

UP IN THE AEREO: DID THE SUPREME COURT JUST ELIMINATE THE VOLITIONAL CONDUCT REQUIREMENT FOR DIRECT COPYRIGHT INFRINGEMENT?

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I. INTRODUCTION

Justice Scalia calls *American Broadcasting Companies, Inc. v. Aereo, Inc.* “the latest skirmish in the long-running copyright battle over the delivery of television programming,”¹ but this skirmish may have warlike consequences. The United States Constitution gives 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.”² This constitutional language suggests that the Framers intended that consumers be the ultimate beneficiaries of the intellectual property system. The Intellectual Property Clause is not meant to give the wealthiest broadcasters a steel grip over competition and new technology, but rather to promote the progress of science.

Pursuant to this power, Congress passed the Copyright Act of 1976, which gives a copyright owner certain enumerated rights in his

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¹ *Am. Broad. Cos. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2511 (2014) (Scalia, J., dissenting).

² U.S. CONST. art. I, § 8, cl. 8.

work.³ At issue in the *Aereo* case⁴ is the right to perform the copyrighted work publicly.⁵ *Aereo* was a start-up business that provided access to basic cable by capturing and streaming free, over-the-air broadcasts⁶ on the Internet. The company spent time and money to ensure that its system fit squarely within a loophole in the current Copyright Act as determined by the Second Circuit Court of Appeals.⁷ *Aereo* sought to change the way that we watch local television, to break the iron grip that cable companies have over all of us, and to keep more of our hard-earned cash in our pockets instead of the giant cable companies'.⁸ Today, cable systems generally use a scheme of channel bundling as opposed to allowing customers to purchase only the channels that they watch, meaning customers are forced to pay for channels that they never use in order to get the few that they want. *Aereo* charged eight dollars per month for its streaming service;⁹ the current price for the most basic television package from major cable systems is at least twice *Aereo*'s cost with one cable company charging as much as sixty-five

³ See 17 U.S.C. § 106 (2014) (listing the six exclusive rights of the copyright owner as the rights: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by renting, leasing, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission).

⁴ *Aereo III*, 134 S. Ct. at 2498.

⁵ 17 U.S.C. § 106(4).

⁶ See Chloe Albanesius & Jamie Lendino, *Aereo: Everything You Need to Know*, PCMag (Apr. 22, 2014, 12:01 AM), <http://www.pcmag.com/article2/0,2817,2417>

555,00.asp (explaining that major broadcasters like CBS, ABC, NBC, FOX, the CW, and PBS are all available with an *Aereo* subscription, but pay TV, like HBO or SyFy, is not available. *Aereo* only gives users access to programming that they can already access for free in their homes by using an antenna and a digital HDTV tuner).

⁷ *Am. Broad. Cos. v. Aereo, Inc. (Aereo I)*, 874 F. Supp. 2d 373, 395 (S.D.N.Y. 2012) ("Aereo has made substantial investments of money and human capital in its system, all in reliance on the assumption that the Second Circuit meant what it said in *Cablevision* rather than what it did not say."), *aff'd*, 712 F.3d 676 (2d Cir. 2013), *rev'd*, 134 S. Ct. 2498 (2014).

⁸ Ted Kritsonis, *Aereo's CEO Wants to Turn TV on its Head (And Big Media Wants His Head)*, DIGITAL TRENDS (July 20, 2013), <http://www.digitaltrends.com/home-theater/aereos-ceo-wants-to-turn-tv-on-its-head-and-big-media-wants-his-head/>.

⁹ Jon Skillings, *Aereo Fine-Tunes its TV Streaming Prices, Plans*, CNET (May 13, 2013, 5:52 AM), <http://www.cnet.com/news/aereo-fine-tunes-its-tv-streaming-prices/plans/>.

dollars per month for basic cable.¹⁰

Unfortunately, Aereo must be referred to in the past tense following the Supreme Court's 2014 decision. Because the Court declared Aereo's service illegal, the company decided to cease operations and eventually declared bankruptcy in late 2014.¹¹ Aereo was not the only company impacted by the Court's decision; in fact, companies and individuals across the country will have to change business models, products, and services because the Court eliminated any need for volitional conduct in order to find direct copyright infringement. In addition to eliminating the most significant element required to prove direct copyright infringement, the Court also created a double standard for so-called "cable systems" that lowers the bar for finding direct infringement in cases where the looks-like-cable-TV standard applies. Aside from putting Aereo out of business, the Court's decision threatens advancements in Internet streaming technology and forces the American people to pay exorbitant subscription prices to cable companies that, for the most part, operate with the bottom line prioritized over the customer.

Part II of this Comment provides the reader with background information on the cable industry and sets the scene for Aereo's entry into this highly competitive business. Part III provides a description of Aereo's technology, including the trial court's factual findings, which were conceded throughout the appellate proceedings. Part IV considers the history of the Copyright Act and analyzes the relevant case law providing a foundation for the *Aereo* decision. Part V of this Comment examines the Supreme Court's decision and its effect on copyright law. Part VI explores the implications of the Court's decision, investigates how the Court may have produced unintended consequences with its ruling, and argues that the Court, while attempting to limit the decision to cable television lookalikes, in fact eliminated the traditional volitional conduct requirement. The

¹⁰ See *Shop*, XFINITY SHOP, <http://www.comcast.com/Corporate/Learn/DigitalCable/Digitalcable.html> (last visited Feb. 2, 2015) (listing the "Limited Basic" plan at \$20 per month); *Digital Cable TV Plans & Packages*, TIME WARNER CABLE, <https://www.timewarnercable.com/en/plans-packages/tv/digital-cable-tv-plans.html> (last visited Feb. 2, 2015) (listing the "Starter TV" package at \$19.99 per month); *Optimum TV: Better Television*, OPTIMUM, <http://www.optimum.com/digital-cable-tv/pricing.jsp> (last visited Feb. 2, 2015) (listing the "Optimum Value" plan for \$64.95 per month); *Fios TV*, VERIZON, <http://www.verizon.com/home/fiostv/> (last visited Feb. 2, 2015) (listing the "FiOS TV Local" plan for \$10 per month).

¹¹ Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0.

Court's decision had this consequence because the majority ventured too far beyond the text of the Copyright Act to rule against Aereo; this part also argues that the Court should have followed historic patterns and let the legislature amend the Copyright Act to respond to technological advancements that fill loopholes in current copyright law. Part VII concludes.

II. WELCOME TO THE JUNGLE: HOW THE BROADCAST AND CABLE INDUSTRIES WORK TOGETHER

In order to fully appreciate the landscape surrounding this case, it is important to understand how the broadcast business works and why a technology like Aereo's is frightening for major broadcast television companies. Like many American battles, this is not a fight over what is morally right or what is best for the public; this is a fight over money. Broadcasters make the majority of their money from three sources: advertising, compulsory licensing fees, and retransmission fees.¹² Advertising revenue was not an issue in this case primarily because Nielsen¹³ had made a change in its procedures to bring Aereo viewers into the rating equation.¹⁴ Compulsory licensing fees were also not the main issue in this battle. Those fees are established in § 111 of the Copyright Act, which provides that cable systems, at a maximum, may have to pay up to approximately three percent of gross receipts in royalty fees to the broadcasters.¹⁵

The main issue in this battle was the fact that Aereo did not pay any retransmission fees to the broadcasters who brought the lawsuit. Why are these fees the most important part of this battle? Because, unlike compulsory licensing fees, retransmission fees are not statutorily regulated in amount; instead, they must be negotiated in good faith.¹⁶ These fees are established by the 1992 Cable Act,¹⁷ which

¹² See 17 U.S.C. § 111 (2014); Miriam Gottfried, *Network Fees Create Drama for Broadcasters*, WALL ST. J. (Sept. 21, 2014), <http://online.wsj.com/articles/network-fees-create-drama-for-broadcasters-heard-on-the-street-1411331884>.

¹³ Nielsen Company provides a "Nielsen rating" for each program on television, which measures the size and composition of the audience for the program. That data is then used to calculate the rate for a commercial spot during the particular program. *About Us*, <http://www.nielsen.com/us/en/about-us.html> (last visited Jan. 9, 2015).

¹⁴ Brian Stelter, *Nielsen Adjusts Its Rating to Add Web-Linked TVs*, N.Y. TIMES (Feb. 21, 2013), http://mediadecoder.blogs.nytimes.com/2013/02/21/tvs-connected-to-the-internet-to-be-counted-by-nielsen/?_php=true&_type=blogs&_r=0.

¹⁵ 17 U.S.C. § 111(d).

¹⁶ 47 U.S.C. § 325(b)(3)(C) (2014).

¹⁷ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992); see also 47 C.F.R. § 76.55-62 (2014) (implementing cable must-

provides commercial broadcasters, every three years, with two options. First, broadcasters may elect the “must carry” provision requiring all cable systems in the area to carry their programming.¹⁸ Importantly, broadcasters do not get paid retransmission fees if they select this option.¹⁹ The second, more popular option allows broadcasters to renegotiate their contracts with cable systems every three years,²⁰ which is where the real money is made.²¹

Retransmission fees provide broadcasters with a massive amount of leverage that leaves cable companies in an undesirable position. If cable providers negotiate too hard for their customers, their customers end up losing access to desired programming; if cable providers do not fight hard enough, however, their customers must pay incredibly high prices for access to broadcast television that the public has a right to receive for free over the air. For example, Time Warner Cable subscribers in Corpus Christi, Texas lost access to their local NBC affiliate for nearly five months and missed out on the Super Bowl in 2012 because the broadcaster and Time Warner could not reach an agreement.²² That demonstration of power followed one in 2010 when FOX banned Cablevision from showing games one and two of the World Series to Cablevision subscribers.²³ Broadcasters use their superior bargaining power to leverage cable companies into paying high retransmission fees, which ultimately result in pass-through charges to consumers ranging anywhere from one to five dollars per

carry); 47 C.F.R. § 76.64 (2014) (implementing cable retransmission consent).

¹⁸ See 47 C.F.R. § 76.55–62 (implementing cable must-carry).

¹⁹ See JEFFERY A. EISENACH, PH.D., DELIVERING FOR TELEVISION VIEWERS: RETRANSMISSION CONSENT AND THE U.S. MARKET FOR VIDEO CONTENT 5 (2014), http://www.nera.com/content/dam/nera/publications/2014/PUB_Retransmission_Consent_0714.pdf.

²⁰ See *id.*

²¹ See Kevin Hunt, *Kevin Hunt: What Is \$1.50 'Broadcast TV Fee' On Cable Bill? (It's Worth Billions)*, HARTFORD COURANT (Apr. 28, 2014), http://cached.newslookup.com/cached.php?ref_id=510&siteid=2420&id=5855178&t=1398723072 (“Broadcasters get \$3 billion a year in retransmission fees from cable and satellite providers, according to research firm SNL Kagan.”); Roger Yu, *Retransmission Fee Race Poses Questions for TV Viewers*, USA TODAY (Aug. 2, 2013), <http://www.usatoday.com/story/money/business/2013/07/14/tv-retrans-fees/2512233/> (describing retransmission fees as expected “to more than double from \$2.36 billion in 2012 to \$6.05 billion—about 23% of total TV station revenue—by 2018, according to industry research firm SNL Kagan.” And reporting, “The stakes are high: At Nexstar, retrans revenue rose 64.2% to \$23.8 million in the first quarter this year, outpacing the more modest 32.6% growth in advertising. Other broadcasters report similarly increasing rates.”).

²² Yu, *supra* note 21.

²³ Hunt, *supra* note 21.

month.²⁴

In addition to traditional cable companies, broadcasters exert their iron grip on satellite companies like DirecTV, which reported that its retransmission fee rates went up eight percent in the latest round of negotiations.²⁵ Of course, neither satellite nor traditional cable systems can realistically refuse to reach an agreement with any major broadcaster because failure to carry a major network will result in massive customer losses for the provider. With no way for cable systems to fight back, broadcasters are free to demand exorbitant retransmission fees to the American people's detriment.²⁶

Essentially, this is a fight over how the American people can receive copyrighted works broadcast over frequencies that we, in fact, own. Undisputedly, you have a right to set up an antenna, a TV, a DVR, and a Slingbox,²⁷ which together would give you your own version of Aereo right in your home. The plaintiffs in this case urge the Court to expand broadcaster copyright protections beyond the scope of the Copyright Act's text in order to provide themselves with a monopoly over the methods that deliver their programs to the consumer. The unpopularity of the current regime is evidenced by HBO's recent announcement that it will "offer a stand-alone streaming service directly to Internet customers beginning [in 2015], taking a giant step toward breaking the pay-TV bundle that has been a cornerstone of the television industry for more than a quarter-century."²⁸

Finally, not all broadcasters oppose Aereo; in fact, it is only the largest, wealthiest few who have filed suit. An amicus brief in the case, filed by a group of small and independent broadcasters ("SIBs"), revealed the damaging effects a decision against Aereo would have on

²⁴ *See id.*

²⁵ *Id.*

²⁶ *See* Yu, *supra* note 21 ("CBS is seeking to roughly double its retrans fee total to about \$500 million this year.")

²⁷ *See* SLINGBOX, <http://www.slingbox.com/DiscoverSling.aspx> (last visited Sept. 23, 2015). A Slingbox enables a person to watch programming from his cable subscription on any Internet connected device. The Slingbox connects to the user's cablebox and allows access to all the channels to which the user is subscribed and to the user's DVR. This allows a user to pay for only one cablebox and have access to the programming on other televisions within the home and on any Internet connected device on the go, and even allows access via the Internet while the user is traveling internationally.

²⁸ Meg James, *HBO Going 'Over the Top' with Internet Streaming Service in 2015*, L.A. TIMES (Oct. 15, 2014, 8:30 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-hbo-to-launch-internet-only-service-20141015-story.html>.

their businesses.²⁹ SIBs provide content that is not available on the major networks; for example, Cocola Broadcasting, a Fresno-based broadcaster, provides Hmong-language programming to the sizable Hmong population there, which has been completely ignored by major broadcasters.³⁰ Technology like Aereo's would provide those individuals with a cheap service allowing access to vital news and information in their native language.

Another benefit of Aereo's service was that it would have allowed SIBs to expand viewership in their respective markets. For example, "once Aereo became available in Cincinnati, Ohio, small broadcaster WKRP began actively promoting the use of Aereo to expand viewership and increase interest among viewers who were otherwise unable to receive WKRP's signal clearly."³¹ Large broadcasters do not want to lose market share to these SIBs who provide diverse content to local communities. According to the amici SIBs, broadcasters "have accepted a basic bargain: In return for their right to broadcast freely over the public airwaves, consumers have the reciprocal right to use an antenna to access their over-the-air broadcasts, and to make personal recordings of the broadcast programs without license or payment."³² SIBs contend that large broadcasters have "reneged on this bargain,"³³ and that in order to increase their own power and wealth, those large networks believe that "they are entitled to control how and when individual audience members tune the antennas that receive their transmissions for private recording and viewing."³⁴

The Court's decision hurts Aereo as a business, but the biggest loss is borne by the American people who have lost a valuable technological advancement, have been stripped of the opportunity for a more free-flowing exchange of ideas, and have been forced into the chokehold of cable companies who are free to charge shocking prices, since their only competition has just been deemed illegal. The Court's decision miscalculates the proper balance that the Framers intended to achieve with the Intellectual Property Clause; the decision overemphasizes the protections afforded by the Copyright Act and undervalues the fact that Congress is instructed "to promote the

²⁹ Brief of Amici Curiae Small and Independent Broadcasters in Support of Respondent, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1319385.

³⁰ *Id.* at 5–6.

³¹ *Id.* at 6–7.

³² *Id.* at 8.

³³ *Id.*

³⁴ *Id.*

progress of science and useful arts,”³⁵ not to promote the self-interests of a few large, powerful broadcasting companies.

III. PARADISE CITY: AEREO’S INNOVATIVE TECHNOLOGY

Aereo designed its technology platform with the *Cablevision*³⁶ decision in mind, intending to utilize the four guideposts set out in that case to ensure that its business would be in compliance with the Second Circuit’s view of the Copyright Act’s Transmit Clause.³⁷ “Aereo’s system allows users to access free, over-the-air broadcast television through antennas and hard disks located at Aereo’s facilities.”³⁸ Subscribers may use any Internet-connected device including, but not limited to, televisions, computers, tablets, or smart phones to stream their selected program online.³⁹ Aereo users have the choice to either “Watch” or “Record” the programming that they desire to view.⁴⁰ While the initial choice may make a difference in the retention of the video file after playback is complete, any meaningful distinction is eliminated by the fact that users who initially select “Watch” may, during viewing, select to “Record,” and users who initially record may start to watch before the program has completely aired.⁴¹ Therefore, from the user’s perspective, Aereo operates similarly to a DVR that has been connected to a Slingbox,⁴² or equivalent technology, which allows a user to stream data from his DVR to his Internet-connected device.⁴³

Behind the scenes, Aereo’s system is inert until a user-generated request springs the system into action.⁴⁴ By clicking “Watch” or

³⁵ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

³⁶ *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008).

³⁷ *See WNET Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 689 (2d Cir. 2013), *rev’d*, 134 S. Ct. 2498 (2014) (discussing each of the four guideposts gleaned from the *Cablevision* decision. First, “the Transmit Clause directs courts to consider the potential audience of the individual transmission.” Second, private transmissions should not be aggregated. “Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work.” Finally, any factor limiting the potential audience of a particular transmission is relevant to the Transmit Clause analysis.).

³⁸ *Aereo I*, 874 F. Supp. 2d 373, 376–77 (S.D.N.Y. 2012).

³⁹ *Id.* at 377.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See SLINGBOX*, *supra* note 27.

⁴³ *Aereo I*, 874 F. Supp. 2d at 377.

⁴⁴ *Aereo III*, 134 S. Ct. 2498, 2518 (2014).

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“Record,” the user sends a signal to the Aereo system, which tunes a specific antenna to the frequency corresponding to the program the user wants to watch.⁴⁵ The data collected by the antenna is passed through a transcoder, which creates a digital file of the program that is stored in a directory unique to the user.⁴⁶ The system then waits approximately seven seconds, while a portion of the program is saved to the user’s directory, before beginning playback.⁴⁷ Both the antenna capturing the free, over-the-air broadcast, and the file subsequently created are unique to the user. At any given time, an antenna may either be inert or in use by a maximum of one user.⁴⁸ Additionally, each file saved to Aereo’s system is accessible only by the user who created it.⁴⁹

Assignments of antennas to users occur based upon the user’s subscription type, with the majority of users opting for the “dynamic” configuration over the “static” plan.⁵⁰ A dynamic user is assigned an antenna randomly and becomes the sole user of that antenna for the duration of the program.⁵¹ After the program has aired, the antenna has finished its job and is then free to be assigned to another user at a later time.⁵² In comparison, static users have a set of antennas previously assigned to them. Every time a static user watches or records a program, he is guaranteed that the antenna capturing the signal will be one of his previously assigned antennas.⁵³

The only factual dispute in the trial court was whether the antennas housed in Aereo’s warehouse operated independently or collectively as a unit.⁵⁴ Plaintiffs claimed that the antennas operated collectively, while Aereo contended that each antenna operated independently.⁵⁵ The antennas consist of a pair of dime-sized metal loops.⁵⁶ Eighty antennas are present on each circuit board with a metal rail that separates the antennas from the electrical components used

⁴⁵ *Aereo I*, 874 F. Supp. 2d at 377–78.

⁴⁶ *Aereo II*, 712 F.3d 676, 683 (2d Cir. 2013).

⁴⁷ *Aereo I*, 874 F. Supp. 2d at 378.

⁴⁸ *Aereo II*, 712 F.3d at 683.

⁴⁹ *Id.*

⁵⁰ *Aereo I*, 874 F. Supp. 2d at 377–78.

⁵¹ *Id.* at 378.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Aereo I*, 874 F. Supp. 2d at 379.

to operate the antennas.⁵⁷ Each housing contains a parallel configuration of sixteen circuit boards.⁵⁸

Each party presented expert testimony at trial regarding the collective or independent nature of the antennas.⁵⁹ After reviewing all of the evidence, the trial court “[found] that Aereo’s antennas function independently.”⁶⁰ The plaintiffs did not challenge that finding on appeal; thus, the fact that each antenna operates individually is undisputed for the purpose of appellate review.⁶¹

In summary, “Aereo’s system creates a subscriber-specific copy—that is, a ‘personal’ copy—of the subscriber’s program of choice,” which is stored in a subscriber-specific folder and streamed over the Internet directly to the subscriber’s Internet-connected device.⁶²

IV. YOU AIN’T THE FIRST: A BRIEF HISTORY OF THE COPYRIGHT ACT OF 1976

The Statute of Anne, promulgated in 1710, is considered the first modern copyright statute because it was the first time that authors received rights in their respective works.⁶³ Copyright law in the United States has existed since colonial times, with the first federal copyright laws coming shortly after the ratification of the Constitution.⁶⁴ The modern Copyright Act has been interpreted and revised a number of times since its origination. It is that pattern of interpretation by the Court and revision by the legislature that is relevant here.

A. *The Fortnightly and Teleprompter Cases*

In *Fortnightly Corp. v. United Artists Television, Inc.*, the Court considered the copyright liability of a community antenna television (“CATV”) system.⁶⁵ The CATV provider installed antennas on the tops of hills surrounding two cities and used amplifying technology to send the signals via coaxial cable to its subscribers.⁶⁶ The CATV system

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 380–81.

⁶⁰ *Id.* at 381.

⁶¹ *Aereo II*, 712 F.3d 676, 680 (2d Cir. 2013).

⁶² *Aereo III*, 134 S. Ct. 2498, 2502–03 (2014).

⁶³ CRAIG JOYCE ET AL., *COPYRIGHT LAW* 17 (9th ed. 2013).

⁶⁴ *Id.* at 20–21.

⁶⁵ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

⁶⁶ *Id.* at 391–92.

constantly transmitted a television signal to its subscribers; a subscriber only had to switch on his TV and turn to any of the five programs that were being transmitted at a given time.⁶⁷ Each subscriber would receive the same programming at the same time, which included only unedited transmissions of the original broadcasts.⁶⁸

A copyright owner challenged the CATV system as an infringement of his right to publicly perform his work.⁶⁹ The United States Supreme Court, interpreting the Copyright Act of 1909, held that broadcasters performed, but viewers did not perform.⁷⁰ The 1909 Act did not contain a specific definition of “perform” and did not contain the Transmit Clause found in the current version of the Act. Instead, the Court found that “resolution of the issue . . . depend[ed] upon a determination of the function that CATV plays in the total process of television broadcasting and reception.”⁷¹ After drawing this line, the Court concluded that a CATV provider was more akin to a viewer than a broadcaster, and as such, it was incapable of performing and therefore, incapable of infringing the copyright holder’s public performance right.⁷² According to the Court, “a CATV system no more than enhances the viewer’s capacity to receive the broadcaster’s signals; it provides a well-located antenna with an efficient connection to the viewer’s television set.”⁷³

What is crucial to note about the *Fortnightly* decision is not what the Court ultimately held, but rather what the Court refrained from doing in its decision. The Court explicitly noted that it had been presented with a difficult task in “read[ing] the statutory language of 60 years ago in the light of drastic technological change.”⁷⁴ Instead of letting the pressures of outside commentators and officials interfere with the Court’s duty to apply the law, the Justices reached a conclusion in line with the law as written and not the law as it should have been updated to reflect the changes in technology made between 1909 and the 1960s. Justice Stewart, in concluding the majority opinion, noted that the Court had “been invited by the Solicitor General . . . [to] accommodate various competing considerations of copyright,

⁶⁷ *Id.* at 392.

⁶⁸ *Id.*

⁶⁹ *Id.* at 394.

⁷⁰ *Id.* at 398.

⁷¹ *Fortnightly*, 392 U.S. at 397.

⁷² *Id.* at 399.

⁷³ *Id.*

⁷⁴ *Id.* at 396.

communications, and antitrust policy.”⁷⁵ Wisely, the Court “decline[d] the invitation,” stating, “[t]hat job is for Congress.”⁷⁶ Instead, the Court applied the Copyright Act of 1909 as written to hold that the CATV providers did not “perform” the copyrighted works under the Act.⁷⁷

Six years after the *Fortnightly* decision, the Court granted certiorari in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, which involved a CATV system similar to that at issue in *Fortnightly*.⁷⁸ Teleprompter’s technologies were essentially the same as those employed by *Fortnightly*, but as can be expected, in the six years between these cases, technology improved. Teleprompter’s system was capable of delivering broadcast programming originating a distance of more than 450 miles away from the subscriber,⁷⁹ whereas the *Fortnightly* case dealt with systems carrying signals for 52–82 miles.⁸⁰

The plaintiffs in *Teleprompter* attempted to distinguish their CATV system from the *Fortnightly* system, noting that even if an individual subscriber owned his own antenna, the curvature of the earth would make it impossible for him to receive a signal from such a great distance.⁸¹ The crux of the argument was that CATV providers, who offered a service that an individual viewer could not provide for himself, did not fall on the viewer’s side of the line⁸² drawn in *Fortnightly*.⁸³

The Court then quickly addressed some of the underlying concerns presented in the case, including the CATV system’s effect on the relationship between advertisers and broadcasters, calling the “reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act.”⁸⁴ Ultimately, the Court found the alleged distinctions unconvincing and followed precedent established in *Fortnightly* to again “hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.”⁸⁵

⁷⁵ *Id.* at 401.

⁷⁶ *Id.*

⁷⁷ *Fortnightly*, 392 U.S. at 401–02.

⁷⁸ *Teleprompter Corp. v. Columbia Broad. Sys. Inc.*, 415 U.S. 394 (1974).

⁷⁹ *Id.* at 400.

⁸⁰ *Fortnightly*, 392 U.S. at 392.

⁸¹ *Teleprompter*, 415 U.S. at 400.

⁸² *Fortnightly*, 392 U.S. at 398–99.

⁸³ *Teleprompter*, 415 U.S. at 401–02.

⁸⁴ *Id.* at 413.

⁸⁵ *Id.* at 404 (citing *Fortnightly*, 392 U.S. at 400–01).

Although the 1976 revision of the Copyright Act negated the *Teleprompter* Court's interpretation of "perform," the Court's deference to the plain meaning of the statutory language remains important. The Court noted that "[s]hifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived."⁸⁶ The Court again wisely refrained from rewriting the decades-old Copyright Act even though there was a sense that the Justices were indeed hoping that the *Fortnightly* decision would invite Congress to review the Act. Instead of violating traditional notions of separation of powers, Justice Stewart gave the legislature another reminder that "[d]etailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."⁸⁷

B. The 1976 Revision of the Copyright Act

The 1976 amendments to the Copyright Act were, in large part, a legislative response to the Court's holdings in *Fortnightly* and *Teleprompter*.⁸⁸ The Justices had called for this action at the end of both opinions in an effort to maintain the proper balance between the judiciary and legislature. In response, the 1976 Copyright Act contained three significant changes that expressly rejected the Court's finding that CATV providers did not perform.

First, Congress provided that "to 'perform' an audiovisual work means 'to show its images in any sequence or to make the sounds accompanying it audible.'"⁸⁹ Second, Congress enacted the Transmit Clause, which was wholly absent from the 1909 Act, and which provides that an entity performs publicly where it "communicates [a performance] by any device or process whereby images or sounds are received beyond the place from which they are sent."⁹⁰ Finally, Congress enacted § 111, which "creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may

⁸⁶ *Id.* at 414.

⁸⁷ *Id.*

⁸⁸ *Aereo III*, 134 S. Ct. 2498, 2505 (2014).

⁸⁹ *Id.* at 2505–06 (citing 17 U.S.C. § 101 (2014)).

⁹⁰ *Id.* at 2506 (citing H.R. REP. NO. 94-1476, at 86–87 (1976); 17 U.S.C. § 101).

retransmit broadcasts.”⁹¹ In the *Aereo* opinion, Justice Breyer concluded that Congress made these three changes “to bring the activities of cable systems within the scope of the Copyright Act.”⁹²

C. *Sony: Volitional Conduct and “Time-Shifting”*

Sony Corp. of America v. Universal City Studios, Inc. involved the invention of the Betamax VTR (predecessor to the once-popular VCR), which allowed customers to record copyrighted programs primarily for the purpose of watching the program at a later time, a process Sony labeled “time-shifting.”⁹³ In *Sony*, the Court held that in order to be liable for direct infringement, the actor must “personally engage[] in infringing conduct.”⁹⁴ The Court established that the concept of contributory infringement in copyright comes not from a copyright statute, but rather from the Patent Act and the common law concept of vicarious liability.⁹⁵ Therefore, in order to be found liable for contributory infringement, there must be some legal relationship or other affirmative act—like providing the copyrighted work to be infringed⁹⁶—in order for a third party to be liable for the infringer’s conduct. The Court then went on to hold that “time-shifting” was a non-infringing fair use,⁹⁷ meaning the Betamax had significant non-infringing uses and that Sony was not liable for contributory infringement.⁹⁸ *Aereo*’s appeal only addressed the “Watch” streaming feature, but if a hypothetical company were to offer subscribers only the “Record” portion of *Aereo*’s model, *Sony* may provide a way around the *Aereo* decision.⁹⁹

⁹¹ *Id.* at 2506 (citing H.R. REP. NO. 94-1476, at 88).

⁹² *Id.* at 2506.

⁹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984).

⁹⁴ *Aereo III*, 134 S. Ct. at 2512 (Scalia, J. dissenting) (citing *Sony*, 464 U.S. at 433).

⁹⁵ *Sony*, 464 U.S. at 434–35 (citing 35 U.S.C. § 271 (2014); *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911)).

⁹⁶ *Id.* at 434–37.

⁹⁷ *Id.* at 454–55.

⁹⁸ *Id.* at 455–56.

⁹⁹ The argument would be that while *Aereo* provided a service similar to CATV systems by delivering essentially live TV, this hypothetical record-only *Aereo* would be more akin to the Betamax VTR. It would only be able to record programming for later viewing after the program has aired, just like an old VCR. If the Court were to apply a black-box analysis, like the analysis applied in *Aereo III*, *infra* Part VI.B, the basic input and output for the recordings would be almost identical to those in *Sony*. The user initiates the recording by pressing or clicking a button, some magic happens, and then after the program airs, the recording is available. It should not matter that the hardware is located in a warehouse instead of a user’s home; if the end result is that the user is viewing the program in a private manner, then that is fair use. No infringing

While *Sony* remains important for its holdings regarding the line between fair use and copyright infringement and affirming the volitional conduct requirement, the case also provides dicta regarding the proper role of the Court and of Congress in copyright matters. The *Sony* Court pointed out the historic roles of the judiciary and the legislature in the United States, noting that “[r]epeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.”¹⁰⁰ This pattern of technological advances followed by amendments to the copyright law was broken in *Aereo III* when the Court reached beyond the scope of the Copyright Act’s text to include a new technology—Internet streaming—under laws that the Court recognized were intended to deal specifically with cable television systems. In addition, the *Sony* Court explicitly mentions the limitations of judicial power, saying: “It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.”¹⁰¹

Thus, the *Sony* decision is important not only because it held that direct infringement requires some personally infringing conduct, known as the volitional conduct requirement, but also because it reinforced the Court’s pattern of refraining from going beyond the text of the Copyright Act applicable to the suit and leaving the legislature to do its job in amending or revising the statute.

D. *The Second Circuit’s Particular Transmission Approach*

In *Cablevision*, the Second Circuit dealt with a case involving Cablevision’s use of remote storage DVR (“RS-DVR”) technology to allow customers without set-top DVRs to record programs at a “remote” location.¹⁰² A number of copyright owners brought suit claiming that Cablevision’s failure to obtain licenses to operate or sell the RS-DVR resulted in direct infringement of their exclusive right to reproduce and publicly perform the copyrighted works.¹⁰³

The RS-DVR system worked in a manner similar to the *Aereo* system, but with two major differences. First, instead of capturing a program once for each user, Cablevision’s system used a single

conduct by the user means no infringement to which *Aereo*-record-only can contribute.

¹⁰⁰ *Sony*, 464 U.S. at 430–31.

¹⁰¹ *Id.* at 456.

¹⁰² *Cablevision*, 536 F.3d 121, 124 (2d Cir. 2008).

¹⁰³ *Id.* at 124.

stream¹⁰⁴ of incoming data to produce a copy of the program for each user.¹⁰⁵ What that means is that Cablevision used the single stream of data, for which it had a license, and made a copy of that entire stream to send through the Broadband Media Router (“BMR”)¹⁰⁶ and then through a primary ingest buffer¹⁰⁷ to be processed.¹⁰⁸ Second, Cablevision initially buffered every incoming program to prepare it for saving on a hard disk regardless of whether a customer had actually requested the recording of that program.¹⁰⁹

The *Cablevision* court analyzed the plaintiff’s claim that Cablevision’s RS-DVR would infringe its right to publicly perform the copyrighted works under the Transmit Clause.¹¹⁰ The district court looked to the potential audience for an underlying work, which, as the Second Circuit noted, is the public in each and every imaginable case, rendering every transmission of a copyrighted work “to the public” regardless of the number of people actually capable of receiving the specific transmission.¹¹¹ This approach, looking to the potential audience for an underlying work instead of a specific transmission, is

¹⁰⁴ *See id.* Each “copy” received by any Cablevision user was the product of the same underlying data stream, whereas each Aereo user received a “copy” that was produced by a different antenna and transcoder than every other user’s copy. Therefore, each Cablevision customer received a copy of the exact same data, which came from the split stream through the buffers, while each Aereo customer had a copy of different data. Hypothetically, if there was interference with some, but not all, of Aereo’s antennas, it was possible for two Aereo users who chose to record the same program at the same time to end up with different data since each “copy” was produced wholly independently of each other “copy” of the same programming.

¹⁰⁵ *Id.* at 124–25.

¹⁰⁶ *Id.* (stating that the BMR is used to reformat incoming data into a data stream that can be utilized by the primary ingest buffer. The BMR is used constantly, regardless of whether any user has made a request to record the programming, and holds up to 1.2 seconds of programming at any given time).

¹⁰⁷ *Id.* (stating that the primary ingest buffer’s job is to hold the entire stream of data coming from the BMR for a split second while the system determines if any customers have requested to record the programming in the buffer. If there has been a request made that data is sent to a secondary buffer, which in turn creates a copy of the programming on a hard disk in a directory allocated specifically to the user. The primary ingest buffer is constantly operational and holds no more than a tenth of a second of each channel’s programming at any given time).

¹⁰⁸ *Cablevision*, 536 F.3d at 124–25.

¹⁰⁹ *Id.* See also *supra* notes 106 & 107 for a brief discussion of the main buffers used regardless of whether there had been a user request for the data. It could be argued here that Cablevision chooses to record every program and their customers only choose to not stop the recording and get a personal copy, though this seems like a negligible distinction given the transitory nature of the initial recording.

¹¹⁰ *Cablevision*, 536 F.3d at 134.

¹¹¹ *Id.* at 135–36.

called the “aggregate audience approach” within this Comment.

The Second Circuit found the lower court’s reading of the Transmit Clause incorrect because of the implications of that reading on current technology. Following the lower court’s reasoning would mean that if HBO transmitted a copyrighted work to Cablevision and Comcast, then Cablevision retransmitted that work from one Cablevision facility to another without transmitting it to any customers while Comcast transmits the program to its customers, then Cablevision would be publicly performing solely because of the acts of Comcast.¹¹² Clearly, this result is illogical. Additionally, the Second Circuit pointed to the unfortunate and irrational impact of such an interpretation on individual consumers. Under the aggregate audience approach, “a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public.”¹¹³ This is undoubtedly a scary and unsustainable interpretation for any consumer who owns a multi-room DVR.

The Second Circuit, in rejecting the district court’s reasoning, looked to the statutory language of the Transmit Clause, and its legislative history, to conclude that the RS-DVR system at issue made only private performances, noting that each “transmission of a performance is itself a performance.”¹¹⁴ The Second Circuit determined that the question to be answered in the face of a Transmit Clause issue is “who precisely is ‘capable of receiving’ a particular transmission of a performance.”¹¹⁵ Answering this question, in *Cablevision*, the court concluded that only the particular customer who requested the recording was capable of receiving the transmission at issue, rendering the performance, or the transmission, not “to the public” under the Copyright Act.¹¹⁶

Because the Second Circuit recognizes each transmission as a distinct performance, the main issue is whether the individuals capable of receiving a particular transmission constitute “the public.” Historically, the Second Circuit’s approach fits with the CATV cases because in those cases, the particular transmissions at issue originated from a single antenna. That single transmission was carried through

¹¹² *Id.* at 136.

¹¹³ *Id.*

¹¹⁴ *Id.* at 134.

¹¹⁵ *Id.* at 135.

¹¹⁶ *Cablevision*, 536 F.3d at 138.

coaxial cables to provide every subscriber with the exact same programming at the exact same time from the exact same device; thus, the audience for the particular transmission constituted “the public.” This approach therefore gives credence to the legislative changes incorporated into the 1976 Act to bring CATV systems within its reach, while staying true to the Act’s text and refraining from artificially enlarging the scope of copyright protection beyond that which the legislature has guaranteed.

V. GET IN THE RING: AEREO GOES TO THE SUPREME COURT

A. *The Lower Court Decisions*

The appeal presented to the Supreme Court stemmed from a motion filed in the United States District Court for the Southern District of New York in 2012 to enjoin Aereo “from engaging in those aspects of its service that allow its users to access ‘live’ copyrighted content over the internet.”¹¹⁷ As the trial court noted, “the issue . . . is quite limited.”¹¹⁸ The issue is limited in two respects: (1) “Plaintiffs moved for a preliminary injunction, asserting that Aereo was *directly liable* for copyright infringement by publicly performing Plaintiffs’ copyrighted works[,]”¹¹⁹ and (2) the “motion was further limited in scope, challenging only the aspects of Aereo’s service that allow subscribers to view Plaintiffs’ copyrighted television programs contemporaneously with the over-the-air broadcast of these programs.”¹²⁰

Although the district court entered a lengthy opinion in the case, the ultimate disposition is easily summarized in two sentences: “But for *Cablevision’s* express holding regarding the meaning of the provision of the Copyright Act in issue here—the transmit clause—Plaintiffs would likely prevail on their request for a preliminary injunction. However, in light of that decision, this Court concludes that it is bound to DENY Plaintiffs’ request.”¹²¹

On appeal, the Second Circuit agreed with the trial court’s decision and affirmed the order denying the plaintiffs’ motion for a preliminary injunction.¹²² The circuit court’s opinion sheds some light

¹¹⁷ *Aereo I*, 874 F. Supp. 2d 373, 375 (S.D.N.Y. 2012).

¹¹⁸ *Id.* at 376.

¹¹⁹ *Id.* (emphasis added).

¹²⁰ *Id.*

¹²¹ *Id.* at 375.

¹²² *Aereo II*, 712 F.3d 676, 680 (2d Cir. 2013).

on why Aereo's system falls beyond the reach of the Copyright Act. First, and most importantly, in the Second Circuit, "technical architecture matters."¹²³ This is significant because the Second Circuit does not reason by analogy or resemblance; instead, the court actually looks at the technical functionality of a system to determine whether the system performs publicly or privately.¹²⁴

Second, the court recognizes that the legislative intent of the 1976 Copyright Act requires the court to determine whether a transmission is made to the public.¹²⁵ The court specifically rejects the aggregate audience approach, which makes all transmissions public, noting that "if Congress intended all transmissions to be public performances, the Transmit Clause would not have contained the phrase 'to the public.'"¹²⁶

The Second Circuit ultimately rested its conclusion on the *Cablevision* decision, which is circuit precedent, holding that, "Aereo's transmissions of unique copies of broadcast television programs created at its users' requests and transmitted while the programs are still airing on broadcast television are not 'public performances' of the Plaintiffs' copyrighted works under *Cablevision*."¹²⁷ Thus, the issue presented to the Supreme Court for review was a limited one: an appeal from the denial of a motion for a preliminary injunction against Aereo alleging direct copyright infringement for only the "Watch" portion of Aereo's service, which allows users to contemporaneously view broadcast programs on Aereo's system while those programs are being aired.¹²⁸

B. *The Majority's Opinion*

Petitioners in this case, television broadcasters who own copyrights in many of the programs that Aereo streams to subscribers, argued "that Aereo was infringing their right to 'perform' their works 'publicly,' as the Transmit Clause defines those terms."¹²⁹ The majority recognized two distinct questions to be answered in this case. First,

¹²³ *Id.* at 694.

¹²⁴ *Id.* at 695 ("[U]nanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private.").

¹²⁵ *Id.* at 694.

¹²⁶ *Id.* (citing *Cablevision*, 536 F.3d 121, 135–36 (2d Cir. 2008)).

¹²⁷ *Id.* at 696.

¹²⁸ *See supra* text accompanying notes 119 & 120.

¹²⁹ *Aereo III*, 134 S. Ct. 2498, 2503–04 (2014).

does Aereo “perform”? And second, if it does, is that performance “public”?¹³⁰

In answering the first question, the Court engaged in what the dissent called a “looks-like-cable-TV” analysis.¹³¹ The majority proceeded to engage in a historical analysis of the *Fortnightly* and *Teleprompter* cases, and the 1976 amendments to the Copyright Act that effectively overruled those cases.¹³² The Court needed to engage in this analysis because the rest of the majority opinion was fashioned through analogies to CATV providers of the 1960s. First, the Court stated the universally accepted fact that Congress made the 1976 amendments to the Copyright Act “to bring the activities of cable systems within the scope of the Copyright Act.”¹³³

Then, although the majority recognized some differences in technology between CATV and Aereo, noting that CATV systems “transmitted constantly” whereas Aereo’s system is “inert until a subscriber indicates that she wants to watch a program,” the Court determined that the technological differences did not merit a substantive discussion.¹³⁴ In fact, one of the biggest differences in technology between the 1960s and today is the Internet, which in the 1960s was completely undiscovered, but is part of our everyday lives today. The majority acknowledged that the Internet plays a large role in Aereo’s system, but concluded that “this difference means nothing.”¹³⁵

After disregarding most technological differences between the CATV providers of the 1960s and Aereo’s current technology using small antennas, transcoders, Internet-connected servers, and a web-based mobile interface,¹³⁶ the Court then analogized Aereo’s system to that of CATV providers from the 1960s to affirmatively answer the question of whether Aereo performs. The majority accepted the difference between Aereo’s inert system and the constant transmissions of CATV systems, but concluded that “the many similarities between Aereo and cable companies, considered in light of Congress’ basic purposes in amending the Copyright Act, convince us

¹³⁰ *Id.* at 2504.

¹³¹ *Id.* at 2512 (Scalia, J., dissenting).

¹³² *Id.* at 2504–07.

¹³³ *Id.* at 2506.

¹³⁴ *Id.* at 2507.

¹³⁵ *Aereo III*, 134 S. Ct. at 2507.

¹³⁶ *See id.* at 2503 (describing Aereo’s technology).

that this difference is not critical here.”¹³⁷

Next, the Court took on the difficult task of defining the performance, which is necessary to answer the next question regarding whether that performance is public. The Court began this analysis by disregarding the text of the Copyright Act and substituting its own beliefs based on what “Congress would . . . have intended to protect a copyright holder from.”¹³⁸ The basis for the majority’s ultimate conclusion is essentially that the Act does not mean what its text explicitly says. According to the Court, “[t]he fact that a singular noun (‘a performance’) follows the words ‘to transmit’ does not suggest” that the performance involves only a singular transmission.¹³⁹ Instead, the Court concluded that this statutory language “suggests that an entity may transmit a performance through multiple, discrete transmissions.”¹⁴⁰ Ultimately, the majority “conclude[d] that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.”¹⁴¹ Thus, the Court took the leap that the Second Circuit refused to take in *Aereo II* and adopted the aggregate audience approach.

This resolution led to the holding that, “when Aereo streams the same television program to multiple subscribers, it ‘transmit[s] . . . a performance’ to all of them.”¹⁴² The Court recognized the commercial objective of Aereo’s business and brought the Ninth Circuit’s commercial nature analysis¹⁴³ into play.¹⁴⁴ Finally, after finding Aereo’s practices “highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*,” the Court “conclude[d] that Aereo ‘perform[ed]’ petitioners’ copyrighted works ‘publicly,’ as those terms are defined by the Transmit Clause.”¹⁴⁵

¹³⁷ *Id.* at 2507.

¹³⁸ *Id.* at 2509.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Aereo III*, 134 S. Ct. at 2509.

¹⁴² *Id.*

¹⁴³ See 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, 934 (2014) (noting that the Ninth Circuit’s approach is essentially that “because commercial enterprises necessarily open their services ‘to the public,’ any transmissions they make must transitively also be public”); see also *Fox Television Stations, Inc. v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012) (expanding on the Ninth Circuit’s commercial nature theory of infringement).

¹⁴⁴ *Aereo III*, 134 S. Ct. at 2508.

¹⁴⁵ *Id.* at 2511.

C. Justice Scalia's Dissenting Opinion

Justice Scalia's dissent stands in stark contrast both to the majority's holding and to the entire progression of analysis used to reach the conclusion in the case. The dissent began by stating that the public performance claim "fails at the very outset because Aereo does not 'perform' at all."¹⁴⁶ As opposed to the majority, Justice Scalia believes that "the question is *who* does the performing."¹⁴⁷ Since the issue is one of direct copyright infringement, Justice Scalia recognized that there could be liability only if Aereo itself had engaged in volitional conduct that violated the Copyright Act.¹⁴⁸ Because the dissent found that Aereo's subscribers were the actors, not Aereo itself, Justice Scalia concluded that Aereo had not performed at all and therefore could not be found liable for direct infringement.¹⁴⁹

Next, Justice Scalia performed a direct copyright infringement analysis, something the majority seemed to disregard entirely. Justice Scalia's inquiry noted that in order to be liable for direct infringement, as petitioners in this case argued, Aereo must have personally engaged in infringing conduct.¹⁵⁰ This requirement, known as the "volitional-conduct requirement," has been a crucial element of finding direct copyright infringement since *Sony*.¹⁵¹ In a case like this one, where a system may be used to view both copyrighted works and non-copyrighted works, "courts require 'some aspect of volition' directed at the copyrighted material before direct liability may be imposed."¹⁵² Generally, that issue is resolved by determining who selects the copyrighted content: the defendant or its customers.¹⁵³ After working through this analysis, Justice Scalia ultimately determined that "Aereo does not 'perform' for the sole and simple reason that it does not make the choice of content."¹⁵⁴

Justice Scalia then moved on to a discussion of the majority

¹⁴⁶ *Id.* at 2512 (Scalia, J., dissenting).

¹⁴⁷ *Id.* (emphasis in original).

¹⁴⁸ *Id.* at 2512 (Scalia, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Aereo III*, 134 S. Ct. at 2512 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984)).

¹⁵¹ *Sony*, 464 U.S. at 434; *see also* *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1066–68 (9th Cir. 2014); *CoStar Grp., Inc. v. LoopNet, Inc.* 373 F.3d 544, 549–50 (4th Cir. 2004).

¹⁵² *Aereo III*, 134 S. Ct. at 2513 (Scalia, J., dissenting) (quoting *CoStar*, 373 F.3d at 550–51).

¹⁵³ *Id.* at 2513 (citing *Cablevision*, 536 F.3d 121, 131–32 (2d Cir. 2008)).

¹⁵⁴ *Id.* at 2514.

opinion, which, the Justice argued, suffered from a “trio of defects.”¹⁵⁵ First, the Court, perceiving the text to be ambiguous, relied on “snippets . . . from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress” to give thrust to the interpretation necessary to support the majority’s ultimate conclusion.¹⁵⁶

Second, the Court disregarded every technical difference between Aereo’s system and CATV systems stating plainly, and without justification, that those dissimilarities “do[] not make a critical difference.”¹⁵⁷ It is unclear whether the majority disregarded these differences because it did not understand the technological differences between the systems, but the looks-like-cable-TV standard, which the Court announced, certainly suggests that the Justices in the majority simply lacked the ability to discern the importance of technological differences between the systems.

Third, Justice Scalia argued that “even accepting that the 1976 amendments had as their purpose the overruling of [the Court’s] cable-TV cases, what they were meant to do and how they did it are two different questions—and it is the latter that governs the case before us here.”¹⁵⁸ Justice Scalia recognized that Congress, in 1976, amended the Copyright Act in order to bring the operations of the CATV providers in the *Fortnightly* and *Teleprompter* cases within the purview of the Act, but the dissent did not accept the theory that the Act should now be interpreted to require analysis by analogy to those systems. “The injury claimed is not violation of a law that says operations similar to cable TV are subject to copyright liability, but violation of § 106(4) of the Copyright Act.”¹⁵⁹ The dissent did not believe that the Copyright Act, as written, included Aereo’s conduct within the meaning of a public performance.

After detailing the trio of defects, Justice Scalia’s dissent pointed out that the majority’s opinion created two standards for direct copyright infringement: one that seems to apply to cable company look-alikes and one that applies to everyone else.¹⁶⁰ The confusion created by this double standard will be shown immediately upon remand in this very case. As Justice Scalia pointed out, “On remand,

¹⁵⁵ *Id.* at 2515.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2507.

¹⁵⁸ *Aereo III*, 134 S. Ct. at 2516 (Scalia, J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2516.

one of the first questions the lower courts will face is whether Aereo's 'record' function . . . infringes the Networks' public-performance right."¹⁶¹ The volitional-conduct rule clearly answers that question in the negative, "[b]ut it is impossible to say how the issue will come out under the Court's analysis, since cable companies did not offer remote recording and playback services when Congress amended the Copyright Act in 1976."¹⁶²

It seems that Justice Scalia is not concerned with the Court's ultimate disposition of the case. In fact, Justice Scalia "share[d] 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."¹⁶³ Justice Scalia disagreed with the majority's opinion because it introduces more uncertainty into the law. According to the dissent, "It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment."¹⁶⁴

Finally, Justice Scalia addressed the Court's role in this case as compared with Congress's role in legislating, a point which the majority failed to address. "[W]hat we have before us must be considered a 'loophole' in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes."¹⁶⁵ Justice Scalia believes that "the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade."¹⁶⁶

VI. LIVE AND LET DIE: THE SUPREME COURT STRIKES DOWN AEREO AND VOLITIONAL CONDUCT

Careful determination of what constitutes a performance is crucial to the ultimate issue of whether that performance is public or private because only public performances are infringing under the Copyright Act. An improper interpretation of what constitutes the performance may have detrimental effects on other types of technology that are already widely in use and generally considered

¹⁶¹ *Id.* at 2517.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Aereo III*, 134 S. Ct. at 2517 (Scalia, J., dissenting).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2518.

non-infringing. Though the dissent suggests that Aereo does not perform at all, this view seems to be foreclosed by the plain language of the statute, which includes transmissions as performances.¹⁶⁷ Under the Copyright Act, one performs an audiovisual work by showing its images in any sequence, making the sounds accompanying it audible, or transmitting the work.¹⁶⁸ The Act states, “[t]o ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”¹⁶⁹ Therefore, under the plain language of the statute, both the user and Aereo perform whenever the user watches a program using Aereo’s service. The user, through his Internet-connected device, shows the images on screen and makes the sounds accompanying them audible so that he can enjoy the program. Aereo transmits the program from its antennas through the transcoders and servers to the user’s device.

But recall that the Copyright Act does not prohibit the transmission of a copyrighted work; § 106(4) only prohibits a public performance. Therefore, the real issue is whether Aereo’s performance is a public one. This is where the Court makes use of the looks-like-cable-TV standard and other analogies to reach the erroneous conclusion that Aereo performs publicly. The proper course of action would have been to apply the Copyright Act as written to find each particular transmission to be a private performance, which would allow the legislature to make any necessary amendments after assessing the impact that a new business like Aereo has on the cable industry as a whole. After all, the public, not the author, is supposed to be the biggest beneficiary of the copyright laws.

A. *Ruling by Unnecessary Analogy*

First, the majority concluded that “Congress *would* as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.”¹⁷⁰ The fact that the Court believed that Congress, in the 1970s, *would* have intended certain protections implies that, in fact, Congress did not explicitly protect a copyright holder from Aereo-type activities. If Congress had so intended, then why would the Court not say “Congress intended . . . “?

¹⁶⁷ See 17 U.S.C. § 101 (2014) (“To perform . . . a work ‘publicly’ means . . . to transmit or otherwise communicate . . . the work . . .”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Aereo III*, 134 S. Ct. at 2509 (emphasis added).

The answer must be that the Court substituted its beliefs in the year 2014 for what the majority believes Congress might have intended fifty years before; note also that the Court cites no authority for this conclusion. In fact, Congress would have needed a crystal ball to formulate any thoughts at all on Aereo-type services before or during the passage of the 1976 Copyright Act, considering that personal computers were not introduced until the early 1980s, the first experiment linking commercial email to the Internet was just getting underway in 1988, and the first publicly available web-browser was not launched until 1993.¹⁷¹

Next, the Court played an interpretation game with the statutory language to conclude, again without citing any authority, that “the fact that a singular noun (‘a performance’) follows the words ‘to transmit’ does not suggest” that each individual transmission is a separate performance.¹⁷² This finding is crucial to the Court’s holding; without giving a singular noun a plural meaning, the Court could not have reached its ultimate holding. It is not surprising that the Court cites no authority for such a form of statutory construction considering that the weight of authority is clearly contrary.¹⁷³

The Court then used these findings to announce what is essentially the aggregate audience principle previously discussed within this Comment. The majority “conclude[d] that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.”¹⁷⁴ All that matters is that people have received the same underlying work from a single entity. If those people constitute the public and the perceptible images and sounds are copyrighted, then following *Aereo*, the entity making the transmission has directly infringed the copyright holder’s exclusive right to perform the work publicly regardless of whether the entity actually engaged in any infringing conduct itself.

To understand the impact of the Court’s decision on other technologies beyond cable television and cable television look-a-likes,

¹⁷¹ *Internet Service Provider (ISP)*, ENCYCLOPEDIA BRITANNICA (2015), available at <http://www.britannica.com/EBchecked/topic/746032/Internet-service-provider-ISP>.

¹⁷² *Aereo III*, 134 S. Ct. at 2509.

¹⁷³ *See* Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”) (citing *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241–42 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102–03 (1897); *Oneale v. Thornton*, 10 U.S. 53 (1810)).

¹⁷⁴ *Aereo III*, 134 S. Ct. at 2509.

consider the following hypothetical. Dropbox is now a popular file-sharing service that uses cloud-computing technology to allow users to share any files. Hypothetically, if a law student were to upload a digital copy of a *Parks and Recreation*¹⁷⁵ episode to Dropbox and share it with forty-five people from his 1L class, then clearly Dropbox has directly infringed NBC's copyright, right? Dropbox is an entity, and through Dropbox's technology the same contemporaneously perceptible images and sounds have been communicated to forty-five separate people who must be considered the public. This seems like an odd result since most people would react by saying, "But wait, Dropbox never really *did* anything wrong." This is the problem with the *Aereo* decision.

To avoid this far-reaching consequence, instead of focusing on the Transmit Clause's first reference to "a performance," the Court should have focused on the definitive "the performance," which clearly indicates that the statute is concerned with a single performance.¹⁷⁶ The text of the Copyright Act itself provides ample evidence that a single performance is the correct interpretation. The Act expressly defines a public performance as one where "the members of the public capable of receiving *the performance* . . . receive it in the same place or in separate places."¹⁷⁷ This makes sense in light of the Congressional intent to bring CATV providers within the bounds of the Copyright Act, since those providers were sending a single transmission (a single performance) to all of their customers; thus, the ratio of transmissions to subscribers was one transmission to many subscribers. The key difference with *Aereo*'s technology is that each transmission is only capable of being received by a single subscriber. In other words, the ratio here is one transmission to one subscriber. Therefore, *the performance* is only capable of being received in one place by one user, which should remove it from the purview of the Transmit Clause altogether because the performance is private, not public.

Now we reach the most critical step in the Court's decision: the majority's refusal to consider any technological differences between CATV providers of the 1960s and *Aereo*. While the majority acknowledged at least one technological difference between CATV systems and *Aereo*'s technology—namely that CATV providers sent continuous streams to all subscribers while *Aereo*'s system was inert until the subscriber selected a program—the Court concluded that

¹⁷⁵ A copyrighted broadcast television program that originally aired on NBC.

¹⁷⁶ See 17 U.S.C. § 101 (2014).

¹⁷⁷ *Id.* (emphasis added).

“this sole technological difference between Aereo and traditional cable companies does not make a critical difference here.”¹⁷⁸ The fact that the majority seems to think that this is the *sole* technological difference between the systems shows a lack of understanding of the technologies at issue. Of primary concern is the majority’s reasoning behind the irrelevancy of this technological difference.

The Court claimed that because this difference is “invisible to subscriber and broadcaster alike,”¹⁷⁹ it should be ignored. This rationale seems unsupported; the Transmit Clause does not reference the visibility of the technology that drives the process delivering the content. The Court has dismissed the technical intricacies and focused solely on input and output. Undermining the already feeble conclusion that this technological difference does not matter is the Court’s acknowledgement, immediately following the invisibility claim, that, “In other cases involving different kinds of service or technology providers, a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act.”¹⁸⁰ These differences, however, are not to be considered when other “similarities” between the technologies at issue “convince [the Court] that [the] difference is not critical.”¹⁸¹

What the Court appears to evaluate is not the technology at all, but the end result of a process. Engineers call this type of analysis “black-box testing,” meaning that the system is viewed solely in terms of its input and output without any knowledge of its internal workings.¹⁸² The Court does not inquire into whether the black-box is made up of coaxial cables connected to a giant antenna to send a constant stream to all subscribers or whether it is comprised of dime-sized antennas connected to the Internet through a complex process of transcoders and buffers to send a limited signal to a single subscriber. What matters to the Court is that television programs are being transmitted and broadcasters are unpaid. The problem is that the Court gives no guidance as to which technologies qualify for a user involvement inquiry and which get the black-box treatment.

A final example of the contradictory nature of the Court’s decision comes directly from the majority’s claim that cable system

¹⁷⁸ *Aereo III*, 134 S. Ct. at 2507.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² RON PATTON, *SOFTWARE TESTING* 55 (2d ed. 2006).

DVRs will be unaffected by the ruling. *Cablevision* has stood for the proposition that a cable provider does not need to pay any additional fees to broadcasters in order to provide DVR services, even though cable providers split the one incoming signal for which they actually pay into two streams in order to provide these services.¹⁸³ The court determined that the DVR service was providing private, not public, performances since only the singular customer who requested the recording could watch the recorded program from a particular DVR.¹⁸⁴ Clearly, DVR copies of a program communicate the same underlying work to multiple people, who constitute the public, through multiple transmissions. It is difficult to reconcile the Court's definition of what constitutes direct infringement of the public performance right with the continued legality of DVR services.

B. Schrödinger's¹⁸⁵ Cable Company

An additional issue with the Court's ruling by analogy to outdated technology is that it leaves Aereo in a precarious position after the decision. The Copyright Act makes many provisions for cable companies, including the § 111 provision for compulsory licensing agreements.¹⁸⁶ If Aereo were to qualify as a cable system under the Act, then it would be allowed to continue its operations after paying the broadcasters a fee, which would ultimately drive up the cost of Aereo's service, but not kill the company and its technology entirely. This is not the case with Aereo because the Court did not hold that Aereo was a cable system under the § 111; instead, the Court held that because there were so many similarities between Aereo and CATV providers of the 1960s, Aereo was violating § 106(4) of the Copyright Act.¹⁸⁷

The Second Circuit, where this case is being tried, has circuit precedent that stands for the proposition that Internet streaming companies like Aereo are not cable systems within the meaning of §

¹⁸³ *Cablevision*, 536 F.3d 121, 124–25 (2d Cir. 2008).

¹⁸⁴ *Id.* at 137.

¹⁸⁵ See *Erwin Schrodinger*, FAMOUS SCIENTISTS, <http://www.famousscientists.org/erwin-schrodinger-2/> (last visited Jan. 9, 2015) (stating that Erwin Schrödinger was a Nobel Prize-winning Austrian physicist who focused much of his career on quantum theory. However, he may be best known today for a thought experiment he developed to explain a theory of quantum mechanics known colloquially as Schrödinger's Cat. The executive summary involves a cat in a closed container and there is some random event that may, with equal chances, either take place or not take place within the closed container, but if it does, it will kill the cat. Thus, while the container remains closed, the cat is equal parts dead and alive.).

¹⁸⁶ See 17 U.S.C. § 111 (2014).

¹⁸⁷ 17 U.S.C. § 106(4).

111 of the Copyright Act.¹⁸⁸ The Second Circuit did not create this rule; instead, it is an acknowledgement that “[t]he Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for § 111 compulsory licenses.”¹⁸⁹ This inconsistent treatment between related sections of the Copyright Act creates quite the conundrum for Internet streaming services.

If Aereo, according to the Supreme Court, infringes § 106(4) because it is too much like a cable company, yet it does not qualify for a compulsory license under § 111 of the same statute because the Copyright Office has concluded that Internet streaming services are not cable systems, then what type of beast is Aereo? Perhaps Aereo is a Schrödinger’s cable company of sorts; both a cable company and not a cable company at the same time.

Unlike Schrödinger’s famous thought experiment, Aereo’s situation was actually remanded by the Supreme Court for the district court to decide.¹⁹⁰ Upon remand, Aereo made three new arguments against the plaintiffs’ motion for a preliminary injunction.¹⁹¹ First, Aereo argued “that in light of the Supreme Court’s holding in *Aereo III*, it should be considered a ‘cable system’ that is entitled to a compulsory license under § 111 of the Copyright Act.”¹⁹² The argument was that because the Supreme Court determined that Aereo was sufficiently similar to a cable system to come within the purview of the 1976 amendments to the Copyright Act with respect to the Transmit Clause, it should also be found sufficiently similar to a cable system for purposes of the § 111 compulsory license since that section was added to the Act as part of a single statutory scheme that Congress developed to handle CATV provider copyright liability.¹⁹³

The district court rejected Aereo’s argument, finding that “the Supreme Court consistently stated throughout its opinion that Aereo’s similarity to CATV systems informed its conclusion that Aereo performs, not that Aereo is a cable system.”¹⁹⁴ The court went on to note the Supreme Court’s silence on the § 111 issue, but determined that the “void . . . is filled by on-point, binding Second Circuit

¹⁸⁸ See *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284–85 (2d Cir. 2012) (holding that Internet streaming company ivi was not a cable system under the Copyright Act).

¹⁸⁹ *Id.* at 283.

¹⁹⁰ *Am. Broad. Cos. v. Aereo, Inc. (Aereo IV)*, No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555 (S.D.N.Y. Oct. 23, 2014).

¹⁹¹ *Id.* at *12–13.

¹⁹² *Id.* at *13.

¹⁹³ *Id.* at *16–17.

¹⁹⁴ *Id.* at *17.

precedent¹⁹⁵ from *WPIX, Inc. v. ivi, Inc.*¹⁹⁶ In concluding the § 111 analysis, the court noted that Congress, in 1988, added § 119 of the Copyright Act to provide compulsory licenses for satellite TV providers who did not qualify for those licenses under § 111.¹⁹⁷ Congress may ultimately determine that another provision should be made for Aereo-type services, but until then, compulsory licenses are not available to these Internet-streaming services.

The district court ultimately granted the plaintiffs' motion for a preliminary injunction "barring Aereo from retransmitting programs to its subscribers while the programs are still being broadcast."¹⁹⁸ Though this ruling only technically barred Aereo from using the "Watch" aspect of its service, the company ceased all operations, presumably because of users' ability to use the "Record" function in essentially the same manner as the "Watch" function.

Although Aereo elected to discontinue its entire service, it is worth taking a brief moment to think about what the Supreme Court's opinion really decided. Aereo cannot allow users to watch any programming while it is currently airing, but so long as Aereo's system does not allow a user to click "Play" until one second after the program has aired, it may continue to provide users access to copyrighted material without violating the Copyright Act and without paying broadcasters any fee.

This situation shows exactly why the Court should not have used the looks-like-cable-TV standard adopted by the majority in the *Aereo* decision. The problem is that the Court, while attempting to vindicate the supposed intentions of Congress, is not able to provide this new type of cable-look-a-like with statutorily authorized compulsory licenses to transmit content like Congress provided for CATV systems in 1976. While Congress clearly intended to bring the CATV systems of the 1960s within reach of the Copyright Act, the drafters also provided a way for those companies to remain in business and continue to provide services that benefit the American people. Congress enacted § 111, which allows the government to monitor and maintain a fair price for compulsory licenses to transmit copyrighted programming, striking the proper balance between promoting the progress of science and securing to authors exclusive rights in their works.¹⁹⁹ Congress was able

¹⁹⁵ *Id.* at *20.

¹⁹⁶ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012).

¹⁹⁷ *Aereo IV*, 2014 U.S. Dist. LEXIS 150555, at *26–27.

¹⁹⁸ *Id.* at *40.

¹⁹⁹ *See* U.S. CONST. art. I, § 8, cl. 8.

to find a suitable balance because of its ability to thoroughly weigh the competing interests of the nation and create laws that attempt to strike the appropriate constitutional and societal balance.

On the other hand, the Supreme Court, for good reason, is generally reluctant to go beyond the specific issues presented in a particular case. While the Court announced that companies with sufficient similarities to cable providers infringe copyright protections, the majority does not have the legislative power to provide that those same companies also qualify for compulsory licenses. This deficiency shows just one reason why the Court erred in straying from the traditional volitional conduct requirement to establish a new test specific to companies that strike the Court as sufficiently similar to CATV companies of five decades ago.

Instead, the Court should have applied the traditional volitional conduct test to find that Aereo was not infringing on a protected copyright and then deferred to Congress to determine the ramifications of this technological advancement on the 1976 Act. Such a decision would have given Congress the opportunity to debate and balance the competing interests in order to make a decision as to whether or not Internet-streaming services like Aereo should be swept under the Copyright Act's protections, and furthermore, whether those streaming services should be lumped together with cable systems or put into their own unique category. Congress would then have the opportunity to provide compulsory licensing for those streaming companies in order to provide opportunities for useful technology to deliver beneficial services to the American people while still offering some level of protection for copyright holders. Instead, the Court cuts Aereo down at the knees, which caused Aereo to suspend its service and file for bankruptcy, and created an air of uncertainty in the Internet-streaming and cloud computing industries that undoubtedly has stifled the development of useful technology because of the unclear legal grounds for marketing those technologies.

C. *Erosion of the Volitional Conduct Requirement*

The volitional conduct requirement is central to the law of copyright liability because it distinguishes between direct and secondary liability.²⁰⁰ Direct infringement occurs “when an actor personally engages in infringing conduct”²⁰¹ or where “the defendant *itself* trespassed on the exclusive domain of the copyright owner.”²⁰² On the other hand, secondary liability “is a means of holding defendants responsible for infringement by third parties, even when the defendants ‘have not themselves engaged in the infringing activity.’”²⁰³ The distinction in most suits against equipment manufacturers or service providers is drawn by determining whether the manufacturer, or provider, itself engaged in the infringing conduct or whether it was the customer who committed the volitional act.²⁰⁴ This is the case because the Copyright Act does not expressly impute liability to any person or company for another’s infringement.²⁰⁵

The majority and the dissent seem to be on opposite ends of the spectrum when it comes to volitional conduct. The majority never even mentions the term “volitional conduct,”²⁰⁶ but the dissent rests its conclusion—that Aereo does not perform—on the fact that Aereo users are the actors making the choice of content.²⁰⁷ This dichotomy creates a point of tension that will not only create confusion in years to come, but has already had a significant impact on similar pending cases.²⁰⁸ In fact, pleadings have already been filed in the United States district courts arguing that a majority of the Supreme Court in *Aereo* “acknowledged—and ultimately dismissed—the dissent’s call for

²⁰⁰ *Aereo III*, 134 S. Ct. 2498, 2514 (2014) (Scalia, J., dissenting).

²⁰¹ *Id.* at 2512 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984)).

²⁰² *Id.* at 2513 (citing *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550–51 (4th Cir. 2004)).

²⁰³ *Id.* at 2512 (quoting *Sony*, 464 U.S. at 435).

²⁰⁴ *Id.* at 2512.

²⁰⁵ *Sony*, 464 U.S. at 434.

²⁰⁶ *Aereo III*, 134 S. Ct. at 2498–2511.

²⁰⁷ *Id.* at 2514 (Scalia, J., dissenting).

²⁰⁸ *See Getty Images (U.S.), Inc. v. Microsoft Corp.*, 61 F. Supp. 3d 296, 300 (S.D.N.Y. 2014) (plaintiff arguing that volition is not required for direct infringement); Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment at 27, *Fox Broad. Co. v. Dish Network*, 2014 WL 10100767 (C.D. Cal. Jan. 20, 2015) (No. 12-CV-04529(DMG)), 2014 U.S. Dist. Ct. Briefs LEXIS 3675 (arguing that the Dish Anywhere platform directly infringes Fox’s copyrights after *Aereo*).

‘volition’ as an element of direct infringement.”²⁰⁹

The dissent’s argument is straightforward and comports with the Court’s previous cases involving direct infringement of an equipment manufacturer or service provider that offers a product to the public that is capable of infringing use.²¹⁰ There is one rule for direct infringement: “A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act.”²¹¹ Accordingly, the dissent determined that the first question to be answered with respect to direct infringement is whether Aereo itself engaged in the volitional conduct. Much like in *Sony*, Aereo simply provides equipment that a customer can use to record and watch some television programming.

According to the undisputed facts, “Aereo’s automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it.”²¹² Aereo is nothing more than a warehouse full of metal until a customer makes a demand; Justice Scalia likens it to a copy shop that allows patrons to use copy machines to copy any material they please, whether copyrighted or not.²¹³ In both cases, the operation of the system is a volitional act and a but-for cause of the infringing conduct, but “that degree of involvement is not enough for direct liability.”²¹⁴ Based on the longstanding volitional conduct requirement, Justice Scalia determined that “Aereo does not ‘perform’ for the sole and simple reason that it does not make the choice of content.”²¹⁵ This is the only

²⁰⁹ Plaintiff’s Reply Memorandum in Support of Motion for Preliminary Injunction at 13 n.8, *Getty Images (U.S.), Inc. v. Microsoft Corp.*, 2014 U.S. Dist. LEXIS 147532 (S.D.N.Y. Oct. 16, 2014) (No. 14-CV-7114(DLC)).

²¹⁰ See e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550–51 (4th Cir. 2004); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417 (1984).

²¹¹ *Aereo III*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

²¹² *Id.* at 2514.

²¹³ *Id.* at 2513–14 (“A copy shop rents out photocopiers on a per-use basis. One customer might copy his 10-year-old’s drawings—a perfectly lawful thing to do—while another might duplicate a famous artist’s copyrighted photographs—a use clearly prohibited by § 106(1). Either way, *the customer* chooses the content and activates the copying function; the photocopier does nothing except in response to the customer’s commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. . . . the fact that the copy shop does not choose the content simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules.”) (citing *Sony*, 464 U.S. at 434–42; *CoStar*, 373 F.3d at 550; *Cablevision*, 536 F.3d 121, 132–33 (2d Cir. 2008)).

²¹⁴ *Aereo III*, 134 S. Ct. at 2513–14 (Scalia, J., dissenting) (citing *Grokster*, 545 U.S. at 960 (Breyer, J., concurring) (“[T]he producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying. . . .”).

²¹⁵ *Aereo III*, 134 S. Ct. at 2514.

possible conclusion that the Court can reach using the traditional volitional conduct requirement. This conclusion does not mean that Aereo is off the hook; instead, Aereo, while not being directly liable, will under the same facts certainly be found to have produced equipment capable of infringing copyrights, making a finding of contributory infringement likely.²¹⁶

The problem with the *Aereo* decision, with respect to volitional conduct, lies in the fact that the majority of the Court failed to even mention the only test for direct copyright infringement that the Court has ever supported in the past. The majority was so bothered by what Aereo was doing that the Court flew right past volitional conduct to establish a new test, which is applicable only to those technologies that, in a black-box analysis, resemble CATV systems of the 1960s. Justice Breyer failed to mention volitional conduct, not because of its irrelevancy, but because it would undermine the majority's position, as it is the user that selects which program to view or record, not Aereo or Aereo's system.

To demonstrate the flaws inherent in the majority's new standard, consider a hypothetical with all of the facts of the *Aereo* case, but one key difference. Instead of capturing broadcast television signals, assume that Aereo is, at the request of the user, capturing copyrighted radio broadcasts (e.g., an NPR broadcast). Aereo still uses its warehouse of antennas and produces user-specific copies that are transmitted via the Internet to only the specific user who requested to listen to the program. What result now? Congress did not amend the Copyright Act to address any issues with radio broadcasts, so presumably there is no looks-like-a-radio-broadcast test that the Court could formulate from legislative history. One would think that in this hypothetical, the Court would have to apply the only test there is for direct infringement: the volitional conduct requirement. The result is a fractured copyright law where television broadcasters receive more protection than radio broadcasters by virtue of the fact that the last major overhaul of the Copyright Act was in response to the proliferation of CATV systems.

Recall, this is an appeal of limited scope. All that the Court is dealing with is an appeal from the denial of a motion for a preliminary injunction against Aereo alleging *direct* infringement of the plaintiffs' public performance right for only the "Watch" portion of Aereo's service, which allows users to contemporaneously view broadcast

²¹⁶ See, e.g., *Grokster*, 545 U.S. at 913 (describing contributory infringement); *Sony*, 464 U.S. at 417 (describing the difference between fair use and contributory infringement).

programs on Aereo's system while those programs are being aired.²¹⁷ By no means did the Court need to rule against Aereo on this specific appeal in order for Aereo to be found liable for some form of copyright infringement. The plaintiffs in the case alleged multiple theories of liability "including infringement of the public performance right, infringement of the right of reproduction, *and contributory infringement.*"²¹⁸

If the majority were to apply the traditional volitional conduct test to the facts at bar, the outcome almost certainly would have been in favor of Aereo. Instead, the Court has opened the door to uncertainty; now that there is a special direct infringement test for "cable systems," what is to keep the Court from expanding to other tests for other industries? Copyright law is an ever-changing beast, as it must be, because the introduction of new technology changes societal norms requiring changes in the law to keep up with technological and societal progress. The Founders wisely left the power to amend the law to Congress because it is a delicate process that requires the balancing of competing interests in an ever-changing society. The Court is not the place to fashion new standards on a case-by-case basis because having a different copyright law standard for each technology capable of producing copyrightable works is impracticable and inefficient. Congress is able to weigh competing interests in developing new laws that strive to strike an appropriate balance between technological and scientific progress and the rights that should be afforded to the creators of artistic works.

VII. CONCLUSION

In the end, the basis for disagreement with respect to the *Aereo* decision comes down to separation of powers and the role that the Court should play in creating the law. The majority seems to believe that it is the Court's role to expand protections provided by the Copyright Act to reach those technologies, which, in the Court's view, would have been a target of Congress half a century ago. On the other hand, those who believe in the separation of powers view the expansion of copyright protection as a job for Congress, which is given the sole authority to create such laws under the Constitution. The flaws in the *Aereo* decision clearly demonstrate why the Court is an improper venue for the creation of legislation. In order for the majority to reach a conclusion, the Justices had to create a new standard for direct

²¹⁷ See *supra* text accompanying notes 119 & 120.

²¹⁸ *Aereo II*, 712 F.3d 676, 683 (2d Cir. 2012) (emphasis added).

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copyright infringement, which applies only to a single type of entity, and is unsupported by any precedent. While Congress is in a position to make full-scale updates to the Copyright Act and provide new avenues for emerging technologies to fit neatly within a system that respects not only the rights of copyright holders but also the societal advantages of scientific progress, the Court has no such power. Instead, the Court has created a rule, with no specific guidelines, that applies to only one section of the Copyright Act for one specific type of technology and has no bearing on other sections of the Copyright Act. In adopting the looks-like-cable-TV standard, the Court simultaneously disregarded the traditional volitional conduct test. While the majority opinion never expressly rejected the test, briefs in the district courts following the ruling show that parties are reading the opinion to indicate such a rejection. What we are left with is a fragmented and drastically expanded state of copyright law that will take years to piece back together.