



---

Volume 23 | Issue 1

Article 4

---

4-1-2016

## Stop Bashing Breyer: How the Justice's Powerful Subtlety Out-Witted Scalia in Aereo III

Zachary Stirparo

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

Zachary Stirparo, *Stop Bashing Breyer: How the Justice's Powerful Subtlety Out-Witted Scalia in Aereo III*, 23 Jeffrey S. Moorad Sports L.J. 149 (2016).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol23/iss1/4>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

## Casenote

### STOP BASHING BREYER: HOW THE JUSTICE'S POWERFUL SUBTLETY OUT-WITTED SCALIA IN *AEREO III*

#### I. INTRODUCTION: NOT CLEVER ENOUGH

In a single opinion, the United States Supreme Court eviscerated the streaming-technology company Aereo. Aereo's future does not look bright.<sup>1</sup> Legal commentators say there is no future.<sup>2</sup> Aereo's future was much brighter a few months ago, as major sports leagues were threatening to make free broadcasts part of a subscription if the Supreme Court sided with Aereo.<sup>3</sup> Broadcasters were concerned about their billions in retransmission licensing fees.<sup>4</sup>

Under the traditional television model, broadcasters are paid retransmission consent fees for cable and satellite companies to show broadcasters' programming, which includes sports events.<sup>5</sup> Even watching "NBC sports LiveExtra" on a computer, or through an ESPN Xbox application, requires a subscription to cable before viewing the sports game on the screen is possible.<sup>6</sup> Aereo has de-

---

1. See Kwame Opam, *Aereo Turns to Congress to Reverse Supreme Court Decision*, THE VERGE (July 1, 2014, 12:06 PM), <http://www.theverge.com/2014/7/1/5860888/aereo-turns-to-congress-to-reverse-supreme-court-decision> (reporting Aereo CEO urging its former customers to talk to Congress about changing laws so Aereo could function legally); see also *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) [hereinafter "*Aereo III*"].

2. See, e.g., Bill Rosenblatt, *TiVo Buys Aereo Assets at Auction. Is a Legal Aereo Coming?*, FORBES (Mar. 1, 2015, 10:24 PM), <http://www.forbes.com/sites/billrosenblatt/2015/03/01/tivo-buys-aereo-assets-at-auction-is-a-legal-aereo-coming/> ("Aereo officially died last week.").

3. See Sam Gustin, *NFL, MLB Warn of the End of Free Sports on Television*, TIME (Nov. 18, 2013), <http://business.time.com/2013/11/18/nfl-nba-warn-of-the-end-of-free-sports-on-television/>.

4. See Alex Barinka & Edmund Lee, *Aereo Court Loss Protects \$4 Billion in Broadcast Fees*, BLOOMBERGBUSINESS (June 25, 2014, 5:04 PM), <http://www.bloomberg.com/news/articles/2014-06-25/aereo-court-loss-protects-4-billion-in-broadcast-fees> (protecting \$4 billion for broadcasters). In order to be labeled a cable company in *Aereo IV*, Aereo revealed in 2014 that its subscription numbers were below 80,000 over ten cities at the end of 2013. See Cassandra Khaw, *Aereo Reveals Appallingly Low Subscriber Numbers*, THE VERGE (July 22, 2014, 3:23 AM), <http://www.theverge.com/2014/7/22/5925347/aereo-subscriber-numbers> (discussing which cities had which numbers).

5. See Gustin, *supra* note 3.

6. See Michael Humphrey, *Aereo and the Cord Cutters' Ethical Dilemma*, FORBES (June 26, 2014, 10:13 AM), <http://www.forbes.com/sites/michaelhumphrey/2014/06/26/aereo-and-the-cord-cutters-ethical-dilemma/>. Humphrey notes that

scribed itself as “reinvent[ing]” television by making television antennas small, moving them to “the cloud,” tying them to a cloud-based DVR system, and allowing its users to watch, record, rewind, and replay when the user wants.<sup>7</sup> When the United States Supreme Court decided that Aereo was infringing others’ copyrights when it used its tiny antennas to stream over the air broadcasting to Internet devices, Aereo’s most wealthy investor, Barry Diller, noted that his wallet would not suffer, but innovation would.<sup>8</sup> Broadcasters disagreed.<sup>9</sup>

While Aereo CEO Chet Kanojia sounded a battle cry against technological suppression, broadcasters were pointing out that suppression is not unlawful if it is stealing.<sup>10</sup> Reed Hundt, the former chairman of the Federal Communications Commission, called Aereo a “‘trick’” posing as innovation.<sup>11</sup> The United States Su-

---

a possible new normal is “cable-subscribing” friends sharing their passwords with their cord-cutting friends. *See id.*

7. *See* Aereo, *How Aereo Works*, YOUTUBE (June 9, 2014), <https://www.youtube.com/watch?v=IQCEKfKPVio> (noting that a “recording starts” when the user decided to watch (stream) a television program); *see also* BloombergBusiness, *Inside the Tiny Aereo Technology Threatening TV*, YOUTUBE (March 25, 2014), [https://www.youtube.com/watch?v=OG\\_SSpr\\_HnM](https://www.youtube.com/watch?v=OG_SSpr_HnM) (Aereo gave Bloomberg an “inside look” into an Aereo factory and Aereo technology); *accord* ReasonTV, *Aereo, the Supreme Court, and the Future of TV*, YOUTUBE (June 1, 2014), [https://www.youtube.com/watch?v=SXmNE\\_EsJ9I](https://www.youtube.com/watch?v=SXmNE_EsJ9I) (interviewing Aereo CEO Chet Kanojia about technology and broadcasters’ opposition). Steve Effros of Effros Communications was interviewed and noted that Aereo is a “gimmick” because while the second transmission of a copyrighted work is not infringement as it is not a “performance for profit,” Aereo never paid any copyright licensing the first time. *See* ReasonTV, *supra* (stating that he would take “broadcasters off the air” and use broadcasting frequencies to bolster Wi-Fi instead). James Grimmelmann, Professor of Law at University of Maryland, was also interviewed and noted that Aereo was not taking advantage of a “loophole” because it applied the “complex” contours of copyright law to the internet which is so different from telephone and cable lines. *See id.* Grimmelmann is noted as filing an Amicus Brief in support of Aereo in the United States Supreme Court. *See id.*

8. *See* Humphrey, *supra* note 6 (“It’s not a big [financial] loss for us, but I do believe blocking this technology is a big loss for consumers.” (alteration in original)).

9. *See* Aereo CEO: *We’re Disappointed in the Outcome, But Our Work is Not Done*, CNBC (June 25, 2014, 12:10 PM), <http://www.cnbc.com/id/101769731#> (noting National Association of Broadcasters’ President and CEO Gordon Smith spoke on Aereo).

10. *See id.*; *see also* Aereo, *Inside Aereo*, YOUTUBE (June 16, 2014), <https://www.youtube.com/watch?v=DDOQ0qwgY5Y> (Aereo CEOs discussing Aereo’s “alternative,” “next generation” technology).

11. *See* Aereo CEO: *We’re Disappointed In the Outcome, But Our Work Is Not Done*, *supra* note 9 (Barry Diller arguing that “the service would have offered consumers an ‘alternative to the bundle’”); *see also* Schuyler Moore, *Aereo Follows Grokster and Napster Into the Trash Bin of History*, FORBES (June 30, 2014, 2:32 AM), <http://www.forbes.com/sites/schuylermoore/2014/06/30/the-aereo-decision/> (“The simple truth is that Aereo’s entire business plan was based on piracy, pure and simply.”).

preme Court agreed.<sup>12</sup> After the release of the opinion, Aereo informed its customers, via its website, that it filed for Chapter 11 Bankruptcy and abandoned its various other court cases.<sup>13</sup>

---

12. See Mark P. McKenna, *The Limits of the Supreme Court's Technological Analogies: The Misguided Aereo Decision Shows Why Technical Details Matter*, SLATE (June 26, 2014, 12:07 PM), [http://www.slate.com/articles/technology/future\\_tense/2014/06/abc\\_v\\_aereo\\_ruling\\_the\\_supreme\\_court\\_s\\_terrible\\_technological\\_analogies.html](http://www.slate.com/articles/technology/future_tense/2014/06/abc_v_aereo_ruling_the_supreme_court_s_terrible_technological_analogies.html) (noting that depending on whether one views Aereo as a viewer putting an antenna on roof or stealer who places themselves on higher ground than broadcasters by not paying licensing fees, the view will color one's opinion on Supreme Court's outcome). McKenna, professor of law at University of Notre Dame, disclosed that he "was a signatory on an amicus brief in the case authored by law professors David Post and James Grimmelmann," which was "adopted by the dissent." *Id.* He argued that the Supreme Court's decision was "dictating technological design" by not drawing a more "general[ ]" analogy for legal decision-making. *See id.*

13. See Chet Kanojia, *A Letter To Our Consumers: The Next Chapter*, AEREO.COM (Nov. 21, 2014), <https://www.aereo.com/> (on file with author) ("Accordingly, today, we filed for Chapter 11 reorganization proceedings. We also appointed Lawton Bloom of Argus to server as Aereo's Chief Restructuring Officer during this period. Chapter 11 will permit Aereo to maximize the value of its business and assets without the extensive cost and distraction of defending drawn out litigation in several courts."). Mr. Kanojia noted Aereo's innovate mark on history and lamented Aereo's demise. *See id.* ("We have traveled a long and challenging road. We stayed true to our mission and we believe that we have played a significant part in pushing the conversation forward, helping force positive change in the industry for consumers. We feel incredibly lucky to have had the opportunity to build something as meaningful and special as Aereo. With so many shifts and advances in technology, there has never been a more perfect time to take risks, challenging the status quo and build something special. Thank you for all your support. Your emails, tweets, Facebook posts and letters have meant the world to us. We are incredibly grateful to have gone on this journey together."); *see also Aereo's Asset Values Hurt by Court Case: Kanojia*, BLOOMBERGBUSINESS (March 9, 2015, 9:59 AM), <http://www.bloomberg.com/news/videos/2015-03-09/aereo-s-asset-values-hurt-by-court-case-kanojia> (stating he was "disappointed in June" when asked about whether he was disappointed about the price he received for Aereo's assets at auction). Mr. Kanojia did not believe that the broadcaster's prediction of Aereo's demise was a "foregone conclusion," as Aereo "went all the way to the Supreme Court." *See Aereo's Asset Values Hurt By Court Case: Kanojia, supra* (noting that Kanojia raised one hundred million for Aereo). Countering, he noted that broadcasters "must be online." *See id.* (noting that it is a "shame" that "sling" is redefining the bundle on its own without broadcasters' network television input). Also Mr. Kanojia commented "good for them" in TiVo "grabbing" Aereo's consumer list. *See id.*

Reportedly, TiVo bought Aereo's trademark and customer lists for an unspecified amount, while all of Aereo's assets sold for \$2 million at an auction with only ten bidders. *See Mariella Moon, Aereo Gets Only \$2 Million from Selling Assets to TiVo and Other Companies*, ENGADGET (Feb. 27, 2015), <http://www.engadget.com/2015/02/27/aereo-auction-tivo/> ("Aereo was expecting to sell its assets for at least \$4 million (and up to \$31 million)."). TiVo seems to have its sights set on becoming a legal Aereo. *See Mariella Moon, TiVo Wants to Become the Legal Version of Aereo*, ENGADGET (May 14, 2015), <http://www.engadget.com/2015/05/14/tivo-aereo/>. In the end, Mr. Kanojia sided with Justice Scalia's dissent in noting that the majority opinion "was so results driven it was not the law). *See Aereo's Asset Values Hurt by Court Case: Kanojia, supra* (noting Aereo was "right on the merits" whether it got a fair shot or not). Mr. Kanojia believed the majority was "fabricating" the law by

The recent *Aereo* decision has been greatly critiqued.<sup>14</sup> Consumers generally agree that the Supreme Court did the right thing in preventing *Aereo* from continuing.<sup>15</sup> Legally however, there has been minimal support for Justice Breyer's majority in *Aereo III*.<sup>16</sup> Charging ahead, Justice Scalia's dissent was the majority's biggest critic.<sup>17</sup>

This case note rushes to Justice Breyer's aid—although he needs no defenders—and asserts that the Supreme Court's decision was not overly broad or incorrect.<sup>18</sup> Contrary to Justice Scalia's dissent, the majority opinion struck the appropriate balance between a copyright owner's rights and innovation. Section II provides back-

---

“going off [a] 1960's . . . staffers memo.” *See id.* (noting that this is how a business man and engineer read the opinion).

Since then, he formed a new company with twenty-five others and the company is in the experimental phase. *See id.* This next phase has been confirmed. *See* Peter Kafka, *As Aereo Winds Down, Founder Chet Kanojia Starts His Next Venture at Project Decibel*, RECODE.NET (Jan. 8, 2015, 9:24 AM), <http://recode.net/2015/01/08/as-aereo-winds-down-founder-chet-kanojia-starts-his-next-venture-at-project-decibel/> (noting he took “some of his former employees”).

14. *See infra* notes 315–51 and accompanying text.

15. *See, e.g.*, Bill Snyder, *Aereo Deserves to be Put Out of Business for Stealing Content*, CIO (June 27, 2014, 10:17 AM), <http://www.cio.com/article/2426291/consumer-technology/aereo-deserves-to-be-put-out-of-business-for-stealing-content.html> (noting that broadcasters will not continue making content if they are not reimbursed for their intellectual property). CBS even noted that it would become a cable network if *Aereo* was deemed a valid endeavor by the Supreme Court. *See* Alexandra Cheney, *Leslie Moonves and Jeff Shell Defend Movie Industry, Blast Aereo for ‘Stealing’ Content*, VARIETY (Apr. 30, 2014, 12:05 PM), <http://variety.com/2014/biz/news/les-moonves-and-jeff-shell-defend-movie-biz-blast-aereo-for-stealing-content-1201168099/>. CBS chief Leslie Moonves was “heated” when arguing that *Aereo* was trying to confuse everyone by pushing “innovation” when “the law [was] not on their side.” *Id.*

16. *See, e.g.*, Mitch Stoltz, *Symposium: Aereo decision injects uncertainty into copyright*, SCOTUSBLOG (June 27, 2014, 2:18 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-decision-injects-uncertainty-into-copyright/> (noting that the majority opinion did not simply read the Copyright Act, but brought “flexibility,” and with it “uncertainty,” to the Act). Even less severe articles have found fault with Justice Breyer's majority. *See, e.g.*, Sarah E. Claypool, Comment, *Aereo, Unlicensed Retransmissions, And Emerging Technologies: The Case for Congressional Action*, 100 IOWA L. REV. 1789, 1804–07 (2015) (noting that the majority's analysis was not shallow and delved into the legislative history quite extensively).

17. *See infra* notes 269–88 and accompanying text; *see also* Devlin Hartline, *On Scalia's Aereo Dissent*, LAW THEORIES BLOG (Sep. 3, 2014), <http://lawtheories.com/?p=1675> (describing Justice Scalia's dissent as “acerbic”).

18. *See infra* notes 380–448 and accompanying text. One reason the Honorable Stephen G. Breyer needs no defenders is because he has previously written on the intricacies of copyright. *See generally* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970), and Stephen G. Breyer, *The Uneasy Case for Copyright: A Look Back Across Four Decades*, 79 GEO. WASH. L. REV. 1635 (2011), the latter of which was based on his November 4, 2010 keynote delivered at The George Washington University Law School symposium.

ground with a discussion of the Copyright Act of 1976's purpose, intent, and language; cases that preceded *Aereo*; and cases that defined *Aereo*.<sup>19</sup> Section III will discuss *Aereo*'s technology and long journey from *Aereo I* to *Aereo IV*, the latter ruling that while *Aereo* was *like* a cable company it could not pay licensing *as* a cable company.<sup>20</sup> Section IV will analyze Justice Breyer's majority opinion in *Aereo III* and support its subtle power, contrary to Justice Scalia's categorization of the opinion in his dissent.<sup>21</sup> Section V will conclude in support of Justice Breyer's opinion.

## II. BACKGROUND: FIGHT OR FLIGHT?

### A. Cable Television: A Brief Synopsis

Television is defined as a "transmission of audio and video signals."<sup>22</sup> "Broadcast television" is a transmission "over public airwaves" that requires an antenna attached to one's television.<sup>23</sup> Conversely, "[c]able television" travels through "coaxial cable" that runs to the cable box ("set-top box" provided by a cable company), which is plugged into the consumer's television.<sup>24</sup> Cable companies are providers of "basic cable" (ex. AMC), "premium cable channels" (ex. HBO), and "broadcast television stations" —all

19. See *infra* notes 22–140 and accompanying text.

20. See *infra* notes 141–298 and accompanying text.

21. See *infra* notes 299–448 and accompanying text.

22. *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 610 (S.D.N.Y. 2007) [hereinafter *Cablevision I*] ("Television involves the transmission of audio and video signals—a moving picture, plus sound." (internal citation omitted)).

23. *Id.*

24. *Id.* It has been noted that the difference between broadcast television (ex. NBC) and cable television (ex. HBO) goes beyond delivery methods, and is not simply that the FCC polices only the former, but that the former's outlook on how viewers perceive life, and coincidentally what viewers enjoy, is more light-hearted. See Neal Gabler, *Cable vs. broadcast: TV's Different Mindsets*, L.A. TIMES (April 4, 2010), <http://articles.latimes.com/2010/apr/04/entertainment/la-ca-cable-cosmology4-2010apr04> ("It's a matter of cosmology—the way they perceive the universe. Cable TV and broadcast TV purvey different worlds, and cable's is darker, bleaker, more complicated and less forgiving."). Also, broadcast television emerged toward the end of the 1940s, was about engrossing the "broadest possible audience," and, subsequently, was focused on selling products, not content. See *id.* Because it was hoping to sell products, broadcast television did not want to rock-the-boat and upset its wide-ranging audience; it simply wanted to entertain with cookie cutter characters. See *id.*

In stark contrast, cable television was born out of the audiences' "anxieties." See *id.* Cable television tells viewers that life is messy and painful, and allows viewers to root for characters they can identify with. See *id.* ("[Cable television] tells us that we are not necessarily good and that neither is our world."). While broadcast television tries to be edgy (e.g. FX's "Nip Tuck"), it misunderstands complex characters and ends up creating caricatures (e.g. FX's "Nip Tuck"). See *id.*

of which are provided at select times during a programming schedule (i.e. “linear channels”).<sup>25</sup>

## B. Copyright Act of 1976

### 1. Congressional Purpose

The Constitution of the United States grants Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>26</sup> Copyright law considers artistic expression to contribute to the public good.<sup>27</sup> The author’s compensation is a “secondary consideration.”<sup>28</sup>

Nevertheless, payment facilitates the public good of artistic expression which induces authors to produce better quality work.<sup>29</sup> Ultimately, the Copyright Act is meant to give the authors (or owners) a steel backbone through which to assert their ownership rights and monetarily incentivize authors to produce quality expression.<sup>30</sup> Evidenced by the Copyright Act’s aim, Congress was not seeking to make copyright protection the goal itself.<sup>31</sup>

---

25. See *Cablevision I*, 478 F. Supp. 2d at 610. Cable has an interesting history. See generally *History of Cable*, CALCABLE.ORG, <http://www.calcable.org/learn/history-of-cable/> (last visited Mar. 9, 2015). Not to mention an evolution. See generally *Cable’s Story*, NCTA.COM, <https://www.ncta.com/who-we-are/our-story> (last visited Mar. 9, 2015). This evolution seems to be starting to unravel, as Nielsen has noted that it will begin counting viewers who watch online (such as on Netflix, Amazon, etc.). See David Bauder, *Nielsen to Begin Counting Broadband Viewing Homes*, YAHOO! (Feb. 21, 2013, 4:00 PM), <https://www.yahoo.com/movies/s/nielsen-begin-counting-broadband-viewing-homes-165248375.html>. Nielsen itself noted that just because homes do not have televisions does not mean they don’t watch multimedia. See generally *Zero-TV Doesn’t Mean Zero Video*, NIELSEN (Mar. 11, 2013), <http://www.nielsen.com/us/en/insights/news/2013/zero-tv-doesnt-mean-zero-video.html> (noting five percent of homes do not use cable or satellite to receive their entertainment).

26. U.S. CONST., art. I, § 8, cl. 8.

27. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor.”).

28. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (drawing parallel to patent statutes’ considerations).

29. See *id.* (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)) (noting Chief Justice Hughes’ belief that the author’s benefit must be directly connected to product quality, which is thought to better benefit the public).

30. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (citing *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 36 (1939)) (noting that author’s pay should be equivalent to the quality).

31. See Amanda Asaro, Comment, *Stay Tuned: Whether Cloud-Based Service Providers Can Have Their Copyright Cake And Eat It Too*, 83 *FORDHAM L. REV.* 1107, 1115 (2014).

## 2. Congressional Intent

Prior to the Copyright Act of 1976 overhaul, the United States Supreme Court decided *Fortnightly Corp. v. United Artists Television, Inc.*<sup>32</sup> and *Teleprompter Corp. v. CBS, Inc.*<sup>33</sup> *Fortnightly* dealt with the Fortnightly Corporation, which was helping residents of a “hilly” area (who could not receive local television broadcasting stations by attaching antennas to their roofs), by selling those residents a subscription to have coaxial cables run from some of Fortnightly’s antennas on top of those hills to the residents’ home televisions.<sup>34</sup> The users of this service could choose between the broadcast stations by turning a knob on their television sets.<sup>35</sup> United Artists Television was a copyright holder of movies and had licensing agreements with the broadcasting stations, and typically did not allow CATV systems to transmit their programming.<sup>36</sup>

The *Fortnightly* Court found that Fortnightly did not perform under the 1909 Copyright Act.<sup>37</sup> The Court chose not to apply a volitional standard to Fortnightly because the Court thought applying the volitional standard would cause apartment owners, whose tenants often shared an antenna, to be liable as well.<sup>38</sup> Instead, the Court asked CATV’s “function” in “television broadcasting and reception.”<sup>39</sup> Noting that “broadcasters perform” and “viewers do not perform,” the Court defined CATV as a viewer because CATV simply “enhance[d]” the viewer’s reception of the broadcaster’s con-

32. 392 U.S. 390 (1968).

33. 415 U.S. 394 (1974); see Thomas M. Cramer, Comment, *The Copyright Act and the Frontier of “Television”*: What to Do About *Aereo*, 67 VAND. L. REV. EN BANC 97, 103 (2014) (noting that these two cases “[s]et[ ] the stage”).

34. See *Fortnightly*, 392 U.S. at 391–92.

35. See *id.* at 392. Fortnightly did not “edit[ ] the programs received nor originate[ ] any programs of its own.” See *id.*

36. See *id.* at 393 (noting some licensing agreements “specifically prohibited” the transmission by CATV).

37. See *id.* at 395.

38. See *id.* at 397. Direct infringement’s “volition” is merely asking whether the infringer—by his own willful act—is stealing from the author or owner of the copyrighted work. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.06 (2014). If the infringer is being forced to act, then his or her “automatic response” is not volitional by definition. See *id.*; see also *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 742–43 (S.D.N.Y. 2012) (Kodak’s automated website feature of virtually placing plaintiff’s copyrighted pictures on a product during preview mode was not direct infringement). See *infra* note 422 for a discussion on applying the volitional standard to *Aereo*. Justice Scalia’s volitional standard used in *Aereo III* has been attributed to “legal principles of agency and responsibility.” See James Y. Stern, *ABC v. Aereo and the Humble Judge*, 9 N.Y.U. J.L. & LIBERTY 81, 88 (2015) (noting volition standard may not be “up to the task in the long run”).

39. See *Fortnightly*, 392 U.S. at 397.



tent.<sup>40</sup> The CATV was simply a viewer helping another viewer.<sup>41</sup> CATV systems were not broadcasting, “rebroadcast[ing],” editing, or choosing the programs.<sup>42</sup> Therefore, CATV could not be defined as a broadcaster.<sup>43</sup>

*Teleprompter* also dealt with a CATV system, but this system both received local broadcasting signals that residents could acquire with their own antennas, and “imported ‘distant’ signals,” which the residents could not acquire.<sup>44</sup> The *Teleprompter* Court agreed with *Fortnightly* and found that even CATV systems with control over choosing “distant” broadcasting stations was not enough to make the CATV system more than a viewer for liability purposes.<sup>45</sup> This was because the CATV system still simply performed a subscriber “function” because there was no “nexus” between the CATV system receiving and sending the copyrighted work and creating or procuring the copyrighted content like a broadcaster does.<sup>46</sup>

When overhauling the Copyright Act of 1909 for the 1976 version, Congress specifically demonized cable television systems (CATV) by stating that a “cable television system [ ] perform[s] when it retransmits the broadcast to its subscribers.”<sup>47</sup> Congress, thus, extended the “perform” definition and sought to include “all kinds of equipment for reproducing or amplifying sounds or visual

---

40. *See id.* at 399. “The television broadcaster . . . supplies his audience with visible images but only with electronic signals.” *See id.* at 398. “The viewer conversely . . . provides the equipment to convert electronic signals into audible sound and visible images.” *See id.* (comparing the theater exhibitor and audience which the 1909 Act was aimed at). Justice Fortas noted that it was not this simple because precedent held a performance to include “the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy.” *See id.* at 406 (Fortas, J., dissenting) (citing *Buck v. Jewell-LaSalle Realty Corp.*, 283 U.S. 191 (1931)).

41. *See id.* at 399–400 (noting that a viewer could just place his antenna on a hill, or several viewers could erect one large antenna on the same hill).

42. *See id.* at 400–01.

43. *See id.* at 401.

44. *See Teleprompter Corp. v. CBS*, 415 U.S. 394, 401 (1974).

45. *See id.* at 403, 408, 414.

46. *See id.* at 405, 409–10.

47. *See* H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677 (noting the performance must be public to be infringing). Prior to the 1976 version enactment, the performance “for profit” analysis was still being applied despite the difficulty in striking a balance between protecting the copyright owner and the public. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 152–53, 162–64 (1975) (finding that a store owner who played a radio in his store was neither performing by turning his radio on, nor could he be expected to license everything that came over his radio—even if the performance played was public and “for profit”).

images.”<sup>48</sup> The congressional report was very broad, in fact stating, “any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.”<sup>49</sup>

Congress noted that the Transmit Clause was also broadly intended to capture “all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them.”<sup>50</sup> It specifically noted that “every method by which the images or sounds comprising a performance or display are picked up and conveyed” falls under a transmission.<sup>51</sup> Congress also noted this transmission will be a public transmission “if the transmission reaches the public in [any] form.”<sup>52</sup>

The report continues, noting that “‘public’” is “the public at large,” which means people do not need to be in the same room, nor does there need to be evidence that the person actually received the transmission.<sup>53</sup> Thus, the report notes that the language, “‘in the same place or in separate places and at the same time or at different times’” considers even a “limited segment of the public” in private rooms to be the “public.”<sup>54</sup>

### 3. *Plain Language*

The Copyright Act of 1976 holds that a copyright owner has certain “exclusive rights” over his copyrighted material, which include: “to *reproduce* the copyrighted work in copies or phonorecords,” and “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to *perform the copyrighted work publicly*.”<sup>55</sup>

48. See H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

49. See *id.* Authors have stated that this broad reaching definition is the reason for the current mess as “transmission” and “performance” are being swept up into the same definition. See, e.g., Kevin W. Yoegel, Comment, *The Aereo Loophole: A Retrospective Inquiry into the Legality of Antenna Farms and Internet-Based Television*, 87 TEMP. L. REV. 339, 367–68 (2015) (proposing change to Copyright Act that would remove all references to “performance”).

50. See H.R. Rep. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

51. See *id.*

52. See *id.*

53. See *id.* at 64–65.

54. See *id.* at 65 (meaning “occupants of hotel rooms or the subscribers of a cable television service”).

55. See 17 U.S.C. § 106(1), (4) (2002) (emphasis added). Other rights include: (2) “derivate works,” (3) selling copies, (5) displaying work publicly, and (6)

Specifically pertaining to the reproduction right:

“Copies” are material objects, other than phonorecords, in which a work is *fixed* by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.<sup>56</sup>

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.<sup>57</sup>

Related to the public performance right:

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any *device or process* or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.<sup>58</sup>

To perform or display a work “publicly” means—

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

(2) *to transmit or otherwise communicate* a performance or display of the work to a place specified by clause (1) or *to the public*, by means of any device or process, whether

---

performing “sound recordings” “publicly by means of a digital audio transmission.” See 17 U.S.C. § 106.

56. 17 U.S.C § 101 (emphasis added). Note that phonorecords are not involved here because they “are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.” See *id.*

57. See *id.*

58. See *id.* (emphasis added). The act also notes “[a] ‘device’, ‘machine’, or ‘process’ is one now known or later developed.” See *id.*

the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>59</sup>

Notably, Congress has proposed amendments to section 106 (exclusive rights section); however, none of the amendments expand the Copyright Act to Internet services.<sup>60</sup> Likewise, no amendments that involve section 101 (pertaining to the reproduction right) change the definitions at issue.<sup>61</sup> Additionally, prior to 1967, there was no Transmit Clause (17 U.S.C. § 101) and the definitions were slight and contained mainly in the sections.<sup>62</sup> For instance, the public performance right (and definition) stated, “[t]o perform or represent the copyrighted work publicly . . . it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.”<sup>63</sup>

### C. Pre-Aereo: Public Performance Issues Emerge

The following cases set a framework for the analysis of “public performance” in *Aereo III* (17 U.S.C. § 101 “publicly” definition). Some of the following cases were also discussed by *Cablevision I* and *II*, which served as the guide for Aereo’s service.<sup>64</sup>

---

59. *See id.* (emphasis added).

60. *See* S. Res. 2045, 113th Cong. (2014) (“To amend title 17, United States Codes, to secure the rights of visual artists to copyright, to provide for resale royalties, and for other purposes.”); *accord* H.R. 4103, 113th Cong. (2014); *see also* H.R. 3219, 113th Cong. (2013) (“To amend title 17, United States Code, to provide copyright owners in sound recordings with the exclusive right to negotiate in the marketplace the performance of their works to the public by means of an audio transmission, and for other purposes.”).

61. *See* H.R. 238, 114th Cong. (2015) (“To amend . . . with respect to the definition of ‘widow’ and ‘widower’ . . .”); *accord* S. Res. 23, 114th Cong. (2015); S. Res. 2919, 114th Cong. (2014); H.R. 5617, 114th Cong. (2014).

62. *See* H.R. 2083, 80th Cong. (1974), *available at* <http://law.copyrightdata.com/index.php> (select December 31, 1974 to Dec. 31, 1977); *see also* Cramer, *supra* note 33, at 104 (noting Transmit Clause was added in 1976).

63. *See* H.R. 2083, 80th Cong. (1974); *see also* *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 n.15 (1968) (noting legislature intended to cover a person in the audience who copied down a play word-for-word).

64. *See infra* notes 126, 140; *see also* Matthew Schruers, *Symposium: Aereo Copyright Decision Creates Uncertainty for the Cloud*, SCOTUSBLOG (June 26, 2014, 12:55 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-copyright-decision-creates-uncertainty-for-the-cloud/> (“Aereo’s legal rationale turned on the reasoning of the 2008 *Cablevision* decision in the Second Circuit, which the Supreme Court declined to hear.”).

*Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*<sup>65</sup> dealt with the “recent technological developments” of a Maxwell video store.<sup>66</sup> The issue was whether the video store could charge a patron for selecting a movie from the store’s list and watching that movie in the privacy of Maxwell’s small, “private booths.”<sup>67</sup> While the Third Circuit noted that Maxwell lawfully purchased the movies on its list, the movie showings were public performances because the video store was open to the public (even though they charged a fee), and repeat showing of one movie-copy was a performance.<sup>68</sup>

The Ninth Circuit, in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*,<sup>69</sup> found that the renting of videos to hotel guests for use in hotel room videodisc players was not infringement.<sup>70</sup> Movies were available to rent by guests at the hotel’s lobby gift shop and, if the guests asked for help, hotel employees would help the guests play the movies in their rooms.<sup>71</sup> The only issue before the court was whether the performance was considered public.<sup>72</sup> The court distinguished *Redd* by noting that a hotel’s nature “incidentally” must allow the movie watching because the guests presume it.<sup>73</sup>

Under the first prong of the Copyright Act, the Ninth Circuit did not find public performance because—although a hotel room is “‘open to the public’” —it becomes private when rented.<sup>74</sup> Under the Transmit Clause, the court did not find public performance because it assumed that the Transmit Clause required the movies to be sent beyond (to or from) the hotel room itself in order to be transmitted.<sup>75</sup> Thus, because the transmission of “signal”

---

65. 749 F.2d 154 (3d Cir. 1984).

66. *See id.* at 157–58 (noting technology could still be “analyzed and resolved within existing statutory framework”).

67. *See id.* at 156–57 (noting Maxwell had eighty-five rooms in two stores, and the booths were four feet by six feet and could fit up to four people).

68. *See id.* at 157–59 (following Professor Nimmer’s scholarship on one-movie copy).

69. 866 F.2d 278 (9th Cir. 1989).

70. *See id.* at 282.

71. *See id.* at 279.

72. *See id.* (noting that hotel did not argue that its use was not performance because the Copyright Act specifically defines performance for motion picture).

73. *See id.* at 280–81.

74. *See id.* at 281 (noting there is more privacy assumed in rented hotel room than more open “hotel meeting rooms”).

75. *See id.* at 282 (“In sum, when one adds up the various segments of clause (2), one must conclude that under the transmit clause a public performance at least involves sending out some sort of signal via a device or process to be received by the public at a place beyond the place from which it [was] sent.”).

from movie to television occurred in the private hotel room, the performance was not transmitted “to the public.”<sup>76</sup>

In *NFL v. PrimeTime 24 Joint Venture*,<sup>77</sup> the NFL was unhappy when PrimeTime decided to transmit weekly football games via satellite to United States households that could receive “adequate over-the-air broadcast reception” in their areas.<sup>78</sup> The court rejected PrimeTime’s argument that transmission to satellites and downloads from satellites to user were not public performance.<sup>79</sup> The court was persuaded that public performance, as defined by the Copyright Act, constituted each “step in the process” in which the transmission traveled to the viewer.<sup>80</sup>

In *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*,<sup>81</sup> defendants streamed “free, over-the-air broadcast television” to Internet and mobile devices.<sup>82</sup> Defendants did not contest this accusation by plaintiffs who: “produce[d] and license[d] the distribution of copyrighted works” to free broadcast networks and licensed with cable, satellite television, and Internet services.<sup>83</sup> The defendants relied on *Cablevision II* when arguing that they were using technology that was accessible to the average consumer and provided private performances for each user.<sup>84</sup>

The court was not persuaded.<sup>85</sup> The court found *Cablevision*’s reading of the statute not determinative; the court believed a more logical reading of the Copyright Act would find infringement when performance transmissions were public even if the transmission was

76. *See id.*

77. 211 F.3d 10 (2d Cir. 2000).

78. *See id.* at 11 (noting PrimeTime had paid for licenses to send these transmissions to houses that could not receive quality broadcast reception). The NFL televised its games over broadcast, while also recording these games and registering these recordings with the Copyright Office. *See id.*

79. *See id.* at 12.

80. *See id.* at 13 (citing *WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982)) (agreeing with Judge Posner that sending signals through cable systems does not expunge one of liability).

81. 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

82. *See id.* at 1140.

83. *See id.* (noting defendants did not challenge plaintiffs’ copyright ownership).

84. *See id.* at 1141; *see also Cablevision II*, *infra* note 128.

85. *See Fox Television Stations*, 915 F. Supp. 2d at 1143 (stating court would not subscribe to Second Circuit precedent, which had not been adopted by Ninth Circuit).

162 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 149

not public.<sup>86</sup> Thus, the unique copies were not important because “in public” was not being argued, but rather “to the public.”<sup>87</sup>

*Fox Television Stations, Inc. v. FilmOn X LLC*<sup>88</sup> was extremely similar to *BarryDriller*’s facts and players; FilmOn X is a mini antenna system that transmits free broadcast signals to users over the Internet for a fee.<sup>89</sup> Both parties agreed that Aereo technology and BarryDriller technology was equivalent to FilmOn X technology.<sup>90</sup> The court found that FilmOn X violated 17 U.S.C. § 106(4) because the statute is broad enough to encompass making “programs available [performing] to any person with an internet-enabled device [publicly].”<sup>91</sup> The court did not agree that FilmOn X’s position was similar to an individual user hooking up an antenna on his roof because of FilmOn X’s ability to amass the antennas under one roof and distribute.<sup>92</sup>

#### D. Cablevision: Aereo’s Crutch & Achilles

##### 1. *Cablevision I*<sup>93</sup>

###### a. Cable Television Services Overview

Transmission of the cable company’s programming content is fairly straight forward; with content transmitted from content owner, through the cable company, to consumer.<sup>94</sup> Video-on-de-

86. *See id.* at 1144 (“[The Copyright Act] does not require ‘performance’ of performance.”).

87. *See id.* at 1145.

88. 966 F. Supp. 2d 30 (D.D.C. 2013).

89. *See FilmOn X*, 966 F. Supp. 2d at 34–37 (no consent or licensing agreements involved).

90. *See id.* at 34 (“They also agree that the *Aereo* courts and *BarryDriller* court described the technology and services accurately.”).

91. *See id.* at 46–47. The District of Massachusetts has disagreed in noting that there would be no need for Congress to say “‘a performance or display of the work’” if every transmission of an original performance was infringement. *See Hearst Stations, Inc. v. Aereo, Inc.* 977 F. Supp. 2d 32, 38–39 (D. Mass. 2013) (emphasis added) (quoting 17 U.S.C. § 101). However, the court did believe there was evidence of volition to fall under the reproduction right. *See id.* at 39–40 (noting reproduction “is a closer question than the issue of public performance”). Alternatively, the District of Utah countered, arguing Aereo clearly met the definition of CATV that was meant to fall under the transmit clause. *See Cmty. Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1200 (D. Utah 2014). The court noted that Aereo’s reliance on *Cablevision II* overlooked that those facts established a cable company which had paid licenses already. *See id.* at 1201.

92. *See id.* at 47–48 (noting also the complex system was still “‘device or process’” under 17 U.S.C. § 101).

93. 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

94. *See id.* at 610. Modern television is transmitted over “digital signals,” which allow for more content to be “compressed” into a single “space.” *See id.* The quality of the sound and picture transmitted through digital transmission is supe-

mand (VOD) enhances the playing field by letting a consumer decide when he or she will watch their programs.<sup>95</sup> Digital-video-recording (DVR) continued the progression by copying VOD's recorded content onto a physical hard drive at the consumer's home.<sup>96</sup> The physical hard-drive is often combined with a cable box and placed inside the cable box housing; this box combination is known as a "set-top storage DVR[ ]" ('STS-DVR[ ]').<sup>97</sup>

---

rior to the older analog television, which received its signals through a "series of continuous waves." *See id.* Specifically, the transmission of cable television (digitally) begins with the "programming owners" who send "content feeds" to the cable company. *See id.* The cable companies gather all of the feeds at a central location. *See id.* (noting that central location is where most equipment required to keep a cable system running is stored). To transmit the feeds for linear channels, the feed is formatted into one "aggregated programming stream" ('APS'). *See id.* A customer of linear programming receives the APS in his or her home by a device that changes the digital signals of the feed into "radio frequency ('RF') signals." *See id.* at 611 (noting that radio signals are "better suited for transmission along a cable system's coaxial cable lines"). The RF signals are transmitted across the main cable system, which then bounces the RF signals to the "smaller cable systems" that branch off of the main cable system. *See id.* The RF signals then end up at the consumer's home set-top box (by the smaller cable systems) where the APS content is sorted and "reassembled into a single program transport stream [(PTS)]." *See id.* So as to not give every channel to every consumer (i.e. no HBO for everyone), the PTS content is encrypted. *See id.* Thus, when the set-top box receives the packets it has "decryption hardware," which sorts the content accordingly. *See id.* The content is then "decoded, and displayed," after being decrypted. *See id.*

95. *See id.* at 611. As opposed to watching (linear) television programming during its specific time slot, a Cable company also allows customers to watch a linear program (ex. an episode of a FX show) outside of the timed programming of regular, linear television. *See id.* This service, "Video-on-Demand ('VOD')," which customers must purchase separately, allows the customer to select his or her desired program through an "on-screen menu and [TV] remote control." *See id.* While the customer can select the show from a menu of options, it is the cable company that decides which shows are included in this menu. *See id.* (noting that cable company must have licenses to include content in menu). After the license agreements are established, the cable company is allowed to store the VOD menu content on computers at its *central location*. *See id.* Because the linear programming is already taking up the whole stream, a second stream must be used, along with a "reverse" channel [stream] for each customer." *See id.* The reverse channel is needed for the customer to pick and control ("rewind, fast-for-ward, and pause") which shows he or she desires to watch on the VOD menu service. *See id.* ("[P]layback control[s] are known as 'trick modes.'").

96. *See id.* Whereas a VCR copies the content from the television signal onto the videocassette inside of the VCR, a DVR copies the content onto a physical hard-drive. *See id.* (noting VCRs were placed in homes around 25 years ago while DVRs gained popularity in 1999).

97. *See id.* at 611–12 (stating STS-DVR can copy digital content and does not have to decode the stream; some STS-DVRs work by providing customers a "tuner" that allows watching programs and a tuner that allows recording programs, verses recording at the same time). Like the VOD service, the STS-DVR uses a menu from which the customer can record a selected program, which is copied onto the physical hard-drive and is able to be replayed. *See id.* (storage space is determined by physical hard-drive's capacity which cable provider determines).



## b. Cablevision's Technology

While similar STS-DVR technology was used in *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.* (“Cablevision I”), unlike an STS-DVR, Cablevision used an “RS-DVR,” which is a “network DVR (‘nDVR’).”<sup>98</sup> In *Cablevision I*, nDVR did not store the copied recordings on a physical hard drive at the customer’s house, but on a computer server at a central location owned by Cablevision.<sup>99</sup> Importantly, the RS-DVR is not a single “piece of equipment” like the STS-DVR, but involves around-the-clock human interaction and maintenance.<sup>100</sup> What the customer can and cannot record was determined by Cablevision.<sup>101</sup> Cablevision allowed all of its 170 channels to be recordable.<sup>102</sup>

From Cablevision’s perspective, in order for Cablevision’s servers to be ready to record any of its 170 channels on a customer’s whim, the content of those 170 channels are temporarily stored in multiple “buffer” zones.<sup>103</sup> From the customer’s perspective,

---

98. *See id.* at 612. Cablevision sold its own STS-DVRs, which could only record linear programming that the customer was currently paying for. *See id.* In other words, there was no ability for the customer to use the STS-DVR to record VOD content. *See id.*

99. *See id.* An RS-DVR is also different from an STS-DVR because the RS-DVR does not copy the content to a physical box in the customer’s home. *See id.* The RS-DVR is more than just a remote control, “on-screen program guide” (that stored content at Cablevision’s central location), and a set-top box at the customer’s house. *See id.* It was also (a) “a network of wires, relays, switches, and RF devices connecting the set-top box . . . to Cablevision’s cable television system,” and (b) “computer hardware and software located at Cablevision [i.e. central locations].” *See id.*

The recorded content that the consumer stored on Cablevision’s in-house servers was created by Arroyo Video Solutions, Inc. and had numerous physical hard drives with which to store the customer’s content. *See id.* However, all the customers’ content was not stored on the same hard-drive in one big file, but the content was stored on that customer’s individually allotted hard-drive space (i.e. individual folders within a big file). *See id.* Once the customer chose to record a program the program would be stored on Cablevision’s hard-drives “indefinitely,” unless the customer deleted it or it was automatically deleted off of the hard-drive server because the customer recorded a new program and the customer’s space was full. *See id.*

100. *See id.* Put in perspective, Cablevision’s expert estimated that around “ten ‘boxes’” would be involved for each server created by Arroyo. *See id.* at 613. Likewise, the expert stated that a Cablevision RS-DVR customer would not be allowed to touch the RS-DVR “service,” which took-up more than a 60 feet by 60 feet room at the central location. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* at 613–14 (noting that “‘buffer’ memory” is a form of “random access memory—RAM”). There are two buffer zones; the main buffer zone was present when Cablevision’s servers received the streams of programming content. *See id.* at 614. The RS-DVR travels began (like cable) with a smaller circuit system called the “BarcoNet,” which receives the “aggregated programming stream”

while either watching a program or finding the program on the menu program guide, the customer can use the remote to start recording a show within his or her subscription.<sup>104</sup> For each customer that requests a recording, their own, separate copy is copied onto a secondary buffer zone, which then makes a “complete copy” of that content onto the physical hard drive that Cablevision has set aside on its server for that customer.<sup>105</sup> Once the content is on

---

(“APS”). *See id.* at 613. For linear programming, an APS would travel from BarcoNet; however, for RS-DVR the APS is separated from the BarcoNet into two different streams. *See id.* at 613. The “Big Band Broadband Multimedia Router (‘BMR’)” receives the second stream and “clamp[s]” the second stream into a “variable bitrate (‘VBR’)” stream, which is “more efficient.” *See id.* When the BMR clamps it places part of the content into “‘buffer’ memory,” which is the first buffer zone. *See id.* Different from regular cable streaming, the BMR also separates out the APS into streams that only carry one channel per stream. *See id.* The packets in these APSs are transformed by the BMR into “larger packets known as User Datagram Protocol (‘UDP’),” which are given a “port number” that matches the television channel that the single channel stream is meant for. *See id.* The UDPs are transported via stream to “‘switch[es],” which send the stream from “one port to another” until being fed into the Cablevision servers. *See id.* at 613–14.

Importantly, the buffering of content to the buffer zone occurs (“automatically”) when the content was fed into Cablevision’s servers from the BMR, before any customer started to record the programming. *See id.* at 614 (defining this main buffer zone as the “‘primary ingest buffer’”). However, this main buffer zone can only hold the “equivalent of . . . three frames of video” at a time. *See id.* (noting that the primary ingest buffer can only hold 6,000 packets at once, which is only “three frames of video”).

104. *See id.* Behind the scenes, that record action is sent to the “‘Application Data Server’ (‘ADS’),” which is located at Cablevision’s central location (“head-end”). *See id.* The ADS checks to make sure the content is within the customer’s subscription, the content is not already being recorded, there is enough hard-drive space, and the customer is not trying to record two programs at once. *See id.* After the ADS finds or gets the requested content an “‘asset ID,’” so that the content has an identifier for Cablevision’s server, the content is sent to the “‘Vitria’ server.” *See id.* at 615. The ADS gets an ID for the content by communicating with the “‘Oracle Production Server’ (‘OPRD’).” *See id.* at 614. The OPRD is responsible for keeping track of what has been requested by the customer for recording by “maintain[ing] a list of programs.” *See id.* The OPRD will already have an asset ID for the content if the customer has previously recorded the content. *See id.* If the customer has not previously requested this content, then the ADS will ask the “‘Asset Management and Publishing System’ (‘AMP’)” to create an asset ID for the content. *See id.* After the AMP has sent the ADS the new asset ID, the ADS will inform the OPRD of the new ID. *See id.* at 614–15. The OPRD then adds the new ID to its list of “waiting to be recorded” content. *See id.* at 615. Meanwhile, the ADS has informed the Vitria server of the asset ID. *See id.*

The Vitria server will then hold those recording requests until the content is set to be recorded. *See id.* When the content is about to be recorded, the Vitria server sends the list to Cablevision’s server. *See id.* When Cablevision’s server receives the list of recorded requests from the Vitria server, Cablevision’s server goes to the primary ingest buffer zone and copies the content onto the “secondary ingest buffer” zone. *See id.*

105. *See id.* (“For instance, if 1000 customers want to record a specific episode of HBO’s ‘The Wire,’ 1000 separate copies of that episode are made, each copy

166 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 149

Cablevision's server, the customer has almost complete "playback" control, yet the customer cannot copy the content from Cablevision's server (which houses physical hard drives) to his or her own physical hard drive (or VCR equivalent).<sup>106</sup>

The playback system works very similarly to the recording system.<sup>107</sup> When customers wish to playback content, they also select the content program from an on-screen list with their remote control.<sup>108</sup> This customer request asks their home set-top box to converse with the Cablevision servers and the server finds the content that is already copied on the customer's set-aside hard drive space and streams that content into "buffer memory."<sup>109</sup> The customer can then use the trick modes to "pause, fast-forward, and rewind the program," which is accomplished by the RS-DVR "automatically plac[ing] one to two seconds worth of video data from the programming stream into buffer memory."<sup>110</sup>

c. Procedure

Two consolidated cases were involved, with both plaintiffs seeking declaratory and injunctive relief to stop Cablevision from debuting its RS-DVR, as Cablevision did not pay for any licenses in order to retransmit plaintiffs' copyrighted material.<sup>111</sup> Interestingly, the plaintiffs stipulated to only arguing that Cablevision was directly infringing their copyright (versus indirectly) and Cablevision agreed to waive its defense that its use of the copyrighted material was a

---

uniquely associated by identifiers with the set-top box of the requesting customer. Once a copy of the program is made to the customer's hard drive, the [Cablevision server] initiates a series of messages to inform the other components of the RS-DVR that the program has been recorded, is available for playback, and should appear as such on the customer's on-screen program guide." (citations omitted)). Note that the "complete copy" of the content that is downloaded from the secondary ingest buffer zone to Cablevision's hard drive does not occur if the customer does not request for the content to be recorded. *See id.* (noting that "portions" of the content is still waiting in the buffer zones regardless of whether customer records the content or not).

106. *See id.* (noting that customer could do this if Cablevision server hard drive was replaced with customer's in-house "set-top DVR").

107. *See supra* notes 104–07 and accompanying text.

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

109. *See id.*

110. *See id.* at 616.

111. *See id.* at 616, 618.

“fair use.”<sup>112</sup> Both sides were seeking summary judgment after filing cross-motions.<sup>113</sup>

d. Copyright Analysis: RS-DVR Transmissions Were Public Performances

As the Copyright Act of 1976 only allows owners of copyrighted works to “reproduce . . . copies” of their original copyrighted work and to “perform . . . publicly” those copyrighted works, plaintiffs argued that Cablevision was violating both of these “exclusive” rights.<sup>114</sup> Infringing another’s copyright requires the showing of “(1) ownership of a valid copyright and (2) unauthorized copying or a violation of one of the other exclusive rights afforded copyright owners [e.g. performing the work publicly].”<sup>115</sup>

The plaintiffs argued that Cablevision was infringing their right to reproduce and publicly perform their work.<sup>116</sup> The court found that Cablevision directly infringed both rights because of Cablevision’s temporary storage of content in its buffer zones, and the complexity of the RS-DVR, which made Cablevision an active, direct infringer.<sup>117</sup> Under the court’s “public performance” analy-

112. *See id.* at 616 (noting also that Cablevision had agreed not to release its RS-DVR service until court ruled on issue in this case).

113. *See id.* (noting, after “limited discovery,” hearing, and oral argument, that court was allowed to determine: witness credibility, findings on expert testimony, and sufficiency of record; these determinations would allow court to rule—unless there was disputed issue of material fact).

114. *See id.* at 617 (quoting Copyright Act of 1976, 17 U.S.C. § 106(1) and (4) (2002)) (internal quotation marks omitted) (stating that neither side argued that plaintiffs did not own valid copyrights on televised content).

115. *See id.* (quoting *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 232 (S.D.N.Y. 2001)).

116. *See id.* at 617.

117. *See id.* at 618, 622. In arguing against infringing on the reproductive right of the plaintiffs, Cablevision asserted that it merely provided the *equipment* for its customer to use in recording the program and, thus, Cablevision was not directly “doing” the infringing. *See id.* at 617–18 (noting that Cablevision believed it was simply providing “a machine” and was “entirely passive” in the copying process). Cablevision compared its RS-DVR to a “VCR, STS-DVR, [and] a photocopier.” *See id.* at 617. The critical question for the court was how involved Cablevision was with the supposed recording that the customer was doing when he or she pushed the record button via his or her remote control. *See id.* at 618. Cablevision argued it was not involved at all—beyond selling the RS-DVR ability to the customer—but the court disagreed and sided with the plaintiff. *See id.* at 617.

The court disagreed with Cablevision’s proposition that the RS-DVR was equivalent to a piece of equipment. *See id.* at 618 (Cablevision believed that the most the plaintiffs could prove was indirect infringement, but, of course, the plaintiffs waived this right). The court agreed with the plaintiffs, who define the RS-DVR as providing a “service.” *See id.* In the court’s eyes, an example of a true piece of equipment is a “Betamax VCR” (“B-VCR”), which was at issue in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *See id.* (discussing *Sony Corp.*).

The B-VCR was sold by Sony to customers who could use the B-VCR to “time-shift[ ]” television programming. *See id.* (internal quotation marks omitted) (recognizing time-shifting is “the practice of recording a program to view it at a later time, then erasing it”). Cablevision believed its RS-DVR was analogous to Sony’s B-VCR; however, the court found multiple differences between the two, emanating from Cablevision’s overt involvement. *See id.* (noting Court in *Sony* found Sony to have a fair use defense, which Cablevision waived here).

The B-VCR is a single piece of equipment that customers buy once, own, and can connect it to whatever television they want and start recording. *See id.* The RS-DVR is not a “single piece of equipment,” it has to connect to a certain customer’s television, and cannot be moved. *See id.* The B-VCR will start recording when the customer pushes the record button with his or her remote control. *See id.* Pushing record on the RS-DVR started the relay of information that involved software, computers, and other “devices” at Cablevision’s central location property. *See id.* With the B-VCR, the customers involvement with Sony was buying their product; versus Cablevision which gave the set-top box to the customer, chose the programs that the customer could record and how much memory the customer was afforded to record on, provided the copyrighted content through its channels, kept the software and equipment needed to deliver the content up and running, housed the equipment on its land, and hired people to oversee the transfer of content-to name a few. *See id.* at 618–19 (reiterating that Sony was involved in no way after the point of sale).

Cablevision wanted to argue that its “ongoing participation” was equivalent to an STS-DVR, which was not a problem because a “programmer” or “cable operator” had never sued Cablevision for the STS-DVRs. *See id.* at 619. Because the STS-DVR is distinguishable from the RS-DVR, which Cablevision was being sued for, the court quickly dispensed with this argument as irrelevant. *See id.* Specifically, the court noted that the two were different because the STS-DVR recorded to a physical hard drive which was at the customer’s house, often in the set-top box casing; whereas, the RS-DVR required a second APS stream (apart from the original linear channel stream). *See id.*

The court held the RS-DVR system to be more analogous to a “modified VOD platform,” which Cablevision paid licensing fees to use. *See id.* (noting the system itself and how it delivered content to be analogous). That is, the RS-DVR was only allowed to record that which Cablevision allows, the content available for recording was stored at Cablevision’s central location and not at the customer’s house, both needed a “session resource manager” to stream the content to the customer. *See id.* (recognizing this streamed content is encrypted so only the customer’s set-box can read it, and if no stream avenue is available the customer does not receive the content he or she requested).

Cablevision argued that the copies stored in the buffer zones, in anticipation of a customer recording a program, were not infringing on the plaintiffs’ copyrights because they were not “copies,” were “not fixed,” and were only a small part of the overall content (i.e. three frames at a time). *See id.* at 621 (internal quotation marks omitted). The court was not persuaded. *See id.* at 622. Precedent had established that temporary storage of “information” on RAM (Random Access Memory) was a Copyright Act copy. *See id.* at 621 (internal quotation marks omitted) (citing *Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998), *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995), *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), *Marobie-FL., Inc. v. Nat’l Ass’n of Fire Equip. Distrib.*, 983 F. Supp. 1167, 1177–78 (N.D. Ill. 1997)).

Additionally, while only “portions” of the content were stored at any given time in the buffer zone, (a) all portions would pass through the buffer zone, and (b) all portions would form the entire program of content (show or movie) for the customer to record. *See id.* Notably, the Senate Report for the Digital Millennium Copyright Act agreed that “buffer copies” were “fixed” according to the Copyright

sis, Cablevision agreed it was “performing” by streaming the content to the customer.<sup>118</sup> Cablevision admitted this, but argued it was “passive in [the streaming] process” and therefore not directly infringing.<sup>119</sup> The court dismissed Cablevision’s passive-argument because of Cablevision’s direct involvement in transmitting the content to the customer.<sup>120</sup>

After losing the performance argument, Cablevision then argued that the performance was not streaming to the “public.”<sup>121</sup> Cablevision argued its streaming was not public because the performances were “private,” as each customer received his or her own copy of the content.<sup>122</sup> The court disagreed.<sup>123</sup> The court noted that the Copyright Act did not require the viewers of the content to be watching it together or even at the “same time.”<sup>124</sup> The court

---

Act. *See id.* at 621–22 (skimming over that Digital Millennium Copyright Act defined buffer copies this way only if “they exist for a sufficient amount of time to be capable of being copies, perceived or communicated” (emphasis added) (citing DMCA Report at xxii, 110–11)).

118. *See id.* at 622. *See supra* note 107–10 and accompanying text for an explanation of Cablevision’s act of transmission.

119. *See Cablevision I*, 478 F. Supp. 2d at 622; *see also* 17 U.S.C. § 101 (defining performance as, “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible”).

120. *See Cablevision I*, 478 F. Supp. 2d at 622 (noting that if customers hit record, there would be no transmission without Cablevision’s facilitation). “The customer’s command triggers the playback process, but again, it is Cablevision and its operation of an array of computer servers at the [central location] that actually make the retrieval and streaming of the program possible.” *See id.* The court also rejected Cablevision’s passive arguments in Cablevision’s reproduction defense. *See supra* note 117.

121. *See id.* at 622 (arguing that—because each consumer received a “distinct copy”—it was privately streaming).

122. *See id.* (internal quotation marks omitted) (noting customers may not view content in their homes, but that is where Cablevision “intended” the customer to view the content). The copyright act defines public performance as, “(1) to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” *See* 17 U.S.C. § 101 (second definition is defined as “transmit clause”).

123. 478 F. Supp. 2d at 622 (holding argument to be “flawed”).

124. *See id.* at 622–23 (quoting 17 U.S.C. § 101) (“To transmit . . . to the public . . . 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.*”).

170 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 149

held Cablevision to fit this definition perfectly.<sup>125</sup> The court also held Cablevision's transmissions were public because Cablevision's relationship with its customers was "commercial" in nature.<sup>126</sup> Cablevision's individual transmissions, while occurring in private homes, were sent to numerous people based on a payment transaction; thus, Cablevision performed publicly.<sup>127</sup>

2. *Cablevision II*<sup>128</sup>

a. Background

Cablevision appealed the District Court's opinion, which found it to be directly infringing the appellees' rights under the Copyright Act.<sup>129</sup>

b. Take Two: Cablevision's Transmission is a Performance, but is not Public

The Second Circuit's public performance analysis boiled down to whether Cablevision's playback transmission was the transmission of a public performance.<sup>130</sup> Only the Transmit Clause of the public performance definition was implicated when the court asked whether Cablevision was publicly transmitting a performance.<sup>131</sup>

---

125. *See id.* at 623 ("Cablevision would transmit the same program to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback.").

126. *See id.* The court notes that precedent has found neither watching copyrighted content in privately rented hotel rooms, nor "private viewing booths" in rental stores, as private performances since the nature of the viewing was commercial. *See id.* (citing *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991), *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984)); *see also supra* notes 65–68 and accompanying text.

127. *See id.* at 623–24. Cablevision has "discretion over what content was available to customers, the customer selected the programming he or she wished to view; the service provider supplied the content from one location to another location for the customer's exclusive viewing; and the service provider supplied the same content to other customers at different times." *See id.*

128. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) [hereinafter *Cablevision II*].

129. *See id.* at 123 (internal quotation marks omitted). The Second Circuit reminded its readers that Cablevision did have "numerous licensing agreements" with the appellees. *See id.*

130. *See id.* at 134. *See supra* note 122 for the full Copyright Act definition of a public performance.

131. *See id.* (noting Cablevision agreed RS-DVR "playback" was "transmission of a performance of a work"). The Second Circuit phrases the buffer zone issue as whether Cablevision's buffer zone, which stored data, was "reproduc[ing]" a copy of that work. *See id.* at 127. As noted above, part of the definition of a "copy" is that it is "fixed," which requires that "the work must be embodied in a medium"

and that the work “must remain thus embodied ‘for a period of more than transitory duration.’” *See id.* (internal quotation marks omitted). *See supra* notes 57–58 for the specific Copyright Act definitions. The Second Circuit held the District Court to be confused when it found that the buffer zone copies were fixed because the District Court combined the separate fixed analyses. *See id.* The District Court combined these analyses by holding that—because the content was embodied in the buffer zone—the content remained embodied for a sufficient period of time. *See id.*

The Second Circuit argued that this was a misreading of the Copyright Act, as it would make language found in the “fixed” definition, “‘for a period of more than transitory duration,’” irrelevant. *See id.* at 127, 129 (disagreeing with copyright office, and giving lower level of deference, which held that “any amount of time” is enough for content to be fixed). The Second Circuit disagreed with the District Court’s citing of *MAI Systems* because the case did not address, and did not need to address, the “duration requirement,” as the software was admitted to be held on the RAM for a satisfactory duration. *See id.* at 127–28 (dealing with whether person who loaded computer with software in order to fix the computer was creating copy of that software, which had to be processed on the computer’s RAM). In order for the software to process, the software’s time spent on the computer’s RAM must have been “several minutes.” *See id.* at 128.

Likewise, the court did not need to address whether a few minutes was enough time as no one seemed to debate it. *See id.* Thus, the Second Circuit read *MAI Systems* only “as holding that loading a program into a computer’s RAM *can* result in copying that program,” not that it “*always*” does. *See id.* Applying both analyses to Cablevision, the Second Circuit found “‘embodiment’” because the buffer zones were “‘stable’” enough for the content to “‘be perceived, [or] reproduced.’” *See id.* at 129 (noting even though content was only placed in buffer zone in small increments, whole work still passed through zone and, thus, was embodied). However, because the content only lasts “a fleeting 1.2 seconds” before it was “automatically overwritten” with the next content fragment, the court did not believe this was enough time to be considered ‘non-transitory.’” *See id.* at 129–30. Hence, the buffer zone content is not a copy because it is not fixed. *See id.* at 130 (noting court will not touch whether “copies produced by buffering data would be” too small to be considered copies).

After the recorded content was requested by the customer, a copy of that “complete copy” would be stored on Cablevision’s server for that customer unless deleted by the customer or automatically deleted by Cablevision. *See id.* Cablevision would automatically delete content to make room on the limited hard drive for more content. *See id.*; *see also supra* note 105 and accompanying text. The question was who was the creator of this copy, Cablevision or the customer. *See id.* Unlike the District Court, the Second Circuit believed that the distinction between direct and contributory liability was important to understand how the court’s analysis should be applied. *See id.* at 130–31. The Second Circuit found that direct infringement needed a purposeful action (i.e. “direct” link) by the infringer, or the distinction was non-existent. *See id.*

The court discussed supporting precedent which did not want to impose liability for direct infringement on an Internet service provider (“ISP”) when the ISP’s system “automatically reproduced” a copyrighted work that had been uploaded by a user. *See id.* at 130 (internal quotation marks omitted) (citing *Religious Tech. Ctr. v. Netcom On-Line Commuc’n Serv.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995)) (noting direct infringement use to be strict liability concern). Therefore, the court in *Religious Technology* wanted the infringer to show willingness, a choice, to infringe, which was not present in automatic reproduction of a work. *See id.* The Second Circuit also noted that the Fourth Circuit endorsed *Religious Technology* by requiring a showing of “actual infringing conduct with *a nexus sufficiently close and causal* to the illegal copying.” *See id.* (emphasis added) (quoting *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)). While the Dis-



Cablevision argued that the customer performed by imitating the playback function, and the performance was not public, but private.<sup>132</sup> However, the court did not address the first, as it found the latter dispositive.<sup>133</sup>

In its analysis, the court began with the plain language of the statute, which does not define “to the public.”<sup>134</sup> However, the phrase is contextualized by the Copyright Act noting that transmission to the public is not limited by whether the “members of the public capable of receiving the performance” are together or apart

---

strict Court found cases dealing with the causal connection problem and Internet service providers (“ISP”) to be distinguishable because of the Internet’s “unique attributes,” the Second Circuit disagreed. *See id.* at 131 (noting District Court’s “pigeon-hol[ing]” of *Religious Technology*). The court disagreed because the underlying issue of causal conduct “transcend[s] the Internet.” *See id.*

Thus, the court focused on Cablevision’s conduct that could link it as a direct infringer, its creation and maintenance of its system that placed a complete copy on its server, versus the conduct of the customer in “ordering” the copy. *See id.* (noting VCR example obviously put the causal act on the customer who pushed the record button, but also noting that RS-DVR use was not too different). The court found that Cablevision was similar to a Staples, for example, that allows the customer to make his or her copies with a photocopier found in Staples. *See id.* (holding that the District Court’s focus on “instrumental” involvement versus “incidental” could be said of VCR or photocopier).

Just as Staples is not a direct infringer, neither is Cablevision. *See id.* Interestingly, the District Court thought that Cablevision was not Staples (“store proprietor”) but the employee at Staples that is asked to make copies of the copyrighted material. *See id.* at 131–32. However, the Second Circuit noted that this analogy breaks down because the Staples’ employee is making a direct act of infringement, whereas Cablevision’s system “automatically obeys [the customer’s] commands.” *See id.* at 131. The more proper analogy: the customer is the Staples’ employee. *See id.* at 132 (stating that even though Cablevision chose which content its customers could record, while that conduct was “more proximate . . . [than] operating an ISP or opening a copy shop,” link was still too attenuated for direct infringement). In denying a causal link, the court honed in on the fact that while Cablevision did decide which channels could be recorded by the customer, it could not determine which content (e.g. shows) on those channels could be recorded; therefore, having “less control” over RS-DVR recording than VOD recording. *See id.* The court concluded these points by noting the importance and need for the distinction between direct and contributory infringement. *See id.* at 132–34 (leaving for another day the question of whether contributory infringer can become direct infringer based on quality and quantity of involvement in that contributory infringement).

132. *See id.* at 134.

133. *See id.* The court noted that just because it found Cablevision as the “copier” did not mean it would find Cablevision as the “performer.” *See id.* (“[W]e note that our conclusion in Part II that the customer, not Cablevision, ‘does’ the copying does not dictate a parallel conclusion that the customer, and not Cablevision, ‘performs’ the copyrighted work.”). The court noted that the reproduction right and public performance right are very different. *See id.* (“For example, the statute defines the verb ‘perform’ and the noun ‘copies,’ but not the verbs ‘reproduce’ or ‘copy.’”). *See id.* *See supra* note 131 for the court’s analysis of the reproduction right.

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

when they receive it, nor whether they view the transmission at “the same time or at different times.”<sup>135</sup> The court read “‘capable of receiving’” and “‘capable of receiving the performance,’” as indicating that the public must be receiving the transmission to be part of “to the public,” and any transmission of the original performance is a performance.<sup>136</sup>

The court agreed with Cablevision that the RS-DVR’s transmission of one copy per customer, only decodable by that customer’s set-top box, was important to the Transmit Clause analysis.<sup>137</sup> The court did not agree with the plaintiff (and District Court) that “to the public” insinuated a “larger potential audience,” thus, the court would not focus on all customers with RS-DVRs, nor all customers with RS-DVRs who recorded the same content.<sup>138</sup> The court noted that if the plaintiff was correct, “to the public” would be superfluous language because every transmission would reach a “potential audience.”<sup>139</sup> Thus, Cablevision was only transmitting the one copy to one person, which was not transmission “to the public.”<sup>140</sup>

---

135. *See id.* (quoting 17 U.S.C. § 101) (internal quotation marks omitted). *See supra* note 122 for the full Copyright Act definition of a public performance.

136. *See Cablevision II*, 536 F.3d at 134–35 (citing H.R. Rep. No. 94-1476 at 64–65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678; H.R. Rep. No. 90-83, at 29 (1967)) (giving deference to legislative history of 1976 House Report and 1967 House Report, which noted the importance of the two phrases).

137. *See id.* at 135.

138. *See id.* at 135–36 (internal quotation marks omitted) (holding that following the District Court would be focusing on transmission of the *content* (“work”) when the plain language draws focus to the *transmission* itself). The court also rejected the plaintiff’s spin on the court’s refutation by arguing that the Copyright Act’s use of the word “performance” means “‘original’ performance,” thus, requiring an analysis of a broader spectrum of the public because all transmissions of an original are an original performance. *See id.* at 136.

The court rejected this because it believed the act was punishing the transmitter (i.e. Cablevision) for transmitting a copy, and the plaintiff’s theory would allow the transmitter to be punished for another transmitter’s copy. *See id.* For example, two transmitters are given the same content, one transmits legally (among itself) and another transmits to customers. *See id.* (court uses HBO, Cablevision, and Comcast). The legal transmitter would still be liable for the illegal transmission to the customers because the content is the same, even though the legal transmitter did not do the illegal transmitting. *See id.* (stating that these results would be absurd).

139. *See id.* at 135–36 (internal quotation marks omitted) (noting also that the Copyright Act says “‘performance,’” not “‘work’”).

140. *See id.* at 137 (noting that plaintiffs’ argument—that singling out the copies makes no difference—has not been supported by plaintiffs). The court distinguished *PrimeTime 24* as finding a public performance at every stage of transmission only because the final transmission was a public performance. *See id.* at 136–37; *see also infra* text accompanying notes 77–80 (discussing *PrimeTime 24*). Likewise, the court held *Redd* to support its contention that in order for a performance to be transmitted it must be the “same copy.” *See Cablevision II*, 536 F.3d at 138; *see also infra* text accompanying notes 65–68 (discussing *Redd*). The Second

## III. THE NARRATIVE: AEREO'S LONG JOURNEY

## A. Aereo's Technology

From the Aereo consumer's perspective, after subscribing to Aereo, the user could select television programs that were airing, or would air, from an online-interface.<sup>141</sup> The user could either watch the airing programs with a delay online, or record the program for later viewing.<sup>142</sup> A copy would only be stored if the user recorded the program.<sup>143</sup> In either instance, the user could pause or rewind the program.<sup>144</sup> The District Court compared Aereo to a "remotely located DVR" that streamed over the Internet instead of over cable.<sup>145</sup>

From Aereo's "perspective," when the user selected "Watch," "Aereo's Application Server" received a request and then sent this request (with user information) to "Aereo's Antenna Server."<sup>146</sup> The Antenna Server would assign the user his or her own antenna and transcoder to receive the Internet stream of the television program.<sup>147</sup> If the user was "static" then the user received only antenna-X every time he or she requested that Aereo play or record a

---

Circuit also found the argument that any transmission for profit is a public transmission as "untenable." See *Cablevision II*, 536 F.3d at 139 (citing *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991)).

141. See *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 377 (S.D.N.Y. 2012) [hereinafter *Aereo I*]. Originally, Aereo was limited to New York City users and New York City area channels only. See *WNET v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013) [hereinafter *Aereo II*].

142. See *Aereo I*, 874 F. Supp. 2d at 377 (noting that if the user records the program when the program is airing, then the user can watch nearly simultaneously to its recording).

143. See *id.*

144. See *id.* The fact that the Aereo system allowed its users to rewind and pause supports the argument that Aereo was not sending them the original broadcast transmission, but a copy of that original that Aereo was storing until the user was done watching the program. See *Aereo II*, 712 F.3d at 692 n.15. A second fact that supports that Aereo used a copy is that if a user simply decided to "Watch" the program, but in the middle of watching the program the user decided to hit "Record," the program would be recorded from the beginning of the copy and not at the time that the user hit "Record." See *id.* (internal quotation marks omitted).

145. See *Aereo I*, 874 F. Supp. 2d at 377. A typical DVR travels through cable and requires another device to stream its content over the Internet (such as a "Slingbox"). See *id.*

146. See *id.* (internal quotation marks omitted). Aereo's antennas were dime size and made of two square, metal loops. See *id.* at 379. These antennas were stuffed shoulder-to-shoulder, row-to-row onto a circuit board, which was housed in a structure that also housed the encoder, which allowed the antennas to function. See *id.* Filed away, sixteen boards were found parallel in that metal structure and protruded out of the housing, so as to receive signals. See *id.*

147. See *id.* at 377.

program.<sup>148</sup> If the user was “dynamic” then he or she would still only use one, individual antenna, but each time he or she requested Aereo to play or record a program, Aereo could choose antenna-X, antenna-Y, antenna-W, et cetera, to play or record the program.<sup>149</sup>

After the Antenna Server assigned the user, the server would send a “tune’ request” that made the user’s specified antenna “tune into” the program’s “particular broadcast frequency.”<sup>150</sup> The Antenna server also communicated with the “Streaming Server” which recorded a “unique directory” for each user’s data that was produced by his or her individual antenna and transcoder (“output data”).<sup>151</sup> This directory allowed the antenna to send an “electric signal,” which was adapted into “data packets,” over the Internet.<sup>152</sup> These packets proceeded to the Streaming Server, were saved on a hard drive for later directory filing, and read into the RAM buffer zone.<sup>153</sup> This buffer zone then sent the program six-to-seven seconds at a time to the user’s interface.<sup>154</sup>

## B. Aereo I

### 1. *Background Procedure (preliminary injunction)*

Plaintiffs’ complaint argued that Aereo infringed copyright holders’ rights of public performance, reproduction, and contributing to others’ infringement, when Aereo intercepted broadcast television signals and sent them to their consumers’ Internet-connected devices.<sup>155</sup> The complaints were limited by plaintiffs asking the court for a preliminary injunction against Aereo for direct copyright infringement of the public performance right.<sup>156</sup> The

148. *See id.* at 377–78 (internal quotation marks omitted). Note antenna-X is an example.

149. *See id.* (internal quotation marks omitted) (noting that most of Aereo users were “dynamic”). Importantly, two users would never use the same antenna at the same time. *See id.* at 378. Neither would a user’s data be accessible by another user. *See id.* Note antenna-X, antenna-Y, and antenna-W are used as examples.

150. *See id.* at 378 (internal quotation marks omitted).

151. *See id.* This means that the antenna was not directly streaming the content to the user, but streaming a copy from Aereo’s server. *See Aereo II*, 712 F.3d 676, 682 (2d Cir. 2013).

152. *See Aereo I*, 874 F. Supp. 2d at 378.

153. *See id.* The hard drive did save a temporary copy of the program if the user watched the program, or a stored copy if the user recorded. *See id.* at 377-78. The buffer zone was re-writing over these packets every time new packets came in, so it was not storing any data indefinitely. *See id.* at 377.

154. *See id.*

155. *See id.* at 375–76.

156. *See id.* at 376. A preliminary injunction standard requires that the plaintiff will win on merits alone. *See id.*

176 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 149

complaint was further limited to argue that only Aereo's service, which allowed its users to watch the televised programs at the same time as the programs were televised, infringed.<sup>157</sup>

## 2. *Disputed Facts*

The only factual dispute between the parties was whether Aereo's antenna structure allowed the antennas to function individually.<sup>158</sup> Importantly, if the antennas could not transmit individually, then the antenna structure would be acting as one giant antenna, and not creating separate transmissions of the programs.<sup>159</sup> Plaintiffs argued that the size of the dime antennas and their crammed nature presented the incoming signal with "one continuous piece of metal."<sup>160</sup> Various tests were done that attempted to isolate the small antennas and show that their size required the conglomerate structure in order for the signals to be strong enough.<sup>161</sup> However, the court sided with Aereo because the opposing opinion arguments against Aereo were too vague to allow Aereo to counter them.<sup>162</sup>

## 3. *Analysis: Equivalent to Cablevision*

Aereo argued that it was simply a provider of equipment and that its system was an antenna/DVR/Slingbox "equivalent."<sup>163</sup> Aereo claimed a *Cablevision*-similar defense because its system pro-

157. *See id.*

158. *See id.* at 379. This was important to the plaintiffs who sought to show the court that Aereo's tiny antennas were acting as one big antenna and, thus, not sending individual copies. *See infra* note 170 and accompanying text.

159. *See Aereo I*, 874 F. Supp. 2d at 379.

160. *See id.*

161. *See id.* at 379–80. Because smaller antennas do not have the "reach" that larger antennas do, the plaintiffs' Dr. Volakis testified that he believed the antennas must be using each other, and surrounding metal, to increase their reach. *See id.* at 379 (noting only alternative is for broadcast signal to be made stronger). Dr. Volakis tried various tests, for example, he focused on just one dime sized antenna and turned off or suppressed the surrounding antennas, and introduced more metal to the circuit board and did not see the reception rise or dip. *See id.* at 379–80.

162. *See id.* at 380. Aereo noted that Dr. Volakis incorrectly positioned the control board for his tests, which influenced signal strength; had no control group in his experiments; used computer simulations in his analysis; could not explain exactly how his experiments worked at his deposition; and could not explain how he introduced more metal to the circuit board. *See id.* These flaws with Dr. Volakis and the inability for him to be cross-examined as an expert moved the District Court to side with Aereo. *See id.* The Second Circuit noted that the District Court had resolved the dispute of whether Aereo's antennas operated independently or as a conglomerate in Aereo's favor. *See Aereo II*, 712 F.3d 676, 680 (2d Cir. 2013).

163. *See Aereo I*, 874 F. Supp. 2d at 385.

duced “unique, user-requested copies” that went only to that user by a single antenna.<sup>164</sup> CBS, on the plaintiffs’ side, argued that Aereo was infringing the copyright owner’s right to perform the work publicly by taking the broadcast signal in the first place.<sup>165</sup> CBS did not believe *Cablevision* should be applied because it was fact specific.<sup>166</sup> Thus, Aereo argued that by taking the broadcast signal and re-transmitting, Aereo created unique copies that were private performances for each user.<sup>167</sup> Conversely, CBS argued that simply retransmitting the broadcast signal did not make unique copies, but passed the original from person to person.<sup>168</sup>

Falling under *Cablevision*’s precedent, the District Court was not persuaded by CBS’s arguments.<sup>169</sup> The court noted that, just like *Cablevision*’s system, Aereo’s system was triggered by the user, made unique copies for the user, no other user was privy to another user’s copy, and Aereo’s service was just a combination of equipment that the user could purchase on his own.<sup>170</sup> Likewise, any dissimilarities were in Aereo’s favor; for example, *Cablevision*’s original “stream of data” created all of the user copies while Aereo’s copies were created from “separate stream[s].”<sup>171</sup> The similarities between *Cablevision* and Aereo were too great for the court to ignore.<sup>172</sup>

Strategically, CBS took a different route in arguing that *Cablevision* was only applicable to “time shifting” (recording programs for later viewing) whereas Aereo is allowing the user to watch the program “live”- at only a slight delay.<sup>173</sup> Because the court believed this argument was based on “*Cablevision*’s silence,” the court was not persuaded.<sup>174</sup> Additionally, CBS conceded that *Cablevision* was silent on the time-shifting element because *Cablevision* “was licensed

---

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.* (noting no difference between *Cablevision*’s system and Aereo’s).

170. *See id.* at 386 (noting *Cablevision* was basically DVR or VCR and Aereo’s was DVR or Slingbox).

171. *See id.* at 387.

172. *See id.*

173. *See id.* (noting if there is “overlap” between broadcast and recorded program then there is no time-shifting).

174. *See id.* at 388 (“[T]ime-shifting is simply not the basis of the Second Circuit’s opinion.”). “Thus, even accepting that a distinction based on time-shifting exists in this case, nothing in the Second Circuit’s analysis indicates that this distinction is material, and this Court remains obligated to apply Circuit precedent with fidelity to its underlying reasoning.” *See id.*

to make live transmissions.”<sup>175</sup> The court found this stipulation and Cablevision’s focus on user-specific copies to make CBS’s point moot.<sup>176</sup> Time shifting was not dispositive because regardless of whether one watched the program after it had aired (Cablevision) or while the program was airing (Aereo), unique copies were made in both instances.<sup>177</sup>

*Cablevision* did not define a public performance by the number of people receiving the transmission.<sup>178</sup> In fact, the opposite is true because Cablevision followed the Copyright Act, which did not focus on whether the transmission was received at “the same time or at different times.”<sup>179</sup> Practically this makes sense because if a public performance occurred each time a transmission was made then a paying customer could not use a Slingbox to send a recorded program to his smartphone.<sup>180</sup> Redundantly, CBS next argued that “buffer copies,” which have been found to be infringing, were what Aereo’s “Watch” service created.<sup>181</sup> The court pointed again to how the unique copies were more permanent than Internet buffer copies because Aereo’s server stored the show until the user was finished watching it.<sup>182</sup>

Finally, CBS tried to argue that *Cablevision* was wrong in plainly reading the transmit clause and Aereo’s performance was a “quintessential public performance.”<sup>183</sup> Aereo’s performance was quintessential because it used a “device or process to communicate performances of Plaintiffs’ copyrighted work to members of the public.”<sup>184</sup> The court noted that *Cablevision* rejected this argument when it did not affirm the District Court, which argued the same thing.<sup>185</sup> Likewise, the plaintiffs could not explain how watching a

---

175. *See id.* at 388–89.

176. *See id.* at 389. Even CBS’s argument that “time-shifting limits the potential audience” in *Cablevision* more so than in *Aereo* was rejected by the court as just another conclusory statement. *See id.*

177. *See id.*

178. *See id.* at 390.

179. *See id.* (quoting 17 U.S.C. § 101).

180. *See id.* “A Slingbox is a device that connects the user’s cable or satellite set-top box or DVR to the internet, allowing the user to watch live or recorded programs on an internet-connected mobile device, such as a laptop or tablet.” *See Aereo II*, 712 F.3d 676, 680 n.2 (2d Cir. 2013).

181. *See Aereo I*, 874 F. Supp. 2d at 392 (internal quotation marks omitted).

182. *See id.* at 390–92.

183. *See id.*

184. *See id.*

185. *See id.* at 392–93. The court also rejected CBS’s argument that the time-shifting had to be “complete” in order for infringement not to occur. *See id.* at 393. Because this argument was based on *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which only discussed time-shifting in refer-

recorded program a minute before its airing ends was public performance, but watching the recorded program a minute after it had fully aired was not a public performance.<sup>186</sup>

### C. Aereo II

#### 1. *The Copyright Act of 1976's Transmit Clause Interpretation*

The 1976 amendment to the Copyright Act was intended to include the Transmit clause in response to issues raised, prior to, but covered in *Fortnightly Corp. v. United Artists Television, Incorporated* and *Teleprompter Corp. v. Columbia Broadcasting System, Incorporated*.<sup>187</sup> When *Fortnightly Corp.* and *Teleprompter Corp.* were decided, the Copyright Act did not have a Transmit Clause, therefore, the Court naturally found the re-transmission of broadcast television signals from an antenna-through coaxial cable—to the user allowable.<sup>188</sup> This setup was not found to infringe the public performance right of the copyright holders because there was no performance.<sup>189</sup> Plaintiffs argued that Aereo's technology was the exact same concept only technologized.<sup>190</sup>

#### 2. *Copyright Act of 1976's Legislative Intent*

The Plaintiffs ignored Congress' own concerns when they asserted that the Aereo model was the same as the CATV model, which Congress encapsulated in the 1976 amendment.<sup>191</sup> Originally, Congress was concerned with how broadly "performance" was defined.<sup>192</sup> Congress limited the performance standard by requiring that the performance be done publicly.<sup>193</sup> Therefore, private performances would not infringe.<sup>194</sup> The court did note that determining between private and public was not as difficult in the 1970's; however, it felt that Congress' limiting concerns took precedent.<sup>195</sup>

---

ence to fair use and reproduction infringement, the court viewed Sony's arguments as misstatements. *See id.*

186. *See id.* at 394. Importantly, the court did not address whether "Aereo escapes liability" because it did not begin the transmission process. *See id.* at 396.

187. *See Aereo II*, 712 F.3d 676, 685 (2d Cir. 2013).

188. *See id.*

189. *See id.* The court noted that Congress also created a "compulsory license" to encourage continual "investment in cable systems." *See id.*

190. *See id.* at 686.

191. *See id.* at 694.

192. *See id.* (internal quotation marks omitted).

193. *See id.*

194. *See id.*

195. *See id.* at 694–95.



3. *Following the District Court's Lead*

Under a *Cablevision* Analysis, the majority did not find Cablevision's creation of "temporary buffer copies," or its "permanent" copies for each customer, as relevant to the question of whether Cablevision publicly performed.<sup>196</sup> The court did parse out exactly what Cablevision had rejected as a definition for public performance.<sup>197</sup> First, *Cablevision* rejected determining if a transmission was public by looking at the "potential audience" of the "underlying work," instead of the "particular transmission."<sup>198</sup> This was rejected because every work has a potential audience, therefore, Congress' inclusion that the transmission must be "to the public" would be superfluous.<sup>199</sup>

Second, *Cablevision* rejected taking all the transmission phases of a performance and holding each phase to be a public performance.<sup>200</sup> Practically, this would make individual users liable for recording a program and transmitting it to their second television.<sup>201</sup> The *Cablevision* court held that performing publicly was determined by whether the original program was watched by multiple people ("performed"), regardless of whether the people were watching at different times or places.<sup>202</sup>

The *Aereo II* court found *Cablevision* produced four guidelines: (1) "consider the potential audience of the individual transmission," (2) "private transmission . . . should not be aggregated," unless (3) the "private transmissions are generated from the same copy of the work," and (4) whether unique copies are made is relevant to whether the performance is public because the potential audience is limited.<sup>203</sup> Hence, the court boiled down *Cablevision* into: (a) unique copies were created at the behest of the user, and (b) the transmission of the program was based on the unique copy and not the original program stream.<sup>204</sup> This meant that the transmissions were not public because only one user received each

---

196. *See id.* at 687.

197. *See id.*

198. *See id.* (internal quotation marks omitted).

199. *See id.* (internal quotation marks omitted).

200. *See id.* at 688 (assuming conglomerate actually reached users).

201. *See id.*

202. *See id.* at 688–89 (internal quotation marks omitted).

203. *See id.* at 689.

204. *See id.*

one.<sup>205</sup> Aereo's system was exactly the same, so the court found *Cablevision* to apply and be dispositive of plaintiff's claim.<sup>206</sup>

Plaintiffs argued similarly as in District Court; however, their Second Circuit focus was on Aereo's equivalency to the cable television provider.<sup>207</sup> The plaintiffs argued that in *Cablevision* the focus was on comparing the Cablevision RS-DVR system to a VCR, which was not equivalent to Aereo's system.<sup>208</sup> The court dispensed with this argument as the VCR comments did not appear relative to the public performance discussion and, alternatively, the Second Circuit had already applied the VCR analogy to different technologies.<sup>209</sup> Likewise, the court quickly dismissed the plaintiffs concern that Aereo's setup was designed because of *Cablevision*.<sup>210</sup> The court noted that this was simply a last ditch effort to argue that *Cablevision II* was wrong.<sup>211</sup>

#### 4. Judge Chin's Dissent

Judge Chin viewed Aereo's set-up as a "sham."<sup>212</sup> He saw no reason why Aereo could not have used "one central antenna" other than to skirt the law in making one performance for each user.<sup>213</sup> Following this reasoning, Judge Chin also found *Cablevision* to be distinguishable, as Cablevision paid licensing and retransmission consent fees.<sup>214</sup>

##### a. The Copyright Act's Plain Language

The dissent believed Aereo fell under a plain reading.<sup>215</sup> First, Aereo's system of multiple antennas and transcoders falls under the broad wording of a "any device or process."<sup>216</sup> Second, Aereo's system took original, copyrighted work and retransmits them to

205. *See id.* at 689–70.

206. *See id.*

207. *See id.* at 691 (holding that *Cablevision* undermined plaintiffs' arguing, again, that "to the public" meant public could "receive" the retransmission, and unique performances should be aggregated).

208. *See id.*

209. *See id.* (applying to internet music downloads) (citing *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 649 (2d Cir. 2010)).

210. *See Aereo II*, 712 F.3d at 694.

211. *See id.*

212. *See id.* at 697 (Chin, J., dissenting). Judge Chin held to his view when the Second Circuit court denied rehearing *en banc* and he dissented. *See WNET v. Aereo, Inc.*, 722 F.3d 500, 501 (2d Cir. 2013).

213. *See id.*

214. *See id.*

215. *See id.* at 698.

216. *See id.* (quoting 17 U.S.C. § 101).

182 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 23: p. 149

users “‘beyond the place from which they are sent.’”<sup>217</sup> Third, the “‘performance’” was sent to users who could view it “‘in separate places’ and ‘at different times.’”<sup>218</sup> Finally, Chin believed the potential audience argument should apply in making Aereo’s transmissions public, as a “transmission to anyone other than oneself or an intimate relation is a communication to a ‘member[ ] of the public,’ because it is not in any sense ‘private.’”<sup>219</sup> This argument is bolstered when the “anyone” includes “paying strangers.”<sup>220</sup>

#### b. Legislative History

Judge Chin agreed that the Transmit Clause is not “crystal” clear.<sup>221</sup> Yet, he believed the history was clear.<sup>222</sup> Congress knew that the Act would need to apply to new technologies.<sup>223</sup> Congress reacted to extremely similar situations with the cable system cases.<sup>224</sup> The cable system cases also involved the question of whether a company who sells equipment that a user could buy was infringing.<sup>225</sup>

Factually, Congress already “rejected” this rationale by passing the 1976 amendment.<sup>226</sup> Furthermore, Congress changed the definitions of “perform” and “publicly” to include these CATV systems within the Act.<sup>227</sup> Congress even noted that “transmit” would change with the evolution of technology, and that public performance was not restricted to the same time and place.<sup>228</sup> The dissent admitted that Congress probably did not foresee Aereo, but Congress cast a broad net that certainly applied to Aereo.<sup>229</sup>

#### c. Cablevision Distinguished

Notably, the dissent did not believe the reproduction rights noted in *Cablevision* were inapposite to the public performance

---

217. *See id.* (quoting 17 U.S.C. § 101) (that is, beyond where they were originally intended to go).

218. *See id.* (quoting 17 U.S.C. § 101).

219. *See id.* (internal quotation marks omitted) (quoting *Kouichi Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012)).

220. *See id.* at 699.

221. *See id.* (noting it is not clear as applied to Aereo type technologies).

222. *See id.*

223. *See id.* (noting that Congress “intended to reach new technologies”).

224. *See id.*

225. *See id.*

226. *See id.* at 700.

227. *See id.*

228. *See id.*

229. *See id.* at 701.

right because Cablevision's right to retransmit was important to the analysis.<sup>230</sup> In other words, the majority is inadvertently discussing the reproduction right when it points to the copies as proof that private performances are occurring.<sup>231</sup> Judge Chin's divergence from the majority on this point was important because he did not believe Cablevision's reproduction was equivalent to Aereo's.<sup>232</sup>

His primary disagreements with the majority were two fold.<sup>233</sup> First, Cablevision's RS-DVR was to record, not watch an (almost) equivalent "live" broadcast.<sup>234</sup> Judge Chin viewed this as the difference between a secondary perk (the RS-DVR) and a purpose (Aereo).<sup>235</sup> This distinction should make *Cablevision* inapplicable because the court was working under the assumption that Cablevision paid license fees and its RS-DVR system was simply an add-on and not the whole show.<sup>236</sup> This is in stark contrast to the Aereo customer who wanted to "[w]atch" television "live" instead of solely recording it.<sup>237</sup> Ironically, this makes the "Record" function a secondary consideration for the consumer whereas the RS-DVR was only being sold to record.<sup>238</sup>

Second, Aereo's purpose made its recording system different than Cablevision's because when the Aereo user pressed "[w]atch" a recording was made and stored for the length of the program.<sup>239</sup> This is important, the Aereo user was not pressing a record button, but was forced to indirectly record by Aereo's model, which recorded in case the consumer wanted to take future action.<sup>240</sup> The only reason the recording took place was in case the user wanted to use Aereo's other functions later (rewind, pause, play, record).<sup>241</sup> Because of this, Aereo is now the instigator of the recording copy of its "Watch" function and not its user.<sup>242</sup>

---

230. *See id.*

231. *See id.* at 702.

232. *See id.*

233. *See id.*

234. *See id.* (noting that Aereo's lack of retransmission license agreements is especially important to this analysis).

235. *See id.* (insinuating that Aereo added "Record" as afterthought).

236. *See id.*

237. *See id.*

238. *See id.* at 702-03.

239. *See id.* at 703.

240. *See id.*

241. *See id.*

242. *See id.* Judge Chin also believed *Cablevision* did not wish to extend beyond its own facts. *See id.* Also, the dissent holds the majority opinion to ignore other precedent, which held that Internet streaming was public performance. *See id.* (citing *WPIX, Inc. v. Ivi, Inc.*, 691 F.3d 275, 286-87 (2d Cir. 2012) (streaming

## D. Aereo III

The United States Supreme Court disagreed with the Second Circuit.<sup>243</sup> While the issue remained the same, the Court broke the issue into two parts: (1) is Aereo performing, and if Aereo is performing, (2) is Aereo publicly performing.<sup>244</sup>

1. *Majority: Aereo performs*

Unlike the Second Circuit, the Court honed in on the Copyright Act's historical context.<sup>245</sup> The Court did not find the language to be clear regarding whether a supplier of equipment is performing or transmitting.<sup>246</sup> Yet, historically, the Act was amended to bring community antenna television (CATV) under its purview.<sup>247</sup> The Court focused on the rationale behind Congress' attempt to include CATV within the Transmit Clause.<sup>248</sup> In the case law, CATV providers were found to be distinguishable from broadcasters because the latter choose the programs and the former received and transmitted the programs.<sup>249</sup> Vital to the analysis, this made CATV providers equivalent to "viewers" generally.<sup>250</sup> Just as viewers would not infringe by using "amplified equipment," neither would CATV providers.<sup>251</sup> Even though CATV providers did have control over what they transmitted, the Court did not believe this was similar to the broadcaster's ability to choose "what to air."<sup>252</sup>

The Copyright Act's redefined terms created the Transmit Clause which established that CATV similar entities must fall under the Act.<sup>253</sup> Aereo was the modern equivalent to the CATV sys-

---

television over Internet); *United States v. Am. Soc'y of Composers, Authors, Publishers*, 627 F.3d 64, 74 (2d Cir. 2010) (streaming song)).

243. *See Aereo III*, 134 S. Ct. 2498, 2503 (2014) (holding Aereo's "complex service" of near-simultaneous television viewing to infringe the Copyright Act of 1976).

244. *See id.* at 2504.

245. *See id.*

246. *See id.*

247. *See id.* (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968)).

248. *See id.*

249. *See id.* at 2505.

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.* at 2505–06 ("The Clause 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.").

tem.<sup>254</sup> The majority did not agree with the dissent that the CATV systems were distinguishable from Aereo because the CATV systems “transmitted constantly” to the user’s television set.<sup>255</sup> The majority did not view the Aereo user selecting the content as distinguishable either because CATV users could also select their content.<sup>256</sup> The similarities of Aereo and CATV systems were too overwhelming for the majority to ignore.<sup>257</sup> Thus, Aereo “performed” as defined by the Copyright Act, based on the intent and history of the Copyright Act of 1976.<sup>258</sup>

## 2. *Majority: Aereo Performs Publicly*

Moving to issue (2), the Court assumed for argument’s sake that Aereo was transmitting a “new” performance when it transmitted from its own copy.<sup>259</sup> The Court granted this argument for Aereo, but did not believe Aereo’s next argument—that each new performance was private for each subscriber—flowed logically.<sup>260</sup> Just because a new performance occurred each time a user watched a program did not mean the new performance was private.<sup>261</sup> The jump in logic was apparent when one considers that if Aereo’s individual antenna system was all that was needed to make a private performance than CATV could just implement a similar system and not be covered by the Act.<sup>262</sup> This outcome is obviously contrary to Congress’ objectives in the 1976 amendment.<sup>263</sup> The Court reasoned that the Act’s use of “‘to transmit . . . a performance’” does not insinuate only a “single transmission” because whether one is

---

254. *See id.* at 2506.

255. *See id.* at 2507.

256. *See id.* (CATV systems users “turned the knob”). “But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to the subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system. . . .” *See id.*

257. *See id.*

258. *See id.*

259. *See id.* at 2508. This is in opposition to the plaintiffs who argue that Aereo was transmitting the original (“prior”) performance multiple times. *See id.*

260. *See id.*

261. *See id.* (noting that congressional objectives trump “technological differences”).

262. *See id.* at 2508–09. *But see* Max Hsu, Note, *Private Performances for the Public Good: Aereo and the Battle for Broadcast’s Soul*, 67 *FED. COMM. L.J.* 57, 68–69 (2014) (disagreeing that sending one work to one person was to the public, as “the majority succumbed to a red herring and missed the true crux of the dispute”).

263. *See Aereo III*, 134 S. Ct. at 2509.

telling a crowd of people a message or individually emailing each one, a transmission of information has occurred.<sup>264</sup>

This is especially true when the Transmit Clause is applied because it does not require everyone to view the transmission at the same time or in the same place.<sup>265</sup> Further, its broad language of using a “‘device or process’” encompasses multiple transmissions as a process or through a single device.<sup>266</sup> Also, practically speaking, sending the same information to large groups of people must constitute “to the public.”<sup>267</sup> Ultimately, the Court found that Aereo publicly performed and defined “public” to encompass “a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs,” that is, a “substantial number of people.”<sup>268</sup>

### 3. *Justices Scalia, Thomas, and Alito Dissent*

The dissent believed the question of whether Aereo was directly infringing had been glossed over.<sup>269</sup> This question is under the broader issue of whether Aereo actually does the performing; the dissent did not believe Aereo performed.<sup>270</sup> Justice Scalia noted that direct infringement requires “volitional conduct” on the part of Aereo.<sup>271</sup> Similar to an Internet service provider (ISP), which simply allows users to use its equipment to send information,

---

264. *See id.* (quoting 17 U.S.C. §101) (noting that emailing people individually or in a group, or telling idea to crowd or calling each one in crowd are transmissions).

265. *See id.*

266. *See id.*

267. *See id.* at 2509–10. The Court notes that the other piece of the public’s definition includes “‘any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered,’” which must insinuate a large group of people that are intimately known to the sender. *See id.* at 2510 (quoting 17 U.S.C. § 101). The Court also noted that if the Aereo users had some relation to the “underlying work” than whether they were part of the “public” may change. *See id.*

268. *See id.* at 2510–11 (internal quotation marks omitted) (noting that this definition narrows the Court’s opinion from being construed broadly). The Court dismissed any public policy concerns about its ruling chilling future technologies and going beyond Congress’ foresight by noting that its holding was very limited. *See id.* This is especially true since the court did not provide any broad definitions of what is performing, or publicly performing, or applying its analysis to companies beyond Aereo. *See id.* Furthermore, the court noted that it did not hold that “owners or possessors of the relevant product” would be infringing. *See id.* The Court also remained silent on whether a “remote storage of content” type-company, whose users transmit copyrighted material, would be included. *See id.* at 2511.

269. *See id.* at 2512, 2514 (Scalia, J., dissenting).

270. *See id.* at 2511–12.

271. *See id.* at 2514.

Aereo's user was the one who performed by watching or recording the program.<sup>272</sup> Aereo's automated response did not intrude on or obstruct the copyright owner and his or her rights.<sup>273</sup> Importantly, this automated response was not running in the background, but was "dormant until a subscriber activate[d] it."<sup>274</sup>

Turning to his "Guilt By Resemblance" section, Justice Scalia did not believe the majority could base its opinion "on a few isolated snippets of legislative history."<sup>275</sup> Likewise, he believed Aereo was distinguishable from the CATV systems Congress was concerned about when it drafted the 1976 amendment.<sup>276</sup> CATV systems were continuously sending their users all of the broadcast channels and were essentially able, like broadcasters, to "select[ ] and import[ ] distant signals," begin programs, and "sell[ ] commercials."<sup>277</sup> CATV systems were not simply selling equipment, they were like video-on-demand services that picked and provided the content as well.<sup>278</sup>

Finally, the dissent noted that the majority had made a third prong of infringing conduct beyond direct and contributory.<sup>279</sup> The dissent viewed the majority's opinion as holding a *type of technology* as publicly performing.<sup>280</sup> This changed the Act so it applied differently to "'cable companies and their equivalent'" compared to "everyone else."<sup>281</sup> Justice Scalia noted that the majority's opinion was overly wordy because, if Congress intended to cover all "cable systems" of the future, then once Aereo was found to be that type of future CATV—whether Aereo was publicly performing would be irrelevant.<sup>282</sup>

---

272. *See id.* at 2513 (stating both ISP and Aereo's equipment responds "automatically").

273. *See id.*

274. *See id.* at 2514–15 (attempting to reiterate that Aereo does not perform and, therefore, falls under secondary liability).

275. *See id.* at 2515 (noting text relied on is "single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress").

276. *See id.* ("[T]he Court's reasoning fails on its own terms because there are material differences between the cable systems at issue in [*Teleprompter Corp.* and *Fortnightly Corp.*], on the one hand and Aereo on the other." (citations omitted)).

277. *See id.* at 2515–16 (naming cable companies as "curators of content").

278. *See id.* at 2516.

279. *See id.*

280. *See id.*

281. *See id.*

282. *See id.*



Moreover, the majority did not explain what the CATVs of the future would be defined by.<sup>283</sup> If “live television” was dispositive then Aereo could just have made its “Watch” feature not start playing back the program until the show had ended.<sup>284</sup> Justice Scalia thought this loophole made the majority’s opinion pointless.<sup>285</sup> In the end, Justice Scalia found the majority opinion to rest on a “totality-of-the-circumstances test,” which was not defined.<sup>286</sup> He saw the majority’s precedent as too broad and entangling.<sup>287</sup> The dissent believed that Aereo did infringe, but it found the majority to be “distort[ing]” the Copyright Act in its plight.<sup>288</sup>

#### E. Aereo IV: Similar, But Not the Same

Remanded to District Court, the plaintiffs’ preliminary injunction should have been automatically granted had Aereo not proposed new arguments.<sup>289</sup> Primarily related to its infringement, Aereo argued that because it was now classified as a cable system it should be allowed a “compulsory license” under the Copyright Act.<sup>290</sup> Alternatively, plaintiffs posed a new argument that the preliminary injunction should be “expanded to cover all retransmission of their copyrighted content, regardless of when those

---

283. *See id.*

284. *See id.* at 2516–17 & n.6 (noting that this would just be time-shifting, which Aereo does not currently have, even though “live” program was on ten second delay).

285. *See id.* at 2517. (noting other possible dispositive criteria: (1) “stor[ing] live television broadcasts at a user’s direction” or (2) focusing on the selling of equipment to users). The dissent noted that the former would counter *Cablevision* and the latter would include ISPs. *See id.*

286. *See id.*

287. *See id.* (entangling because others will have to figure out which equipment will be evaluated by the majority’s standard and which will not). “The Court vows that its ruling will not affect cloud-storage providers and cable-television systems, but it cannot deliver on that promise given the imprecision of its result-driven rule.” *See id.* (internal citation omitted).

288. *See id.* at 2517–18 (“I share the Court’s evident feeling that what Aereo is doing (or enabling to be done) to the Networks’ copyrighted programming ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it.”).

289. *See ABC, Inc. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*1–2 (S.D.N.Y. Oct. 23, 2014) [hereinafter *Aereo IV*].

290. *See id.* at \*2 (internal quotation marks omitted) (citing 17 U.S.C. § 111). Aereo also argued that it was “mere[ly]” a “conduit” and protected under the “safe harbor provision,” and injunction failed because plaintiffs could not show “imminent irreparable harm.” *See id.* The court rejected both of these arguments also. *See id.* at \*6–7.

retransmission occur.”<sup>291</sup> Aereo countered by arguing that the injunction should be narrowed to only the first ten minutes of a program.<sup>292</sup>

The District Court held Aereo to be twisting the Court’s analysis.<sup>293</sup> The United States Supreme Court did not say Aereo *was* a cable system, but that Aereo *performed* because it was similar to the CATV.<sup>294</sup> The District Court found no analysis in *Aereo III* to support Aereo’s argument.<sup>295</sup> Aereo agreed that there was no analysis in the opinion, but argued that support for its argument was found in oral argument.<sup>296</sup> The court noted that oral argument is not binding law.<sup>297</sup> Furthermore, precedent rejected Aereo’s argument.<sup>298</sup>

#### IV. A CRITICAL ANALYSIS: BREYER’S POWERFUL SUBTLETY

Prior to *Aereo III*, it was assumed that the Court had two options.<sup>299</sup> One, either the Court would follow in the majority’s shadow of *Aereo I* and *Aereo II* and hold the technological advancement of Aereo did not infringe public performance, or two—it could follow Judge Chin’s dissent in *Aereo II* and find public performance infringement.<sup>300</sup> Strictly speaking, the Court rebelled in choosing a third route—finding CATV-equivalency to be publicly

291. *See id.* at \*2. The court did not extend, or narrow, the preliminary injunction that sought to prevent retransmission of currently broadcasting programs for the sake of consistency and ruling. *See id.* at \*8.

292. *See id.* at \*2.

293. *See id.* at \*3.

294. *See id.*

295. *See id.* at \*4.

296. *See id.* (“Aereo argues that such a holding can be inferred from the questions and statements of the Justices at oral argument”).

297. *See id.*

298. *See id.* at \*4–5 (citing *WPIX, Inc. v. Ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012) (“Concluding that ‘Congress did not . . . intend for § 111’s compulsory license to extend to Internet transmissions’ . . .”). Aereo countered by arguing that *Ivi* was inapplicable because Aereo’s coverage was not as expansive as the Internet. *See id.* at \*5. The court disagreed by noting that the geographical limitation concern, while mentioned in *Ivi*, was not dispositive, and Aereo’s retransmissions had the potential to be as expansive as the Internet itself. *See id.* Also, the court noted that Congress has not carved out § 111 protection for other technologies that are similar to cable systems, but has created new statute-licenses for them. *See id.* at \*6 (noting satellite carriers arguing same and receiving “Satellite Home Viewer Act of 1988”).

299. *See Cramer, supra* note 33, at 112 (“There are two clear-cut choices in front of the court . . .”).

300. *See id.* (noting that Judge Chin’s dissent in *Aereo II* followed *BarryDriller* and *FilmOn X*).

performing and, thus, infringing.<sup>301</sup> Although the decision may have been controversial, it was effective.<sup>302</sup>

The majority in *Aereo III* has been criticized for leaving too many questions unanswered.<sup>303</sup> However, while Justice Breyer walked a narrow line, the so-called “unanswered” cry misses the powerful and subtle nature of *Aereo III*.<sup>304</sup> Certainly, the Court decided the broad question of Aereo’s fate, yet it also answered the narrow questions by noting the reversal of *Fortnightly* and *Teleprompter*’s rationales by Congress.<sup>305</sup> Justice Breyer’s dependency on the Copyright Act of 1976 was not misplaced and the opinion was masterfully crafted to be both narrowly applicable to Aereo and widely applicable to future technologies.<sup>306</sup> For this reason, the Copyright Act does not need to be amended by Congress, but can follow the new test set out by Justice Breyer’s majority opinion in *Aereo III*.<sup>307</sup>

Regarding whether Aereo’s system performed under the Copyright Act of 1976, Justice Breyer’s majority held that (1) Congress

301. *See id.* (foreseeing the two options may be ignored by noting that congressional action may be needed); *see also* Asaro, *supra* note 31, at 1136 (“[T]he majority’s opinion effectively created a new standard for cloud-based service providers . . .”).

302. *See Aereo III*, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting) (“[A]dopting . . . an improvised standard (‘looks-like-cable-TV’) that will sow confusion for years to come.”).

303. *See generally* Rebecca Giblin & Jane C. Ginsburg, *We (Still) Need to Talk About Aereo: New Controversies and Unresolved Questions After the Supreme Court’s Decision*, 38 COLUM. J.L. & ARTS 109 (2015); *see also infra* notes 315–51 and accompanying text (discussing perceived problems with Justice Breyer’s majority decision).

304. *See* Giblin & Ginsburg, *supra* note 303, at 121 (“[T]he *Aereo* Court’s holding is likely to be more nuanced than an initial reading might suggest.”).

305. *See id.* Giblin and Ginsburg note that services such as Drop-box would not fall under the majority’s opinion because the majority is drawing a distinction in which performing a work requires the work to be communicated by the company. *See id.* Drop-box does not communicate like Aereo, but stores content. *See id.*

306. *See, e.g., id.* at 129–30. The authors pull analytic points from the court’s silence: (1) just because Aereo performs, as similar to CATV, does not mean non-similar systems automatically do not perform; (2) if the program proposes someone else’s content (“broadcasters’ selections”) to its users than it is more likely to perform (Aereo) than not (video-on-demand service); (3) time-shifting has less direct involvement than a video-on-demand system, but still involves a level of “active participation.” *See id.* at 129–30. Other authors have suggested that the “breadth of the majority’s analysis may render the Aereo opinion the touchstone for analyzing copyright infringement as it applies to new and developing technologies.” Shannon McGovern, Note, *Aereo, In-Line Linking, and a New Approach to Copyright Infringement for Emerging Technologies*, 64 CATH. U. L. REV. 777, 796 (2015) (noting that majority did not intend their reasoning to apply beyond Aereo).

307. *See infra* notes 380–448 and accompanying text (arguing *Aereo III* was correctly decided).

intended to bring CATV systems within the purview of the Copyright Act of 1976; (2) Aereo is a technological advancement on the CATV system; therefore, (3) Congress' intention extended to Aereo.<sup>308</sup> Analytically, this means that the majority created a third standard.<sup>309</sup> The majority's standard defined direct liability's volitional conduct to include a performance that generated company profit from disseminating information, even if an individual consumer could receive the same information with similar equipment.<sup>310</sup>

As direct and indirect liability are often close partners, it is not unconscionable that an internet streaming service, which is built around infringement, is found to be directly infringing.<sup>311</sup> Notably, as Judge Chin stated in his *Aereo II* dissent, Aereo's nature required the user to transmit a copy even if all the user wanted to do was watch the program.<sup>312</sup> While Justice Scalia believed the majority did not need to define what is public after its cable-like, performance analysis, Justice Breyer's majority defined "to the public" in order to alleviate concerns about the opinion's applicability to future technologies.<sup>313</sup> The majority discarded all of Justice Scalia's concerns by dismissing the dissimilarities between CATV and Aereo as distinctions that made no difference to the analysis.<sup>314</sup>

#### A. Perceived Problems with Breyer's Majority

Scalia is not the only one who has disagreed with the majority.<sup>315</sup> Recently, in *We (Still) Need to Talk About Aereo: New Controver-*

308. See *Aereo III*, 134 S. Ct. 2498, 2515 (2014) (Scalia, J., dissenting) (noting the same).

309. See *id.* at 2512–14 (2014) (stating there are only two types of liability and majority did not follow either type).

310. See Giblin & Ginsburg, *supra* note 303, at 125 (noting that majority's non-discussion of volition amidst outcry from dissent, "might suggest" that "the majority considers volition irrelevant to the assessment of whether the defendant has publicly performed a work"); see also *supra* text accompanying note 280. Giblin and Ginsburg go on to suggest that the majority did adopt a volition standard, as "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," but is still considered. See Giblin & Ginsburg, *supra* note 303, at 126.

311. See *infra* notes 390–99 and accompanying text.

312. See *supra* text accompanying note 241.

313. See *supra* text accompanying note 282; see also *Aereo III*, 134 S. Ct. at 2511 (discussing limited nature of opinion and non-extension to dissimilar technologies).

314. See *supra* text accompanying notes 255–58.

315. See generally Giblin & Ginsburg, *supra* note 303; accord Benjamin Branda, *Up in the Airwaves: Technological Determinism, the Public Performance Right, and Aereo's Uncertain Future*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 287, 311 (2015) ("Jus-

sies and Unresolved Questions After the Supreme Court's Decision, Rebecca Giblin and Jane C. Ginsburg argue that the only performance analysis done by the majority was that services which act equivalent to CATVs were not "mere 'equipment provider[s].'"<sup>316</sup> The authors do not believe the volitional conduct analysis was present, which is required when dissecting direct infringement.<sup>317</sup> To the majority's second prong of public performance, Giblin and Ginsburg note that the majority combined two different situations highlighted in the Copyright Act.<sup>318</sup>

The authors believe "to the public, by means of any device or process," which deals with transmission was combined with, "to perform or display a work publicly," which deals with actually performing in public.<sup>319</sup> The authors were concerned with the majority using the latter physical performance in the public square definition to elucidate the former non-physical transmission definition.<sup>320</sup> However, the authors found Justice Breyer's statement of the issue supported his understanding that only *offering* delivery (versus *proving* delivery) is required.<sup>321</sup> Historically, this follows the established argument that commercial use cannot extend to cover uses of the individual.<sup>322</sup>

---

tice Breyer's defense of the *Aereo* opinion's effect on discouraging the emergence of new technologies is backwards-looking.").

316. See Giblin & Ginsburg, *supra* note 303, at 118.

317. See *id.* at 117.

318. See *id.* at 118.

319. See *id.* at 109, 118 (quoting 17 U.S.C. § 101).

320. See *id.* at 119 (noting the majority could be read to endorse that a transmission does not need to just have been "merely offered," but "made" and "receiv[ed]"). The authors do not believe the majority intended this outcome because a plain reading of the Transmit clause uses the word "public capable of receiving," which points to *Aereo* just offering as being enough. See *id.* (quoting 17 U.S.C. § 101). Likewise, the majority did not do a "head-count[ ]" of *Aereo*'s users who actually watched (versus received only) the broadcasts. See *id.* at 120. A contrary view has argued that the *in the public* helps define the word "public" for *to the public*, and even if disagreed with, a common understanding of *to the public* involves a group of people. See Bryan Giribaldo, Comment, *Walking the Semantics Tight-Rope: Defining "Public Performance" in WNET, Thirteen v. Aereo, Inc.*, 19 J. TECH. L. & POL'Y 147, 152–53 (2014).

321. See Giblin & Ginsburg, *supra* note 303, at 120 (emphasis added) (arguing this is supported by Justice Breyer stating, "by *selling* its subscribes . . . that *allows* them to watch" (quoting *Aereo III*, 134 S. Ct. 2498, 2503 (2014))). The authors note that this is in accordance with the World Intellectual Property Organization (WIPO) Copyright Treaty, which is focused on preventing "making available" the works to the public. See *id.* at 121 (quoting World Intellectual Property Organization (WIPO) Copyright Treaty, art. 8).

322. See *id.* at 131. The authors also noted disagreement with the majority not focusing on the "relationship between the *performing entity* and the audience," and its use of the fair use doctrine as a safety-net. See *id.* at 122, 124.

In reverse order, the authors next discuss the majority's silence on the volitional standard of direct infringement.<sup>323</sup> While the authors note the opinion's silence they also note that the majority was drawing a distinction between merely providing equipment for its user and Aereo's more involved conduct.<sup>324</sup> This insinuates that an analysis of volition was occurring; yet the authors continue to go back and forth about the majority's intent.<sup>325</sup> Essentially, the authors concede some volition-analysis was taking place.<sup>326</sup> However, the authors are most concerned with applying *Aereo III* to technologies like Aereo which have no "[w]atch" function and only record.<sup>327</sup> Yet, this goes beyond *Aereo III*'s fact-specific holding, as did the dissent in its concern for future technologies.<sup>328</sup>

It was the focus on fact specific "design characteristics" over a "principled reading of the Transmit Clause" that was concerning.<sup>329</sup> GIBLIN and GINSBURG agreed that the Transmit Clause did not require the public to be a specific size when defining "to the public" because the clause was meant to accommodate the popularization of technologies over time.<sup>330</sup> *Aereo III* used *in public* to help define *to the public* and required the size to be "substantial."<sup>331</sup> In the authors' opinions, this required the Court to find that Aereo performed instead of the user because if the user were found to perform, then their transmission would not be *to the public*, as defined by the majority's *in public*'s rationale.<sup>332</sup> This would create an "enormous new loophole" that would disturb the whole system.<sup>333</sup>

---

323. *See id.* at 124–25.

324. *See id.* at 125.

325. *See id.* at 126 (noting that majority's swift dismissal of dissent's concerns shows lack of consideration, but then going back to the opinion of conducting "role of the user" analysis which also insinuates conscious thought). *See also* Samuel J. Dykstra, Note, *Weighing Down the Cloud: The Public Performance Rights and the Internet After Aereo*, 46 *LOY. U. CHI. L.J.* 989, 1041 (2015), which reiterated Justice Scalia's belief that no analysis of volition took place in the majority's opinion.

326. *See* GIBLIN & GINSBURG, *supra* note 303, at 125–26. The authors concede this in later analysis. *See supra* text accompanying notes 306.

327. *See id.* at 127–28 (noting that analysis of public in *Cablevision* is dead). The authors believe that Aereo would still be found to infringe even if they only starting airing after the program finished. *See id.* at 129.

328. *See id.* at 129 ("The *Aereo* Court carefully avoided giving any explicit guidance about 'who performs' in circumstances outside the cable TV analogy."); *see also supra* text accompanying notes 253, 262.

329. *See* GIBLIN & GINSBURG, *supra* note 303, at 140.

330. *See id.* at 141–42.

331. *See id.* at 142; *see also supra* text accompanying note 268.

332. *See* GIBLIN & GINSBURG, *supra* note 303, at 142.

333. *See id.*

Giblin and Ginsburg hold this to be the reason volition was not the focus of the opinion.<sup>334</sup> However, they note, while the opinion blurred the line of primary and secondary infringement, the majority could be making a statement that direct infringement occurs in situations like *Aereo*.<sup>335</sup> The authors believe the majority had to change the analysis because its rationale would find no direct infringement where the user is only performing for a “small number of people.”<sup>336</sup>

While the authors note that *Aereo III* stands for a new analysis, the authors do not find its analysis to be “desirable.”<sup>337</sup> They prefer to focus on whether “the use should be permitted for free.”<sup>338</sup> Without this focus the authors believe *Aereo III* is just as susceptible to loopholes as the act, since *Aereo* could avoid infringement by sending the programming in downloads to users’ cloud storage instead of streaming the content.<sup>339</sup> This would mean *Aereo* was not performing because it was not involved in the user watching or downloading the program.<sup>340</sup>

In Giblin’s own analysis, Justice Breyer’s majority needed to more completely defined what it meant to perform to the public.<sup>341</sup> She believes the focal point should be the user’s relation to the work.<sup>342</sup> Following Australia and the United Kingdom, the question would be whether the user streaming the program is the consumer who the copyright owner would consider as his or her audience.<sup>343</sup> In other words, if the owner is expecting payment he

---

334. *See id.* It is not clear how solving the volition question would solve the problem of the giant loophole because even if direct infringement is not found, the authors’ note that indirect infringement could still ruin *Aereo*’s chances. *See id.* at 141–44.

335. *See id.* at 144 (“[The Court’s opinion] may blur the distinction between primary and secondary infringement, at least in scenarios resembling *Aereo*’s.”).

336. *See id.* at 144. The authors note this when they state: “[o]ur application of *Aereo*’s principles to other technologies demonstrates that a great deal hangs on ‘who does the act,’” despite they themselves not favoring the majority’s analysis *See id.*

337. *See id.*

338. *See id.* at 145. The authors believe that the majority’s focus will harm innovation by requiring all innovators to only produce if the user is directly involved in the use. *See id.* at 145–46.

339. *See id.* at 146.

340. *See id.* Yet, the authors note that this new *Aereo* download system would still most likely not get them off the hook for secondary liability. *See id.* at 146–47.

341. *See id.* at 149.

342. *See id.*

343. *See id.* (citing *Telstra Corp. v. Australasian Performing Rights Ass’n* (1997) 191 CLR 140, 198–200 (Austl.), which cites *Ernest Turner Elec. Instruments Ltd. v. Performing Rights Soc’y Ltd.*, [1943] Ch. 167 at 171–73 (Eng.)).

should receive payment.<sup>344</sup> Interestingly, Giblin's analysis does not focus on "who performs," but on the "relationship between the recipient and the work."<sup>345</sup> Giblin admits that this is circular reasoning, but argues that the courts have allowed similar arguments in the arena of the public's "relationship to the underlying work."<sup>346</sup> In the end, Giblin believes *Aereo III's* analysis was unfinished.<sup>347</sup>

Ginsburg, unlike her co-writer, does not couch the issue of performance within the definition of "public."<sup>348</sup> Ginsburg first articulates that the money should be examined to determine who is performing; thus, volition would depend on whether the company is "proposing the content" to the user, or simply allowing the user to "access" the content.<sup>349</sup> Additionally, Ginsburg views "to the public" as also following the money in the sense that the service should be examined to determine if the service-user relationship is focused on lawful activity or unlawful activity.<sup>350</sup> Likewise, Ginsburg expresses concern for requiring the audience size to be substantial because a single person, in the aggregate, could have a big economic impact.<sup>351</sup>

## B. Translating the Transmit Clause

The consensus among scholars is that *Aereo* was not performing because the work was a copy of the original, and the performance was not public because each individual received their own copy.<sup>352</sup> Professor David Nimmer believes the original copy must

---

344. *See id.* (noting that this could even apply to transmitting amidst one's own devices). Giblin does not explain how her analysis is not also focused on a concern for business, except to focus on "use." *See id.* She admits that whether the owner is expecting payment is a totality of the circumstances test, which looks to "all relevant circumstances." *See id.* at 151.

345. *See id.* at 150. Confusingly, she still holds that who performs matters as to deciding whether direct liability exists. *See id.*

346. *See id.* at 152.

347. *See id.* at 152–53.

348. *See id.* at 153 ("We have identified two problems. . . .").

349. *See id.* at 153–54. Ginsburg argues the former is infringing. *See id.* at 154.

350. *See id.* at 155 (focusing on "what the service does, not how it does it"). That is, Ginsburg views transferring one's files between one's computers as not "to the public" because one has a personal stock in lawful property; however, this stock is not present in illegal, copyrighted material. *See id.*

351. *See id.* at 155–56. The authors do not believe the majority's opinion would fail to prevent aggregation, assuming secondary liability can tell the difference between innovation and "exploiters." *See id.* at 156.

352. *See* Krista Consiglio, *Aereo and Filmon: Technology's Latest Copyright War and Why Aereo Should Survive*, 71 WASH. & LEE L. REV. 2557, 2593 (2014).



be retransmitted for there to be a public performance.<sup>353</sup> He argues that Congress intended this interpretation when it noted that the person did not need to be in the same location to listen to the copy.<sup>354</sup> He believes this geographical point would be irrelevant if a copy of the original would infringe.<sup>355</sup> If there were multiple copies of the original then it would be assumed that different people were listening to them at different locations and at different times.<sup>356</sup>

Scholar William Patry adheres to an even more original interpretation of the Copyright Act by arguing that the performance has to be live.<sup>357</sup> If the performance is recorded than the issue becomes the “exclusive-distribution right.”<sup>358</sup> This understanding is based on how Patry defines “public place.”<sup>359</sup> Judge Daniel Brenner believes that if a company pays licensing fees for the original performances, the same company should not have to pay to transmit over the Internet.<sup>360</sup> Judge Brenner also argues for a “substantial enough audience” in order for the performance to be public.<sup>361</sup>

Conversely, Consiglio believes Nimmer and Patry are incorrect, as the Copyright Act of 1976 only requires the performance occur, not that it occur in a certain manner.<sup>362</sup> Likewise, Consiglio believes the public definition in the Transmit Clause is broad enough to cover Internet distribution, regardless of whether the users receive it individually, or as a conglomerate.<sup>363</sup>

---

353. *See id.* at 2590 (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §8.14[C][3] (Matthew Bender ed., rev. ed. 2013)).

354. *See id.* at 2591.

355. *See id.*

356. *See id.*

357. *See id.* (citing WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:21 (2008)). Patry is “a major copyright treatise author and senior copyright counsel at Google.” *See id.*

358. *See id.*

359. *See id.* (“A public place is one that the public has access to despite any condition to entry, such as an admission fee.”).

360. *See id.* at 2592 (citing Daniel Brenner, “Gently Down the Stream”: *When is an Online Performance Public Under Copyright?*, 28 BERKELEY TECH. L.J. 1167, 1168 (2013)) (viewing Copyright Act protections as not “extend[ing] as far [on the Internet] as for other mediums”).

361. *See* Consiglio, *supra* note 354, at 2592–93 (pointing to transmit clause and its language that people (“the public”) actually “receive” the content (internal quotation marks omitted)).

362. *See id.* at 2593 & n.280 (citing 17 U.S.C. §101) (“[By means of any device or process . . . .]”).

363. *See id.* at 2594–95 (noting that *Aereo II* was incorrect in its analysis).

### C. The Copyright Office & Congress: Beacons of Unlikely Change

After the case was remanded, Aereo believed it was entitled to §111 Retransmission fees, as a CATV-equivalent system.<sup>364</sup> While the district court in *Aereo IV* did not believe similarity allowed Aereo to claim CATV status, the concern seemed to be that Aereo, unlike CATV, did not pay initially for the copyrighted material.<sup>365</sup> However, since the Copyright Office denied Aereo's application for §111 licensing fees to apply, there is strong doubt that Aereo-like services were intended to fall under §111 at all.<sup>366</sup> While Congress could amend the Copyright Act, overcoming deference to the Copyright Office is unlikely.<sup>367</sup>

Alternatively, authors propose a new section in the Copyright Act of 1976 that specifically addresses cloud-based storage devices.<sup>368</sup> The author notes that *Aereo III* should have made Aereo a cable company for Copyright Act purposes.<sup>369</sup> However, since this was not done, the Copyright Act should be revised to define cloud-service technology and give them a "new compulsory licensing scheme."<sup>370</sup> It is argued that this would be more "cost effective" and could more easily balance owners' rights and the right of cloud-service companies without chilling innovation.<sup>371</sup> Returning to Congress' original concern for cable companies, the author notes small-player-status and the time consuming "bargain on a signal-by-signal basis."<sup>372</sup> The argument is that these cloud-service companies and Aereo-like companies have similar problems and, thus, should not be required to pay for content that individuals can receive by buying their own antennas.<sup>373</sup> The author proposes exempting content under these licensing agreements based on geography or viewership demands.<sup>374</sup>

Additionally, Congress' creation of a separate license for satellite carriers is an example of the need for a new section.<sup>375</sup> How-

---

364. See *supra* notes 289–98 and accompanying text.

365. See *supra* note 298.

366. See Cramer, *supra* note 33, at 119.

367. See *id.* at 120.

368. See, e.g., Asaro, *supra* note 31, at 1111, 1140–41.

369. See *id.* at 1140.

370. See *id.*

371. See *id.*

372. See *id.*

373. See *id.* at 1141.

374. See *id.*

375. See Cramer, *supra* note 33, at 119.

ever, the Copyright Office continues to hold that allowing such statutory licenses would allow Internet companies to infringe the rights of copyright owners by not obtaining the owner's original consent.<sup>376</sup> The Copyright Office reaffirmed this view in 2011.<sup>377</sup> The Copyright Office's opinion is strongly respected, as the office's knowledge and analysis are highly valued.<sup>378</sup> Congress is not blind to technological advancement yet has refused to act.<sup>379</sup>

#### D. *Aereo III* was Correctly Decided

Although legal commenters have labeled *Aereo III* as difficult to analyze and apply, the opinion has been successfully applied to alternative situations.<sup>380</sup> In hypothetically applying *Aereo III* to Drop-box, Drop-box was not found to perform because there was no transmission of Drop-box to the consumer, thus, no infringement of the copyrighted works.<sup>381</sup> Alternatively, even if Drop-box was

376. See *id.* at 120 (noting that much has changed "since 2008").

377. See *WPIX, Inc. v. Ivi, Inc.*, 691 F.3d 275, 283 (2d Cir. 2012); see also U.S. Copyright Office, Satellite Television Extension and Localism Act § 302 Report 48 (2011), available at <http://copyright.gov/reports/section302-report.pdf> ("The Office itself has opposed (and continues to oppose) the formation of a statutory license for the retransmission of broadcast signals over the Internet.").

378. See *Ivi, Inc.*, 691 F.3d at 283. The Copyright Office's analysis focused on the more local nature of cable systems versus *Aereo*. See Keith M. Stolte, *Is Cheap Internet TV Dead? Duck Hunting Season Comes Early to the Supreme Court*, 26 No. 10 INTELL. PROP. & TECH. L.J. 3, Oct. 2014, at \*8.

379. See Johanna R. Alves-Parks, *Adapt or Die: Aereo, Ivi, and the Rights of Control in an Evolving Digital Age*, 34 LOY. L.A. ENT. L. REV. 33, 63 & nn.218–220 (2014) (citing *Future of Video: How Advances in Consumer Electronics, Broad., Cable, Satellite, the Internet and Other Platforms Are Changing How Consumers Access Video Content: Hearing Before the Comm'ns and Tech. Subcomm. of the House Energy and Commerce Comm.*, 112th Cong. (2012)) (noting that Congress held hearing where executives and industry leaders discussed "effect of unlicensed Internet retransmissions"); generally Bradley Ryba, *Aerevolution: Why We Should, Briefly, Embrace Unlicensed Online Streaming of Retransmitted Broadcast Television Content*, 13 J. MARSHALL REV. INTELL. PROP. L. 577 (2014) (arguing that *Aereo* has benefits in short term).

380. See Giblin & Ginsburg, *supra* note 303, at 132 (applying their own analysis of *Aereo III*). Perhaps *Aereo* is more easily applied because copyright case law is naturally aimed at remaining malleable so it can extend to new technologies. See Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1861–62 (2015) (labeling this phenomenon "giving effect to the equity of the statute").

381. See Giblin & Ginsburg, *supra* note 303, at 132–33 (noting that first question must be "who engages in the transmission," and that there was no performance by Drop-box); see also Todd Spangler, *Why a Loss for Aereo Wouldn't Threaten Cloud Services*, VARIETY (Mar. 28, 2014, 12:33 PM), <http://variety.com/2014/digital/news/why-a-loss-for-aereo-wouldnt-threaten-cloud-services-1201149611/> (noting that Drop-box could not fall under *Aereo III* majority because *Aereo* is actively involved, unlike Drop-box). Authors who believe Drop-box would infringe if a user utilized the service to store an illegal download miss Giblin's and Justice Breyer's point that simple storage is not volitional enough to satisfy *Aereo III*'s analysis; *Aereo*'s act were not merely passive. See, e.g., Collette Corser, Note, *ABC v.*

found to be performing, transferring files between one's own devices would not meet the "to the public" standard found in *Aereo III*.<sup>382</sup>

*Aereo III* was also applied to "Slinging" devices, which were determined to perform publicly.<sup>383</sup> Slinging devices allow content to be sent between devices solely by transmission.<sup>384</sup> Because Dish sold these slinging devices for profit, the device's location in the user's home is not enough to overcome Dish's direct involvement.<sup>385</sup> Also, Dish publicly performs because the users are being sold a service and the user has no "prior relationship" with the content.<sup>386</sup> There has even been no problem in applying *Aereo III* to a "Tablet TV," which places a device in the user's hands, and acts as a "digital TV antenna, tuner and DVR" combined.<sup>387</sup> This tablet TV device allows the user to stream content within one hundred feet.<sup>388</sup> This was not a performance because there was no involvement by a company like Aereo, and the devices were individually owned, which meant there was no public performance.<sup>389</sup> This ease of applying *Aereo III* supports the majority opinion's subtle strength.

### 1. *A Subtle Performance Analysis*

Even in 1984, determining direct versus indirect infringement of recording equipment was difficult because it was hard to determine when the infringer was using the work versus "authoriz[ing]" another to use the work.<sup>390</sup> Direct infringement involves an intentional act in relation to a copyrighted work.<sup>391</sup> Indirect infringe-

---

*Aereo: How The Supreme Court's Flawed Rationale Will Implicate Problems in New Technologies*, 16 N.C. J.L. & TECH. ON. 1, 22-23 (2015).

382. See Giblin & Ginsburg, *supra* note 303, at 134 (noting that there is a connection between the Drop-box user and uploaded content because the user uploaded it).

383. See *id.* at 137-38.

384. That is—no copying, only transmitting. See *id.* at 134.

385. See *id.* at 137.

386. See *id.* at 138.

387. See *id.* at 139.

388. See *id.*

389. See *id.*

390. See *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984). Sony's product, "home video tape records," (VCR/VTR) were used by customers to record public broadcast programs. See *id.* at 420. The Court was very concerned about stopping VCR sales because an ancillary use was to record these programs, which would grant a monopoly against Sony. See *id.* at 441 n.21.

391. See Kimberlianne Podlas, *Applying Aereo to the Internet: Understanding Volitional Links to Leaked Films, Television Episodes, and Scripts as Copyright Infringement*, 18 NO. 5 J. INTERNET L. 1, Nov. 2014, at \*13; accord *Aereo III*, 134 S. Ct. 2498, 2513

ment involves “intentionally inducing or encouraging direct infringement” (contributory), or “by profiting from direct infringement while declining to exercise a right to stop or limit it” (vicarious).<sup>392</sup>

Applying these principals to the non-traditional forum of the Internet becomes fuzzy.<sup>393</sup> Although applying these principles to a computer’s “automatic response” is less murky when the infringer is completely “passive,” Aereo was not passive.<sup>394</sup> Aereo was not an Internet Service Provider (ISP) whose technology makes the ISP’s conduct “passive, automatic acts.”<sup>395</sup> Aereo’s service does not merely allow its users access to an Internet-equivalent, where other users provide the infringing works; Aereo was *the* user providing the infringing content.<sup>396</sup> Obviously, a copy shop would not be directly

---

(2014) (Scalia, J., dissenting) (“A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act.”).

392. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

393. See *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (finding automatic responses by Google in response to user’s search and click of the link is not direct copyright infringement). While the Internet application is difficult, it is not impossible when the application does not require “hold[ing] the entire Internet liable for activities that cannot reasonably be deterred.” See *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1365–66, 1372 (N.D. Cal. 1995) (involving critic of Church of Scientology who posted parts of church’s works on bulletin board service, which paid Netcom for internet access). Application to Aereo poses no such problem, as the problem with a direct infringement analysis of the Internet is that ISPs do not “create or control the content of the information available.” See *id.* at 1368. In this way, the ISP is a copy shop. See *id.* at 1369. In his *Aereo III* dissent, Justice Scalia noted that Aereo was not an ISP or copy shop, but a copy shop with the added volitional conduct of handing out a “library card.” See *Aereo III*, 134 S. Ct. at 2514 (Scalia, J., dissenting).

394. Compare *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 546–47, 550 (4th Cir. 2004) (Internet Service Provider not directly liable for not intervening in user’s posting of copyrighted photographs), and *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (no direct infringement where person did not “directly cause[ ] the copying” by actually uploading or downloading the files himself or causing the copying “to occur”), with *Quantum Sys. Integrators, Inc. v. Spring Nextel Corp.*, 338 Fed. App’x 329, 336 (4th Cir. 2009) (finding “loading of the software onto . . . computers” satisfied volitional act—though failing to mention whether this was under direct or indirect analysis).

395. See *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 620, 621–22 (4th Cir. 2001) (involving whether DMCA gives ISPs shield from copyright infringement). Even Justice Scalia in *Aereo III* does not believe Aereo is an ISP. See *Aereo III*, 134 S. Ct. at 2514 (Scalia, J., dissenting).

396. See *ALS Scan, Inc.*, 239 F.3d at 620, 622 (noting district court determined ISP is “passive conduit for copyrighted material”). Discussing Aereo’s knowledge of its user’s infringement, in the indirect infringement analysis, would not be sensible since Aereo’s purpose is providing this content to the user and his or her ability to watch that content. Compare *id.* at 622 (insinuating that knowledge is required), with *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (“It does not matter that Defendant Frena may have been unaware of the copyright infringement.”). Thus, Aereo’s conduct is more volitional by its very

liable for a customer's use of his shop to illegally copy, but even Justice Scalia held Aereo not to be just a copy shop, but a copy shop with a "library card."<sup>397</sup> The distinctions of Aereo's technology correctly prove its more direct involvement.<sup>398</sup> Like Napster, which was found to directly infringe because its sole use was infringement by the "downloading or uploading of copyrighted music," Aereo's sole purpose was to transmit copyrighted programs.<sup>399</sup>

*Aereo II* had to be overruled, as the Second Circuit incorrectly focused on the uniqueness of the individual copies.<sup>400</sup> Contrary to the belief that *Aereo III* had no volitional standard, the majority did establish one.<sup>401</sup> The volitional standard was not openly discussed

---

nature than an indirect infringement analysis requires. *See* Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F. Supp. 2d 1114, 1117–19, 1121–22 (C.D. Cal. 2001) (noting that even bulletin board service provider could be held directly liable depending on infringing website's volitional act as established by its relationship to other websites which have infringed copyrights); *see also* Lee B. Burgunder, 17 VAND. J. ENT. & TECH. L. 845, 867–69 (2015) ("The three dissenting judges in *Aereo*, unfortunately, fell for the smokescreen raised by *Aereo* and its amicus curiae supporters, who clouded the analysis with faulty arguments about volitional conduct. . . . First of all, *Aereo*'s customers did not come to *Aereo* with their own independently acquire materials, whether they were obtained from a public library or elsewhere. Rather *Aereo* gave them access to copyrighted materials on its property that *Aereo*, as the property owner, had no right to show or transmit to the public.").

397. *Compare* *CoStar*, 373 F.3d at 550 (holding ISP to be an "owner of a traditional copying machine whose customers pay a fixed amount per copy and operate the machine themselves to make copies"), *with* *Aereo III*, 134 S. Ct. at 2514 (Scalia, J., dissenting) ("So which is *Aereo*: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card.").

398. *See* *Aereo III*, 134 S. Ct. at 2509–10. *But see* *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067 (9th Cir. 2013) (holding Dish's similar technology was not direct infringement because "Dish's program creates the copy only in response to the user's command").

399. *See* *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

400. *See* Megan Larkin, *The Demise of the Copyright Act in the Digital Realm: Re-engineering Digital Delivery Models to Circumvent Copyright Liability After Aereo*, 37 COLUM. J.L. & ARTS 405, 426 (2014). In this vein, some have argued for a focus on defining performance on whether the original transmission is being performed or a copy, the latter not being infringement. *See, e.g.*, Jacob Marshall, Note, *Trading Rabbit Ears for Wi-Fi: Aereo, the Public Performance Right, and How Broadcasters Want to Control the Business of Internet TV*, 16 VAND. J. ENT. & TECH. L. 909, 940–41 (2014) (relying on Melville Nimmer's dis-analogous hypothetical of a phonograph playing the same record in both person A and person B's home, as too absurd to be infringement). However, Justice Breyer disavowed this analysis by granting *Aereo* the argument that it was producing a new performance. *See supra* text accompanying note 259.

401. *See* Giblin & Ginsburg, *supra* note 303, at 150. *But see* *Gardner v. CafePress Inc.*, 2014 U.S. Dist. LEXIS 168328, \*9 (S.D. Cal. Dec. 4, 2014) ("[T]he Supreme Court [in *Aereo III*] expressly decided not to address the volitional conduct issue . . ."). Some authors have advised applying the volitional standard

because it was not an official question presented before the Court.<sup>402</sup> However, Justice Breyer discussed the issue under the public performance question.<sup>403</sup> He ended his analysis of whether Aereo performed by noting that Aereo was not simply an “equipment provider,” which was a statement against applying secondary infringement.<sup>404</sup> By following Congress’ analysis in rebutting *Fortnighly* and *Teleprompter*, Justice Breyer refuted those courts’ analyses.<sup>405</sup> *Fortnighly*’s analysis refused to acknowledge a volitional standard of direct infringement by finding that the CATV, even with control over content, did not perform.<sup>406</sup> *Teleprompter*’s analysis that CATV had no “nexus” to make its transmissions directly copying was a lack of volition argument.<sup>407</sup> And Congress rebutted these views on volition with the Copyright Act of 1976.<sup>408</sup>

Supporting Congress’ decision and drawing the parallel to Aereo, Justice Breyer addressed the volitional standard.<sup>409</sup> Originally concerned about writing an over inclusive opinion, Breyer deferred to Congress.<sup>410</sup> If Justice Breyer had ignored the issue of performance completely, then possibly one could argue that his opinion ignored the volitional question and was patently against applying secondary infringement.<sup>411</sup> However, Justice Breyer did not ignore it, but rightfully found that in combating *Fortnighly* and *Teleprompter*, Congress intended that Aereo’s acts were directly involved

---

established in *Aereo III* very narrowly. See Ira S. Sacks, Mark S. Lafayette & Amy S. Price, *Aereo: Another View*, 26 NO. 12 INTELL. PROP. & TECH. L.J. 17, Dec. 2014, at \*19 (2014).

402. See Larkin, *supra* note 400, at 436.

403. See *id.* at 437 (predicting that public performance had to be discussed in *Aereo III*).

404. See *Aereo III*, 134 S. Ct. 2498, 2507 (2014).

405. See *id.* at 2506–07 (noting similarities to *Fortnighly* and *Teleprompter*).

406. See *supra* text accompanying notes 37–43.

407. See *supra* text accompanying notes 45–46.

408. See *supra* text accompanying note 47.

409. See *supra* text accompanying note 253.

410. See *supra* text accompanying note 254; see also Oral Argument at 3:00–3:40, 3:57–4:18, 14:37–15:19, 20:46–21:28, *Aereo III*, 134 S. Ct. 2498 (2014) (No. 13-461) [hereinafter *Aereo III* Oral Argument], available at [http://www.oyez.org/cases/2010-2019/2013/2013\\_13\\_461#argument](http://www.oyez.org/cases/2010-2019/2013/2013_13_461#argument) (noting concern for physical stores who sell physical copies of music as being public performers without first sale doctrine argument).

411. See Giblin & Ginsburg, *supra* note 303, at 127 (“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.”).

in transmission of the product and, thus, the volitional conduct was present.<sup>412</sup>

Justice Breyer correctly found direct infringement because the line between direct and indirect infringement on the Internet is too intertwined to be distinguishable in Aereo's case.<sup>413</sup> In addressing the issue of clickable links on websites, it has been noted that because links do not copy or distribute information, the volitional act needed for direct infringement is found only in links that a user inserts into a document or webpage.<sup>414</sup> In contrast, the pages of links that a search engine generates when a person searches something on Google are "automatic" links, which do not ascribe volitional conduct to Google because it is simply gathering links from across the web at the user's request.<sup>415</sup> Aereo falls under the first category because it is specifically inserting the programming for its users by assigning the technology to that user and allowing them to "click it" or not.<sup>416</sup> While the user is clicking "[w]atch," it is Aereo

---

412. See *Aereo III*, 134 S. Ct. at 2506–07; see also *supra* notes 33–46 and accompanying text. Notably, Justice Breyer does not name the volition standard, but does assume it in the analysis of whether finding that a cloud-service has publicly performed by storing users' music, excludes compulsory licenses from applying. See *Aereo III* Oral Argument, *supra* note 410, at 47:49–48:47, 49:40–49:57 (noting that his concern for whether fair use applies to this cloud-service should be answered "in a parallel way" to a question of volition—whether the user is copying or not). ABC's attorney, Paul D. Clement, notes that the volitional question is involved in the reproduction right, but is "answered by the Transmit Clause." See *id.* at 57:04–57:35 (transmit clause holds "sender of that transmission, if it allows contemporaneous performance," to have volition).

Justice Breyer also disagreed with Aereo's counsel at oral argument that the question was simply one of equipment use and noted that "what disturbs everyone" is Aereo, in the future, picking "up every television signal in the world" and becoming a cable company without any restrictions. See *id.* at 39:45–40:17. Justice Breyer also noted his concern that if Aereo was found to be similar to a cable system, but not a cable system, they would have to go find each copyright owner and get permission. See *id.* at 58:15–58:42.

413. See Podlas, *supra* note 391, at \*15 (discussing trouble courts have had in establishing how link is involved in direct versus indirect infringement).

414. See *id.* at 15–17; see also Kimberlianne Podlas, *Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows is Copyright Infringement*, 6 HARV. J. SPORTS & ENT. L. 41, 82–83 (2015) ("The linker must locate and choose content to which to link, decide to insert a link, determine where in the document or webpage to insert the link, and decide how to label and contextualize [the link]."). Podlas notes the recent high profile "million dollar lawsuit against Gawker Media and AnonFiles.com" by Quentin Tarantino for "linking to his leaked screenplay." See *id.* at 47. Interestingly, Podlas concluded that Tarantino should have argued direct infringement of his public performance right instead of secondary infringement. See *id.* at 94.

415. See Podlas, *supra* note 391, at \*17.

416. See *supra* note text accompanying notes 239–42. Note this argument against Aereo would not sweep in services that store music in the cloud at the user's request. See Brandon J. Trout, Note, *Infringers or Innovators? Examining Copyright Liability for Cloud-Based Music Locker Services*, 14 VAND. J. ENT. & TECH. L. 729,



that is “inserting” the content into the “document” in order for the user to click or not.<sup>417</sup>

Justice Breyer’s majority opinion is implicitly acknowledging Aereo’s volition when comparing the technology of CATV to Aereo.<sup>418</sup> Of course he is comparing technologies, but there seems to be nothing wrong with looking at the *process or device* since the Copyright Act itself uses these words.<sup>419</sup> Copyrighted works are no longer so simple that the technological components take a back seat to the content and distribution.<sup>420</sup> It seems odd to focus only on the technology when dealing with secondary infringement but ignore it when arguing for direct infringement, as secondary assumes direct infringement by a third party.<sup>421</sup> If the technology is important in determining secondary infringement, it should be just as important when the technology makes the provider as intertwined with infringement as the user.<sup>422</sup>

---

748–49 (2012) (noting that user is performing by uploading music to cloud, but there is no similar transmission by service beyond allowing it).

417. See *supra* note text accompanying notes 239–42.

418. See *Aereo III*, 134 S. Ct. 2498, 2506 (2014).

419. See 17 U.S.C. § 101. “To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. . . .” See *id.* “A ‘device,’ ‘machine,’ or ‘process’ is one now known or later developed.” See *id.* This shows that the newness of Aereo’s technology does not matter, but the technology itself does. Authors believe focusing on the technology places too much trust in judges clearly delineating between the different technology systems accurately. See, e.g., Stern, *supra* note 38, at 89 (noting that trust “rests on an exaggerated self-confidence”). Other authors disagree on whether the United States Supreme Court should remain silent on technological analyses and defer to agency decisions. Compare Oliver Sylvain, *Disruption and Deference*, 74 MD. L. REV. 715, 735–38 (2015) (advising that courts should determine first if agency is more fit to answer question before proceeding to substance of legal issue), with Zahr K. Said, *Defending Deference: A Reply to Professor Sylvain’s Disruption and Deference*, 74 MD. L. REV. 777, 781–82 (2015) (believing that Sylvain left few issues unanswered, for example, what if judges are deciding administrative issues as “interpreters of last resort” and not overstepping their bounds).

420. See *Copyright Act of 1976—Transmit Clause—ABC, Inc. v. Aereo, Inc.*, 128 HARV. L. REV. 371, 376–78 (2014) (noting that Justice Breyer is focusing on Aereo’s functional equivalency to CATV versus Justice Scalia who is focusing on Aereo’s technological form—both focusing on technology).

421. See Podlas, *supra* note 391, at \*19.

422. See *id.* To illustrate just how intertwined Aereo infringement is—picture the Amazon Cloud Player (ACP), which allows users to store music and play music through any handheld device over the cloud. See Cullen Kiker, *Amazon Cloud Player: The Latest Front in the Copyright Cold War*, 17 J. TECH. L. & POL’Y 235, 243–44 (2012) (describing Amazon’s service). The author notes that Amazon is not a direct infringer because there is no volitional act; ACP is analogized to the copy store that allows a person to walk into the store and make the copy. See *id.* at 257. The author goes further, pointing out that if the user were to send a copyrighted fax from the copy shop, which is then received and automatically resent to the user (analogous to how ACP user can automatically play his songs), the copy shop is not directly liable. See *id.* at 257.

Concernedly, if Aereo is not directly liable, then no streaming service will be found directly liable.<sup>423</sup> In order to combat this outcome, the volitional standard for systems like Aereo must be based on a “totality of facts” test.<sup>424</sup> In this regard, the act of creating a system whose sole purpose is infringement is a volitional act—just an “earlier” volitional act.<sup>425</sup> This is vital to copyright holders; if no direct infringement is found because there is no volitional act then there may be no claim for secondary liability when suing the user.<sup>426</sup>

---

However, unlike Aereo, ACP’s service is a blank slate of simple storage space before the user uploads his music. *See id.* Aereo is not a blank slate but has a list ready for the user. *See supra* notes 141–54. In the fax analogy, Aereo is the copy shop that provides a walk-in-customer with a list of copyrighted material they can fax, has the user pick the work, then places the work on the fax, and asks the user to press send. *See* 4 MELVILLE B NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.06 (Matthew Bender, Rev. ed., 2014) (noting there is difference between ISP who allows users complete discretion in what websites they create and post, and Google which “made the initial decision to send the Googlebot to cache many millions of web pages”).

Nimmer argues that when you set up the automatic system to provide the users with a list of copyrighted material, there is more volition than a completely user-choice system. *See id.*; *see also* *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148–49 (S.D.N.Y. 2009) (holding that “automated filtering and human review” transform an automated system from passive to volitional). *Usenet* imported the volitional analysis of the copyright issues of reproduction and public performance to the distribution right. *See Arista Records*, 633 F. Supp. 2d at 147. *But see In re Celico P’ship*, 663 F. Supp. 2d 363, 378 (S.D.N.Y. 2009) (failing to import *Usenet*’s analysis back into public performance right because court did not view *Usenet*’s volitional threshold high enough for similar volitional act under public performance). Noteworthy, *Celico* involved an argument that tried to link Verizon’s profit from selling ringtones to the user’s volitional act of playing the ringtones in public. *See Celico*, 663 F. Supp. 2d at 378.

423. *See* Carrie Bodner, *Master Copies, Unique Copies and Volitional Conduct: Cartoon Network’s Implications for the Liability of Cyber Lockers*, 36 COLUM. J.L. & ARTS 491, 515 (2013) (noting that if direct infringement must require “some degree of actual human involvement” then automated services will likely not be directly liable ever). However, even Bodner notes that direct liability has been found when the employees of the service are involved in the uploading of the content. *See id.* at 515.

424. *See id.* at 516 (noting that courts are looking at “awareness and exploitation of the use of its services for infringement as well as control over the infringement”). Recently, there has been insinuation that the volition standard could be met by a website uploading the copyrighted content to its server; Aereo’s list of broadcasted content being similar. *See* *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1308 (S.D. Fla. 2011) (holding no direct infringement because website merely allowed users to upload and download content); *see also infra* note 433.

425. *See* Bodner, *supra* note 423, at 517 (arguing that system’s “automated nature” cannot preclude finding of direct infringement).

426. *See id.* at 518–19 (noting that where direct infringement of user is obvious there has been lack of analysis for system’s direct infringement); *accord* Gibling & Ginsburg, *supra* note 303, at 144 (“[W]ithout any direct infringement there can be no basis for holding the service provider secondarily liable.”).

2. *Public is Tied to Performance*

The United States Code defines “public” in two ways: (1) actually performing *in public* and (2) transmitting a performance in public, or *to the public*.<sup>427</sup> Transmission is defined by the use of “any device or process” and can be transmitted to people who are in different locations and receive it at “different times” in the day.<sup>428</sup> The very fact that (1) is isolated from (2), but (2) refers to (1)—shows that the Transmit Clause (2) intends for a performance sent over a medium—capable of playing that performance—to be a public performance.<sup>429</sup> This means (1)’s statement that “where a substantial number of persons . . . is gathered” can be imported into *to the public* without issue, as Justice Breyer did.<sup>430</sup> By reinforcing (2) this way, Justice Breyer simply supported why a transmission of a television program to an individual in his home is a public performance—because that one person is part of a “substantial number.”<sup>431</sup>

The act of transmission, or “streaming,” is not the same as downloading for public performance purposes.<sup>432</sup> Streaming is defined as “relating to or being the transfer of data (as audio or video material) in a continuous stream especially for immediate processing or playback.”<sup>433</sup> Importantly, streaming is not equivalent to downloading because streaming does not involve storing content beyond the stream itself.<sup>434</sup> That is, while streaming is occurring there is a “buffer” zone where the program is loaded in advance so there will be no pauses, but this data, in the buffer zone, is not

---

427. See *supra* text accompanying note 59.

428. See *supra* text accompanying note 59.

429. See SCOTT ON MULTIMEDIA LAW §4.19 (2014), available at 2014 WL 6856141 (“However, when a copyrighted work is distributed online to a user who may be sitting at home, there has been a public performance under subsection (2).”). This is in contrast to a download which is not capable of playing the performance. See *id.*

430. See *id.* (establishing number of required people to be in attendance at public event is equivalent of *in public*); see also *supra* text accompanying notes 59, 268.

431. See SCOTT ON MULTIMEDIA LAW, *supra* note 429, at §4.19; see also *supra* text accompanying notes 59; cf. Giblin, *supra* note 303, at 141 (arguing that importing (1)’s number equivalent into (2) misses point of transmit clause).

432. See SCOTT ON MULTIMEDIA LAW, *supra* note 429, at §4.19.

433. See Sam Medez, *Aereo and Cablevision: How Courts Are Struggling to Harmonize the Public Performance Right with Online Retransmission of Broadcast Television*, 9 WASH. J.L. TECH. & ARTS 239, 243 (2014) (quoting *Dictionary*, MERRIAM-WEBSTER.COM, <http://www.merriamwebster.com/dictionary/streaming>).

434. See *id.* (discussing difference and noting that streaming involves right of reproduction and public performance).

stored once the program is closed.<sup>435</sup> This distinction is important because streaming alone involves the public performance right.<sup>436</sup> However, there is disagreement as to whether streaming to one's computer is public.<sup>437</sup>

Justice Breyer was not unsupported in finding an act of streaming (a performance) to also be public because the Internet itself allows anyone to access it.<sup>438</sup> A public performance has been found when the transmission is from a computer to external monitors.<sup>439</sup> A public performance has also been found when a website has “re-direct[ ]” links that a user clicks on and their computer is redirected to a website where copyrighted clips of video are shown on their computers.<sup>440</sup> In these examples, the technology is still linking performing with publicly performing analogous to how Congress determined that CATV technology was performing publicly.<sup>441</sup> Thus, Justice Breyer did not provide a superfluous anal-

435. *See id.* at 244.

436. *See, e.g.,* United States v. Am. Soc’y of Composers, Authors and Publishers, 627 F.3d 64, 75 (2d Cir. 2010) (downloading makes act of streaming non-public). Also this court notes that simply downloading does not produce a performance because, in the example of music, the music does not play itself as a file once downloaded. *See id.* at 73–74.

437. *Compare* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001), *with* Live Nation Motor Sports, Inc. v. Davis, No. 3:06-CV-276-L, 2007 WL 79311, at \*3 (N.D. Cal. Jan. 9, 2007) (website’s streaming of “live audio webcasts” of broadcast racing events is public).

438. *See Aereo III*, 134 S. Ct. 2498, 2509 (2014); *see also infra* notes 439–40.

439. *See* Zuffa, LLC v. Kamranian, No. 1:11-cv-036, 2013 WL 1196632, at \*1–2, \*6, \*9 (D.N.D. Mar. 25, 2013) (noting that public performance occurred when store owner used his computer to stream UFC fight to “multiple large external monitors,” which did not allow him to take advantage of Copyright Act exemption). In crafting an exemption from 17 U.S.C. § 106, the Copyright Act allows transmission of a performance as long as the streamed content is over a “single receiving apparatus of a kind commonly used in private homes.” *See* 17 U.S.C. § 110(5)(A) (“[C]ommunication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—(i) a direct charge is made to see or hear the transmission; or (ii) the transmission thus received is further transmitted to the public.”). This exemption has been referred to as the “homestyle” exemption.” *See Zuffa, LLC*, 2013 WL 1196632, at \*7.

440. *See* Video Pipeline, Inc. v. Buena Vista Home Ent., Inc., 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 158 (3d Cir. 1984)).

441. *Cf. Aereo III*, 134 S. Ct. at 2516 (Scalia, J., dissenting) (noting that Justice Breyer did not need to analyze whether Aereo was performing publicly because Court had already determined that Aereo was meant to fall under Act as similar to CATVs). For example, the very fact that downloading is not deemed publicly performing is because of what downloading technology is and does. *See supra* note 436. Conversely, “streaming thirty-second song clips . . . to potential buyers” was assumed to be a public performance. *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 652 (S.D.N.Y. 2013).

ysis when he analyzed the public nature of Aereo, as he was preventing Aereo's secondary argument that its individual copy model made it different from the CATV system.<sup>442</sup>

### 3. *Remaining Concerns*

Authors posit that copyright law should allow itself some leeway in the statute when its principals are at stake.<sup>443</sup> The argument is that one should look at what "copyright law is supposed to do," but this sentiment is hollow when the Copyright Act of 1976 was intended to encompass technologies similar to CATV.<sup>444</sup> Consiglio believes the technology should be allowed to evolve alongside an owner's right to be paid for originality and creative "incentive."<sup>445</sup> She believes that copyright law has "evolved to benefit creators too much," as copyright law is not intended to protect the creator's "monopoly."<sup>446</sup> While this sentiment is powerful, it does not explain how *Aereo III* failed at striking such a balance.<sup>447</sup> Justice Breyer combatted this issue by narrowing his holding to Aereo's technology and functionality.<sup>448</sup>

## V. CONCLUSION: JUSTICE BREYER WAS RIGHT

There is a subtlety to Justice Breyer's opinion that Justice Scalia missed. While Justice Breyer does not spell out every answer to Jus-

442. See *Aereo III*, 134 S. Ct. at 2508–09.

443. See Consiglio, *supra* note 352, at 2602 ("Combining the underlying theories of copyright law and a historical framework shows that Aereo should not be considered a copyright infringer despite the Supreme Court's ruling.").

444. See *id.* at 2602–03 (question provoked by Professor Paul Goldstein). Not to mention that some argue that keeping the Copyright Act narrowly focused (on CATV) would prevent money from being infused into producing new content. See Larkin, *supra* note 400, at 440.

445. See *id.* ("Copyright should encourage innovation and 'the widest possible production and dissemination of literary and artistic works.'" (quoting Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 1.14 (3d ed. 2013))).

446. See *id.*

447. See *id.* The author argues that because most of broadcasters' revenue is based on advertising, allowing more people to watch the programs (and advertisements) on Aereo-type systems would support Aereo's model. See *id.* at 2604. However, the argument for Aereo could also be made for Dish TV's "AutoHop" system that allows its customers to skip the commercials, so the question of balance is still not addressed. See *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1065 (9th Cir. 2013) (involving AutoHop services). But see Katie Wolters, Comment, *Dish Network vs. The Entertainment Industry: How the "AutoHop" Litigation Has Chilled Technological Advancement*, 67 BAYLOR L. REV. 493, 517 (2015) (stating Aereo's legal issue of public performance is too distinct from Dish's legal issue of reproduction right to "clarify" anything).

448. See *Aereo III*, 134 S. Ct. 2498, 2510 (2014) ("Congress . . . 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.").

tice Scalia's questions, there are strong implications from the majority opinion that these questions were addressed. For instance, Justice Breyer imports a volitional standard against Aereo. He does not ignore the "to the public" analysis, but simply addresses it in relation to Aereo's technology. Whether these answers were to Justice Scalia's satisfaction seems to be another story entirely.

Regardless, the subtleness of Justice Breyer's analysis is vital. Aereo's involvement in distributing copyrighted content was more active than an indirect infringement standard would require. Aereo's performances were distributed to the public in individual transmissions. Aereo's model and technology made it an equivalent to the CATV system, which Congress curtailed in the Copyright Act of 1976. Carefully read, Justice Breyer's opinion made the correct parallels and arguments in order to narrowly find Aereo's actions to constitute direct infringement. Without this subtle nature, the majority opinion could have fallen prey to Aereo's weak salute of technological "innovation."

*Zachary Stirparo\**

---

\* J.D. Candidate, May 2016, Villanova University Charles Widger School of Law; Liberty University, Western Legal Traditions, B.S., 2013. Special thanks to my family for being a constant sounding board to my analytic antics. I would also like to thank the managing editors and staff writers of the JEFFREY S. MOORAD SPORTS LAW JOURNAL for their hard work in preparing this article for publication. This case note is dedicated to my grandfather, Jimmy Stirparo.