at a more convenient time—something that the Supreme Court, in a different technological environment, had previously held to be a fair use.¹³¹

The majority, having evoked fair use, did not explain why that exception did not exculpate Aereo's near-live transmissions.¹³² However, the Court's finding that the

127. We explore below, *see infra* text accompanying notes 234–239, the legal analysis of another way in which Aereo might redesign its service to elude liability for public performances: rather than streaming the content of the recorded programs to its subscribers (the Cablevision model), it might simply transmit the file to the subscriber as a download, for the subscriber to subsequently open and play. In this scenario, Aereo would be transmitting a file, not a "performance" (since the work would not be contemporaneously perceptible with its communication). Whether Aereo's response to its subscriber's request for delivery of the copy would violate the § 106(3) distribution right would depend on whether the act of delivery is attributed to Aereo or to the subscriber. *See* 17 U.S.C. § 106(3) (2012).

128. *Aereo III*, 134 S. Ct. at 2510.

129. *Id.* at 2503; *Cablevision II*, 536 F.3d at 125.

130. *Aereo III*, 134 S. Ct. at 2510.

131. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that consumer uses of Sony's Betamax VCR to timeshift free broadcast television programming are fair use).

132. *See Aereo III*, 134 S. Ct. at 2511.

service, rather than the subscriber, engaged in the transmission may well have doomed a fair use defense. U.S. law has traditionally operated less favorably to commercial service providers that act on a user's behalf than to the user herself.¹³³ Thus, copy shops may be liable for making infringing copies, even if the copying would have amounted to educational fair use had it been done by the ultimate user on her own behalf.¹³⁴ In one such case, the Sixth Circuit observed that "courts have . . . properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses."¹³⁵ In a subsequent case involving the sale of karaoke discs, that court reiterated that "the end-user's utilization of the product is largely irrelevant; instead, the focus is on whether the alleged infringer's use is transformative and/or commercial."¹³⁶ Thus, while a viewer arguably has a fair use right to stream local free-to-air content when she was freely entitled to do so via a rooftop antenna, it is unlikely that Aereo had the right to do so, on the viewer's behalf, for profit.

We have posited that the service's involvement in the selecting, proposing, storing and transmitting the content may potentially lead to its designation as the entity that "performs" the work. Nonetheless, even if it is the provider that performs, the users' prior relationship to the works, and their payment for access to timeshifted works rather than to near-live broadcast TV, may introduce sufficient distinctions to support a finding that those performances are not "to the public." But that conclusion depends on the assumption that the copies were lawfully made by virtue of an end-user timeshifting fair use exception. In fact, we should not treat *Sony* as imprimatur for any and all timeshifting whatsoever.¹³⁷ *Sony* was far from a blanket authorization of any and all consumer time-deferred copying of television broadcasts. While the *Sony* Court assumed that consumers should be entitled to watch at their convenience programming that they had been invited to view for free,¹³⁸ the Court reached the conclusion that the copies made there were noninfringing only after considering market harm, cost and difficulty of copying,

133. Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, 218 REVUE INTERNATIONALE DU DROIT D'AUTEUR 167, 224 (2008) [hereinafter Ginsburg, *Recent Developments in US Copyright Law*]; WILLIAM F. PATRY, PATRY ON FAIR USE § 7:3 (2014).

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

135. *Princeton Univ. Press*, 99 F.3d at 1389 (quoting WILLIAM F. PATRY, PATRY ON FAIR USE § 7:3 (2014)).

136. *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007).

137. See, e.g., *Fox Broad. Co. v. Dish Network, L.L.C. (Fox I)*, 905 F.Supp.2d 1088 (C.D. Cal. 2012), *aff'd* by *Fox Broad. Co. v. Dish Network L.L.C. (Fox II)*, 723 F.3d 1067 (9th Cir. 2013), *amended and superseded on denial of reh'g en banc* by *Fox Broad. Co. v. Dish Network L.L.C. (Fox III)*, No. 12-57048, 2014 WL 260572 (9th Cir. Jan 24, 2014).

138. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421, 423–25 & n. 8 (1984).

and the nonexistence of copyright owner-supplied alternatives to inconvenient broadcast times.¹³⁹

Technologies such as Aereo are readily distinguishable from Sony's Betamax. Most importantly, they have much more potential to compete with remunerated markets for making the same content conveniently available on demand (which have developed significantly since the 1980s, now offering multiple alternative viewing opportunities to the original broadcast time). Moreover, the technologies have eliminated a great deal of "friction" from the copying process (notably, as in the case of Dish's AutoHop service, by automatically deleting the advertisements¹⁴⁰). In an environment where there is less and less difference between commercially-aided timeshifting and video on demand (which indubitably, even for the dissenters, implicates the public performance right), the reflexive assumption that timeshifting equals fair use should be questioned. If users do not in fact have a legitimate, possessory relationship to the content, under the Supreme Court's reasoning, that may change the performance into one to the "public."

C. WHAT ARE THE IMPLICATIONS OF THE DECISION FOR OTHER TECHNOLOGY PROVIDERS?

One of the biggest concerns in the lead-up to the Supreme Court's decision was the fear that a finding against Aereo could impose enormous collateral damage upon other technology providers, particularly the cloud storage industry.¹⁴¹ The majority clearly expressed its intention to draft its holding narrowly to avoid such outcomes.¹⁴² However, it declined to elaborate on the implications of its holdings for most other kinds of Internet-based enterprises.¹⁴³ Here, we consider what the Supreme Court's decision might mean for a range of technology providers, including those that supply cloud storage, Slingboxes, "tablet TVs" and live TV streaming, in order to tease out the boundaries of its ruling.

139. See Giblin & Ginsburg, *supra* note *, at 35.

140. See *infra* text accompanying notes 163–165.

141. See, e.g., Brief for Respondent, *supra* note 1, at 20.

142. In the words of the Court:

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.

... [T]he 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." ...

....

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."

Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III), 134 S. Ct. 2498, 2510–11 (2014).

143. *Id.* at 2511.

1. Cloud Storage

Before the Supreme Court handed down its ruling, there was widespread concern that a reading of the Transmit Clause that captured Aereo might also impose new liability on each cloud provider whose users streamed copyright-protected works from their personal storage “lockers.”¹⁴⁴

Dropbox, one of the most popular online services, epitomizes the likely implications for cloud storage providers. Dropbox’s pitch is simple—it offers “[y]our stuff, anywhere.”¹⁴⁵ Dropbox copies and synchronizes content between multiple devices, and has been designed to make those processes as simple as possible for users.¹⁴⁶ The subscriber needs only to install the application, log in and start putting material in a folder.¹⁴⁷ Dropbox then actively monitors that folder, automatically copies and synchronizes users’ files across each of their devices via the Internet once new content is added, and encrypts those files when they reach its servers.¹⁴⁸ Subscribers may then access it from phones, tablets and anywhere with an Internet connection. Accounts are private: only the account owner or a person she has expressly authorized may access the content stored within them.¹⁴⁹

Imagine that a user records a broadcast of a particular NFL football game, and, intending to watch it at a more convenient time, uploads that recording to her private Dropbox account. When she later streams the recorded broadcast from her Dropbox, is Dropbox engaging in an infringing public performance?

The starting point of the analysis under *Aereo* must be to ask who engages in the transmission.¹⁵⁰ Dropbox has little resemblance to the CATV providers the 1976 Act was intended to capture. It does not sell a service that allows subscribers to watch television programs; it sells a service that allows subscribers to remotely store any kind of content at all. There is nothing about that service that is specifically designed to enable users to watch TV simultaneously or near simultaneously with the broadcast. Dropbox does own and host the storage equipment, but it does not provide the antenna or transcoder equipment necessary to receive and convert the broadcast signals—those must be obtained elsewhere by the user. And Dropbox does not propose the content to the users to store and play back. Given the majority’s careful confinement of its “who performs?” analysis to technology providers analogous to CATV providers, and its explicit reference to cloud storage providers in noting that the right may not be infringed where service users “pay[] primarily for something other than the transmission of copyrighted

144. See, e.g., Brief for Respondent, *supra* note 1, at 49.

145. See *Install*, DROPBOX, <http://perma.cc/ZS43-KJ82?type=source> (last visited Nov. 13, 2014).

146. See *How Do I Sync Files Between Computers?*, DROPBOX, <http://perma.cc/6MXD-Q8VM?type=source> (last visited Nov. 13, 2014).

147. *Id.*

148. See *id.*; *How Secure Is Dropbox?*, DROPBOX, <http://perma.cc/XLT3-3WNH?type=source> (last visited Nov. 13, 2014).

149. See *How Do I Share a File or Folder with Others?*, DROPBOX, <http://perma.cc/NQV5-PEJ8?type=source> (last visited Nov. 13, 2014); *How Do I Unshare a File or Folder with Others?*, DROPBOX, <http://perma.cc/SBQR-47R4?type=source> (last visited Nov. 13, 2014).

150. See *Am. Broad Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. at 2504.

works,”¹⁵¹ the *Aereo* judgment does not suggest that Dropbox would be the one performing.

Even if Dropbox were “performing,” it seems unlikely that it would be doing so “to the public.” Dropbox has millions of subscribers,¹⁵² and presumably sometimes substantial numbers of users with no relationship to one another do store and stream the same works. However, those subscribers have a clear prior relationship to the work (in that they have uploaded the file after making the initial recording) and, rather than paying Dropbox primarily to watch copyright-protected works, they pay primarily for the benefit of that storage. Accordingly, these performances would not be “to the public” and should therefore fall outside the scope of the copyright owners’ exclusive rights. In our view, *Aereo* successfully tailored its ruling to protect Dropbox-type cloud storage providers from public performance liability.

2. “Slinging” Technologies Such as Hopper with Sling and TiVo Stream

The current generation of home DVRs that incorporate “slinging” technologies provides a particularly intriguing case study in testing the implications of the Supreme Court’s decision. Slinging is the practice of shifting to another location content that consumers are entitled to watch in a different place.¹⁵³ The original Slingbox was created by a pair of keen Giants baseball fans who found it difficult to follow their team’s progress through the World Series while they were travelling.¹⁵⁴ They came up with a product that, when connected to the home video source and network router, received the video signal, encoded it into a compressed format and transmitted it online to another device on request, enabling users to access their home TVs and DVRs from any other Internet-connected screen.¹⁵⁵ Slinging does not involve making copies of works, just retransmitting them elsewhere.¹⁵⁶ Technical restrictions prevent Slingboxes from placeshifting to more than one device at a time, and the use of passwords and encryption further prevent shows from being “slung” to the public at large.¹⁵⁷ A number of consumer products now incorporate such technology, including Dish’s Hopper with Sling DVR and TiVo’s Stream and Roamio DVRs.¹⁵⁸

151. *Aereo III*, 134 S. Ct. at 2511.

152. Josh Constine, *Dropbox Hits 200M Users, Unveils New “For Business” Client Combining Work and Personal Files*, TECHCRUNCH (Nov. 13, 2013), <http://perma.cc/UN5T-4JYD>.

153. *Digital Content and Enabling Technology: Satisfying the 21st Century Customer: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. 18 [hereinafter *21st Century Consumer Hearing*] (statement of Blake Krikorian, Co-Founder & CEO, SlingMedia, Inc.).

154. *See id.* at 16–17.

155. *How Placeshifting Works*, SLINGBOX, <http://perma.cc/BP34-93XZ> (last visited Oct. 3, 2014).

156. *21st Century Consumer Hearing*, *supra* note 153, at 19 (statement of Blake Krikorian, Co-Founder & CEO, SlingMedia, Inc.).

157. *Id.*

158. *See, e.g., Dish Anywhere TM: Exclusive Hopper with Sling Features*, MYDISH, <http://perma.cc/H3UK-BUEA> (last visited Oct. 3, 2014); *Roamio*, TiVo, <http://perma.cc/6KEX-GY45?type=image> (last visited Oct. 3, 2014); *Stream*, TiVo, <http://perma.cc/FK5B-LXQL?type=image>

Dish has incorporated slinging technology in its DVRs in various forms since 2009.¹⁵⁹ The technology was recently challenged as part of Fox's ongoing litigation against Dish's Hopper DVR technology.¹⁶⁰ Dish attracted Fox's ire in 2012 after launching a DVR with a feature called PrimeTime Anytime. Once that feature is activated, it automatically records all prime time programming from each of the four major broadcast networks and retains it for eight days, effectively enabling subscribers to access prime time broadcast content on demand.¹⁶¹ A few months later, Dish added a new feature called AutoHop that worked with PrimeTime Anytime to skip commercials.¹⁶² If AutoHop was available, subscribers would be alerted when watching the relevant recording.¹⁶³ If they chose to automatically skip the commercials, they would see just a few seconds from the beginning and end of an ad break.¹⁶⁴ "Unlike the 30-second skip feature available on many DVRs, once a user has enabled AutoHop, the user does not press anything to skip through commercials."¹⁶⁵

The court rejected Fox's request for a preliminary injunction against Dish's provision of the PrimeTime Anytime and AutoHop features.¹⁶⁶ By that point, however, Dish had released Hopper with Sling, a "second generation" version of the Hopper that incorporated slinging technology.¹⁶⁷ Combined with the "Dish Anywhere" software, it enabled users to watch live broadcast television on a remote device, watch prerecorded material stored on the DVR or schedule future recordings.¹⁶⁸ There are a number of key differences between Dish's Hopper with Sling and Cablevision's RS-DVR. For one thing, no copies are ever made as part of the transmission process.¹⁶⁹ For another, the content is transmitted directly from the Hopper to the remote device without passing through the service provider's servers.¹⁷⁰ A third difference is that the Hopper exists as a physical box in the

(last visited Oct. 3, 2014).

159. See Order Re Plaintiffs' Motion for Preliminary Injunction Re Dish's New 2013 Services (Redacted Version) at 3, *Fox Broad. Co. v. Dish Network, L.C.C. (Fox I)*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012) (No. 12-04529).

160. *Fox Broad. Co. v. Dish Network L.L.C. (Fox IV)*, No. 13-56818, 2014 WL 3398107 (9th Cir. July 14, 2014).

161. *Fox Broad. Co., Inc. v. Dish Network L.L.C. (Fox III)*, 747 F.3d 1060, 1064–65 (9th Cir. 2013).

162. *Id.* at 1065.

163. Commercial free watching is typically available from the morning after each program is recorded. *Id.*

164. *Id.*

165. *Id.*

166. *Fox Broad. Co., Inc. v. Dish Network, L.C.C.*, 905 F. Supp. 2d 1088 (*Fox I*), *aff'd* by *Fox Broad. Co., Inc. v. Dish Network L.L.C. (Fox II)*, 723 F.3d 1067 (9th Cir. 2013), *amended and superseded on denial of reh'g en banc* by *Fox III*, 747 F.3d 1060.

167. See Darrell Etherington, *DISH's Hopper with Sling Whole-Home DVR Now Available Nationwide, Following CES 2013 Awards Controversy*, TECHCRUNCH (Feb. 11, 2013), <http://perma.cc/A2LK-YKRA>.

168. See Order Re Plaintiffs' Motion for Preliminary Injunction Re Dish's New 2013 Services (Redacted Version) at 2, 4, *Fox I*, 905 F. Supp. 2d 1088 (No. 12-04529).

169. *Id.* at 4.

170. *Id.*

hands of the subscriber: the recordings are stored on that box, and the “slung” transmissions emanate directly from it.¹⁷¹ Fox filed another motion seeking to shut down this second generation technology, arguing, among other things, that Dish’s use of slinging technology infringed the right of public performance.¹⁷²

The Central District of California denied Fox’s motion for preliminary injunctive relief on the ground that Fox had failed to show the likelihood of sufficient harm to warrant an injunction, even were it likely to succeed on the merits of the case; the court gave no guidance as to whether the public performance claim would be likely to succeed.¹⁷³ On appeal to the Ninth Circuit, armed with the Supreme Court’s decision against Aereo that had been handed down just a few days before, Fox argued that Dish “engages in virtually identical conduct when it streams Fox’s programming to Dish subscribers over the Internet.”¹⁷⁴ Fox suggested that Dish both engages in the relevant performances and that these were “to the public.”¹⁷⁵ The Ninth Circuit upheld the lower court’s decision, also without addressing the merits of the public performance argument, which will have to be considered at trial.¹⁷⁶ While other DVR providers also incorporate slinging technology (including TiVo, in its Roamio Plus and Pro versions), we focus our analysis on Dish’s liability for performances emanating from its Hopper with Sling technology.

The Hopper with Sling is a device physically located in the home of each subscriber.¹⁷⁷ Subscribers lease the box from Dish at a current cost of twelve dollars per month, and Dish continues to own the boxes for the lifetime of the arrangement.¹⁷⁸ While it is possible to buy one of the devices outright, subscribers will still be obliged to pay the same monthly device fee: the only benefit of purchasing is to avoid being locked into a minimum contract term.¹⁷⁹ The Hopper with Sling allows the transmission of copyright-protected content in the form of live TV signals as well as material that has previously been recorded onto the DVR.¹⁸⁰ While essentially the same technology is used to deliver both types of performances, it is necessary to separate out those activities in order to apply the

171. *Id.*

172. Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction Against Dish’s New 2013 Services at 2–3, *Fox I*, 905 F. Supp. 2d 1088 (No. 12-04529), 2013 WL 646146.

173. Order Re Plaintiffs’ Motion for Preliminary Injunction Re Dish’s New 2013 Services (Redacted Version), *supra* note 168, at 14–15.

174. Letter from Richard L. Stone, Partner, Jenner & Block LLP, to Molly C. Dwyer, Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit (June 25, 2014) (on file with the court).

175. *Id.*

176. *Fox Broad. Co. v. Dish Network L.L.C. (Fox IV)*, No. 13-56818, 2014 WL 3398107 (9th Cir. July 14, 2014).

177. *See* Etherington, *supra* note 167.

178. A Dish sales representative further explained in a telephone conversation that when a device has become obsolete or is otherwise no longer supported, in some instances the organization may gift it to the subscriber. Telephone Interview with Dish Sales Dep’t Representative, Dish Network (Sept. 18, 2014). In all other cases, however, the DVRs continue to belong to the service provider. *Id.*

179. The Dish sales representative quoted an outright sale price for the device of \$498. *Id.*

180. *See* Etherington, *supra* note 167.

principles enunciated by the Supreme Court.

a. Who Engages in the Performances of Live TV?

The Supreme Court instructs us that a provider will be considered to have “performed” (rather than merely provided the equipment for others to do so) at least where it is sufficiently similar to the CATV companies that Congress amended the Act to capture.¹⁸¹ In finding that Aereo was sufficiently similar, the Court found it notable that the service Aereo sold was for the near-live broadcast of TV, and that Aereo used its own equipment, housed centrally, outside of its users’ homes.¹⁸²

When it comes to the transmission of live TV, Dish has many similarities to Aereo. Both providers are, at least in part, selling access to near-live broadcast TV, and both of them use their own equipment to do so. The primary difference lies in the *location* of the equipment. While Aereo’s equipment is housed centrally, Dish’s sits in each subscriber’s home. One further difference is that Dish may not provide all of the relevant equipment. It is unclear whether Dish’s technology requires additional equipment such as an external antenna or receiver that must be provided by the subscriber, or whether Dish provides all the necessary equipment. Either way, however, it may be sufficiently analogous to a CATV provider to be taken to have itself engaged in the performances.

b. Are Those Performances “to the Public”?

If those performances *are* made by Dish, would they be “to the public”? Dish may argue that it is distinguishable from Aereo in that it has paid the compulsory satellite retransmission license fee to make the programming available to its users in the first place.¹⁸³ However, it is irrelevant that Dish may have a license for a different service. The correct analysis is to ask whether Dish needs a license for the additional service, which it would if the relevant performances fall within the scope of the copyright owners’ exclusive rights. If not, there is no need to obtain a license. If so, then it becomes necessary to ask whether there is a license that extends to that conduct. In the case of Dish, its license to provide the content to the users in the first place does not extend to these online retransmissions and thus would not avail it here.¹⁸⁴

As was the case in *Aereo*, Dish’s subscribers would seem to have no prior relationship to the works. No copies are made when the Hopper “slings” content to users, and the slinging occurs nearly simultaneously with the transmission of live TV.¹⁸⁵ Any argument that subscribers have a prior relationship by virtue of their

181. See *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2507 (2014).

182. See *id.* at 2506.

183. See 17 U.S.C. § 119 (2012).

184. See *Fox Broad. Co., Inc. v. Dish Network L.L.C. (Fox III)*, 747 F.3d 1060, 1070–72 (9th Cir. 2013) (explaining the terms of Dish’s contracts with Fox).

185. See Order Re Plaintiffs’ Motion for Preliminary Injunction Re Dish’s New 2013 Services (Redacted Version), *supra* note 168, at 4.

entitlement to access those signals from their home TVs would seem doomed to failure: because the “slung” transmissions are of live TV, the “prior” element must by definition be missing. Additionally, if it is Dish that is engaging in the transmission, fair use is unlikely to assist it any more than it did Aereo. For these reasons, if a court found that Dish was the performer, the court would likely also find public performance liability.

The analysis of whether the performance was “public” looks quite different if we assume that it is Dish’s subscriber who performs; Dish’s liability, if any, would be derivative of its subscriber’s, and the subscriber would be unlikely to be performing “to the public.”¹⁸⁶ Although the individual subscriber who streams to herself may well be paying primarily to watch broadcast TV, and lack any prior relationship to the works, she is not making the transmission available to a “large” or “substantial” number of people, merely to herself. Furthermore, if it was the user engaging in the transmission, she would have a much stronger fair use case for accessing those signals via remote devices.¹⁸⁷ Liability would be unlikely.

c. Who Engages in the Performances of the TV Timeshifted via a Hopper with Sling, and Are The Performances “to the Public”?

In the case of transmissions of prerecorded, timeshifted TV, the analysis is similar to that for the timeshifting services provided by Aereo and Cablevision. The one key difference is that the equipment is located at the subscriber’s home rather than remotely. Under the *Aereo* majority’s reasoning, this factor would strengthen the argument that the transmissions are made by the subscriber rather than the provider.¹⁸⁸ The analysis about whether those transmissions would be “to the public” would be the same as set out above.

d. Is “Slinging” Unlawful After Aereo?

Slinging technologies were not at issue in *Aereo*, and indeed the district court judge there noted that the plaintiffs “d[id] not appear to contend . . . that services such as Slingbox are unlawful, instead claiming that they are ‘irrelevant’ and that Aereo’s service is distinguishable because Slingbox consumers themselves set up the Slingbox in their homes.”¹⁸⁹ However, the Supreme Court’s reasoning may in fact be sufficiently broad to capture these uses—at least where their provider is sufficiently analogous to the CATV providers the Act was intended to cover. Recall that the cable television services Congress brought within the 1976 Act included retransmissions not only of local signals (*Aereo*’s business model), but also of distant signals (akin to Dish).¹⁹⁰ Just like Aereo, Dish is selling a service for the near-live broadcast of TV, and it is using its own equipment to do so. The

186. See *Fox III*, 747 F.3d at 1068–70.

187. See *id.*

188. Cf. *Aereo III*, 134 S. Ct. at 2506–07.

189. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo I)*, 874 F. Supp. 2d 373, 377 (S.D.N.Y. 2012).

190. See H.R. REP. NO. 94-1476, § 11, at 88–90 (1976) (royalty rates for local and distant signals).

only real difference between the two is that equipment is not housed centrally. If this is sufficient to result in a finding that Dish performs, those performances would clearly be “to the public.” Under the Court’s ruling, however, a different result would likely follow from other versions of slinging technology. For example, it is possible for a user to purchase for a one time outright fee a standalone Slingbox that plugs into her existing cable box or DVR.¹⁹¹ In that case, the technology provider’s role is relatively attenuated: the user would be the one engaging in the transmissions, and, for reasons already canvassed, would not be doing so “to the public.”¹⁹²

3. Portable Antennae, or “Tablet TV”

Yet another variation on the theme is a new technology called “Tablet TV,” which is shortly due to launch out of San Francisco.¹⁹³ Subscribers will purchase a device called a “T-Pod”—a digital TV antenna, tuner and DVR about the size of a palm—for around \$50 to \$100.¹⁹⁴ Users have to be within 100 feet of the T-Pod to stream content, but otherwise the product effectively enables subscribers to replicate Aereo’s near-live functionality with their own equipment.¹⁹⁵ This time, the product is actually being driven by a broadcaster, Granite Broadcasting, which claims to reach some six percent of U.S. television households.¹⁹⁶

The product was announced well before the Supreme Court decided *Aereo*. In the post-*Aereo* world, however, its legality remains assured. Since the Tablet TV will be both owned by its users and physically located in their premises, its developers have a strong case that they are mere equipment providers, and that it is the users who engage in any relevant act. Those users’ access to free-to-air TV via their own antennae trigger no exclusive rights under copyright; their at home transmissions are not “to the public.” Thus, there would be no infringement.

IV. REPORT CARD: EVALUATING THE DECISION

The interpretations of both sides of the Aereo controversy could have made technological design determine the existence of public performance liability. Aereo’s interpretation of the law would have precluded a finding of public performance in many cases where the service structured the transmission so it could be received by only a single individual.¹⁹⁷ The broadcasters’ interpretation

191. *Sling Store*, SLING, <http://perma.cc/7P23-BJLU> (last visited Oct. 3, 2014).

192. See discussion *supra* Parts II.B.2, II.C.2.b.

193. See Benny Evangelista, *No Fees, No Wires, Just TV on a Tablet, Startup Promises*, SFGATE (Aug. 24, 2013), <http://perma.cc/CQG8-7EQF>.

194. See *id.*

195. See *id.*

196. *About*, GRANITE BROADCASTING CORP., <http://perma.cc/NU5L-DWV3> (last visited Oct. 3, 2014).

197. Regarding the circumstances necessary for successful “Aereoization,” see Giblin & Ginsburg, *supra* note *, at 19–21. See generally Megan Larkin, *The Demise of the Copyright Act in the Digital Realm: Re-Engineering Digital Delivery Models to Circumvent Copyright Liability After Aereo*, 37 COLUM. J.L. & ARTS 405 (2014) (showing how businesses previously held to be infringing could follow

could have resulted in deeming a public performance to have occurred whenever a service happened to make transmissions of the same works to multiple members of the public.¹⁹⁸ Neither interpretation focused sufficiently on the economic (as opposed to technological) nature or consequences of the use, and neither recognized the potential relevance of the relationship between the recipient and the work. In finding that Aereo's interpretation prevailed, even the Second Circuit itself lamented the way in which its reasoning led to technological design determining liability; it admitted: "Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court's decisions . . . held that technical architecture matters."¹⁹⁹

Though the authors of this paper approach copyright law and policy from very different perspectives, we unite in the view that it is undesirable for legal outcomes to depend so heavily on technical design. Such laws are vulnerable to "avoision"—conduct, combining aspects of law "evasion" and "avoidance," that exploits "the differences between a law's goals and its self-defined limits."²⁰⁰ In our previous work we urged the Supreme Court to develop what it means for a performance to be "to the public" in order to enable principled readings of the Transmit Clause which focused on the particular use rather than on the technical architecture of the delivery service.²⁰¹ In this section, we debate the extent to which the Court succeeded in doing so and the benefits and demerits of its approach.

The majority's reasoning succeeds in preventing businesses from "Aereoizing" their way out of liability by simply designing services to make separate transmissions from unique copies to individual users.²⁰² It also ensures that future technology providers will not face public performance liability simply because their services happen to make transmissions of the same works to multiple members of the public.²⁰³ However, the majority missed its mark in developing a principled reading of the Transmit Clause. Under its reasoning, design characteristics still matter too much—both to determining whether transmissions are "to the public," and in establishing who performs in the first place.

A. VULNERABILITIES IN THE COURT'S DECISION

In determining whether transmissions are "to the public," the majority repeatedly stressed the size of the potential audience, holding that, if it is not "large" or "substantial," the performance cannot be "public."²⁰⁴ Under this reasoning, services structured to offer content to small audiences could fall outside

the *Cablevision* roadmap to offer the same services without infringing).

198. See *supra* notes 12–13 and accompanying text.

199. WNET, *Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 694 (2d Cir. 2013).

200. Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 692 (2003); see also LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD AND KINDRED PUZZLES OF THE LAW* (1996).

201. Giblin & Ginsburg, *supra* note *, at 28–29.

202. See *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2508–10 (2014).

203. See *id.* at 2510–11.

204. See *supra* notes 59–60 and accompanying text; see also *Aereo III*, 134 S. Ct. at 2509–11.

the scope of the Act—even, perhaps, if the small audiences cumulatively became large. As we noted above, the Copyright Act in fact refers to the size of the audience only in the context of determining whether a performance is occurring *in public*, rather than whether it is transmitted *to the public*.²⁰⁵ It is likely that the majority imported that size requirement into the latter analysis to avoid problems of over-inclusivity arising from its ruling that the relevant act was the performance of the underlying work (rather than the individual transmission). Limiting the scope of the clause to situations where the performance is directed to a “large” number of people ensures that reading will not scoop up too many performances that might better be seen as “private.”²⁰⁶ Problematically, however, the Court’s emphasis on the size of the potential audience risks automatically putting a swathe of transmissions outside the scope of copyright owners’ exclusive rights without any consideration of whether those uses interfere with the market for their works or otherwise cause harm.

Importing a size requirement into the Transmit Clause misses the essence of the statutory distinction between public performances (encompassed within the copyright owner’s exclusive rights) and non-public performances (to which exclusive rights do not extend):²⁰⁷ size is a proxy for economic significance; in most cases (at least under prior technologies) a transmission offered to a small group of persons, or to members of a family and its social acquaintance, would not have significantly intruded on the copyright owner’s markets for publicly communicating performances of the work. But size is not a value of its own, and the omission of a size-of-audience criterion from the text of the Transmit Clause (unlike the performance “in public” clause) should be taken seriously. What matters is whether the offeree of the transmission is a “member of the public,” not how many members of the public are “capable of receiving” the transmission. The omission of a size threshold from the Transmit Clause enables the public

205. The legislative history indicated that the reason for the “substantial number of persons” component of the “in public” definition was to capture “semipublic places”:

Under clause (1) of the definition of ‘publicly’ in section 101, a performance or display is “public” if it takes place “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932), performances in “semipublic” places such as clubs, lodges, factories, summer camps, and schools are “public performances” subject to copyright control.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 64 (1976).

206. During this litigation, there was particular concern about the impact of a broad reading on cloud computing. Imagine that a user format shifts her CDs to her hard drive, and then uploads the recordings to her private Dropbox account. Assume many other Dropbox users store the same sound recordings. When users later stream the recorded music from their Dropbox accounts, is there any infringing public performance? Under an interpretation of the Transmit Clause that inquires whether a “performance of the work” is transmitted to members of the public (without the some limitation such as the one eventually incorporated by the Court in *Aereo*), Dropbox users could potentially have faced prima facie liability in those circumstances.

207. See generally 17 U.S.C. § 101 (2012) (definition of “to perform or display a work ‘publicly’”); *id.* § 106 (4), (6) (granting copyright holders exclusive performance rights for public performances only).

performance right to adapt to changing market conditions as the means and granularity of transmissions evolve.

B. CONSEQUENCES OF THE MAJORITY'S INTERPRETATION OF "TO THE PUBLIC"

The majority's definition of "to the public" effectively obliged the Court to rule that the "performer" of the act of communication was the service rather than the subscriber. Imagine an Aereo-style service that offered near-live transmissions from individual antennae, on demand from specific users, without making any copies. Suppose further that the person deemed to be making the performance was the subscriber rather than the service. If the subscriber was deemed the one who engaged in performances from the remote antenna to her own computer, she would not be doing so "to the public" under the majority's reasoning because she would not be offering it to a "large" group of people. There would have been no need even to consider whether the use was fair, because there would have been no prima facie infringement in the first place. Such a finding would have opened the floodgates to services offering near-live TV with no obligation to remunerate right holders for that content, including the cable and satellite companies that currently pay billions of dollars a year in retransmission fees.²⁰⁸

This hypothetical shows that, to avoid cleaving that enormous new loophole into the law, the Court *had* to find that Aereo was the performer. And to do that, it needed to base its analysis on something other than "volition"—the criterion on which the dissent relied to contend that Aereo had not "performed,"²⁰⁹ and on which *Cablevision's* analysis of who "made" the copy rested.²¹⁰ In plain English, volition refers to "the making of a definite choice or decision with regard to a course of action; exercise of the will."²¹¹ Showing the defendant's "volition" had not, in fact, historically been an element of a copyright infringement claim. Instead, it had long been established that copyright infringement required no demonstration of defendant's intent to infringe.²¹²

"Volition" as a criterion for determining who commits the copyright-triggering act can be traced to the 1995 decision by the District Court for the Northern District of California in *Religious Technology Center v. Netcom*.²¹³ There, the court declined to hold an ISP or bulletin board provider directly liable for its facilities' automatic reproduction of a copyrighted work that one of its users had posted.²¹⁴

208. See, e.g., Alex Barinka & Edmund Lee, *Aereo Court Loss Protects \$4 Billion in Broadcast Fees*, BLOOMBERG (Jun. 25, 2014), <http://perma.cc/FBS2-CA9F?type=source>.

209. See *Aereo III*, 134 S. Ct. at 2512–14.

210. See *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 130–31 (2d Cir. 2008).

211. *Volition*, OXFORD ENGLISH DICTIONARY, <http://perma.cc/74DD-DFPB?type=source> (last visited Nov. 1, 2014).

212. See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (Hand, J.).

213. *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs.*, 907 F. Supp. 1361 (N.D. Cal 1995).

214. *Id.* at 1373.

(The service had not originated the communication of the content at issue.²¹⁵) The court reasoned that, despite copyright infringement's strict liability standard, "there should still be some element of volition or causation that is lacking where a defendant's system is merely used to create a copy by a third party."²¹⁶ The Fourth Circuit subsequently endorsed that distinction in a case involving an ISP whose subscribers uploaded infringing photographs to its servers.²¹⁷

The Second Circuit in *Cablevision* significantly extended the ambit of the volition criterion from passive communication of third party content to proposing content to copy at the user's behest. That court held that, "In determining who actually 'makes' a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct."²¹⁸ Though noting that *Cablevision's* discretion over the programming that it was making available for recording made its conduct "more proximate" to the creation of the copies than merely "operating an ISP," the Second Circuit concluded that *Cablevision's* involvement did not suffice to justify a finding that *Cablevision* was itself a "make[r]" of the copies.²¹⁹ Unlike its predecessors in the Fourth and Ninth Circuits, the Second Circuit found an absence of volition even where the service was the source of the content communicated to the users.

Whether or to what extent "volition" is in fact a predicate to a finding of infringement therefore invites debate. In any event, the *Aereo* majority held that *Aereo* was the one that engaged in the performances without any reference to volition at all. The majority carefully cabined its reasoning to cable TV-like technologies, and emphasized that it did "not determine whether different kinds of providers in different contexts also 'perform'"; thus, it did not explicitly reject a volition standard, either.²²⁰ Nonetheless, it is worth addressing the troubling consequences that could arise if some concept of willing participation in the communication were to be completely rejected in determining who does the legally relevant act.

As the dissent pointed out, volition is a vital tool for preserving the distinction between primary and secondary infringement.²²¹ If a user puts a technology to infringing use, the provider's secondary liability will depend on both the existence of primary infringement and the extent of its contribution to or involvement in that infringement. The distinction between direct and secondary liability has long provided welcome breathing room for new technologies and uses. If the subscriber's deliberate act is attributed to the passive technology provider instead,

215. *Id.* at 1355–56.

216. *Id.* at 1370.

217. *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

218. *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 131 (2d Cir. 2008).

219. *Id.* at 132.

220. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2510 (2014).

221. *See id.* at 2513–14.

that distinction evaporates. The question of “who does the act” is also vital to considerations of fair use. As described above, U.S. fair use law has historically applied very differently to services that engage in uses on their customers’ behalf than to customers who do those same acts themselves.²²² Thus, if the technology provider is found to be the one engaging in the relevant act, the likelihood that its conduct will be ruled “fair” diminishes.²²³

In bypassing any mention of volition in its finding that Aereo was the performer of the relevant acts (and thus itself directly liable for infringement), the majority may have implicitly recognized that secondary infringement mechanisms would not in that instance sufficiently safeguard right holder interests. As we explained above, the majority’s interpretation of “to the public” effectively obliged it to find that Aereo was the one that “performed” the transmissions. Since the subscriber in the *Aereo* one-transmission-one-recipient scenario was never transmitting to a “large” number of people, a ruling that the subscriber was the “performer” would have precluded any finding of prima facie primary infringement. As a result, all manner of personalized retransmissions would have fallen outside the scope of the Act, and without any direct infringement there can be no basis for holding the service provider secondarily liable.

That said, the absence on *Aereo*’s facts of a viable secondary infringement claim does not in general invalidate or render irrelevant the traditional distinction between primary and secondary infringement. Instead, it highlights the need for sensible and principled rules governing primary infringement. The Supreme Court failed to provide such rules in *Aereo*. While its solution removed Aereo from the near-live television retransmission market, its underinclusive definition of the words “to the public” (and particularly its focus on the need for the potential audience to comprise a “large” number of people) may blur the distinction between primary and secondary infringement, at least in scenarios resembling *Aereo*’s.²²⁴ Since there can be no direct liability in situations where the performance is directed to only a small number of people, the only way to grant relief may be, as occurred on *Aereo*’s facts, to find that the service provider itself engaged in the act. The Court’s focus on the service’s acts also enabled it to forego inquiry into whether or not the subscriber’s use was “fair.”

Our application of *Aereo*’s principles to other technologies demonstrates that a great deal hangs on “who does the act.”²²⁵ We are not convinced that this outcome is desirable or appropriate. We live in a world where technologies provide us with ever-more sophisticated assistance in our day-to-day lives. Backup software automatically scans our hard drives for new content, and uploads copies to the

222. See discussion *supra* Part III.B.2.

223. Some recent case law, however, points toward a conflation of fair uses by end users and copying by commercial and noncommercial entities that enable those uses. See *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (holding that massive book scanning by Google was fair use because of the beneficial noninfringing uses that the digitized books enabled Google’s and the HathiTrust library consortium’s users to make); *Authors Guild v. Google, Inc.*, 954 F.Supp.2d 282 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4829 (2d Cir. Dec. 23, 2013).

224. Cf. *Aereo III*, 134 S. Ct. at 2514 (Scalia, J., dissenting).

225. See discussion *supra* Part III.C.

cloud for safekeeping.²²⁶ TiVos helpfully record shows for us based on programs we have previously enjoyed.²²⁷ As technology advances, courts' determination of who actually engages in the act of public performance (or of reproduction) will require the making of increasingly fine-grained and potentially unhelpful distinctions that result in analyses that address only part of the story. If a court finds that the user does the act, her right to do the act is taken into account. But if her act is deemed noninfringing, then no consideration is given to whether the service provider's contribution to the commission of the act should be permitted for free.²²⁸ If the service provider is the "doer," then courts assess the legality of its participation, but give less consideration to whether the ultimate use ought to be allowed.²²⁹ (Just because the user may have been entitled to do the act for herself does not mean that a for-profit service should be entitled to do the act on her behalf.²³⁰)

Given the increasing potential for arbitrary outcomes from the "who does?" analysis, it seems to us that "who does?" is the wrong question. A better approach would consider whether, after full reflection on the contributions of each party, the *use* should be permitted for free. This inquiry usually occurs at the exceptions stage of the analysis, where courts apply fair use principles with reference to the full range of circumstances, including the extent to which the delivery method interferes with paid markets for protected works.²³¹ While the authors of this paper sometimes disagree about where the fair use line ought to be drawn in specific cases, we do agree that it is undesirable for the infringement analysis to turn on potentially arbitrary findings about who did the relevant act.

The arbitrariness of those distinctions can be demonstrated with reference to the factors the majority indicated could make a technology provider the "performer" (at least in the absence of volition). Key considerations derived from *Aereo* will include: Where the equipment is located, who owns it, and how perfect a substitute it provides for live TV (or potentially other licensed markets for works).²³² In addition to the concerns we raise above, we are perturbed by the possibility that future judicial determination of whether technology providers have engaged in the legally relevant acts will depend too heavily on the relationship of the design of their technologies to their business models. Our application of *Aereo*'s principles to other technologies shows that these factors may make the difference between legality and infringement—even when the ultimate act remains the same. Because so much currently hinges on "who does the act?," the Court's decision has the capacity to influence significantly the evolution of future dissemination technologies. Online access to remote equipment is cheap and efficient, and can

226. See, e.g., *Automatic Cloud Backup*, MOZY, <http://perma.cc/AS55-L4AL> (last visited Nov. 1, 2014).

227. See *How to Use TiVo Suggestions*, TiVO, <http://perma.cc/6QLW-6LA5> (last visited Nov. 1, 2014).

228. See, e.g., *Fox Broad. Co. v. Dish Network L.L.C.* (*Fox III*), 747 F.3d 1060 (9th Cir. 2013).

229. See generally *Aereo III*, 134 S. Ct. 2498.

230. See *supra* notes 133–136 and accompanying text.

231. See generally 17 U.S.C. § 107 (2012).

232. See *Aereo III*, 134 S. Ct. at 2506–07.

result in improved access for individuals who cannot afford to purchase it outright. Post-*Aereo* however, providers have powerful new incentives to design products that are owned by consumers and based in their homes—even though considerations of location and ownership say nothing about the desirability or harm of the underlying use. The Second Circuit had expressed regret that the statute (in its view) placed such importance on technical architecture.²³³ Under the majority’s interpretations, technical architecture matters *less*—but it still matters far too much.

Perhaps most problematically, the majority’s reasoning is vulnerable to precisely the same kind of technological exploitation that it was designed to redress. Imagine, for example, what would happen if, rather than streaming content to users, Aereo instead redesigned its service to deliver downloads to subscribers’ cloud storage lockers. In our analysis above we demonstrated that, if Aereo redesigned its service to offer only its timeshifting product, its potential liability for infringing public performances would apparently depend on whether its service was still sufficiently cable-like in the case of those time delayed transmissions to treat Aereo as the “performer” of the transmissions.²³⁴ The longer the time delay, the less cable-like the service, hence the prospects for technological redesign to eliminate the chance of public performance liability while facilitating precisely the same end result.²³⁵ The majority confirmed that there can be no performance in the absence of the communication of “contemporaneously perceptible images and sounds.”²³⁶ If Aereo delivered downloads instead of streams, there would be no contemporaneous perceptibility and therefore no performance for which it could be liable.²³⁷ And subsequent playback by the user to herself would not be an infringing public performance either, under the majority’s reasoning, because she is not offering it to a “large” group of people.²³⁸ Thus, future providers could avoid direct liability for public performance (and potential secondary liability for their users’ transmissions) by making a minor change to their technical design that interferes little with the function of its timeshifting service. Whether Aereo’s delivery of the downloads would result in liability for infringement of the reproduction and distribution rights would turn on the characterization of “who copies?,” an issue central to *Cablevision*,²³⁹ but untouched by the Supreme Court’s

233. WNET, *Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 694 (2d Cir. 2013).

234. See discussion *supra* Part III.B.

235. Indeed, at the hearing before the Southern District of New York on the scope of the preliminary injunction, Aereo’s counsel contended that the injunction should be limited to near-simultaneous retransmissions, and that were Aereo to retransmit ten minutes after the initial broadcast commenced, that time delay would be permissible under the Supreme Court’s opinion. See *Aereo IV* Hearing Transcript, *supra* note 119, at 27–28.

236. *Aereo III*, 134 S. Ct. at 2509.

237. Arguably, Aereo would be communicating a performance of the work “by any device or process,” since the recording fixes a performance (the original broadcast), and will generate a performance when the end user views or listens to the recording. But it is difficult to reconcile this construction with the requirement that the performance be simultaneously perceptible with its communication.

238. *Aereo III*, 134 S. Ct. at 2509–10.

239. See *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 130–34 (2d Cir. 2008).

decision in *Aereo*. Were the service deemed the “maker” of the copies, it likely they would be held liable. Were the user the “copier,” the service could potentially bear secondary liability depending on the outcome of the fair use analysis.

In other cases, however, the public performance right is the only one of possible relevance. For example, in the wake of the *Aereo* decision, a *Wall Street Journal* article proposed a novel way of reducing cable bills: sharing a single cable subscription between two households by utilizing a Slingbox.²⁴⁰ One household would have legitimate access to the cable content via a paid subscription, and sling the content to the other, giving access to the content without ever making any copies.²⁴¹ The writer argued this arrangement was legal because “this stream goes from one cable connection to just one outside device.”²⁴²

But transmissions even to a small audience can interfere significantly with licensed markets. Think about how the arrangement proposed by the *Wall Street Journal* might spread. The “sharing economy” is all the rage, connecting those who have unused resources with those who seek them. AirBnB, for example, creates a market for households to rent out their spare rooms.²⁴³ Uber joins those who need a ride with those who have a car.²⁴⁴ Households with cable subscriptions might readily reach agreement with friends or relatives to share those, too. And the cable-equipped households could add more functionality by attaching the Slingbox to a secondary set-top box, allowing both households to have full access to the subscribing household’s content without limiting anyone’s viewing choices.²⁴⁵ Since they are nonrivalrous in consumption, TV signals could be the ultimate contribution to the “sharing economy.”²⁴⁶

We caution, however, that *Aereo* should not spawn “sharing economy” brokerage services, akin to Air BnB or Uber. A household that offers unused cable service to a friend limits not only the transmission but also the offer to one other person. By contrast, an “Uber for cable TV” service offers the surplus cable service to the public in general, even though only one household will in fact receive the shared cable transmissions. Properly understood, *Aereo*’s definition of “the public” refers to the public to whom the transmission is *proposed*. If the brokerage service is putting the sharing household together with the first-comer who replies to an offer made to members of the public at large (or, for that matter, to members of a more narrowly defined “public,” such as fans of *Homeland*), the transmissions are “to the public.”²⁴⁷

240. Geoffrey A. Fowler, *Getting Rid of Cable TV: The Smartest Ways to Cut the Cord*, WALL ST. J. (July 15, 2014).

241. *Id.*

242. *Id.*

243. *How to Host*, AIRBNB, <http://perma.cc/FA93-AMY4?type=image> (last visited Dec. 1, 2014).

244. *About Uber*, UBER, <http://perma.cc/R6M7-NEFN?type=image> (last visited Dec. 1, 2014).

245. *Using Sling*, SLINGBOX, <http://perma.cc/JNR2-5B99> (last visited Dec. 1, 2014).

246. It may well be that “sharing” a signal in such a fashion constitutes a breach of the cable service contract. However, given the likely difficulties in detecting such infringements, the existence of contractual remedies would offer cable companies little comfort.

247. In this scenario, the “maker” of the transmissions would be the householder, not the broker through whom the householder offers to share the subscription with a member of the public. But the

Of course, the *Aereo* Court did not confront such scenarios, but the proposed arrangement indeed appears to be consistent with the Court's statements, to the extent they explicitly exclude transmissions that the person engaging in the performance directs to only a small group or to a single individual.²⁴⁸ Applying *Aereo*, the performances would be engaged in by the household providing and hosting the equipment and signal. But the performances would not be "to the public" under the majority's reasoning, because they would not have been offered to a "large or substantial" number of people, even though the cumulative impact on right holders were many people to adopt this practice could be severe.

Aereo's concept of "the public," at least as currently articulated, seems insufficiently nuanced to deal with situations involving individual performances to small audiences that cumulatively interfere with markets for licensed alternatives. Moreover, once an avenue of exploitation opens, many will surely follow it; the more widespread the activity, the more difficult it may later become to interpret the Copyright Act to restrict the practice. Given the potential significance of the public performance right, it is disappointing that the Court's reasoning may open the door to some of the same kind of "avoidance" or technological exploitation that it was intended to address.

V. GIBLIN'S CONCLUSIONS

The above analysis highlights some significant problems that will arise in applying the Supreme Court's ruling in future cases, despite the majority's careful attempt to cabin its holdings. Its interpretation of the words "to the public" will sometimes be underinclusive (by excluding certain transmissions from the scope of the public performance right whenever the potential audience is not "large") and sometimes overinclusive (by sweeping up all transmissions where technological design and business model suggest the service provider engages in them, regardless of the desirability of the ultimate use). It perpetuates the game of technological cat-and-mouse because the rules will apply differently depending on who owns the equipment, where it is based, whether performances are streamed or downloaded and played back later, and the size of the audience. That makes it vulnerable to precisely the same kind of "avoidance" that it was intended to address in the first place. The Court's reasoning also weakens the distinction between primary and secondary infringement in a way that will sometimes have the effect of making some vital fair use considerations disappear from the analysis altogether.

broker would likely be secondarily liable for contributing to or inducing infringement. Other scenarios might involve intermediaries whose participation might be deemed too attenuated to warrant secondary liability, such as the operator of a Craigslist-type website that featured a general "sharing economy" category of listings, not broken down into categories sufficiently specific to suggest knowledge of what is being "shared."

248. *Aereo III*, 134 S. Ct. at 2511.

A. *AEREO*'S PROBLEMS COULD HAVE BEEN AVOIDED

Every one of these problems could have been avoided had the Court more fully developed what it means for a performance to be “to the public.” As previously noted, the majority recognized the relationship between the work and the recipient as relevant in determining whether a performance is public within the meaning of the Act.²⁴⁹ Thus, if the recipient has a license or fair use privilege to use the work, that may affect whether the use falls within the scope of the performance right at all. Developed a little further, that relationship could provide a mechanism for distinguishing between public and private performances without reference to either the design of the technology or the size of the audience. Australia’s law illustrates how that analysis could work. In determining whether a communication is “to the public,” Australian courts ask whether the recipient of the performance is a member of the “copyright owner’s public.”

This approach originates in a line of U.K. cases that focused on the harm the act causes to the author of the work in determining whether a performance was “in public.”²⁵⁰ Proceeding on the basis that such harm is the crucial consideration, Australian law recognizes “the relevant ‘public’ [a]s the group which the copyright owner would otherwise contemplate as its public for the performance of its work.”²⁵¹ Thus, the essence of a performance “to the public” in Australian law is that it is occurring in circumstances where the owner is entitled to expect payment for the work’s authorized performance.²⁵² This interpretation recognizes that it is sometimes possible for a user to engage in a public performance even where she transmits a work to *herself*.²⁵³ The size of the audience does not matter, only the relationship between the recipient and the copyright owner or the work.

By focusing squarely on whether the use is something for which the copyright owner could reasonably expect a royalty, this interpretation provides a principled way of distinguishing between uses that should and should not be permitted. Such distinctions can be made even where the technology, service provider and audience are the same, independent of arbitrary considerations such as the size of the audience, how the system works, where the equipment is located and who owns the equipment.²⁵⁴ Thus, it is able to distinguish between a person slinging her cable signal to a tablet computer to watch it in bed instead of on the couch on the one hand (something that seems likely to be a fair use), and two households using the

249. See discussion *supra* Part II.B.1.

250. *Telstra Corp. v Australasian Performing Right Ass’n* (1997) 191 CLR 140, 198–200 (Austl.) (citing *Ernest Turner Elec. Instruments Ltd. v Performing Right Soc’y Ltd.*, [1943] Ch. 167 at 171–73 (Eng.); *Jennings v Stephens*, [1936] Ch. 469 at 485 (Eng.); *Harms (Inc.) Ltd. v Martans Club Ltd.*, [1927] 1 Ch. 526 at 532 (Eng.)).

251. *Telstra Corp.* (1997) 191 CLR at 199.

252. See, e.g., *id.* at 198–99.

253. See, e.g., *Singtel Optus v. National Rugby League Invs. (No. 2)* [2012] FCA 34, 97–100 (Austl.) (“If the maker of the communication was the user, as I have found, he or she necessarily made it to himself or herself. However, that is not determinative of whether the user so communicated the work ‘to the public’ . . .”).

254. Giblin & Ginsburg, *supra* note *, at 32–33.

same technology to avoid having to pay for two separate subscriptions on the other (which, given the purpose and character of the use, and its potential effect on the market, does not). The former is not a situation where it would be reasonable for the copyright owner to expect a royalty, but the latter certainly would be.

The question of “who performs” becomes much less significant in my proposed analysis, because the focus would be on the relationship between the *recipient* and the work. That relationship remains the same regardless of who actually transmits the content. Since, under my approach, primary infringement can accrue equally regardless of who does the act, this conception reduces the potential for very different outcomes, which depend on arbitrary factors, such as who owns the equipment and where it is based. Having said that, I would not deprive the question of “who performs” of all significance: under the existing law, it is still determinative of *who* bears that direct liability.

As previously identified, under *Aereo*, a finding that the equipment provider “performs” would have two main effects. First, fair use would apply differently than if the user were identified as the doer.²⁵⁵ By contrast, my approach would significantly ameliorate that consequence, since I would give consideration to whether the recipient had a fair use privilege in determining whether the communication was “to the public” regardless of who performs it.

The second consequence of the *Aereo* analysis is that the traditional distinction between primary and secondary infringement would disappear. I see this as troubling, at least in cases where the service provider has not in some way exercised its will to bring about the act. That outcome could be avoided by applying some form of “volition” standard. Where the user is identified as being the one who does the legally relevant act, the service provider’s liability could then be determined applying existing secondary liability principles assessing the extent of its encouragement, contribution or involvement.

Applying such a reading of the Transmit Clause would avoid all of the problems identified above—and not necessarily mean a free pass for *Aereo*. Assume that an individual *Aereo* subscriber transmitted works to herself, near-live to the broadcast time, and was deemed to be the performer of those transmissions. Whether or not those performances were “public” would come down to whether, in all the circumstances, the copyright owner could reasonably expect a royalty for that use. If the use amounted to an unremunerable fair use, there could be no such expectation, and the transmission would not be “to the public.” If no exception applied, however, that online streaming of a protected work (particularly in circumstances where the copyright holder offers that service in exchange for royalties) would be precisely the kind of situation where a royalty could be expected. In that case, the recipient would be one of the copyright owner’s public and would thus have engaged in a public performance. The standard would adjust with usage: as technologies and uses evolve, so too would the circumstances in which it would be reasonable for the copyright owner to expect a royalty.

In determining whether the copyright owner could reasonably expect a royalty

255. See discussion *supra* Part III.B.2.

for the use, full consideration should be given to all relevant circumstances, including the extent to which the method of delivery is interfering with the market for licensed use. Crucially, this part of the analysis should not change regardless of who is identified as the performer, because the focus is on the relationship between the *recipient* and the work, regardless of who transmits it. The analytical steps to be followed are exactly the same regardless of whether the transmission is directly from Aereo's storage or from the user's own cloud locker, near-live or time delayed. Whether or not any of those usages would be "fair" has not yet been developed in the legal record, but it is by no means clear that the transmissions would be accepted as "fair." *Sony* was far from a blanket authorization of any and all consumer copying of television broadcasts, and Aereo is readily distinguishable on a number of bases including the financial impact its use has on right holders, its addition of place-shifting functionality that competes with licensed markets, and the general lack of "friction" in the copying process. If Aereo's users had no fair use right or license to engage in the performances, they would be public. Aereo's involvement in setting up the transmission system and encouraging its use would then result in liability for inducing those infringements, and may also give rise to vicarious liability.²⁵⁶ Relying on secondary infringement to obtain redress in cases involving suppliers of goods or services can be problematic where the law that governs primary infringement is unsatisfactory. For example, a conception of "the public" that relies on transmissions being directed to a "large" number of people will fail to fully capture all of the circumstances in which a transmission might be public in nature, and there secondary liability cannot be counted on to reliably provide redress. However, where there are principled and effective rules in place

256. Vicarious infringement accrues where a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). There is some uncertainty as to the extent to which a defendant must have the ability to supervise infringement for the first element to be satisfied. See, e.g., Rebecca Giblin, *A Bit Liable? A Guide To Navigating The U.S. Secondary Liability Patchwork*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 7, 39 (2008). Aereo clearly satisfies even the stricter approach because it has a genuine practical ability to control the direct infringer's infringement by simply eliminating the option to watch broadcasts while they're still airing. 2 GOLDSTEIN ON COPYRIGHT, *supra* note 92, § 8.2.2. Discovery would be needed to determine the extent to which the near-live uses impacted Aereo's revenue, but it is highly likely that it would have a sufficiently direct financial interest in their users' infringement for the second element to also be satisfied. Liability for inducement arises where a defendant "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005). The doctrine's application to copyright law was recognized for the first time by the U.S. Supreme Court in *Grokster*. *Id.* There, the Court found three "particularly notable" indicia of intent to be "unmistakable" evidence of the defendants' "unlawful objective": (1) the fact that each "showed itself to be aiming to satisfy a known source of demand for copyright infringement"; (2) their failure to develop any mechanisms to reduce their products' use for infringement and (3) the fact that their business models were predicated on infringement. See *Grokster*, 545 U.S. at 939–40. If Aereo's users' near-live transmissions were infringing, Aereo would clearly be liable for inducement under this standard. It has designed its system to facilitate near-live streaming, it has actively encouraged the practice and it has advertised it as a feature. Discovery would be needed to determine the extent to which its business model was dependent on that practice, but per the vicarious infringement analysis above, it would likely have a significant financial interest in that infringement.

regarding primary infringement, as the one proposed here, secondary liability can be trusted to provide appropriate safeguards.

As my coauthor has previously noted, this analysis can be criticized for circularity.²⁵⁷ A public performance that amounts to the doing of one of the copyright owner's exclusive rights ordinarily gives rise to an entitlement to payment. If the way in which we determine whether such a performance has occurred is with reference to *whether* the right holder is entitled to payment, taking account not only the acts that trigger a finding of infringement, but also those that excuse it, the analysis may start to look like a snake that is eating its tail. However, the Supreme Court has already indicated comfort with similar circularity via its holding that whether or not recipients constitute "the public" often depends on their relationship to the underlying work.²⁵⁸ Furthermore, by refocusing the analysis on the relationship between the copyright owner and the recipient in determining whether the performance is "public" in the first place, that redundancy performs the useful function of ensuring the law gives adequate consideration to whether the use itself ought to be permitted.

B. A MISSED OPPORTUNITY

The *Aereo* Court welcomely went some way towards recognizing the importance of the relationship between the copyright owner or work and recipient of the transmission to the determination of whether a particular performance is public. By developing that concept a little further, the definition of "to the public" could provide a principled mechanism for distinguishing between private and public transmissions with reference to the use itself, rather than business model or technical design. In its current form, however, the law remains exploitable and unsatisfactory.

Future courts may be tempted to fill in the holes in the majority's reasoning with ever-broader answers to the question of "who performs." Where an individual is offering a transmission exclusively to herself, but the court nonetheless considers it to be the kind of use Congress intended to capture, the only way of bringing it within the Act would be to further relax the volition predicate outside the cable TV analogy. That standard has been vehemently criticized by my coauthor, who presciently argued in 2008 that it "could herald the development of business models designed to elude copyright control over the exploitation of works, particularly in a technological environment in which pervasive automation is increasingly foreseeable."²⁵⁹ This is, of course, precisely what *Aereo* sought to do. I agree it is undesirable for laws to be circumventable via clever architectural design (rather than by reference to the use).

Nonetheless, any impulse to disregard "volition" in determining who commits the copyright-triggering act should be resisted. Where users remain intimately involved in the copyright-invoking act, the legality of those ultimate end uses needs

257. Giblin & Ginsburg, *supra* note *, at 38.

258. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2510 (2014).

259. Ginsburg, *Recent Developments in US Copyright*, *supra* note 133, at 15.

to remain a relevant consideration, just as the involvement of the service provider should be as well. Imposing direct liability on operators of automated, user-directed systems with no reference to whether those ultimate uses should be permitted is at least as dangerous. As more of our lives are being lived digitally and online, copying and transmission rights are invoked more often, and questions about whether we should be permitted to freely engage in those uses grow commensurately more important. Copyright owners' exclusive rights ought to be read in a way that leaves room for those considerations.

As this analysis has demonstrated, this goal is achievable within the existing statutory framework. By building on the Court's recognition of the importance of the relationship between the user and the work, and further developing what it means for a transmission to be "to the public," it is possible to have a principled reading of the Transmit Clause that focuses on the use instead of business model or technical design. Vitality, in a world where it is so cheap and easy for content to be streamed online, that reading explains why even transmissions offered to a small number of people might be "public." It also treats technologies alike, whether local or remote, owned or rented, and so avoids biasing the direction of their development. And, perhaps most importantly, it incentivizes technology providers to confine their efforts to developing services that assist users to exercise their lawful rights instead of continuing to encourage those entrepreneurs to code their way outside the scope of the law. Admittedly, some will always seek to push the boundaries of copyright's exclusive rights and exceptions, and entrepreneurs and right holders may have different views about where the frontier between infringement and lawful use lies. We can, however, design laws to minimize the opportunities for technological exploitation, and give courts appropriate, principled mechanisms for responding to those who step out of bounds.

VI. GINSBURG'S CONCLUSIONS

We have identified two problems the *Aereo* decision presents to assessing the copyright-compatibility of other, future technologies that communicate performances or copies of works of authorship. First, the paramount importance of "who performs" (and implicitly, "who copies"). Second, the determination of "the public" to which the work is offered.

A. WHO PERFORMS?

We have suggested that making this question the determinative threshold for liability is problematic because the factors that, in the *Aereo* analysis, make an enterprise the "performer" are too susceptible to manipulation, and therefore risk elevating technological form over economic substance. The characterization of "who performs" should instead "follow the money." A concept of active participation in the communication may prove more pertinent, and less technology-dependent, than the "volition" predicate as employed by the Second Circuit in

Cablevision.²⁶⁰ The latter, as we have seen, lends itself to evasion through automation. The “plain English” definition of “volition” may be closer to the mark: “the making of a definite choice or decision with regard to a course of action; exercise of the will.”²⁶¹ It would cover services structured to transmit performances of content offered to the public, that is the “course of action.” If the service is proposing the content (including content originally proposed by the primary transmission service whose content the defendant service is retransmitting), then the (re)transmitter knows what it is offering, even though it may not know which particular works the user will select from among the offerings. To the extent these services are instead merely transmitting or allowing users to access third party content that the services are not proposing, they might be deemed mere equipment providers.²⁶² Moreover, the safe harbor provisions of § 512(a) and (c) of the Copyright Act absolve of all liability, direct or derivative, for both mere conduit service providers and host service providers that remove infringing user-posted content upon receipt of a proper notice.²⁶³ But to require that each transmission manifest specific intent to deliver particular content simply invites technological workarounds to limit human intervention to the fullest extent possible.

B. “TO THE PUBLIC”

1. What Does “to the Public” Mean?

We have queried the coherence of the limiting role of the user’s relationship to the work. How, on the one hand, can there be a public performance if transmissions of performances of the same work are offered to a large number of persons, regardless of the number of source copies for the transmission, but, on the other hand, no public performance when the recipient has some kind of possessory relationship to the work?²⁶⁴ The service’s proposal of the content to members of the public (in their capacity as members of the public) contributes to the determination that its communication is “to the public.” By contrast, where the audience for the transmission from the subscriber’s “own” copy is the subscriber herself, *Aereo* indicates that the transmission is not “to the public” (assuming that

260. *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision II)*, 536 F.3d 121, 130–31 (2d Cir. 2008).

261. *See Volition*, *supra* note 211.

262. *Cf.* World Intellectual Property Organization Copyright Treaty art. 8 n.7, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 121 (“[T]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication . . .”).

263. 17 U.S.C. § 512 (a), (c) (2012); *see also* Doug Lichtman, *Public Performance in the Cloud*, MEDIA INST. (Apr. 30, 2014), <http://perma.cc/4WYD-UM7J> (acknowledging that the § 512 safe harbor would shield Dropbox and similar cloud technologies).

264. *See Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2509 (2014) (finding that there was a public performance where personal copies of the same television program were streamed to multiple subscribers); *id.* at 2510 (noting that “an entity that transmits a performance to individuals in their capacities as owners or possessors is does not perform to the public” (internal quotation marks omitted)).

copy is not made for the purpose of structuring transmissions to the public, as was the case in *Aereo*).²⁶⁵

But if the “possessory relationship” renders the communication non-public in nature, I would go further: it should not matter if the service makes the transmission from the recipient’s individual “own” copy, or instead from a centralized copy, so long as the recipient was already entitled to receive the performance. To require individualized source copies in this context makes the determination as technology-dependent as in the Second Circuit’s *Aereo* and *Cablevision* decisions. On my view, services like Dropbox should be able to centralize repeat-player third-party content that its users store, and not have to waste resources duplicating storage space. The economic impact on the copyright owner is the same whether the source copy for the transmission is individualized or centralized. Arguably, once Dropbox centralizes the content, it becomes more implicated in the communication of the content, but Dropbox still will not have initiated the offer of those works (and therefore under *Aereo* might not even be the entity that “performs” them).

Whether the transmission is “to the public” should be assessed by reference to what kind of service the public is paying for: streaming of copyrighted content on demand on the one hand,²⁶⁶ or access to “my stuff” on the other,²⁶⁷ when “my stuff” includes “my” previously-acquired lawfully-made copy or unrestricted right of access to the works. I stress the lawful nature of the relationship between the user and the work because the possessory relationship that, according to *Aereo*, justifies labeling the performance as not “to the public” necessarily implies that the possession or access be lawful.²⁶⁸ If the content is illegally acquired, it is not “mine.” What makes the possession “mine” may result from a license agreement or from a fair or tolerated use, such as format-shifting a hardcopy CD to a digital file. This assessment of the nature of the service is technology-neutral. What matters is what the service does, not how it does it.²⁶⁹

2. Does Size of Audience Matter?

We also have expressed concern that the *Aereo* Court’s conflation of the two different kinds of “public” in the § 101 definition of “to perform publicly” may result in excluding transmissions whose potential audiences do not comprise “a substantial number of persons,” even when those transmissions in the aggregate

265. *Id.* at 2510.

266. *Cf. id.* at 2503 (describing the system by which an *Aereo* subscriber could select and watch a live TV program).

267. *Cf. Install*, DROPBOX, <http://perma.cc/ZS43-KJ82?type=source> (last visited Nov. 13, 2014) (“Your stuff, anywhere”).

268. *See Aereo III*, 134 S. Ct. at 2510.

269. This observation is consistent with the Court’s allusion in *Aereo* to the nature of the service for which the public is paying. *See Aereo III*, 134 S. Ct. at 2511 (“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.”).

may cause a significant economic impact.²⁷⁰ For example, under *Aereo*, if the audience for the subscriber's "own copy" consists of the subscriber's family members or limited circle of social acquaintance (i.e., not Facebook "friends"), the transmission might not be "public."²⁷¹ Combined with the sort of slinging to friends service posited above,²⁷² one can readily perceive the potential for deleterious economic impact.

My coauthor's notion of the "copyright owner's public" could result in a determination that in this scenario the works are nonetheless publicly performed. But it is not clear under what circumstances, even on a capacious concept of "who performs," the service (as opposed to the subscriber) would be deemed to have engaged in the copyright-infringing act. Moreover, § 512(c) takedowns may not offer a solution where access to the content is confined to a closed circle of family and social acquaintances, when the copyright owner is unable to discover the locations of its works' availability and the service does not cooperate of its own accord in blocking access.²⁷³ And if the service is transmitting, but not storing, user-communicated content, then § 512(a) confers on the service complete immunity from both primary and secondary liability.²⁷⁴ Similarly, given the substantial noninfringing uses that multiple-user access to personal storage lockers enable in the abstract, the service's secondary liability is unlikely to be engaged unless the copyright owner can show that the service promoted its capacity to substitute for paid online access to the stored content.

The cumulative consequences of end-user communications to a small audience thus may yield "public performances" by the end users under a "copyright owner's public" analysis, but as a practical matter those infringements will go unremedied unless the service that enables those communications will also, by cooperation or by judicial compulsion, prevent them. Whether this is a good outcome depends on whether the law of secondary liability sufficiently distinguishes mere technology providers from exploiters of copyrighted works. The *Aereo* approach of broadly defining the "performer," and varying the characterization of whether the performance is "to the public" based on the recipient's possessory relationship to the content, may—despite the shortcomings we have identified—in many cases sufficiently divine the line between equipment and exploitation. But if the Supreme Court persists—notwithstanding the language of the definition of "to perform publicly"—in making the size of the audience a criterion for assessing the "public" to which a transmission is offered, there remains the risk that transmissions to audiences small in instance but large in aggregate may fall outside the scope of the copyright law.

270. See discussion *supra* Part II.A.2.

271. See *Aereo III*, 134 S. Ct. at 2509–10.

272. See discussion *supra* Part IV.B.1.

273. Dropbox, however, does cooperate. Owners supply Dropbox with the file hash for infringing files; Dropbox checks that information against every file that is communicated from one user to another. See Campbell Simpson, *Dropbox Knows When You're Sharing Copyrighted Files*, GIZMODO (Mar. 31, 2014), <http://perma.cc/8VN5-UB6R>.

274. See 17 U.S.C. § 512(a) (2012) (safe harbor for transitory digital network communications).