

No. _____

IN THE
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC.;
DISNEY ENTERPRISES, INC.; CBS BROADCASTING INC.;
CBS STUDIOS INC.; NBCUNIVERSAL MEDIA, LLC; NBC
STUDIOS, LLC; UNIVERSAL NETWORK TELEVISION, LLC;
TELEMUNDO NETWORK GROUP LLC; WNJU-TV
BROADCASTING LLC; WNET; THIRTEEN PRODUCTIONS,
LLC; FOX TELEVISION STATIONS, INC.; TWENTIETH
CENTURY FOX FILM CORPORATION; WPIX, LLC;
UNIVISION TELEVISION GROUP, INC.; THE UNIVISION
NETWORK LIMITED PARTNERSHIP; AND
PUBLIC BROADCASTING SERVICE

Petitioners,

v.

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

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Paul M. Smith*
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6060
psmith@jenner.com

Paul D. Clement†
Counsel of Record
Erin E. Murphy
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Additional Counsel Information on Inside Cover

Richard L. Stone*
Amy M. Gallegos
JENNER & BLOCK LLP
633 West 5th Street
Los Angeles, CA 90071
(213) 239-5100

Bruce P. Keller†
Jeffrey P. Cunard
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
31st Floor
New York, NY 10022
(212) 909-6000

* *Counsel for Petitioners WNET; THIRTEEN Productions, LLC; Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; WPIX, LLC; Univision Television Group, Inc.; The Univision Network Limited Partnership; and Public Broadcasting Service.*

† *Counsel for Petitioners American Broadcasting Companies, Inc.; Disney Enterprises, Inc.; CBS Broadcasting Inc.; CBS Studios Inc.; NBCUniversal Media, LLC; NBC Studios, LLC; Universal Network Television, LLC; Telemundo Network Group LLC; and WNJU-TV Broadcasting LLC.*

QUESTION PRESENTED

A copyright holder possesses the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. §106(4). In the Copyright Act of 1976, Congress defined the phrase “[t]o perform ... ‘publicly’” to include, among other things, “to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” *Id.* §101. Congress enacted that provision with the express intent to bring within the scope of the public-performance right services that retransmit over-the-air television broadcasts to the public. Respondent Aereo offers just such a service. Aereo captures over-the-air television broadcasts and, without obtaining authorization from or compensating anyone, retransmits that programming to tens of thousands of members of the public over the Internet for a profit. According to the Second Circuit, because Aereo sends each of its subscribers an individualized transmission of a performance from a unique copy of each copyrighted program, it is not transmitting performances “to the public,” but rather is engaged in tens of thousands of “private” performances to paying strangers.

The question presented is:

Whether a company “publicly performs” a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.

PARTIES TO THE PROCEEDING

The Plaintiffs-Appellants below, who are the Petitioners before this Court, are American Broadcasting Companies, Inc.; Disney Enterprises, Inc., CBS Broadcasting Inc.; CBS Studios Inc.; NBCUniversal Media, LLC; NBC Studios, LLC; Universal Network Television, LLC; Telemundo Network Group LLC; WNJU-TV Broadcasting LLC; WNET; THIRTEEN Productions, LLC (formerly THIRTEEN); Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; WPIX, LLC (formerly WPIX, Inc.); Univision Television Group, Inc.; The Univision Network Limited Partnership; and Public Broadcasting Service.

The Defendant-Appellee below, who is the Respondent before this Court, is Aereo, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state:

American Broadcasting Companies, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

Disney Enterprises, Inc. is a wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the voting stock of CBS Corporation.

CBS Studios Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the voting stock of CBS Corporation.

NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

NBC Studios, LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

Universal Network Television, LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

Telemundo Network Group LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

WNJU-TV Broadcasting LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

WNET is a non-profit education corporation chartered by the Board of Regents of the University of the State of New York. WNET has no parent corporation, and there is no publicly held corporation that owns 10 percent or more of its stock.

THIRTEEN Productions, LLC (formerly THIRTEEN) is wholly owned by its parent corporation, WNET, a non-profit education corporation chartered by the Board of Regents of the University of the State of New York. WNET has no parent corporation,

and there is no publicly held corporation that owns 10 percent or more of its stock.

Fox Television Stations, Inc. is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company. Twenty-First Century Fox, Inc. has no parent company, and no publicly traded company owns 10 percent or more of its stock.

Twentieth Century Fox Film Corporation is a wholly owned subsidiary of Fox Entertainment Group, Inc., which in turn is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company. Twenty-First Century Fox, Inc. has no parent company, and no publicly traded company owns 10 percent or more of its stock.

WPIX, LLC (formerly WPIX, Inc.) is a wholly-owned subsidiary of Tribune Broadcasting Company, LLC, which in turn is a wholly-owned subsidiary of Tribune Company, which is privately held. JPMorgan Chase & Company, a publicly held company, owns (directly or through affiliates) approximately 9.88% of Tribune Company's stock, according to the most recent information available. This percentage fluctuates, and could total 10% or more while this case is pending.

Univision Television Group, Inc. is wholly owned by PTI Holdings, Inc., which in turn is wholly owned by Univision Local Media, Inc. Univision Local Media, Inc. is wholly owned by Univision Communications Inc., which in turn is wholly owned by Broadcast Media Partners Holdings, Inc., which is itself wholly owned by Broadcasting Media Partners, Inc. None of the above entities is publicly traded.

The Univision Network Limited Partnership is owned by Univision Communications Inc. and Univision Networks & Studios, Inc. Univision Networks & Studios, Inc. is itself wholly owned by Univision Communications Inc. Univision Communications Inc. is wholly owned by Broadcast Media Partners Holdings, Inc., which is itself wholly owned by Broadcasting Media Partners, Inc. None of the above entities is publicly traded.

Public Broadcasting Service is a non-profit District of Columbia corporation with no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

TABLE OF CONTENTS

| | |
|--|-----|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| CORPORATE DISCLOSURE STATEMENT | iii |
| TABLE OF AUTHORITIES | ix |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 1 |
| STATEMENT OF THE CASE | 1 |
| A. Statutory Background | 4 |
| B. Aereo: “Watch Live TV Online” | 9 |
| C. Proceedings Below | 14 |
| REASONS FOR GRANTING THE PETITION..... | 21 |
| I. The Decision Below Cannot Be Reconciled With the Statutory Text, Congress’ Manifest Intent, or the Decisions of Other Courts. | 23 |
| II. The Court of Appeals’ Erroneous Resolution of the Exceptionally Important Question Presented Threatens the Broadcast Television Industry. | 32 |
| CONCLUSION | 37 |
| Appendix A | |
| <i>WNET, Thirteen v. Aereo, Inc.</i> , 712 F.3d 676 (2d Cir. 2013) | 1a |

Appendix B

American Broadcasting Cos. v. Aereo, Inc.,
874 F. Supp. 2d 373 (S.D.N.Y. 2012) 59a

Appendix C

Denial of Rehearing, *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013)..... 127a

Appendix D

Statutory Provisions Involved 156a

TABLE OF AUTHORITIES

CASES

| | |
|---|----------------|
| <i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984)..... | 4, 7 |
| <i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F.3d 121 (2d Cir. 2008)..... | 10, 11, 12 |
| <i>Columbia Pictures Industries, Inc. v. Redd Horne, Inc.</i> , 749 F. 2d 154 (3d Cir. 1984) | 29, 30 |
| <i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968)..... | 5, 6 |
| <i>Fox Television Stations, Inc. v. BarryDriller Content System PLC</i> , 915 F. Supp. 2d 1138 (C.D. Cal. 2012), <i>appeal docketed sub nom., Fox Television Stations, Inc. v. Aereokiller, LLC</i> , Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013)..... | 20, 25, 28, 29 |
| <i>Fox Television Stations, Inc. v. FilmOn X LLC</i> , No. CV 13-758, __ F. Supp. 2d __, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), <i>appeal docketed</i> , No. 13-7146 (D.C. Cir. Sept. 17, 2013)..... | 20, 25 |
| <i>Hearst Stations Inc. v. Aereo, Inc.</i> , Civ. A. No. 13-11649, slip op. (D. Mass. Oct. 8, 2013)..... | 20 |
| <i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005) | 21, 32 |
| <i>On Command Video Corp. v. Columbia Pictures Industries</i> , 777 F. Supp. 787 (N.D. Cal. 1991)..... | 30 |

Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).....6

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).....36

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).....35, 36

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).....32

STATUTES AND REGULATIONS

17 U.S.C. §101.....*passim*

17 U.S.C. §106..... 1, 4

17 U.S.C. §106(4).....4

17 U.S.C. §111..... 7

17 U.S.C. §119..... 7

17 U.S.C. §122..... 7

28 U.S.C. §1254(1)..... 1

47 U.S.C. §325(b)..... 7

47 C.F.R. §76.64..... 7

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 7, 8, 24

S. Rep. No. 94-473 (1975)25

OTHER AUTHORITIES

- Brief for the United States as Amicus Curiae,
Cable News Network, Inc. v. CSC Holdings, Inc., 129 S. Ct. 2890 (2009) (No. 08-448), 2009 WL 1511740 12, 31
- Bill Carter, *After a Fee Dispute With Time Warner Cable, CBS Goes Dark For Three Million Viewers*, N.Y. Times, Aug. 2, 2013, available at <http://www.nytimes.com/2013/08/03/business/media/time-warner-cable-removes-cbs-in-3-big-markets.html>..... 34
- Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FierceCable, Apr. 26, 2012, <http://www.fiercecable.com/story/britt-aereo-could-help-time-warner-cable-stop-paying-retransmission-consent/2012-04-26> 34
- Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, Media Inst., April 23, 2013, www.mediainstitute.org/IPI/2013/042313.php 26
- 2 Paul Goldstein, *Goldstein on Copyright* (3d ed. Supp. 2013-1) 26
- <https://aereo.com> 9
- <https://aereo.com/coverage> 33
- Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 Or. L. Rev. 505(2010) 26-27

Press Release, Aereo, Inc., Aereo Announces
Launch Date for Chicago (June 27, 2013),
available at [https://aereo.com/
assets/marketing/mediakit/press_release_2
0130627.pdf](https://aereo.com/assets/marketing/mediakit/press_release_20130627.pdf).....34

Press Release, Aereo, Inc., Aereo Announces
Expansion Plans for 22 New U.S. Cities
(Jan. 8, 2013), *available at*
[https://aereo.com/assets/marketing/mediak
it/press_release_20130108.pdf](https://aereo.com/assets/marketing/mediakit/press_release_20130108.pdf).....34

Janko Roettgers, *Does Dish Want To Buy
Aereo? Broadcasters Would Love To
Know*, paidContent (Apr. 4, 2013),
[http://paidcontent.org/2013/04/04/does-
dish-want-to-buy-aereo-broadcasters-
would-love-to-know](http://paidcontent.org/2013/04/04/does-dish-want-to-buy-aereo-broadcasters-would-love-to-know)35

Christopher S. Stewart & William Launder,
Diller Wins a Broadcast-TV Clash, Wall
St. J., July 12, 2012, at B1, *available at*
[http://online.wsj.com/article/SB1000142405
2702303644004577521362073162108.html](http://online.wsj.com/article/SB10001424052702303644004577521362073162108.html)34-35

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 712 F.3d 676 and reprinted at Pet.App.1a-58a. The order of the Court of Appeals denying rehearing en banc and Judge Chin's accompanying dissent are reported at 722 F.3d 500 and reprinted at Pet.App.127a-155a. The District Court's ruling denying a preliminary injunction is reported at 874 F. Supp. 2d 373 and reprinted at Pet.App.59a-126a.

JURISDICTION

The Court of Appeals entered judgment on April 1, 2013. A timely petition for rehearing en banc was denied on July 16, 2013. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portions of Sections 101 and 106 of the Copyright Act of 1976, 17 U.S.C. §§101, 106, are set forth in the appendix. Pet.App.156a-157a.

STATEMENT OF THE CASE

This petition presents questions of copyright law that profoundly affect, and potentially endanger, over-the-air broadcast television. For decades, it has been settled law that third parties, such as cable and satellite operators, must obtain authorization to retransmit over-the-air broadcasts of television programs to the public. The broadcast television industry has invested billions of dollars producing and assembling high-quality and creative entertainment and news programming in reliance on this legal regime, which prevents retransmission services from free-riding on broadcas-

ters' investments and provides broadcasters with incentives for further investment and innovation.

The decision below threatens to upend this regime by blessing a business model that retransmits "live TV" to paying customers without obtaining any authorization or paying a penny to the copyright owners. Aereo offers precisely the kind of service Congress sought to prohibit when it revised the Copyright Act to define "public performance" to include retransmissions of over-the-air broadcast transmissions to the public. The Second Circuit nevertheless endorsed Aereo's business model, holding that Aereo's retransmission of over-the-air television broadcasts to its paid subscribers is not a public performance because each Aereo subscriber receives an individualized transmission streamed from an individual subscriber-associated digital copy of the broadcast transmission. In the Second Circuit's view, this technical detail renders Aereo's simultaneous transmissions to thousands of paying subscribers "private." Thus, for example, when tens of thousands of Aereo subscribers all simultaneously watch the same broadcast of the Super Bowl using Aereo, Aereo is not publicly performing the Super Bowl. It is merely making tens of thousands of simultaneous "private" performances to its subscribers.

As courts and commentators have recognized, that nonsensical reasoning cannot be reconciled with the plain text of the Copyright Act or Congress' manifest intent to include retransmission services within the scope of the public-performance right. Congress amended the Act in technology-neutral terms to reach any retransmission "by means of any device or process, whether the members of the public capable of receiving

the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. §101. Aereo’s conduct falls squarely within that broad definition.

The Second Circuit’s decision is already transforming the industry and threatening the very fundamentals of broadcast television. Broadcasters rely on the revenues they receive from the cable and satellite companies that retransmit their signals to recoup their substantial investments in programming, to fund new shows, and to develop new delivery platforms. They and others also have made substantial investments in developing legitimate Internet-based services, such as Hulu, that obtain copyright licenses for the content made available to subscribers.

Unsurprisingly, Aereo, which pays nothing for the content it retransmits and promotes itself as an alternative to cable and satellite retransmission services, has begun to attract subscribers with its low fees. Certain cable and satellite companies have responded by threatening to use the decision below as a road map for reengineering their own delivery systems so they too can retransmit broadcast signals without obtaining the broadcasters’ permission. And copycat services have sprung up that, like Aereo, transmit live broadcast television over the Internet without obtaining permission or paying compensation.

This Court’s intervention is urgently needed. This Court has had little tolerance for business models built on the for-profit exploitation of the copyrighted works of others. And this Court has repeatedly recognized the important public interest in protecting the viability of

over-the-air broadcast television. But the decision below authorizes the former and imperils the latter. And it does so with reasoning irreconcilable with statutory text, congressional intent, and common sense. Courts outside the Second Circuit have rejected its reasoning, and one has enjoined a copycat service nationwide, *except for the Second Circuit*. The issue here is simply too consequential to allow the Second Circuit to operate with a different set of copyright rules from those envisioned by Congress and operative in the rest of the Nation. This Court’s review is needed now.

A. Statutory Background

Copyright protection is designed to “promot[e] broad public availability of literature, music, and the other arts” by “rewarding the creators of copyrighted works.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 (1984). To that end, the Copyright Act grants copyright owners “exclusive rights to do and to authorize” certain uses of their works. 17 U.S.C. §106. Among those is the exclusive right, “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, *to perform the copyrighted work publicly.*” *Id.* §106(4) (emphasis added). The statute embodies the commonsense principle that one cannot profit from the performance of another’s work without authorization from (and generally compensation to) the creator.

As technology has evolved over the years, so too has Congress’ understanding of how a copyrighted work can be performed “publicly”—particularly when it comes to television programming. First, broadcast television makes copyrighted works available to broad

segments of the public. Although most individuals watch the programming in the privacy of their own homes, Congress has always understood such broadcasts to be paradigmatic public performances. Second, although over-the-air broadcast television includes copyrighted works that reflect considerable creative and economic investment, broadcast television is available to the public for free, meaning anyone with an antenna can access it. Congress has been mindful of the potential for third parties to exploit this arrangement by profiting off of the “retransmission” of broadcast programming—*i.e.*, by capturing these free broadcasts and retransmitting them to the public for a fee, without the approval of or compensation to those responsible for making the broadcasts available to the public.

This Court considered one such service in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), a case concerning application of the 1909 Copyright Act to a community antenna television (CATV) system. The CATV system operated by capturing distant over-the-air broadcasts using antennas placed on hilltops and retransmitting those signals via cable to viewers in areas unable to receive the distant broadcasts with antennas of their own. The question before the Court was one the Copyright Act did not specifically address at the time—namely, whether such retransmission infringed upon the exclusive public-performance right. Concluding that the “CATV system no more than enhance[d] the viewer’s capacity to receive the broadcaster’s signals,” the Court found no infringement. *Id.* at 399. The Court reasoned that “[i]f an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying

equipment, he would not be ‘performing’ the programs he received on his television set.” *Id.* at 400. The Court found immaterial “[t]he only difference in the case of a CATV”—namely, “that the antenna system is erected and owned not by its users but by an entrepreneur.” *Id.*; see also *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

Congress emphatically rejected that approach in the 1976 Copyright Act, which was enacted in part to overrule the result in *Fortnightly*. To that end, Congress enacted a series of definitions designed to ensure that the public-performance right includes retransmission of broadcast signals to the public. In addition to adopting an expansive definition of “perform,” see 17 U.S.C. §101 (“to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible”), Congress provided:

To perform or display a work “publicly” means—

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

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

ble of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. Congress also broadly defined “transmit” as “to communicate ... by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.* And it broadly defined “device” and “process” to mean “one now known or later developed.” *Id.*

Three aspects of the second paragraph of the definition of “publicly” (the “Transmit Clause”) are particularly noteworthy. First, although the term “public” is not expressly defined, it unquestionably includes subscribers to a commercial retransmission service. Indeed, Congress specifically drafted the Transmit Clause to cover cable retransmission services. *Crisp*, 467 U.S. at 709 (“Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement.”); *see also* H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676-77 (“a cable television system is performing when it retransmits the broadcast to its subscribers”).¹ Congress also contrasted the term

¹ Cable companies can claim a compulsory copyright license under 17 U.S.C. §111, and satellite companies under 17 U.S.C. §§119 and 122, but both must abide by Federal Communications Commission rules, which generally require them to obtain broadcasters’ consent before retransmitting a broadcast signal. *See* 47 U.S.C. §325(b); 47 C.F.R. §76.64.

“public” with clause (1)’s phrase, a “normal circle of a family and its social acquaintances.” 17 U.S.C. §101. Thus, a performance is clearly public when the audience is not limited to the performer’s family and friends.

Second, Congress explicitly provided that a performance can be “to the public” regardless of whether “the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.” *Id.* Thus, the fact that a performance might be communicated to individual “members of the public” through multiple transmissions to “separate places ... or at different times,” *id.*, does not make it any less public.

Third, the language is purposefully broad and technology-neutral. Congress drafted it to include transmitting a performance to the public “by means of *any* device or process.” *Id.* (emphasis added). Plainly, Congress did not want liability to turn on the technical details of a transmission service and did not want the statute rendered obsolete by changes in the technology used to communicate performances to the public. Instead, Congress drafted the statute flexibly to anticipate the inevitable development of future technologies, the precise details of which could not be predicted in 1976. To underscore that breadth, Congress separately defined “device” and “process” to include “one now known or later developed.” *Id.* The legislative history likewise confirms that “[t]he definition of ‘transmit’ ... is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them.” H.R. Rep. 94-1476, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678.

In short, “if the transmission reaches the public in any form, the case comes within the scope” of the public-performance right. *Id.*

B. Aereo: “Watch Live TV Online”

1. Aereo is a retransmission service that “enables its subscribers to watch broadcast television programs over the internet for a monthly fee.” Pet.App.2a. From the subscriber’s perspective, watching television over the Internet on Aereo is no different from watching television through a cable or satellite service. A subscriber simply logs on to Aereo, selects from a guide a program currently being broadcast on local television, then watches the program live. Pet.App.3a-5a. Aereo explicitly markets itself as a service that, like a cable or satellite service, allows its subscribers to “watch live TV.”² Aereo can offer access to that “live TV” programming more cheaply than its competitors in part because, unlike cable and satellite services or licensed Internet video on-demand services, Aereo has not paid anything or obtained any kind of permission to offer this programming. Instead, like the CATV system in *Fortnightly*, Aereo simply captures over-the-air broadcast signals and then, without authorization, profits from retransmitting those broadcasts to its subscribers.

This would seem to be an obvious copyright violation—an entire business model premised on massive for-profit unauthorized exploitation of copyrights where competitors’ prices are undercut because they seek authorization and pay fees—and the precise kind of re-

² See <https://aereo.com>.

transmission Congress sought to reach when it amended the Copyright Act. Yet Aereo claims to escape that commonsense conclusion and the broad reach and express purpose of the statute because of the details of how it designed its systems (*i.e.*, the devices and processes it employs). In Aereo's view, even though it transmits live television to thousands of members of the public, it is in fact engaged in thousands of *private* performances, and thus is not infringing upon the public-performance right. Aereo derives support for this dubious contention from the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), *cert. denied*, 129 S. Ct. 2890 (2009), which adopted a novel reading of the Transmit Clause that has since been rejected by other courts and widely criticized by commentators.

Cablevision involved a challenge to a very different service and business model—a cable company's remote storage digital video recording service ("RS-DVR"). From a consumer perspective, an RS-DVR operates much like a VCR, allowing subscribers of licensed cable companies to time-shift copyrighted shows. The service gives the consumer access to a subscriber-specific remote hard drive located at the cable company's offices, instead of a set-top hard-drive located in the subscriber's home, to record programming within the consumer's cable package for later viewing. *See* 536 F.3d at 123-24. As required by law, the cable company had already obtained a license to transmit this programming to its subscribers; the only question was whether the company could offer this "supplemental service that allowed subscribers to store that authorized content for later viewing" without infringing upon the public-

performance right. Pet.App.41a. The Second Circuit resolved that question by adopting a construction of the Transmit Clause that defies both the text of the statute and Congress' intent, by focusing on the specific technology through which retransmission is achieved. Aereo has seized on that construction to contend that its massive for-profit retransmission scheme nonetheless complies with the Copyright Act.

The Second Circuit arrived at its interpretation by focusing on the portion of the Transmit Clause specifying that a transmission of a performance can be “to the public ... whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. §101. While this language underscores Congress' technology-neutral intent to reach any and all means by which a performance might be transmitted to the public (*i.e.*, “by means of any device or process”), regardless of whether members of the public receive the performance through a single transmission or many, the Second Circuit erroneously read this language as compelling courts to equate a performance with an individual transmission of a performance. *See* 536 F.3d at 134 (the “transmission of a performance is itself a performance”). In other words, in the Second Circuit's view, when Congress wrote “capable of receiving the *performance*,” it actually meant “capable of receiving the *transmission*.”

As a result of that atextual reading, the court concluded that “the transmit clause directs us to examine who precisely is ‘capable of receiving’ a *particular transmission of a performance*.” *Id.* at 135 (emphasis added). In its view, so long as no two people can receive

the same transmission of a performance, the public-performance right is not violated—even if the performance is being transmitted concurrently to thousands of members of the public. Applying that interpretation to the technology before it, the court determined that the RS-DVR service did not engage in public performance. *Id.* at 137 (“[B]ecause the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, ... the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission.”).

Nonetheless, in seeming recognition that its decision supplied a blueprint for circumventing Congress’ intent in enacting the Transmit Clause, the court cautioned that its opinion should not be read to “permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber.” *Id.* at 139. After her views were invited, the Solicitor General relied on the court’s cautionary language, *inter alia*, to recommend against review, despite expressing concern about some of the Second Circuit’s reasoning if extended beyond the narrow RS-DVR context. Brief for the United States as Amicus Curiae at 6, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) (No. 08-448), 2009 WL 1511740, at *6 (“U.S. Amicus Br.”).

2. Aereo employs a technology that it acknowledges “was designed around the *Cablevision* holding.” Pet.App.32a. That much is obvious. Aereo’s convoluted design serves no other purpose; it does not make transmission faster, more efficient, or cheaper, except

insofar as Aereo believes its design obviates its need to pay the compensation legally demanded of its competitors. Indeed, Aereo initially confined its operations to New York because the Second Circuit alone had adopted this novel construction of the Transmit Clause. In short, Aereo crafted its system to accomplish what even the Second Circuit recognized in *Cablevision* would frustrate Congress' intent: Aereo itself "creates essentially identical copies of the same program for every user who wishes to watch it in order to avoid copyright liability." *Id.*

Specifically, Aereo captures over-the-air broadcast signals using thousands of dime-sized antennas arranged on circuit boards at its facility in Brooklyn. Pet.App.6a. When a subscriber logs onto Aereo to watch a program, Aereo temporarily assigns one of these miniature antennas to the subscriber, tunes it to the broadcast frequency of the requested channel, and feeds the broadcast signal into a computer system that transcodes the data. Pet.App.7a-8a. Aereo then sends the transcoded data to a server, where a copy of the program is created in real time and saved in a hard-drive directory reserved for that subscriber. Pet.App.6a-7a. If the subscriber has chosen to watch the broadcast live, Aereo will stream it to the subscriber over the Internet from the copy once a buffer of six or seven seconds of programming has been saved. Pet.App.7a. This allows the subscriber to watch a program essentially contemporaneously with its over-the-

air broadcast. *Id.*³ Aereo’s dime-sized antennas are generally assigned “dynamically” to its subscribers; that is, once a subscriber is finished using an antenna to watch or record a program, the antenna is reassigned to another Aereo user. Pet.App.7a-8a & n.7.

As noted, this elaborate system of thousands of miniature antennas and digital copies is not easier, more efficient, or more technologically advanced than other retransmission systems. Rather, it is a “Rube Goldberg-like contrivance” designed for a single reason: “to take advantage of [the] perceived loophole in the law” that *Cablevision* created. Pet.App.40a. In Aereo’s view, because each of its antennas is used by only one subscriber at a time, and each subscriber receives a separate transmission of the underlying performance, Aereo is not performing publicly, despite retransmitting the very same broadcast to its thousands of subscribers.

C. Proceedings Below

1. Petitioners own the copyrights to numerous programs broadcast by television stations over the air to viewers. Collectively, Petitioners have spent billions of dollars to produce or obtain the copyrighted works to provide them to the public by means of broadcast transmissions. Because Aereo’s unauthorized retransmissions threaten the value of their works and, more fundamentally, their businesses, Petitioners brought suit against Aereo on March 1, 2012, in two separate complaints in the United States District Court for the

³ Aereo also offers a “Record” function that allows the subscriber to retain the copy for later viewing. Pet.App.7a.

Southern District of New York. Petitioners alleged, *inter alia*, violations of their rights of public performance and reproduction under 17 U.S.C. §106. They immediately moved for a preliminary injunction based on the public-performance claims, seeking to bar Aereo from retransmitting any broadcast of their copyrighted programming to its subscribers.

After expedited discovery and briefing, the District Court (Nathan, J.) held a two-day evidentiary hearing on Petitioners' public-performance claims. On July 11, 2012, the District Court denied the motion. Although the District Court emphasized that “[b]ut for *Cablevision*'s express holding regarding the meaning of ... the transmit clause ... Plaintiffs would likely prevail on their request for a preliminary injunction,” Pet.App.59a-60a, it deemed itself bound by that governing Second Circuit precedent to conclude that Petitioners were unlikely to succeed on the merits of their public-performance claim. Pet.App.60a.

Nevertheless, recognizing that “this case turns on important legal questions,” Pet.App.107a, the District Court went on to conclude that Petitioners had demonstrated substantial irreparable harm—a conclusion not disturbed on appeal. The District Court found that “Aereo will damage [Petitioners'] ability to negotiate with advertisers by siphoning viewers from traditional distribution channels” measured by Nielsen, “artificially lowering these ratings,” Pet.App.109a-10a; that Aereo will harm Petitioners “by luring cable subscribers from that distribution medium into Aereo's service,” Pet.App.116a; that “Aereo's activities will damage [Petitioners'] ability to negotiate retransmission agreements” with cable companies, which amount “to billions

of dollars of revenue for broadcasters,” Pet.App.111a, as cable companies “will demand ... concessions ... or refuse to pay retransmission fees based on Aereo’s refusal to do so,” Pet.App.111a-12a; and that Petitioners’ “loss of control over their content is likely to harm them in other ways” as well. Pet.App.113a.

2. Petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed in a 2-1 decision. *See* Pet.App.2a.⁴ Writing for the majority, Judge Droney held that *Cablevision* controlled the outcome. Like the RS-DVR system at issue in *Cablevision*, “[w]hen an Aereo customer elects to watch or record a program[,] ... Aereo’s system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, ... the transmission sent by Aereo and received by that user is generated from that unique copy.” Pet.App.23a. These “two features” meant that, “just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.” *Id.*

Petitioners argued that a broadcast of a performance can be retransmitted “to the public” through multiple transmissions, each of which is to be received by a particular member of the public “in separate places and ... at different times.” 17 U.S.C. §101. But the majority deemed that argument “foreclosed by *Cablevision*,” reasoning that “*Cablevision* made clear that the

⁴ Proceedings on Petitioners’ claims continued in the District Court during the appeal and remain ongoing.

relevant inquiry under the Transmit Clause is the potential audience of *a particular transmission*, not the potential audience for the underlying work or the particular performance of that work being transmitted.” Pet.App.25a-26a (emphasis added). The Second Circuit nonetheless acknowledged that *Cablevision’s* “focus on the potential audience of each particular transmission would essentially read out the ‘different times’ language” from the statute. Pet.App.21a n.11.

Judge Chin dissented, concluding that Aereo’s system is nothing more than “a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.” Pet.App.40a. In his view, even taking *Cablevision* as a given, “by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act.” Pet.App.39a.

3. Petitioners filed a timely petition for rehearing *en banc*. On July 16, 2013, the Court of Appeals denied the petition, again over a dissent by Judge Chin, this time joined by Judge Wesley. Pet.App.128a-155a.

Judge Chin began by emphasizing the “exceptional importance” of this case, noting that “the panel majority’s decision has already had a significant impact on the entertainment industry.” Pet.App.130a. As Judge Chin recognized, “[i]n recent years, with greater competition from cable and the Internet, television broadcasters have come to rely more heavily on retransmission fees, rather than advertising revenue, to make their free public broadcasts profitable.” Pet.App.132a. The pan-

el’s decision, by “permit[ting] Aereo to retransmit television broadcasts without paying a fee, undermines this model.” Pet.App.132a-33a. Specifically, Judge Chin noted that cable and satellite companies would likely “seek elimination of, or a significant reduction in, their retransmission fees” or “adopt[] an Aereo-like system to avoid these fees entirely.” Pet.App.130a.

Judge Chin explained why the panel’s decision is inconsistent with the statutory language and Congress’ evident intent:

Aereo’s system fits squarely within the plain meaning of the transmit clause. The system is a “device or process,” which Aereo uses first to receive copyrighted images and sounds and then to transmit them to its subscribers. ... Its subscribers are strangers—paying “members of the public”—and under the statute, it matters not whether they are receiving the images “in the same place or in separate places, [or] at the same time or at different times.” Under any reasonable construction of the statute, Aereo is performing the broadcasts publicly as it is transmitting copyrighted works “to the public.”

Pet.App.136a-37a (quoting 17 U.S.C. §101) (alteration in original) (footnote omitted).

Judge Chin also criticized *Cablevision’s* reasoning, arguing that the court “conflated the phrase ‘performance or display’ with the term ‘transmission,’ shifting the focus of the inquiry from whether the transmitter’s

audience receives the same content to whether it receives the same transmission.” Pet.App.142a. Under the statute, he continued, “the public must be capable of receiving the *performance or display*, not the *transmission*. All that matters is whether the transmitter is enabling members of the public to receive the copyrighted work embodied in the *performance or display*, not whether they can receive the same legally insignificant transmission.” Pet.App.144a (emphasis in original).

Finally, Judge Chin criticized the panel for placing decisive weight on how Aereo engineered its system, rather than recognizing that its multiple antennas and unique copies are merely a “device or process” for communicating copyrighted works to the public. Pet.App.149a-51a. As Judge Chin noted, “[i]t is obvious from the text that Congress intended ‘any device or process’ to have the broadest possible construction so that it could capture technologies that were unimaginable in 1976.” Pet.App.149a (quoting 17 U.S.C. §101). Thus, “[c]ourts should ... resist the urge to look ‘under the hood’ at how these processes technically work. Instead, our inquiry should be a functional one.” Pet.App.153a-54a. And a “commercial enterprise that sells subscriptions to paying strangers for a broadcast television retransmission service” performs those works publicly. Pet.App.154a.⁵

⁵ Judge Chin also distinguished Aereo from the remote storage DVR service at issue in *Cablevision*. He explained that whereas Cablevision’s RS-DVR service produced copies “to supplement its authorized retransmission service,” Aereo produces copies “to enable it to retransmit programming to its subscribers without a li-

4. During this proceeding, litigation has arisen in other jurisdictions between many of the Petitioners and a copycat service—formerly known as “BarryDriller” and “Aereokiller” but more recently dubbed “FilmOn X”—that operates essentially identically to Aereo. Considering the public-performance question unbound by the Second Circuit’s atextual construction of the Transmit Clause, two courts have preliminarily enjoined the copycat service’s operations, rejecting the Second Circuit’s approach and concluding that there is no loophole in the Copyright Act to exploit. *See Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012), *appeal docketed sub nom., Fox Television Stations, Inc. v. Aereokiller, LLC*, Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. CV 13-758, ___ F. Supp. 2d ___, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-7146 (D.C. Cir. Sept. 17, 2013). The D.C. District Court entered an injunction against the copycat service that applies nationwide except for the Second Circuit. In another suit brought to enjoin Aereo’s expansion into Boston, a District Court recently denied injunctive relief, relying heavily on the Second Circuit’s decision in this case. *Hearst Stations Inc. v. Aereo, Inc.*, Civ. A. No. 13-11649, slip op. (D. Mass. Oct. 8, 2013). As a consequence of these divergent results, the copycat service is now enjoined from operating everywhere but in the Second Circuit, while Aereo remains free to operate in

cense. Hence, Aereo’s system of antennas and copies are the *means* by which Aereo transmits copyrighted broadcasts to the public.” Pet.App.152a-53a (emphasis in original).

New York, Boston, and perhaps other jurisdictions as well.

REASONS FOR GRANTING THE PETITION

This should have been a straightforward case. There is no dispute that Aereo has developed a business model around the massive, for-profit exploitation of the copyrighted works of others. Its competitive advantage in that business model derives from the fact that its competitors pay fees for the commercial retransmission of those copyrighted works, while Aereo does not. It is likewise undisputed that the 1976 Copyright Act was specifically intended to bring commercial retransmission of broadcast television within the scope of the public-performance right. And it is undisputed that Aereo is in the business of retransmitting broadcast television to thousands of members of the public, and has not obtained authorization to do so. That should have been the end of the matter. Business models premised on the unauthorized commercial exploitation of the copyrighted works of others should not be allowed to take root, *cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and the unauthorized retransmission of broadcast television to the public is obvious and unambiguous copyright infringement.

That result is compelled by both the statute and common sense. Whether a retransmission service uses one transmission or ten thousand transmissions does not change the basic reality that a service retransmitting the same broadcast of a program to ten thousand strangers is “transmit[ting] ... a performance ... to the public, by means of a[] device or process.” 17 U.S.C. §101. The Congress that enacted that provision to

overrule the result in *Fortnightly* could not possibly have thought having ten thousand little antennas, instead of one big one, made any difference. To make that clear, Congress underscored that the Transmit Clause is technology-neutral and applies whether the public is gathered in a public place or in individual homes.

The Second Circuit managed to miss the forest for the trees because its analysis was fundamentally skewed by its earlier decision in *Cablevision*. It managed to reach, in two steps, a result it could not reasonably have reached in one. Only by looking at the case through the distorting lens of *Cablevision* and its conflation of performance and transmission could the Second Circuit give a green light to Aereo's business model. Unsurprisingly, the first two courts to consider the question unconstrained by *Cablevision* had little trouble concluding that a service essentially identical to Aereo was engaged in unauthorized public performance and must be immediately enjoined, resulting in a nationwide injunction, except for in the Second Circuit.

The resulting situation is wholly untenable. While conduct like Aereo's is being enjoined throughout the rest of the country, it is allowed to flourish in the largest national market. More broadly, courts outside the Second Circuit have recognized that the Second Circuit is now playing by different copyright rules than the rest of the country. Inside the Second Circuit, technical detail trumps common sense. In most of the rest of the country, courts follow Congress' technology-neutral command and treat ten thousand simultaneous transmissions the same as a single transmission to ten thousand households. The decision below thus not only undermines the value of Petitioners' copyrighted works; it

also incentivizes Aereo’s competitors to restructure their operations to avoid paying retransmission fees. And the harm is not limited to this precise context. The decision below provides a blueprint for video on-demand providers, cable companies, and Internet streaming services to circumvent Congress’ intent and to avoid compensating copyright owners when they retransmit broadcasts of copyrighted works to their paid subscribers over the Internet. And it rewards designing around the copyright laws with Rube-Goldberg devices that offer no functional improvement. This Court should grant certiorari and eliminate the massive loophole the Second Circuit has created in Congress’ carefully crafted copyright regime.

I. The Decision Below Cannot Be Reconciled With the Statutory Text, Congress’ Manifest Intent, or the Decisions of Other Courts.

1. Under the Copyright Act, “[t]o perform or display a work ‘publicly’ means ... to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. §101. By its plain terms, the statute asks whether “members of the public” are “capable of receiving the performance” of a copyrighted work (*e.g.*, a broadcast of a World Series game). *Id.* It does not matter if they “receive” the performance “in the same place or in separate places” or “at the same time or at different times.” It likewise does not matter what kind of “device or process” is used “to transmit or otherwise communicate” the performance. To the contrary, Con-

gress separately defined a “device or process” broadly to include “any device or process whereby images or sounds are received beyond the place from which they are sent,” whether “now known or later developed.” *Id.* Thus, whether there is one transmission or multiple transmissions, whether the technology is ordinary or innovative, “any device or process” that “transmit[s] ... a performance” of a copyrighted work “to the public” performs the work “publicly” within the meaning of the Copyright Act.

To the extent the statute’s expansive text leaves any room for doubt, the legislative history eliminates it. Congress enacted the Transmit Clause to overturn *Fortnightly* and ensure that “commercial enterprises whose basic retransmission services are based on the carriage of copyrighted program material” would compensate “the creators of such programs.” H.R. Rep. 94-1476, at 88-89, *reprinted in* 1976 U.S.C.C.A.N. at 5703-04. And Congress did not stop with making clear that “a cable television system is performing when it retransmits the broadcast to its subscribers.” *Id.* at 63, *reprinted in* 1976 U.S.C.C.A.N. at 5676-77. It also defined “perform,’ ‘display,’ ‘publicly,’ and ‘transmit’” in the broadest possible terms to reach “*any* further act by which [the initial] rendition or showing [of a work] is transmitted or communicated to the public.” *Id.* (emphasis added). In doing so, Congress directed courts to interpret the Transmit Clause functionally, rather than technically. Congress recognized that technological advancements were inevitable and intentionally wrote the statute flexibly to prevent circumvention of its purpose through the technical details of future technologies. *See id.* (“A performance may be accomplished ‘either direct-

ly or by means of any device or process,’ including all kinds of equipment for reproducing or amplifying sounds or visual images, ... *and any other techniques and systems not yet in use or even invented.*” (emphasis added)); S. Rep. No. 94-473, at 60 (1975) (same).

Applying the straightforward text of the statute and the functional approach it demands, courts have had little trouble concluding that technology nearly identical to Aereo’s infringes upon the public-performance right. See *Barry Driller*, 915 F. Supp. 2d at 1144-46; *FilmOn X LLC*, 2013 WL 4763414, at *12-14. A system of individualized dime-size antennas and digital copies is just another “device or process” for transmitting a performance to “the public.” 17 U.S.C. §101. As the D.C. District Court explained, “[b]y making available Plaintiffs’ copyrighted performance to any member of the public who accesses the FilmOn X service, FilmOn X performs the copyrighted work publicly as defined by the Transmit Clause: FilmOn X ‘transmit[s] ... a performance ... of the work ... to the public, by means of any device or process.’” *FilmOn X LLC*, 2013 WL 4763414, at *13 (quoting 17 U.S.C. §101; first bracket added). Its service “is in no meaningful way different from cable television companies, whose relationship with broadcasters ... was the primary motivation for the 1976 Act’s enactment.” *Id.* at *14. It is inconceivable that Congress intended such a retransmission service to escape the broad sweep of the public-performance right.

2. The Second Circuit’s contrary conclusion rests on a fundamentally flawed reading of the Transmit Clause. In its view, whether a performance is public turns on how many people can receive any given *transmission* of the performance. The Second Circuit reached that con-

clusion by insisting that the phrase “‘capable of receiving the performance’ refers not to the performance of the underlying work being transmitted but rather to the transmission itself.” Pet.App.18a (quoting *Cablevision*, 536 F.3d at 134). On this logic, courts must “examine who precisely is ‘capable of receiving’ a particular transmission of a performance.” *Id.* (quoting *Cablevision*, 536 F.3d at 135 (emphasis in original)). It “is irrelevant ... whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions.” Pet.App.22a.

The flaw in this reasoning is obvious: the statute asks whether the public is “capable of receiving the *performance*,” 17 U.S.C. §101 (emphasis added), *not* whether it is “capable of receiving the *transmission*.” “Transmit” and “perform” are each defined terms with their own meanings. *See* 17 U.S.C. §101. Had Congress intended the inquiry to focus on a particular *transmission* rather than the underlying *performance* being transmitted, it would have said so. *See, e.g.*, 2 Paul Goldstein, *Goldstein on Copyright* §7.7.2, at 7:168 (3d ed. Supp. 2013-1) (“The error in the Second Circuit’s construction of the transmit clause was to treat ‘transmissions’ and ‘performance’ as synonymous, where the Act clearly treats them as distinct—and different—operative terms.”); Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, Media Inst., April 23, 2013, www.mediainstitute.org/IPI/2013/042313.php (“The Second Circuit conflated ‘performance’ with ‘transmission’ This reading does not work in terms of the statute.”); Jeffrey Malkan, *The Public Performance Prob-*

lem in Cartoon Network LP v. CSC Holdings, Inc., 89 Or. L. Rev. 505, 532 (2010) (“The statute does not say ‘capable of receiving the transmission.’”).

In fact, Congress said precisely the opposite: a performance is public “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. §101. Two people cannot receive the *same* transmission of a performance “at different times.” The plain text of the statute therefore conclusively refutes the Second Circuit’s reading, as Congress *explicitly rejected* the notion that the Transmit Clause could be evaded through the simple expedient of making multiple transmissions. The Second Circuit had no answer; it conceded that its “focus on the potential audience of each particular transmission would essentially read out the ‘different times’ language” from the statute. Pet.App.21a n.11.

Attempting to patch that gaping hole in its reasoning, the Second Circuit suggested that discrete “private transmissions” should be “aggregate[d]” when they “are generated from the same copy of the work.” Pet.App.20a n.11. Thus, in its view, separate transmissions at “different times” can be considered a public performance so long as they stem from a single master copy. Once again, the plain text of the statute defeats this argument: section 101 says nothing about whether transmissions taking place at different times originate from a common source or multiple, individualized copies. Rather, what makes a performance “public” is the *audience*, not the *source*. A work is performed publicly when the performance in question (here, the retransmission of a live broadcast) is transmitted to “members

of the public,” 17 U.S.C. §101, that is, to “a substantial number of persons outside of a normal circle of a family and its social acquaintances,” *id.*—regardless of whether it is transmitted to all members of the public at the same time, or to different members of the public at different times. *Id.*; *see also BarryDriller*, 915 F. Supp. 2d at 1144.

The Second Circuit appears to have been led astray by a misplaced concern that, unless one focuses on the audience for a particular *transmission*, as opposed to the audience for a *performance*, a “hapless customer” could be liable for violating the public-performance right whenever he “records a program in his den and later transmits the recording to a television in his bedroom.” *Cablevision*, 536 F.3d at 136. Yet such a “hapless customer” clearly is not performing the work for any “member[] of the public.” 17 U.S.C. §101; *see also BarryDriller*, 915 F. Supp. 2d at 1145 n.12. By contrast, the Second Circuit’s reading produces results Congress plainly did not intend. By its logic, Congress would have viewed the CATV system in *Fortnightly* differently if, instead of mounting a single large antenna on a hilltop, a creative entrepreneur had mounted thousands of little antennas, each one associated with a different home. *See* Pet.App.31a n.16 (distinguishing Aereo’s system from the CATV antenna in *Fortnightly* on the ground that “the signals from those community TV antennas were shared among many users”). Congress could hardly have made clearer that it did not want liability to turn on such engineering details.

In short, “[v]ery few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in

watching the *performance* of the work.” *Barry Driller*, 915 F. Supp. 2d at 1144-45 (emphasis in original). Congress was not oblivious to this reality when it revised the Copyright Act to reach retransmission of broadcast signals. That is why Congress drafted a statute that asks whether the public is “capable of receiving the *performance*,” 17 U.S.C. §101 (emphasis added), not whether it is capable of receiving the *transmission*.

3. *Cablevision*’s conflation of transmission and performance created a path dependency that allowed the Second Circuit to reach in two steps a result that it could not have reached in one. Rather than see Aereo’s business model as a massive scheme for profiting off of the copyrights of others, the court focused on the minutia of the means of exploitation, despite Congress’ command to do otherwise. Courts unburdened by *Cablevision* have had no such difficulties. Indeed, even the Second Circuit seemed to suffer buyer’s remorse. Although it deemed itself bound by *Cablevision* to conclude “that technical architecture matters,” it suggested that “[p]erhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality.” Pet.App.33a.

That is a considerable understatement. Long before Aereo and FilmOn X came onto the scene, courts recognized that the Transmit Clause demands a flexible and functional approach. For instance, in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F. 2d 154 (3d Cir. 1984), the Third Circuit considered whether a video rental store operator publicly performed when he transmitted a performance from a videotape to a private viewing booth. The court held that he did, even

though each transmission of the performance could be received only by the individual inside the viewing booth at the time. *Id.* at 159. As the Third Circuit explained, the video store’s “operation is not distinguishable in any significant manner from the exhibition of films at a conventional movie theater.” *Id.* (internal quotation marks omitted). That “the cassettes can be viewed in private does not mitigate the essential fact that [the store] is unquestionably open to the public.” *Id.*

The Northern District of California likewise held that a company engaged in public performance when it transmitted a movie to a hotel room to be watched “on demand” by a guest. *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). The court reached that conclusion because “[h]otel guests watching a video movie in their room ... are ... members of ‘the public[,]’ ... regardless of where the viewing takes place.” *Id.* The court further emphasized that the statute’s “different times” language was intended “to cover precisely th[at] sort of single-viewer system.” *Id.* It thus concluded, agreeing with *Redd Horne*, that “whether the number of hotel guests ... is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public.” *Id.*

4. When the Solicitor General opposed certiorari in *Cablevision*, she noted:

Some language in the court of appeals’ opinion could be read to suggest that a performance is not made available “to the public” unless more than one person is capable of receiving a *particu-*

lar transmission. ... Such a construction could threaten to undermine copyright protection in circumstances far beyond those presented here, including with respect to [video on-demand] services or situations in which a party streams copyrighted material on an individualized basis over the Internet.

Taken as a whole, however, the court of appeals' analysis of the public-performance issue should not be understood to reach VOD services or other circumstances beyond those presented in this case.

U.S. Amicus Br., 2009 WL 1511740, at *20-21 (emphasis in original). Unfortunately, the Solicitor General was prescient about the potential implications of *Cablevision*, but unduly optimistic about the Second Circuit's willingness or ability to cabin the decision. Thus, the Solicitor General's reason for recommending denial in *Cablevision* is now among the reasons for granting review here.⁶

⁶ Petitioners submit that a decision from this Court finding error in *Cablevision's* construction of the Transmit Clause and holding that Aereo is engaged in an infringing public performance would not need to address the entirely distinct question of how the Transmit Clause or other portions of the Copyright Act, properly construed, apply to a licensed provider that offers a remote storage DVR service such as that at issue in *Cablevision*. Petitioners do not seek a ruling from this Court on that latter set of issues.

II. The Court of Appeals' Erroneous Resolution of the Exceptionally Important Question Presented Threatens the Broadcast Television Industry.

The decision below has far-reaching adverse consequences for the broadcast television industry, making the need for this Court's review urgent and acute. The decision already is having a transformative effect on the industry. Industry participants will not and cannot afford to wait for something of this magnitude to percolate before responding to new business realities. And once Aereo's technology is entrenched and the industry has restructured itself in response, a ruling by this Court in Petitioners' favor will come too late. The disruption threatened by Aereo will produce changes that will be difficult, if not impossible, to reverse. Accordingly, the exceptional importance of the question presented warrants this Court's resolution now.

As this Court has long recognized, the purpose of copyright is "to secure a fair return for an 'author's' creative labor" with "the ultimate aim ..., by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). For that reason, this Court has had little tolerance for business models premised on the unauthorized exploitation of the copyrights of others on a "gigantic scale." *Grokster*, 545 U.S. at 940. The works provided by commercial television broadcasters to a remarkably broad swath of the public cost millions of dollars to produce. Petitioners rely on their ability to control how their programming is used by others in order to recoup those significant investments. Although advertising revenue has traditionally been their most important source of income, "television broadcasters

have come to rely more heavily on retransmission fees, rather than advertising revenue, to make their free public broadcasts profitable.” Pet.App.132a.

Aereo is a direct assault on that well-established and statutorily protected model. It seeks to attract current cable and satellite subscribers by offering broadcast television for a lower fee, which it can do because, unlike its competitors, Aereo does not compensate copyright owners or broadcasters for the use of their programming. As Aereo expands its operations, and as copycat services enter the market, broadcasters’ inability to exert control over retransmission of their programming will make it increasingly difficult for them to obtain sufficient revenue to continue producing high quality programming that serves the public interest. Having obtained a green light from the decision below, Aereo is unleashing its copyright exploitation model throughout the country. Although Aereo initially confined its operations to localities within the Second Circuit (to enjoy the protection of *Cablevision*), it views the Second Circuit’s decision as collaterally estopping the major networks whose copyrights Aereo is exploiting without authorization or compensation. (Although a copycat service has been enjoined outside the Second Circuit, Aereo has not.) Emboldened by the decision below, Aereo has already expanded to Boston, Atlanta, Dallas, Miami, and Salt Lake City,⁷ and announced plans to expand to twenty other cities in 2013, including

⁷ See <https://aereo.com/coverage>.

Chicago, Houston, Philadelphia, and Washington, D.C., with a total population of over 97 million.⁸

Aereo's victory in the Second Circuit also has led certain cable and satellite companies to question why they should continue to obtain permission to retransmit broadcast programming when their competitor Aereo does not. Time Warner Cable ("TWC") has threatened to develop its own Aereo-like system to avoid compensating copyright owners and broadcasters for the use of their programming.⁹ And for a full month this past summer, in an effort to pressure CBS to reduce its retransmission fees, TWC stopped retransmitting CBS to its customers in New York, Los Angeles, and Dallas and urged subscribers in New York to sign up for Aereo to receive CBS broadcasts.¹⁰ Dish Network, a satellite provider, also reportedly has engaged in talks about acquiring Aereo.¹¹ And some broadcasters have consi-

⁸ Press Release, Aereo, Inc., *Aereo Announces Launch Date for Chicago* (June 27, 2013), available at https://aereo.com/assets/marketing/mediakit/press_release_20130627.pdf; Press Release, Aereo, Inc., *Aereo Announces Expansion Plans for 22 New U.S. Cities* (Jan. 8, 2013), available at https://aereo.com/assets/marketing/mediakit/press_release_20130108.pdf.

⁹ Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FierceCable, Apr. 26, 2012, <http://www.fiercecable.com/story/britt-aereo-could-help-time-warner-cable-stop-paying-retransmission-consent/2012-04-26>.

¹⁰ Bill Carter, *After a Fee Dispute With Time Warner Cable, CBS Goes Dark For Three Million Viewers*, N.Y. Times, Aug. 2, 2013, available at <http://www.nytimes.com/2013/08/03/business/media/time-warner-cable-removes-cbs-in-3-big-markets.html>.

¹¹ Christopher S. Stewart & William Launder, *Diller Wins a Broadcast-TV Clash*, Wall St. J., July 12, 2012, at B1, available at

dered “mov[ing] their free public broadcasts to paid cable” to “protect their copyrighted material.” Pet.App.131a.

Aereo also threatens broadcast television in more subtle ways. For instance, Aereo diverts viewers from distribution channels measured by Nielsen ratings, which potential advertisers rely upon to measure viewership. Nielsen does not measure Aereo viewership. Pet.App.110a. And Aereo undermines broadcasters’ ability to obtain revenues from allowing their programming to be distributed over the Internet by licensed video on-demand providers, such as Hulu, Netflix, and Amazon. In short, Aereo threatens a profound and devastating effect on broadcast television.

This Court has repeatedly recognized the strong public interest in preserving over-the-air broadcast television. In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), for example, the Court upheld FCC regulations requiring cable companies to devote some of their channels to retransmission of broadcast stations, despite the First Amendment burden those “must-carry” regulations imposed on cable providers. The Court did so because it recognized that “[b]roadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on

<http://online.wsj.com/article/SB10001424052702303644004577521362073162108.html>; Janko Roettgers, *Does Dish Want To Buy Aereo? Broadcasters Would Love To Know*, paidContent (Apr. 4, 2013), <http://paidcontent.org/2013/04/04/does-dish-want-to-buy-aereo-broadcasters-would-love-to-know>.

subjects across the whole broad spectrum of speech, thought, and expression.” *Id.* at 194; accord *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“[T]he importance of local broadcasting outlets ‘can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation’s population.’” (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968))).

The Court’s observations are no less true today. Broadcast television remains a critically important source of local and national news—particularly during times of emergency. Broadcasters also perform an important role in promoting an informed citizenry, interrupting their programming, for example, to televise Presidential speeches or news conferences. And broadcast television continues to carry the majority of the country’s most popular television shows.

“The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene.” *Turner*, 512 U.S. at 663. Still today, millions of Americans rely on free over-the-air broadcasts to receive television programming. Protecting noncable households from the loss of over-the-air television broadcast service thus remains “an important federal interest.” *Id.* Because the decision below poses a grave threat to that interest, this case presents a question of exceptional importance warranting this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul M. Smith*
 Matthew E. Price
 JENNER & BLOCK LLP
 1099 New York Ave. NW
 Suite 900
 Washington, DC 20001
 (202) 639-6060
 psmith@jenner.com

Paul D. Clement†
Counsel of Record
 Erin E. Murphy
 BANCROFT PLLC
 1919 M Street NW Suite 470
 Washington, DC 20036
 (202) 234-0090
 pclement@bancroftpllc.com

Richard L. Stone*
 Amy M. Gallegos
 JENNER & BLOCK LLP
 633 West 5th Street
 Los Angeles, CA 90071
 (213) 239-5100

Bruce P. Keller†
 Jeffrey P. Cunard
 DEBEVOISE & PLIMPTON LLP
 919 Third Avenue, 31st Floor
 New York, NY 10022
 (212) 909-6000

* *Counsel for Petitioners WNET; THIRTEEN Productions, LLC; Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; WPIX, LLC; Univision Television Group, Inc.; The Univision Network Limited Partnership; and Public Broadcasting Service.*

† *Counsel for Petitioners American Broadcasting Companies, Inc.; Disney Enterprises, Inc.; CBS Broadcasting Inc.; CBS Studios Inc.; NBCUniversal Media, LLC; NBC Studios, LLC; Universal Network Television, LLC; Telemundo Network Group LLC; and WNJU-TV Broadcasting LLC.*

APPENDIX

Appendix A

United States Court of Appeals
Second Circuit

WNET, THIRTEEN, Fox Television Stations, Inc.,
Twentieth Century Fox Film Corporation,
WPIX, Inc., Univision Television Group, Inc.,
The Univision Network Limited Partnership,
and Public Broadcasting Service,
Plaintiffs–Counter–Defendants–Appellants,

v.

AEREO, INC., f/k/a Bamboom Labs, Inc.,
Defendant–Counter–Claimant–Appellee.

American Broadcasting Companies, Inc.,
Disney Enterprises, Inc., CBS Broadcasting Inc.,
CBS Studios Inc., NBCUniversal Media, LLC,
NBC Studios, LLC, Universal Network Television,
LLC, Telemundo Network Group LLC, and
WNJU–TV Broadcasting LLC,
Plaintiffs–Counter–Defendants–Appellants,

v.

Aereo, Inc.,
Defendant–Counter–Claimant–Appellee.

Docket Nos. 12–2786–cv, 12–2807–cv.

Argued: Nov. 30, 2012.

Decided: April 1, 2013.

Before: CHIN and DRONEY, Circuit Judges,
GLEESON, District Judge.

Judge CHIN dissents in a separate opinion.

DRONEY, Circuit Judge:

Aereo, Inc. (“Aereo”) enables its subscribers to watch broadcast television programs over the internet for a monthly fee. Two groups of plaintiffs, holders of copyrights in programs broadcast on network television, filed copyright infringement actions against Aereo in the United States District Court for the Southern District of New York. They moved for a preliminary injunction barring Aereo from transmitting programs to its subscribers while the programs are still airing, claiming that those transmissions infringe their exclusive right to publicly perform their works. The district court (Nathan, *J.*) denied the motion, concluding that the plaintiffs were unlikely to prevail on the merits in light of our prior decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). We agree and affirm the order of the district court denying the motion for a preliminary injunction.¹

BACKGROUND

The parties below agreed on all but one of the relevant facts of Aereo’s system, namely whether Aereo’s antennas operate independently or as a unit. The district court resolved that issue, finding that Aereo’s antennas operate independently. The Plaintiffs do not appeal that factual finding. Thus the following facts are undisputed.

¹ The two actions, although not consolidated in the district court, proceeded in tandem and the district court’s order applied to both actions.

I. Aereo's System

Aereo transmits to its subscribers broadcast television programs over the internet for a monthly subscription fee. Aereo is currently limited to subscribers living in New York City and offers only New York area channels. It does not have any license from copyright holders to record or transmit their programs.

The details of Aereo's system are best explained from two perspectives. From its subscribers' perspective, Aereo functions much like a television with a remote Digital Video Recorder ("DVR") and Slingbox.² Behind the scenes, Aereo's system uses antennas and a remote hard drive to create individual copies of the programs Aereo users wish to watch while they are being broadcast or at a later time. These copies are used to transmit the programs to the Aereo subscriber.

A. The Subscriber's Perspective

Aereo subscribers begin by logging on to their account on Aereo's website using a computer or other internet-connected device. They are then presented with a programming guide listing broadcast television programs now airing or that will air in the future. If a user selects a program that is currently airing, he is presented with two options: "Watch" and "Record." If

² A Slingbox is a device that connects the user's cable or satellite set-top box or DVR to the internet, allowing the user to watch live or recorded programs on an internet-connected mobile device, such as a laptop or tablet.

the user selects “Watch,” the program he selected begins playing, but the transmission is briefly delayed relative to the live television broadcast.³ Thus the user can watch the program nearly live, that is, almost contemporaneously with the over-the-air broadcast. While the user is watching the program with the “Watch” function, he can pause or rewind it as far back as the point when the user first began watching the program.⁴ This may result in the user watching the program with the “Watch” feature after the over-the-air broadcast has ended. At any point while watching the program with the “Watch” feature, the user can select the “Record” button, which will cause Aereo’s system to save a copy of the program for later viewing. The recorded copy of the program will begin from the point when the user first began watching the program, not from the time when the user first pressed the “Record” button.⁵ If a user in “Watch” mode does not press “Record” before the conclusion of the program, the user is not able to watch that program again later.

³ The technical operation of Aereo’s system, discussed below, results in a slight delay in transmitting the program, which means that an Aereo subscriber using the “Watch” feature sees the program delayed by approximately ten seconds.

⁴ Thus if an Aereo user starts watching a program five minutes after it first began airing, he can rewind back to the five-minute mark, but not earlier.

⁵ Thus if an Aereo user starts watching a program five minutes after it first began airing and presses the “Record” button at the twenty-minute mark, the recorded copy will begin from the five-minute mark.

An Aereo user can also select a program that is currently airing and press the “Record” button. In that case, a copy of the program will be saved for later viewing. However, the “Record” function can also be used to watch a program nearly live, because the user can begin playback of the program being recorded while the recording is being made. Thus the difference between selecting the “Watch” and the “Record” features for a program currently airing is that the “Watch” feature begins playback and a copy of the program is not retained for later viewing, while the “Record” feature saves a copy for later viewing but does not begin playback without further action by the user.

If an Aereo user selects a program that will air in the future, the user’s only option is the “Record” function. When the user selects that function, Aereo’s system will record the program when it airs, saving a copy for the user to watch later. An Aereo user cannot, however, choose either to “Record” or “Watch” a program that has already finished airing if he did not previously elect to record the program.

The final notable feature of Aereo’s system is that users can watch Aereo programming on a variety of devices. Aereo’s primary means of transmitting a program to a user is via an internet browser, which users can access on their computers. Aereo users can also watch programs on mobile devices such as tablets or smart phones using mobile applications. Finally, Aereo subscribers can watch Aereo on an internet-connected TV or use a stand-alone device to connect their non-internet TVs to Aereo.

Aereo's system thus provides the functionality of three devices: a standard TV antenna, a DVR, and a Slingbox-like device. These devices allow one to watch live television with the antenna; pause and record live television and watch recorded programming using the DVR; and use the Slingbox to watch both live and recorded programs on internet-connected mobile devices.

B. The Technical Aspects of Aereo's System

Aereo has large antenna boards at its facility in Brooklyn, New York. Each of these boards contains approximately eighty antennas, which consist of two metal loops roughly the size of a dime. These boards are installed parallel to each other in a large metal housing such that the antennas extend out of the housing and can receive broadcast TV signals. Aereo's facility thus uses thousands of individual antennas to receive broadcast television channels.⁶

When an Aereo user selects a program to watch or record, a signal is sent to Aereo's antenna server. The antenna server assigns one of the individual antennas and a transcoder to the user. The antenna server tunes that antenna to the broadcast frequency of the channel showing the program the user wishes to watch or record. The server transcodes the data received by this

⁶ As mentioned in the text above, the lone factual dispute below was whether Aereo's antennas function independently or as one unit. The district court resolved this dispute in favor of Aereo, finding that its antennas operate independently. *Am. Broad. Cos., Inc. v. Aereo*, 874 F. Supp. 2d 373, 381 (S.D.N.Y. 2012). The Plaintiffs do not contest this finding on appeal.

antenna, buffers it, and sends it to another Aereo server, where a copy of the program is saved to a large hard drive in a directory reserved for that Aereo user. If the user has chosen to “Record” the program, the Aereo system will create a complete copy of the program for that user to watch later. When the user chooses to view that program, Aereo’s servers will stream the program to the user from the copy of the program saved in the user’s directory on the Aereo server. If the user instead has chosen to “Watch” the program, the same operations occur, except that once six or seven seconds of programming have been saved in the hard drive copy of the program in the user’s directory on the Aereo server, the Aereo system begins streaming the program to the user from this copy. Thus even when an Aereo user is watching a program using the “Watch” feature, he is not watching the feed directly or immediately from the antenna assigned to him. Rather the feed from that antenna is used to create a copy of the program on the Aereo server, and that copy is then transmitted to the user. If at any point before the program ends, the user in “Watch” mode selects “Record,” the copy of the program is retained for later viewing. If the user does not press “Record” before the program ends, the copy of the program created for and used to transmit the program to the user is automatically deleted when it has finished playing.

Three technical details of Aereo’s system merit further elaboration. First, Aereo assigns an individual antenna to each user. No two users share the same antenna at the same time, even if they are watching or

recording the same program.⁷ Second, the signal received by each antenna is used to create an individual copy of the program in the user’s personal directory. Even when two users are watching or recording the same program, a separate copy of the program is created for each. Finally, when a user watches a program, whether nearly live or previously recorded, he sees his individual copy on his TV, computer, or mobile-device screen. Each copy of a program is only accessible to the user who requested that the copy be made, whether that copy is used to watch the program nearly live or hours after it has finished airing; no other Aereo user can ever view that particular copy.

II. The Present Suits

Two groups of plaintiffs (the “Plaintiffs”) filed separate copyright infringement actions against Aereo in the Southern District of New York. They asserted multiple theories, including infringement of the public performance right, infringement of the right of reproduction, and contributory infringement. ABC and its co-plaintiffs moved for a preliminary injunction barring Aereo from transmitting television programs to its subscribers while the programs were still being broadcast. The two sets of plaintiffs agreed to proceed

⁷ Aereo’s system usually assigns these antennas dynamically. Aereo users “share” antennas in the sense that one user is using a particular antenna now, and another may use the same antenna when the first is no longer using it. But at any given time, the feed from each antenna is used to create only one user’s copy of the program being watched or recorded. Thus if 10,000 Aereo users are watching or recording the Super Bowl, Aereo has 10,000 antennas tuned to the channel broadcasting it.

before the district court in tandem, and the motion for preliminary injunction was pursued in both actions simultaneously.

Following expedited briefing and discovery and an evidentiary hearing, the district court denied the Plaintiffs' motion. *Am. Broad. Cos., Inc. v. Aereo*, 874 F. Supp. 2d 373, 405 (S.D.N.Y. 2012). The district court began its analysis with the first factor relevant to granting a preliminary injunction: whether the Plaintiffs have demonstrated a likelihood of success on the merits. *Id.* at 381 (citing *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010)). The district court found that this factor was determined by our prior decision in *Cablevision*, 536 F.3d 121. *Aereo*, 874 F. Supp. 2d at 381–82. After a lengthy discussion of the facts and analysis of that decision, the district court concluded that Aereo's system was not materially distinguishable from Cablevision's Remote Storage Digital Video Recorder system, which we held did not infringe copyright holders' public performance right. *Id.* at 385–86. The district court found unpersuasive each of the Plaintiffs' arguments attempting to distinguish *Cablevision*. *See id.* at 386–96. Thus the court concluded that the Plaintiffs were unlikely to prevail on the merits. *Id.* at 396.

The district court then considered the other three preliminary injunction factors. First, the court concluded that the Plaintiffs had demonstrated a likelihood that they would suffer irreparable harm in the absence of a preliminary injunction. *Id.* at 396–402. But second, the district court found that an injunction would severely harm Aereo, likely ending its business.

Id. at 402–03. As such, the balance of hardships did not tip “decidedly” in favor of the Plaintiffs. *Id.* at 403. Finally, the district court concluded that an injunction “would not disserve the public interest.” *Id.* at 403–04. Because the Plaintiffs had not demonstrated a likelihood of success on the merits or a balance of hardship tipping decidedly in their favor, the district court denied their motion for a preliminary injunction. *Id.* at 405. The Plaintiffs promptly filed an interlocutory appeal, and this case was briefed on an expedited schedule.

DISCUSSION

We review a district court’s denial of a preliminary injunction for abuse of discretion. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012). A district court abuses its discretion when its decision rests on legal error or a clearly erroneous factual finding, or when its decision, though not the product of legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions. *Id.*

Our decisions identify four factors relevant to granting a preliminary injunction for copyright infringement. First, a district court may issue a preliminary injunction “only if the plaintiff has demonstrated either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff’s favor.” *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (internal citation and quotation marks omitted). Second, a plaintiff seeking a preliminary injunction must demonstrate “that he is likely to suffer

irreparable injury in the absence of” an injunction. *Id.* at 79–80 (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). A court may not presume irreparable injury in the copyright context; rather the plaintiff must demonstrate actual harm that cannot be remedied later by damages should the plaintiff prevail on the merits. *Id.* at 80 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006)). Third, a district court “must consider the balance of hardships between the plaintiff and defendant and issue the injunction only if the balance of hardships tips in the plaintiff’s favor.” *Id.* Fourth and finally, “the court must ensure that ‘the public interest would not be disserved’ by the issuance of a preliminary injunction.” *Id.* (quoting *eBay*, 547 U.S. at 391, 126 S.Ct. 1837).

The outcome of this appeal turns on whether Aereo’s service infringes the Plaintiffs’ public performance right under the Copyright Act. The district court denied the injunction, concluding, as mentioned above, that (1) Plaintiffs were not likely to prevail on the merits given our prior decision in *Cablevision* and (2) the balance of hardships did not tip “decidedly” in the Plaintiffs’ favor. *Aereo*, 874 F. Supp. 2d at 405. Plaintiffs’ likelihood of success on the merits depends on whether Aereo’s service infringes Plaintiffs’ copyrights. And, as we discuss further below, the balance of hardships is largely a function of whether the harm Aereo would suffer from the issuance of an injunction is legally cognizable, which in turn depends on whether Aereo is infringing the Plaintiffs’ copyrights. *See ibi*, 691 F.3d at 287. As a result, a

preliminary injunction can only be granted if Plaintiffs can show that Aereo infringes their public performance right. We now turn to that issue.

I. The Public Performance Right

The 1976 Copyright Act (the “Act”) gives copyright owners several exclusive rights and then carves out a number of exceptions. The fourth of these rights, at issue in this appeal, is the copyright owner’s exclusive right “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). The Act defines “perform” as “to recite, render, play, dance, or act [a work], either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101. The Act also states:

To perform or display a work “publicly” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in

separate places and at the same time or at different times.

17 U.S.C. § 101. This appeal turns on the second clause of this definition (the “Transmit Clause” or “Clause”).

The relevant history of the Transmit Clause begins with two decisions of the Supreme Court, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974). These decisions held that under the then-current 1909 Copyright Act, which lacked any analog to the Transmit Clause, a cable television system that received broadcast television signals via antenna and retransmitted these signals to its subscribers via coaxial cable did not “perform” the copyrighted works and therefore did not infringe copyright holders’ public performance right. *Teleprompter*, 415 U.S. at 408, 94 S.Ct. 1129; *Fortnightly*, 392 U.S. at 399–401, 88 S.Ct. 2084. Even before these cases were decided, Congress had begun drafting a new copyright act to respond to changes in technology, most notably, cable television.

These efforts resulted in the 1976 Copyright Act. The Act responded to the emergence of cable television systems in two ways. First, it added the Transmit Clause. The legislative history shows that the Transmit Clause was intended in part to abrogate *Fortnightly* and *Teleprompter* and bring a cable television system’s retransmission of broadcast television programming within the scope of the public performance right. H.R. Rep. 94–1476, 1976 U.S.C.C.A.N. 5659, at 63 (1976) (“House Report”) (“[A] sing[er] is performing when he

or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing when he or she plays a phonorecord embodying the performance or communicates it by turning on a receiving set.”). Second, Congress recognized that requiring cable television systems to obtain a negotiated license from individual copyright holders may deter further investment in cable systems, so it created a compulsory license for retransmissions by cable systems.⁸ *See* 17 U.S.C. § 111(d).

Plaintiffs claim that Aereo’s transmissions of broadcast television programs while the programs are airing on broadcast television fall within the plain language of the Transmit Clause and are analogous to the retransmissions of network programming made by cable systems, which the drafters of the 1976 Copyright Act viewed as public performances. They therefore believe that Aereo is publicly performing their

⁸ Put briefly, the statute allows cable systems to retransmit copyrighted works from broadcast television stations in exchange for paying a compulsory license to the U.S. Copyright Office calculated according to a defined formula. The fees paid by cable systems are then distributed to copyright holders. *See* *ivi*, 691 F.3d at 281; *E. Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 128–29 (2d Cir. 1982).

copyrighted works without a license.⁹ In evaluating their claims, we do not work from a blank slate. Rather, this Court in *Cablevision*, 536 F.3d 121, closely analyzed and construed the Transmit Clause in a similar factual context. Thus the question of whether Aereo’s transmissions are public performances under the Transmit Clause must begin with a discussion of *Cablevision*.

II. *Cablevision’s* Interpretation of the Transmit Clause

In *Cablevision*, 536 F.3d 121, we considered whether Cablevision’s Remote Storage Digital Video Recorder (“RS–DVR”) infringed copyright holders’ reproduction and public performance rights. Cablevision, a cable television system, wished to offer its customers its newly designed RS–DVR system, which would give them the functionality of a stand-alone DVR via their cable set-top box. 536 F.3d at 124–25. Before the development of the RS–DVR system, Cablevision would receive programming from various content providers, such as ESPN or a local affiliate of a national broadcast network, process it, and transmit it to its subscribers through coaxial cable in real time. *Id.* With the RS–DVR system, Cablevision split this stream into two. One stream went out to

⁹ Plaintiffs assert that Aereo’s transmissions of recorded programs when the original program is no longer airing on broadcast television are also public performances and that Aereo’s system infringes other exclusive rights granted by the Copyright Act, such as the reproduction right. Plaintiffs did not, however, present these claims as a basis for the preliminary injunction. They are therefore not before us and we will not consider them.

customers live as before. The second stream was routed to a server, which determined whether any Cablevision customers had requested to record a program in the live stream with their RS-DVR. If so, the data for that program was buffered, and a copy of that program was created for that Cablevision customer on a portion of a Cablevision remote hard drive assigned solely to that customer. Thus if 10,000 Cablevision customers wished to record the Super Bowl, Cablevision would create 10,000 copies of the broadcast, one for each customer. A customer who requested that the program be recorded could later play back the program using his cable remote, and Cablevision would transmit the customer's saved copy of that program to the customer. Only the customer who requested that the RS-DVR record the program could access the copy created for him; no other Cablevision customer could view this particular copy.¹⁰ *See* 536 F.3d at 124–25.

Copyright holders in movies and television programs sued, arguing that Cablevision's RS-DVR system infringed their reproduction right by creating unauthorized copies of their programs and their public performance right by transmitting these copies to Cablevision customers who previously requested to record the programs using their RS-DVRs. The district court granted the plaintiffs' motion for summary judgment and issued an injunction against

¹⁰ The RS-DVR was therefore unlike a video-on-demand service because it did not enable a customer to watch a program that had already been broadcast unless that customer had previously requested that the program be recorded and because it generated user-associated copies instead of using a shared copy or copies.

Cablevision. See *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007). The court found that the RS-DVR infringed the plaintiffs' reproduction right in two ways: (1) by creating temporary buffer copies of programs in order to create a permanent copy for each of its customers on its hard drives and (2) by creating a permanent copy of the program for each customer. *Id.* at 617-22. The court also found that Cablevision's transmission of a recorded program to the customer who had requested to record the program was a public performance under the Transmit Clause and therefore was infringing on that basis as well. *Id.* at 622-23.

This Court reversed on all three issues. *Cablevision*, 536 F.3d at 140. Because the Plaintiffs in the present cases did not pursue their claim that Aereo infringes their reproduction right in the injunction application before the district court, we need not discuss the two reproduction right holdings of *Cablevision* except where relevant to the public performance issue. Instead, we will focus on *Cablevision's* interpretation of the public performance right and the Transmit Clause, which the court below found determinative of the injunction application.

The *Cablevision* court began by discussing the language and legislative history of the Transmit Clause. 536 F.3d at 134-35. Based on language in the Clause specifying that a transmission may be "to the public . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times," 17 U.S.C. § 101, this Court concluded

that “it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times.” 536 F.3d at 134. As the language makes plain, in determining whether a transmission is to the public it is important “to discern who is ‘capable of receiving’ the performance being transmitted.” *Id.* (quoting 17 U.S.C. § 101). *Cablevision* then decided that “capable of receiving the performance” refers not to the performance of the underlying work being transmitted but rather to the transmission itself, since the “transmission of a performance is itself a performance.” *Id.* The Court therefore concluded that “the transmit clause directs us to examine who precisely is ‘capable of receiving’ a particular transmission of a performance.” 536 F.3d at 135 (emphasis added).

In adopting this interpretation of the Transmit Clause, *Cablevision* rejected two alternative readings. First, it considered the interpretation accepted by the district court in that case. According to that view, a transmission is “to the public,” not based on the “potential audience of a particular transmission” but rather based on the “potential audience of the underlying work (i.e., ‘the program’) whose content is being transmitted.” *Id.* at 135. The *Cablevision* court rejected this interpretation of the Transmit Clause. Given that “the *potential* audience for every copyrighted audiovisual work is the general public,” this interpretation would render the “to the public” language of the Clause superfluous and contradict the Clause’s obvious contemplation of non-public transmissions. *Id.* at 135–36.

Second, the *Cablevision* court considered “a slight variation of this interpretation” offered by the plaintiffs. *Id.* Plaintiffs argued that “both in its real-time cablecast and via the RS–DVR playback, Cablevision is in fact transmitting the ‘same performance’ of a given work: the performance that occurs when the programming service supplying Cablevision’s content transmits that content to Cablevision and the service’s other licensees.” *Id.* In this view, the Transmit Clause requires courts to consider “not only the potential audience [of a particular] transmission, but also the potential audience of any transmission of the same underlying ‘original’ performance.” *Id.* This interpretation of the Transmit Clause would aggregate all transmissions of the same underlying performance, and if these transmissions enabled the performance to reach the public, each transmission, regardless of its potential audience, should be deemed a public performance. *Cablevision* rejected this view because it would make a seemingly private transmission public by virtue of actions taken by third parties. *Id.* For example, if a person records a program and then transmits that recording to a television in another room, he would be publicly performing the work because some other party, namely the original broadcaster, had once transmitted the same performance to the public. *Id.* The *Cablevision* court concluded that Congress could not have intended “such odd results”; instead, the Transmit Clause directed courts to consider only the potential audience of the “performance created by the act of transmission.” *Id.* The *Cablevision* court found this interpretation consistent with prior opinions of this

Court construing the Clause. *Id.*; see *Nat'l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000).

Finally, the *Cablevision* court considered *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984). In *Redd Horne*, the defendant operated a video rental store that utilized private booths containing individual televisions. Customers would select a movie from the store's catalog and enter a booth. A store employee would then load a copy of the movie into a VCR hard-wired to the TV in the customer's booth and transmit the content of the tape to the television in the booth. See 749 F.2d at 156–57. The Third Circuit, following an interpretation of the Transmit Clause first advanced by Professor Nimmer, held that this was a public performance because the same copy of the work, namely the individual video cassette, was repeatedly “performed” to different members of the public at different times. *Id.* at 159 (quoting 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][3], at 8.192.8(1) (Matthew Bender rev. ed.)). The *Cablevision* court endorsed this conclusion¹¹; whether a transmission

¹¹ Aggregating private transmissions generated from the same copy is in some tension with the *Cablevision* court's first conclusion that the relevant inquiry under the Transmit Clause is the potential audience of the particular transmission. This interpretation of the Transmit Clause began with Professor Nimmer. He notes that it is difficult to understand precisely what Congress intended with the language in the Clause stating that a public performance can occur when the audience receives the work “at different times.” See 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][3], at 8.192.8 (Matthew Bender rev.

originates from a distinct or shared copy is relevant to the Transmit Clause analysis because “the use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made ‘to the public.’” 536 F.3d at 138.

Applying this interpretation of the Transmit Clause to the facts of the RS–DVR, the *Cablevision* court concluded that Cablevision’s transmission of a recorded program to an individual subscriber was not a public performance. *Id.* Each transmission of a program could be received by only one Cablevision customer, namely the customer who requested that the copy be created. No other Cablevision customer could receive a transmission generated from that particular copy. The “universe of people capable of receiving an RS–DVR transmission is the single subscriber whose self-made copy is used to create that transmission.” *Id.* at 137. The transmission was therefore not made “to the public” within the meaning of the Transmit Clause and did not infringe the plaintiffs’ public performance right. *Id.* at 138.

ed.). Arguing that this language on its face conflicted with other language in the statute and produced results Congress could not have intended, he proposed that by this language Congress wished to denote instances where the same copy of the work was repeatedly performed by different members of the public at different times. *See id.* at 192.8(1)–192.8(6). The *Cablevision* court’s focus on the potential audience of each particular transmission would essentially read out the “different times” language, since individuals will not typically receive the same transmission at different times. But Nimmer’s solution—aggregating private transmissions when those transmissions are generated from the same copy—provides a way to reconcile the “different times” language of the Clause.

We discuss *Cablevision's* interpretation of the Transmit Clause in such detail because that decision establishes four guideposts that determine the outcome of this appeal. First and most important, the Transmit Clause directs courts to consider the potential audience of the individual transmission. *See id.* at 135. If that transmission is “capable of being received by the public” the transmission is a public performance; if the potential audience of the transmission is only one subscriber, the transmission is not a public performance, except as discussed below. Second and following from the first, private transmissions—that is those not capable of being received by the public—should not be aggregated. It is therefore irrelevant to the Transmit Clause analysis whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions. *See id.* at 135–37. Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work. In such cases, these private transmissions *should* be aggregated, and if these aggregated transmissions from a single copy enable the public to view that copy, the transmissions are public performances. *See id.* at 137–38. Fourth and finally, “any factor that limits the *potential* audience of a transmission is relevant” to the Transmit Clause analysis. *Id.* at 137.

III. *Cablevision's* Application to Aereo's System

As discussed above, *Cablevision's* holding that *Cablevision's* transmissions of programs recorded with its RS-DVR system were not public performances rested on two essential facts. First, the RS-DVR

system created unique copies of every program a Cablevision customer wished to record. 536 F.3d at 137. Second, the RS-DVR's transmission of the recorded program to a particular customer was generated from that unique copy; no other customer could view a transmission created by that copy. *Id.* Given these two features, the potential audience of every RS-DVR transmission was only a single Cablevision subscriber, namely the subscriber who created the copy.¹² And because the potential audience of the transmission was only one Cablevision subscriber, the transmission was not made "to the public."

The same two features are present in Aereo's system. When an Aereo customer elects to watch or record a program using either the "Watch" or "Record" features, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy. Thus, just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.

Plaintiffs offer various arguments attempting to distinguish *Cablevision* from the Aereo system. First,

¹² The *Cablevision* court concluded in its discussion of the reproduction right that Cablevision's customers, not Cablevision, "made" the RS-DVR copies. *See* 536 F.3d at 133.

they argue that *Cablevision* is distinguishable because Cablevision had a license to transmit programming in the first instance, namely when it first aired the programs; thus the question was whether Cablevision needed an additional license to retransmit the programs recorded by its RS-DVR system. Aereo, by contrast, has no license. This argument fails, as the question is whether Aereo's transmissions are public performances of the Plaintiffs' copyrighted works. If so, Aereo needs a license to make such public performances; if they are not public performances, it needs no such license. Thus whether Aereo has a license is not relevant to whether its transmissions are public and therefore must be licensed. This argument by the Plaintiffs also finds no support in the *Cablevision* opinion. *Cablevision* did not hold that Cablevision's RS-DVR transmissions were *licensed* public performances; rather it held they were not public performances. It does not appear that the *Cablevision* court based its decision that Cablevision's RS-DVR transmissions were non-public transmissions on Cablevision's license to broadcast the programs live. Indeed, such a conclusion would have been erroneous, because having a license to publicly perform a work in a particular instance, such as to broadcast a television program live, does not give the licensee the right to perform the work again. That Cablevision had a license to transmit copyrighted works when they first aired thus should have no bearing on whether it needed a license to retransmit these programs as part of its RS-DVR system. Indeed, if this interpretation of *Cablevision* were correct, Cablevision would not need a license to retransmit programs using video-on-demand

and there would have been no reason for Cablevision to construct an RS-DVR system employing individual copies.

Second, Plaintiffs argue that discrete transmissions should be aggregated to determine whether they are public performances. This argument has two aspects. Plaintiffs first argue that because Aereo's discrete transmissions enable members of the public to receive "the same performance (i.e., Aereo's retransmission of a program)" they are transmissions made "to the public." Br. of Pls.-Appellants Am. Broad. Cos., et al. at 19. But this is nothing more than the *Cablevision* plaintiffs' interpretation of the Transmit Clause, as it equates Aereo's transmissions with the original broadcast made by the over-the-air network rather than treating Aereo's transmissions as independent performances. See 536 F.3d at 136. This approach was explicitly rejected by the *Cablevision* court. See *id.*

Plaintiffs also argue that the Copyright Act requires that all of Aereo's discrete transmissions "be aggregated and viewed collectively as constituting a public performance." Br. of Pls.-Appellants WNET, Thirteen, et al. at 34. This is not contrary to *Cablevision*, they argue, because *Cablevision* only held that transmissions of the same performance or work made by different entities should not be aggregated. On their view, discrete transmissions of the same performance or work made by the same entity should be aggregated to determine whether a public performance has occurred. This argument is also foreclosed by *Cablevision*. First, *Cablevision* made clear that the relevant inquiry under the Transmit

Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted. *See* 536 F.3d at 135. But the only reason to aggregate Aereo's discrete transmissions along the lines suggested by Plaintiffs is that they are discrete transmissions *of the same performance or work*. Thus Plaintiffs are asking us to adopt a reading of the Transmit Clause that is contrary to that adopted by *Cablevision* because it focuses on the potential audience of the performance or work being transmitted, not the potential audience of the particular transmission. Second, Plaintiffs provide no reason why Aereo's multiple, audience-of-one transmissions of unique copies of the same underlying program should be aggregated but not *Cablevision*'s multiple, audience-of-one transmissions of unique copies of the same underlying program. Both Aereo and *Cablevision* are making multiple private transmissions of the same work, so adopting the Plaintiffs' approach and aggregating all transmissions made by the same entity would require us to find that both are public performances. While it does not appear that *Cablevision* explicitly rejected this view, interpreting the Transmit Clause as the Plaintiffs urge so as to aggregate Aereo's transmissions would, if fairly applied to the facts of *Cablevision*, require us to aggregate *Cablevision*'s distinct RS-DVR transmissions. For these reasons, we cannot accept Plaintiffs' arguments that Aereo's transmissions to a single Aereo user, generated from a unique copy created at the user's request and only accessible to that user, should be

aggregated for the purposes of determining whether they are public performances.

Plaintiffs' third argument for distinguishing *Cablevision* is that *Cablevision* was decided based on an analogy to a typical VCR, with the RS-DVR simply an upstream version, but Aereo's system is more analogous to a cable television provider. While it is true that the *Cablevision* court did compare the RS-DVR system to the stand-alone VCR, these comparisons occur in the section of that opinion discussing *Cablevision*'s potential liability for infringing the plaintiffs' reproduction right. *See* 536 F.3d at 131. No part of *Cablevision*'s analysis of the public performance right appears to have been influenced by any analogy to the stand-alone VCR. Moreover, this Court has followed *Cablevision*'s interpretation of the Transmit Clause in the context of internet music downloads. *See United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 73–76 (2d Cir. 2010) (“ASCAP”); *see also United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Celco P'Ship)*, 663 F. Supp. 2d 363, 371–74 (S.D.N.Y. 2009) (following *Cablevision*'s analysis of the Transmit Clause in the context of cellphone ringtones). Thus we see no support in *Cablevision* or in this Court's subsequent decisions for the Plaintiffs' argument that *Cablevision*'s interpretation of the Transmit Clause is confined to technologies similar to the VCR.¹³

¹³ And even if such analogies were probative, Aereo's system could accurately be analogized to an upstream combination of a standard TV antenna, a DVR, and a Slingbox.

Plaintiffs' fourth argument for distinguishing *Cablevision* is that Cablevision's RS-DVR copies "broke the continuous chain of retransmission to the public" in a way that Aereo's copies do not. Br. of Pls.-Appellants Am. Broad. Cos., et al. at 39. Specifically, they argue that Aereo's copies are merely a device by which Aereo enables its users to watch nearly live TV, while Cablevision's copies, by contrast, could only serve as the source for a transmission of a program after the original transmission, that is the live broadcast of the program, had finished. As a result, Aereo's copies lack the legal significance of Cablevision's RS-DVR copies and are no different from the temporary buffer copies created by internet streaming, a process that this Court has assumed produces public performances. *See, e.g., ivi*, 691 F.3d at 278; *ASCAP*, 627 F.3d at 74.

This argument fails for two reasons. First, Aereo's copies do have the legal significance ascribed to the RS-DVR copies in *Cablevision* because the user exercises the same control over their playback. The Aereo user watching a copy of a recorded program that he requested be created, whether using the "Watch" feature or the "Record" feature, chooses when and how that copy will be played back. The user may begin watching it nearly live, but then pause or rewind it, resulting in playback that is no longer concurrent with the program's over-the-air broadcast. Or the user may elect not to begin watching the program at all until long after it began airing. This volitional control over how the copy is played makes Aereo's copies unlike the temporary buffer copies generated incident to internet

streaming. A person watching an internet stream chooses the program he wishes to watch and a temporary buffer copy of that program is then created, which serves as the basis of the images seen by the person watching the stream. But that person cannot exercise any control over the manner in which that copy is played—it cannot be paused, rewound, or rewatched later. As a result, the imposition of a temporary buffer copy between the outgoing stream and the image seen by the person watching it is of no significance, because the person only exercises control *before* the copy is created in choosing to watch the program in the first place. By contrast, the Aereo user selects what program he wishes a copy to be made of and then controls when and how that copy is played.¹⁴ This second layer of control, exercised *after* the copy has been created, means that Aereo’s transmissions from the recorded copies cannot be regarded as simply one link in a chain of transmission, giving Aereo’s

¹⁴ It is true that an Aereo user in “Watch” mode will often not exercise volitional control over the playback of the program, because the program will automatically begin playing when selected and he will watch it through to the end. But that is not significant because the Aereo user can exercise such control if he wishes to, which means that the copy Aereo’s system generates is not merely a technical link in a process of transmission that should be deemed a unity transmission. Moreover, the “Watch” feature’s automatic playback is merely a default rule. The user can accomplish the same thing by using the “Record” feature, save that he must take the additional step of pressing “Play” once enough of the program has been recorded for playback. If this additional step were sufficient to break the chain of transmission, we see no reason why the “Watch” feature’s default in favor of playback should change our analysis.

copies the same legal significance as the RS-DVR copies in *Cablevision*.¹⁵

Second, Plaintiffs' argument fails to account for Aereo's user-specific antennas. Each user-associated copy of a program created by Aereo's system is generated from a unique antenna assigned only to the user who requested that the copy be made. The feed from that antenna is not used to generate multiple copies of each program for different Aereo users but rather only one copy: the copy that can be watched by the user to whom that antenna is assigned. Thus even if we were to disregard Aereo's copies, it would still be true that the potential audience of each of Aereo's transmissions was the single user to whom each

¹⁵ We also note that the Aereo system's use of copies gives it two features that would not be present were it simply to transmit the television programs its antennas receive directly to the user. First, it allows the Aereo user to pause and rewind seemingly live TV. This is because while the Aereo user has been watching the program "live," Aereo's system has in fact been creating a complete copy of the program. Thus if the user wishes to rewind thirty seconds or to the beginning of the program, he can easily do so. Second, if a user in "Watch" mode decides during a program he has been watching that he would like to save the program for later viewing, he can simply press the "Record" button. When the user does this, the entire program from the time he first began watching it is saved, not merely the portion beginning from the time when he pressed "Record." Were Aereo to transmit the signal from its antennas directly to each Aereo customer, neither of these features would be possible, because the image seen by the customer would be generated from a live feed, not a copy of the program. Aereo's users may well regard these two features as valuable and they provide an additional reason for regarding Aereo's copies as legally significant and not merely technical artifacts of a system to transmit live TV.

antenna was assigned. It is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna, ensuring that the potential audience of that transmission is only one person. Plaintiffs have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet: it remains the case that only one person can receive that antenna's transmissions.¹⁶ Thus even without the creation of user-associated copies, which under *Cablevision* means that Aereo's transmissions are not public, there is significant reason to believe that Aereo's system would not be creating public performances, since the entire chain of transmission from the time a signal is first received by Aereo to the time it generates an image the

¹⁶ This makes Aereo's system unlike the early cable TV systems at issue in *Fortnightly*, 392 U.S. 390, 88 S.Ct. 2084, and *Teleprompter*, 415 U.S. 394, 94 S.Ct. 1129, because the signals from those community TV antennas were shared among many users. When Congress drafted the 1976 Copyright Act, it intended that such transmissions be deemed public performances. But, as discussed below, Congress clearly believed that, under the terms of the Act, some transmissions were private. The methodology Congress proscribed for distinguishing between public and private transmissions is the size of the potential audience, and by that methodology, the feed from Aereo's antennas is a private transmission because it results in a performance viewable by only one user. The 1976 Congress may not have anticipated that later technology would make it possible to mimic the functionality of early cable TV by means of private transmissions, but that unexpected result does not change the language of the statute.

Aereo user sees has a potential audience of only one Aereo customer.¹⁷

Finally, Plaintiffs argue that holding that Aereo's transmissions are not public performances exalts form over substance, because the Aereo system is functionally equivalent to a cable television provider. Plaintiffs also make much of the undisputed fact that Aereo's system was designed around the *Cablevision* holding, because it creates essentially identical copies of the same program for every user who wishes to watch it in order to avoid copyright liability, instead of using a perhaps more efficient design employing shared copies. However, that Aereo was able to design a system based on *Cablevision*' holding to provide its users with nearly live television over the internet is an argument that *Cablevision* was wrongly decided; it does not provide a basis for distinguishing *Cablevision*. Moreover, Aereo is not the first to design systems to avoid copyright liability. The same is likely true of *Cablevision*, which created separate user-associated copies of each recorded program for its RS-DVR system instead of using more efficient shared copies because transmissions generated from the latter would likely be found to infringe copyright holders' public performance right under the rationale of *Redd Horne*, 749 F.2d 154. Nor is Aereo alone in designing its system around *Cablevision*, as many cloud computing services, such as internet music lockers, discussed

¹⁷ Because Aereo's system uses both user-associated antennas and user-associated copies, we need not decide whether a system with only one of these attributes would be publicly performing copyrighted works.

further below, appear to have done the same. *See* Br. of the Computer & Commc'ns Indus. Ass'n & the Internet Ass'n as Amicus Curiae at 5–8. Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court's decisions in *Cablevision* and *NFL*, 211 F.3d 10, held that technical architecture matters.

IV. The Legislative Intent Behind the 1976 Copyright Act

Plaintiffs also contend that the legislative history of the 1976 Copyright Act shows that Aereo's transmissions should be deemed public performances of the Plaintiffs' copyrighted works. They argue that cable retransmissions are public performances under the Transmit Clause and Aereo is functionally equivalent to a cable system. However, this reading of the legislative history is simply incompatible with the conclusions of the *Cablevision* court.

This view of the legislative history also ignores a contrary strand of the history behind the 1976 Copyright Act. Congress recognized when it drafted the 1976 Act that its broad definition of "performance" could create unintended results. The House Report states that under this definition, "any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set." House Report at 63. But because Congress did not wish to require everyone to obtain a license from copyright holders before they could "perform" the copyrighted works played by their television, Congress was careful

to note that a performance “would not be actionable as an infringement unless it were done ‘publicly,’ as defined in section 101.” *id.* “Private” performances are exempted from copyright liability. *Id.* This limitation also applies to performances created by a “transmission,” since, as the *Cablevision* court noted, if Congress intended all transmissions to be public performances, the Transmit Clause would not have contained the phrase “to the public.”¹⁸ *Cablevision*, 536 F.3d at 135–36.

In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today. New devices such as RS-DVRs and Slingboxes complicate our analysis, as the transmissions generated by these devices can be analogized to the paradigmatic example of a “private” transmission: that from a personal roof-top antenna to a television set in a living room. As much as Aereo’s service may resemble a cable system, it also generates transmissions that closely resemble the private transmissions from these devices. Thus unanticipated 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.

¹⁸ This is particularly appropriate given that in 1976, when cable TV was still in its infancy, many Americans used rooftop antennas. Thus Congress would have certainly wished to avoid adopting language that would make millions of Americans copyright infringers because they transmitted broadcast television programs from their personal rooftop antennas to their own television sets.

Although Aereo may in some respects resemble a cable television system, we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act. And we certainly cannot disregard the express language Congress selected in doing so. That language and its legislative history, as interpreted by this Court in *Cablevision*, compels the conclusion that Aereo’s transmissions are not public performances.

V. Stare Decisis

Though presented as efforts to distinguish *Cablevision*, many of Plaintiffs’ arguments really urge us to overrule *Cablevision*. One panel of this Court, however, “cannot overrule a prior decision of another panel.” *Union of Needletrades, Indus. & Textile Employees, AFL–CIO, CLC v. U.S. I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003). We are “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.” *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). There is an exception when an intervening Supreme Court decision “casts doubt on our controlling precedent,” *Union of Needletrades*, 336 F.3d at 210, but we are unaware of any such decisions that implicate *Cablevision*. Plaintiffs have provided us with no adequate basis to distinguish *Cablevision* from the Aereo system.¹⁹ We therefore see no error in the

¹⁹ Stare decisis is particularly warranted here in light of substantial reliance on *Cablevision*. As mentioned above, it appears that many media and technology companies have relied on *Cablevision* as an authoritative interpretation of the Transmit Clause. One example is cloud media services, which have proliferated in recent years. These services, which allow their users to store music on

district court's conclusion that Plaintiffs are unlikely to prevail on the merits.

VI. The Other Preliminary Injunction Factors

We now turn to the remaining preliminary injunction factors. *See Salinger*, 607 F.3d at 79–80. Because the Plaintiffs are not likely to prevail on the merits, we consider whether the Plaintiffs have demonstrated “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff’s favor.” *Id.* at 79. Given our conclusion that Aereo’s service does not infringe Plaintiffs’ public performance right when it transmits a program still airing on broadcast television, we do not believe the Plaintiffs have demonstrated “sufficiently serious questions going to the merits to make them a fair ground for litigation.” *Id.*

Moreover, we find no abuse of discretion in the district court’s determination that the balance of hardships does not tip decidedly in the Plaintiffs’ favor. The district court reached this decision based on its conclusions (1) that the Plaintiffs were likely to suffer irreparable harm in the absence of an injunction and (2) that Aereo would suffer significant hardship if an

remote hard drives and stream it to internet-connected devices, have apparently been designed to comply with *Cablevision*. Just like Aereo’s system and Cablevision’s RS-DVR, they seek to avoid public performance liability by creating user-associated copies of each song rather than sharing song files among multiple users. *See* Brandon J. Trout, Note, *Infringers or Innovators? Examining Copyright Liability for Cloud-Based Music Locker Services*, 14 Vand. J. Ent. & Tech. L. 729, 746–48 (2012).

injunction should issue, since this would likely be the end of its business. *See Am. Broad. Cos., Inc. v. Aereo*, 874 F. Supp. 2d at 397–403. The parties do not appear to contest the district court’s factual determinations supporting these conclusions and we see no clear error in them. Plaintiffs do argue that any harm suffered by Aereo should be disregarded in the balance of hardships analysis because Aereo’s business is illegal and “[i]t is axiomatic that an infringer of copyright cannot complain about the loss of ability to offer its infringing product.” *ivi*, 691 F.3d at 287. But this argument hinges on the conclusion that Aereo’s business infringes the Plaintiffs’ copyrights. Because we conclude that it does not—at least on the limited question before us of whether Aereo’s transmissions of unique copies of recorded programs to the Aereo users who directed that they be created are public performances—the harms Aereo would suffer from an injunction are legally cognizable and significant. There is thus no reason to disturb the district court’s conclusion that the balance of hardships does not tip “decidedly” in the Plaintiffs’ favor.

CONCLUSION

We conclude 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*. As such, Plaintiffs have not demonstrated that they are likely to prevail on the merits on this claim in their copyright infringement action. Nor have they demonstrated serious questions

38a

as to the merits and a balance of hardships that tips decidedly in their favor. We therefore affirm the order of the district court denying the Plaintiffs' motion.

CHIN, Circuit Judge:

I respectfully dissent.

Defendant-appellee Aereo, Inc. (“Aereo”) captures over-the-air broadcasts of television programs and retransmits them to subscribers by streaming them over the Internet. For a monthly fee, Aereo’s customers may “Watch” the programming “live” (that is, with a seven-second delay) on their computers and other electronic devices, or they may “Record” the programs for later viewing. Aereo retransmits the programming without the authorization of the copyright holders and without paying a fee.

The Copyright Act confers upon owners of copyrights in audiovisual works the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). This exclusive right includes the right “to transmit or otherwise communicate a performance . . . to the public, by means of any device or process.” *Id.* § 101. In my view, by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act.

Aereo argues that it is not violating the law because its transmissions are not “public” performances; instead, the argument goes, its transmissions are “private” performances, and a “private performance is not copyright infringement.” It contends that it is merely providing a “technology platform that enables consumers to use remotely-located equipment . . . to create, access and view their own unique recorded

copies of free over-the-air broadcast television programming.”

Aereo’s “technology platform” is, however, a sham. The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law. After capturing the broadcast signal, Aereo makes a copy of the selected program for each viewer, whether the user chooses to “Watch” now or “Record” for later. Under Aereo’s theory, by using these individual antennas and copies, it may retransmit, for example, the Super Bowl “live” to 50,000 subscribers and yet, because each subscriber has an individual antenna and a “unique recorded cop[y]” of the broadcast, these are “private” performances. Of course, the argument makes no sense. These are very much *public* performances.

Aereo purports to draw its infringement-avoidance scheme from this Court’s decision in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, – U.S. –, 129 S.Ct. 2890, 174 L.Ed.2d 595 (2009) (“*Cablevision*”). But, as discussed below, there are critical differences between *Cablevision* and this case. Most significantly, *Cablevision* involved a cable company that paid statutory licensing and retransmission consent fees for the content it retransmitted, while Aereo pays no such fees. Moreover, the subscribers in *Cablevision* already had the ability to view television programs in real-time

through their *authorized* cable subscriptions, and the remote digital video recording service at issue there was a supplemental service that allowed subscribers to store that authorized content for later viewing. In contrast, no part of Aereo's system is authorized. Instead, its storage and time-shifting functions are an integral part of an unlicensed retransmission service that captures broadcast television programs and streams them over the Internet.

Aereo is doing precisely what cable companies, satellite television companies, and authorized Internet streaming companies do—they capture over-the-air broadcasts and retransmit them to customers—except that those entities are doing it legally, pursuant to statutory or negotiated licenses, for a fee. By accepting Aereo's argument that it may do so without authorization and without paying a fee, the majority elevates form over substance. Its decision, in my view, conflicts with the text of the Copyright Act, its legislative history, and our case law.

For these and other reasons discussed more fully below, I would reverse the district court's order denying plaintiffs-appellants' motion for a preliminary injunction.

DISCUSSION

When interpreting a statute, we must begin with the plain language, giving any undefined terms their ordinary meaning. *See Roberts v. Sea-Land Servs., Inc.*, – U.S. –, 132 S.Ct. 1350, 1356, 182 L.Ed.2d 341 (2012); *United States v. Desposito*, 704 F.3d 221, 226 (2d Cir. 2013). We must “attempt to ascertain how a

reasonable reader would understand the statutory text, considered as a whole.” *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009). Where Congress has expressed its intent in “reasonably plain terms, that language must ordinarily be regarded as conclusive.” *Negonsott v. Samuels*, 507 U.S. 99, 104, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) (internal quotation marks and citation omitted); see *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000). If we conclude that the text is ambiguous, however, we will look to legislative history and other tools of statutory interpretation to “dispel this ambiguity.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, 697 F.3d 154, 159 (2d Cir. 2012).

I begin, then, by considering the text of the relevant sections of the Copyright Act. To the extent there is any arguable ambiguity in the statutory language, I next turn to its legislative history. Finally, I conclude with a discussion of *Cablevision* as well as other relevant precedents.

A. The Statutory Text

Section 106 of the Copyright Act sets out six exclusive rights held by a copyright owner; these include the right “to perform the copyrighted work publicly.” 17 U.S.C. § 106(4).

As defined in section 101, “[t]o perform . . . a work ‘publicly’ means,” among other things:

to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it

in the same place or in separate places and at the same time or at different times.

Id. § 101. “To ‘transmit’ a performance” is “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.* Hence, the use of a device or process to transmit or communicate copyrighted images or sounds to the public constitutes a public performance, whether members of the public receive the performance in the same place or in different places, whether at the same time or at different times.

It is apparent that Aereo’s system fits squarely within the plain meaning of the statute. *See, e.g., Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, No. CV 12–6921, – F. Supp. 2d –, – –, 2012 WL 6784498, at *1–6 (C.D. Cal. Dec. 27, 2012) (holding that a service “technologically analogous” to Aereo’s was engaged in public performances). The statute is broadly worded, as it refers to “*any* device or process.” 17 U.S.C. § 101 (emphasis added); *see also id.* (defining “device” and “process” as “one now known or later developed”). Aereo’s system of thousands of antennas and other equipment clearly is a “device or process.” Using that “device or process,” Aereo receives copyrighted images and sounds and “transmit [s] or otherwise communicate[s]” them to its subscribers “beyond the place from which they are sent,” *id.*, that is, “beyond the place’ of origination,” *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989). The “performance or display of the work” is then received

by paying subscribers “in separate places” and “at different times.” 17 U.S.C. § 101.

Even assuming Aereo’s system limits the potential audience for each transmission, and even assuming each of its subscribers receives a unique recorded copy, Aereo still is transmitting the programming “to the public.” *Id.* Giving the undefined term “the public” its ordinary meaning, *see Kouichi Taniguchi v. Kan Pacific Saipan, Ltd.*, – U.S. –, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012), a transmission to anyone other than oneself or an intimate relation is a communication to a “member[] of the public,” because it is not in any sense “private.” *See Webster’s II: New Riverside University Dictionary* 951 (1994) (defining “public” as “[t]he community or the people as a group”); *see also id.* at 936 (defining “private” as, *inter alia*, “[n]ot public: intimate”). *Cf. Cablevision*, 536 F.3d at 138 (“[T]he identity of the transmitter . . . [is] germane in determining whether that transmission is made ‘to the public.’”); *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 299–300 (3d Cir. 1991) (construing “to the public” in section 106(3) and concluding that “even one person can be the public”).

What Aereo is doing is not in any sense “private,” as the Super Bowl example discussed above illustrates. This understanding accords with the statute’s instruction that a transmission can be “to the public” even if the “members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101. Because Aereo is transmitting television signals to paying strangers, all of its

transmissions are “to the public,” even if intervening “device[s] or process[es]” limit the potential audience of each separate transmission to a single “member[] of the public.” *Id.*

By any reasonable construction of the statute, Aereo is engaging in public performances and, therefore, it is engaging in copyright infringement. *See id.* §§ 106(4), 501(a).

B. The Legislative History

Even if the language of the transmit clause were ambiguous as applied to Aereo’s system, *see Cablevision*, 536 F.3d at 136 (“[T]he transmit clause is not a model of clarity. . . .”), the legislative history reinforces the conclusion that Aereo is engaging in public performances. The legislative history makes clear that Congress intended to reach new technologies, like this one, that are designed solely to exploit someone else’s copyrighted work.

Just before the passage of the 1976 Copyright Act, the Supreme Court held in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974), that community antenna television (“CATV”) systems—which captured live television broadcasts with antennas set on hills and retransmitted the signals to viewers unable to receive the original signals—did not infringe the public performance right because they were not “performing” the copyrighted work. *See Teleprompter*, 415 U.S. at 408–09, 94 S.Ct. 1129; *Fortnightly*, 392 U.S. at 399–400,

88 S.Ct. 2084. In reaching this conclusion, the Court reasoned that:

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be ‘performing’ the programs he received on his television set. . . . The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

Fortnightly, 392 U.S. at 400, 88 S.Ct. 2084. This rationale is nearly identical to the justification advanced by Aereo: each subscriber could legally use his own antenna, digital video recorder (“DVR”), and Slingbox¹ to stream live television to his computer or other device, and so it makes no legal difference that the system is actually “erected and owned not by its users but by an entrepreneur.” *Id.*²

¹ A “Slingbox” is a set-top box that permits consumers to shift their television programming to their portable devices. Slingbox describes its service as “placeshifting”: “Placeshifting is viewing and listening to live, recorded or stored media on a remote device over the Internet or a data network. Placeshifting allows consumers to watch their TV anywhere.” *See Placeshifting*, Slingbox.com, <http://www.slingbox.com/get/placeshifting> (last visited March 5, 2013). The Slingbox thus enables a consumer to view on a remote device content that he is already entitled to receive from a licensed cable company or other authorized source to view on his television.

² Aereo’s contention that each subscriber has an individual antenna is a fiction because the vast majority of its subscribers are “dynamic users” who are randomly assigned an antenna each time they use the system. Although each antenna is used only by one person at a time, it will be randomly assigned to another person for

But Congress expressly rejected the outcome reached by the Supreme Court in *Fortnightly* and *Teleprompter*. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (“Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement.”); see also *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 281 (2d Cir. 2012); *Fox Television Stations*, – F. Supp. 2d at –, 2012 WL 6784498, at *5. In the 1976 Copyright Act, Congress altered the definitions of “perform” and “publicly” specifically to render the CATV systems’ unlicensed retransmissions illegal. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 469 n.17, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984); H.R. Rep. No. 94–1476, at 63, reprinted in 1976 U.S.C.C.A.N. 5659, 5676–77 (“[A] cable television system is performing when it retransmits the broadcast to its subscribers”); *id.* at 64, reprinted in 1976 U.S.C.C.A.N. at 5678 (“Clause (2) of the definition of ‘publicly’ in section 101 makes clear that the concept[] of public performance . . . include[s] . . . acts that transmit or otherwise communicate a performance or display of the work to the public. . . .”).

Congress was not only concerned, however, with the then newly-emerging CATV systems. Recognizing that the *Fortnightly* and *Teleprompter* decisions arose in part because of the “drastic technological change”

the next use. In other words, this is a shared pool of antennas, not individually-designated antennas.

after the 1909 Act, *Fortnightly*, 392 U.S. at 396, 88 S.Ct. 2084, Congress broadly defined the term “transmit” to ensure that the 1976 Act anticipated future technological developments:

The definition of ‘transmit’ . . . is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106.

H.R. Rep. No. 94–1476, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678. Further anticipating that there would be changes in technology that it could not then foresee, Congress added that a public performance could be received in different places and at different times. This change was meant to clarify that:

a performance made available by transmission to the public at large is ‘public’ even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever *the potential recipients of the transmission represent a limited segment of the public*, such as the occupants of hotel rooms or the *subscribers of a cable television service*.

Id. at 64–65, *reprinted at* 1976 U.S.C.C.A.N. at 5678 (emphasis added).

While Congress in 1976 might not have envisioned the precise technological innovations employed by Aereo today, this legislative history surely suggests that Congress could not have intended for such a system to fall outside the definition of a public performance. To the contrary, Congress made clear its intent to include within the transmit clause “all conceivable forms and combinations of wires and wireless communications media,” and if, as here, “the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106.” H.R. Rep. No. 94–1476, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678. Aereo’s streaming of television programming over the Internet is a public performance as Congress intended that concept to be defined.

C. Cablevision

Aereo seeks to avoid the plain language of the Copyright Act and the clear import of its legislative history by relying on this Court’s decision in *Cablevision*. That reliance, in my view, is misplaced.

Cablevision was a cable operator with a license to retransmit broadcast and cable programming to its paying subscribers. *See Cablevision*, 536 F.3d at 123–25; *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 610 (S.D.N.Y. 2007), *rev’d sub nom.*, *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008). The content providers sought to enjoin Cablevision from introducing a new Remote Storage

DVR system (the “RS–DVR”) that would “allow[] Cablevision customers who do not have a stand-alone DVR to record cable programming” and “then receive playback of those programs through their home television sets.” *Cablevision*, 536 F.3d at 124. The lawsuit challenged only whether Cablevision needed additional licenses to allow its subscribers to record shows and play them back later through the RS–DVR system. *See Twentieth Century Fox*, 478 F. Supp. 2d at 609. If subscribers wanted to watch “live” television, they would watch it through Cablevision’s licensed retransmission feed. *See Cablevision*, 536 F.3d at 124 (explaining that Cablevision split its programming data stream, sending one “immediately to customers as before”); *Amicus Br. of Cablevision Sys. Corp.* at 20.

The RS–DVR worked as follows. Cablevision split its licensed data stream, and sent a stream to a remote server, where the data went through two buffers. *Cablevision*, 536 F.3d at 124. At the first buffer, the system made a temporary copy of 0.1 seconds of programming while it inquired whether any subscribers wanted to copy that programming. *Id.* A customer could make such a request “by selecting a program in advance from an on-screen guide, or by pressing the record button while viewing a given program.” *Id.* at 125. If a request had been made, the data moved to the second buffer and then was permanently saved onto a portion of a hard drive designated for that customer. *Id.* at 124. At the customer’s request, the permanent copy was transmitted to the customer and played back to him. *Id.* at 125.

Cablevision held that the RS–DVR did not infringe either the reproduction or the public performance rights. *Id.* at 140. Unlike the majority here, I do not think we can view *Cablevision*’s analyses of each right in isolation. See Majority Opin., *supra*, at 687. As *Cablevision* explained, “the right of reproduction can reinforce and protect the right of public performance.” *Cablevision*, 536 F.3d at 138. “Given this interplay between the various rights in this context,” *id.*, *Cablevision*’s holding that “copies produced by the RS–DVR system are ‘made’ by the RS–DVR customer,” *id.* at 133, was critical to its holding that “each RS–DVR playback transmission . . . made to a single subscriber using a single unique copy *produced by that subscriber* . . . [is] not [a] performance[] ‘to the public,’” *id.* at 139 (emphasis added); see also Amicus Br. of the United States at 17–19, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S.Ct. 2890 (2009), *denying cert.*, *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008) [hereinafter “U.S. *Cablevision* Amicus Br.”].

With this concept in mind, it is clear that Aereo’s system is factually distinct from *Cablevision*’s RS–DVR system. First, *Cablevision*’s RS–DVR system “exist[ed] only to produce a copy” of material that it already had a license to retransmit to its subscribers, *Cablevision*, 536 F.3d at 131, but the Aereo system produces copies to *enable* it to transmit material to its subscribers. Whereas *Cablevision* promoted its RS–DVR as a mechanism for recording and playing back programs, Aereo promotes its service as a means for watching “live” broadcast television on the Internet

and through mobile devices. Unlike Cablevision, however, Aereo has no licenses to retransmit broadcast television. If a Cablevision subscriber wanted to use her own DVR to record programming provided by Cablevision, she could do so through Cablevision's licensed transmission. But an Aereo subscriber could not use her own DVR to lawfully record content received from Aereo because Aereo has no license to retransmit programming; at best, Aereo could only illegally retransmit public broadcasts from its remote antennas to the user. *See, e.g., Fortnightly Corp.*, 392 U.S. at 400, 88 S.Ct. 2084, *overruled by statute as recognized in, Capital Cities Cable*, 467 U.S. at 709, 104 S.Ct. 2694; *ivi, Inc.*, 691 F.3d at 278–79; *see also* U.S. *Cablevision* Amicus Br., *supra*, at 21 (arguing that the legality of a hypothetical unlicensed system that only allowed subscribers to copy and playback content “would be suspect at best, because [the subscriber] would be . . . copying programs that he was not otherwise entitled to view”). Aereo's use of copies is essential to its ability to retransmit broadcast television signals, while Cablevision's copies were merely an optional alternative to a set-top DVR. The core of Aereo's business is streaming broadcasts over the Internet in real-time; the addition of the record function, however, cannot legitimize the unauthorized retransmission of copyrighted content.

Second, subscribers interact with Aereo's system differently from the way Cablevision's subscribers interacted with the RS-DVR. Cablevision subscribers were already paying for the right to watch television programs, and the RS-DVR gave them the additional

option to “record” the programs. *Cablevision*, 536 F.3d at 125. In contrast, Aereo subscribers can choose *either* “Watch” or “Record.” *Am. Broad. Cos. v. AEREO, Inc.*, 874 F. Supp. 2d 373, 377 (S.D.N.Y. 2012). Both options initiate the same process: a miniature antenna allocated to that user tunes to the channel; the television signal is transmitted to a hard drive; and a full-length, permanent copy is saved for that customer. *Id.* at 377–79. If the subscriber has opted to “Watch” the program live, the system immediately begins playing back the user’s copy at the same time it is being recorded. *Id.* Aereo will then automatically delete the saved copy once the user is done watching the program, unless the subscriber chooses to save it. *Id.* at 379.

These differences undermine the applicability of *Cablevision* to Aereo’s system. *Cablevision* found that the RS–DVR was indistinguishable from a VCR or set-top DVR because *Cablevision*’s system “exist[ed] only to produce a copy” and its subscribers provided the “volitional conduct” necessary to make a copy by “ordering that system to produce a copy of a specific program.” *Cablevision*, 536 F.3d at 131; *see also* U.S. *Cablevision* Amicus Br., *supra*, at 16 (noting that *Cablevision* turned on whether RS–DVR was more analogous to set-top DVR or video-on-demand service). The RS–DVR was not designed to be a substitute for viewing live television broadcasts. Aereo’s system, however, was designed to be precisely that. It does not exist only, or even primarily, to make copies; it exists to stream live television through the Internet. Its users can choose to “Watch” live television instead of “Record” a program, but the system begins to produce

a full-length copy anyway because, even under its own theory, Aereo cannot legally retransmit a television signal to them without such a copy.³ Aereo’s system is much different than a VCR or DVR—indeed, as Aereo explains, it is an antenna, a DVR, and a Slingbox rolled into one—and for that reason *Cablevision* does not control our decision here.

I note also that in *Cablevision* this Court “emphasize[d]” that its holding “does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies.” 536 F.3d at 139. Likewise, when the United States opposed the grant of certiorari in *Cablevision*, it argued that “the Second Circuit’s analysis of the public-performance issue should not be understood to reach . . . other circumstances beyond those presented.” U.S. *Cablevision* Amicus Br., *supra*, at 21.⁴ *Cablevision*

³ Aereo’s web page does contain a conspicuous notice under the “Watch” button that reads, “When you press ‘Watch’ you will start recording this show.” Users thus have no choice but to record the show if they wish to watch it live, making it unlikely that the subscribers are voluntarily “ordering that system to produce a copy.” *Cablevision*, 536 F.3d at 131.

⁴ By opposing the grant of certiorari, the government was not embracing *Cablevision*’s construction of the transmit clause. To the contrary, the United States took the position that “scattered language in the Second Circuit’s decision could be read to endorse overly broad, and *incorrect*, propositions about the Copyright Act.” U.S. *Cablevision* Amicus Br., *supra*, at 6 (emphasis added). Specifically, the government was concerned with the suggestion

should not be extended to cover the circumstances presented in this case. Indeed, it is telling that Aereo declines to offer its subscribers channels broadcast from New Jersey, even though its antennas are capable of receiving those signals, for fear of being subject to suit outside the Second Circuit, *i.e.*, outside the reach of *Cablevision*. Cf. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, No. CV 12–6921, – F. Supp. 2d —, — – —, 2012 WL 6784498, at *3–4 (C.D. Cal. Dec. 27, 2012) (declining to follow *Cablevision* and enjoining an Aereo-like system based on plain meaning of § 101).

Finally, the majority’s decision in my view runs afoul of other decisions of this Court. Although the issue was not even contested, in *ivi* we recognized that the retransmission of copyrighted television programming by streaming it live over the Internet constituted a “public performance” in violation of the Copyright Act. 691 F.3d at 278, 286, 287.⁵ Similarly, in

“that a performance is not made available ‘to the public’ unless more than one person is capable of receiving a *particular* transmission” because it might “undermine copyright protection in circumstances far beyond those presented here, including with respect to . . . situations in which a party streams copyrighted material on an individualized basis over the Internet.” *Id.* at 20–21. Despite these “problematic” aspects, *id.* at 22, the United States considered *Cablevision* an “unsuitable vehicle” for deciding these issues, due to the absence of any conflicting circuit court decisions at the time and the limitations imposed by the parties’ stipulations, *id.* at 6.

⁵ There are companies in the market that stream television programming over the Internet pursuant to licenses, such as Hulu, Netflix, Amazon, and channel-specific websites like ComedyCentral.com. See Appellant WNET Br. at 12, 28, 43; Amicus Br. of Pa-

United States v. American Society of Composers, Authors, Publishers (“ASCAP”), where, again, the issue was not even contested, we observed that the streaming of a song, like the streaming of a “television or radio broadcast,” is a public performance. 627 F.3d 64, 74 (2d Cir. 2010) (but holding in contrast that downloads of music do not constitute “public performances”);⁶ *accord Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 106–07, 111–12 (2d Cir. 1998)

ramount Pictures Corp. et al. at 29. In general, however, these “negotiated Internet retransmissions . . . typically delay Internet broadcasts as not to disrupt plaintiffs’ broadcast distribution models, reduce the live broadcast audience, or divert the live broadcast audience to the Internet.” *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012).

⁶ In *ASCAP*, we left open “the possibility . . . that a transmission could constitute both a stream and a download.” *United States v. Am. Soc’y of Composers, Authors and Publishers (ASCAP)*, 627 F.3d 64, 74 n.10 (2d Cir. 2010). While streaming performances over the Internet constitutes a transmission “to the public,” *see ivi, Inc.*, 691 F.3d at 278–79; *ASCAP*, 627 F.3d at 74, allowing a consumer to download a copy so he can later play it back for himself does not, *see ASCAP*, 627 F.3d at 73, 75; *Cablevision*, 536 F.3d at 139. To the extent that Aereo’s system immediately plays back from a copy that is still being recorded, it is clearly “both a stream and a download,” *ASCAP*, 627 F.3d at 74 n.10, and at a minimum the streaming portion constitutes an unlicensed public performance. If 50,000 Aereo subscribers choose to “Watch” the Super Bowl live, each subscriber receives a “performance or display” of the exact same broadcast on a seven-second delay, even if Aereo is also simultaneously creating a unique copy for each subscriber so that each one has the option to pause, rewind, or save the copy for later if they wish. Until the subscriber exercises that option, the existence of the copy is irrelevant; the broadcast is streaming “live” to each user at the same time just as it did in *ivi*.

(holding that device allowing users to access private phone line to listen to public radio broadcasts infringed right of public performance, in the absence of a defense, and was not fair use).

In *ivi*, we addressed the need for a preliminary injunction to enjoin *ivi* from streaming copyrighted works over the Internet without permission:

Indeed, *ivi*'s actions—streaming copyrighted works without permission—would drastically change the industry, to plaintiffs' detriment. . . . The absence of a preliminary injunction would encourage current and prospective retransmission rights holders, as well as other Internet services, to follow *ivi*'s lead in retransmitting plaintiffs' copyrighted programming without their consent. The strength of plaintiffs' negotiating platform and business model would decline. The quantity and quality of efforts put into creating television programming, retransmission and advertising revenues, distribution models and schedules—all would be adversely affected. These harms would extend to other copyright holders of television programming. Continued live retransmissions of copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry.

691 F.3d at 286. These concerns apply with equal force here, where Aereo is doing precisely what *ivi* was enjoined from doing: streaming copyrighted works over the Internet without permission of the copyright holders. Today's decision does not merely deny the broadcasters a licensing fee for Aereo's activity; it

provides a blueprint for others to avoid the Copyright Act's licensing regime altogether. *See* Appellant ABC, Inc. Br. at 10 (citing articles reporting on the rise of copycat services). Congress could not have intended such a result.

CONCLUSION

Based on the plain meaning of the statute, its legislative history, and our precedent, I conclude that Aereo's transmission of live public broadcasts over the Internet to paying subscribers are unlicensed transmissions "to the public." Hence, these unlicensed transmissions should be enjoined. *Cablevision* does not require a different result. Accordingly, I dissent.

Appendix B

United States District Court
S.D. New York
AMERICAN BROADCASTING COMPANIES, INC.,
et al., Plaintiffs,
v.
AEREO, INC., Defendant.
WNET, et al., Plaintiffs,
v.
AEREO, Inc., Defendant.

Nos. 12 Civ. 1540 (AJN), 12 Civ. 1543.
July 11, 2012.

OPINION

ALISON J. NATHAN, District Judge:

Plaintiffs, a group of corporate entities engaged in the production, marketing, distribution, and transmission of broadcast television programs, move to enjoin Defendant AEREO, Inc., (“Aereo”) from engaging in those aspects of its service that allow its users to access “live” copyrighted content over the internet. Aereo claims that its conduct does not violate copyright law, relying on *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). 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.

I. PROCEDURAL POSTURE

On March 1, 2012, Plaintiffs filed two Complaints against Aereo alleging that its service unlawfully captures broadcast television signals in the New York City area, including at least some corresponding to television programs on which Plaintiffs hold the copyright (Pls. Ex. 83), and provides them over the internet to Aereo subscribers.¹ (*E.g.*, Hrg. Tr. at 132:7–141:13, 292:3–25; Pls. Br. at 4–5; Aereo Br. at 6). Although Plaintiffs’ Complaints assert multiple theories of liability, including infringement of the right of public performance, infringement of the right of reproduction, and contributory infringement (Complaint at ¶¶ 28–38, *ABC, Inc. v. AEREO, Inc.*, No. 12–cv–01540, Docket Entry 1; Complaint at ¶¶ 142–58, *WNET v. AEREO, Inc.*, No. 12–cv–01543, Docket Entry 1), the issue presently before the Court is quite limited. On March 13, 2012, Plaintiffs moved for a preliminary injunction, asserting that Aereo was directly liable for copyright infringement by publicly

¹ Aereo characterizes itself as a technology platform, rather than a service, and argues that it is not liable because it is the user, rather than Aereo, that controls the operation of Aereo’s system and “makes” the performances at issue. (Aereo Prop. COL at ¶¶ 48; *see also* Aereo Br. at 6–7). As explained below, *infra* Section IV.B.6, the Court does not reach this question, and any description of Aereo as providing a “service” or of Aereo “doing” any particular acts should not be viewed as a decision on this issue.

performing Plaintiffs' copyrighted works.² (3/13/12 Tr. at 7:23–8:5, 28:12–29:5). This 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. (Hrg. Tr. 255:6–18, 267:14–23). After a roughly eleven week period of expedited discovery and briefing on the preliminary injunction motion, the Court held a two-day evidentiary hearing on May 30 and 31, 2012, to establish the record for deciding the motion.

II. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is an extraordinary remedy, granted only if the plaintiff establishes “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Even if a plaintiff has not demonstrated a likelihood of success on the merits, a preliminary injunction may still be granted if the

² Certain of the Plaintiffs also moved for a preliminary injunction on a theory of unfair competition. (3/13/12 Tr. at 28:12–29:5; Mem. in Support of Mot. for Preliminary Injunction on the WNET Plaintiffs' Claim in the Alternative for Unfair Competition, *WNET v. AEREO, Inc.*, No. 12–CV–01543, Docket Entry 72). The Court dismissed this claim prior to the hearing as preempted by 17 U.S.C. § 301(a). See *Wnet v. Aereo, Inc.*, No. 12–CV–01543, 871 F. Supp. 2d 281, 2012 WL 1850911, 2012 U.S. Dist. LEXIS 70749 (S.D.N.Y. May 21, 2012).

plaintiff shows “a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiffs favor.” *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010).

III. FACTS

A. Aereo’s System

The facts surrounding the operation of Aereo’s system are largely—though not entirely—undisputed. (*See, e.g.*, Hrg. Tr. at 14:12–15, 23:6–15, 309:8–22). Even if not disputing facts, the parties are significantly at odds as to how Aereo’s service should be properly characterized.

1. The Audience Perspective

Aereo’s system allows users to access free, over-the-air broadcast television through antennas and hard disks located at Aereo’s facilities. (*See infra* Section II.A.2). A user of Aereo’s system, after logging into their account on Aereo’s website, may navigate through a programming guide to select television programs that are currently being aired or that will be aired at a later time. (Hrg. Tr. at 133:2–134:24). If the user selects a program that is currently being aired, the user is given two options, “Watch” and “Record.” (Hrg. Tr. at 73:2–19; Kelly Decl. ¶¶ 38–39; Horowitz Rep. ¶ 64). Selecting “Watch” causes Aereo’s system to transmit a web page to the user in which the program starts after a short delay, allowing the user to view the program “live,” *i.e.*, roughly contemporaneous with its over-the-air broadcast. (Hrg. Tr. at 73:9–19; Kelly Decl. ¶¶ 39, 41). While viewing the program, the user may

pause or rewind it, increasing the disparity between the time at which the program is *initially* broadcast and the time at which the user watches it. (Hrg. Tr. at 107:9–18, 111:20–112:12). If enough time has passed, a user may end up watching the program “live” after it has been fully broadcast. If the user presses the “Record” button after having begun watching a program using the “Watch” feature, the Aereo system retains the copy that the user has been watching, and the user may watch that program again later; if “Record” is not selected, the copy is not retained and cannot be viewed again later. (Hrg. Tr. at 88:15–90:9, 112:22–114:17; 121:15–25, 141:7–13; Kelly Decl. ¶¶ 42–43).

Instead of selecting the “Watch” function at the outset, the user may press the “Record” button to schedule a recording of a program that will be broadcast at a later time or that is currently being aired. (Hrg. Tr. at 73:15–74:6, 134:11–24, 136:8–15). However, the “Record” feature can also be used, like the “Watch” feature, to view programs “live”: users can direct Aereo’s system to begin a recording and then immediately begin playback of the recording as it is being made. (Hrg. Tr. at 121:15–25, 138:3–139:3, 140:18–141:6).

Thus, from the user’s perspective, Aereo’s system is similar in operation to that of a digital video recorder (“DVR”) (*See, e.g.*, Hrg. Tr. 290:11–291:10, 298:16–23, 305:9–306:12), particularly a remotely located DVR, although Aereo users access their programming over the internet rather than through a cable connection. One further difference is that Aereo allows users to

view the programming on their computers, laptops, or mobile devices, whereas to watch television on these devices using a standard DVR, the user might need to purchase an additional device, such as a Slingbox. (Hrg. Tr. at 132:16–20; 306:16–308:25; Lipowski Decl. ¶ 6). Slingbox allows users to stream video, including live broadcast television, over the internet to their mobile devices. (Hrg. Tr. at 306:23–307:4). Plaintiffs do not appear to contend in this litigation that services such as Slingbox are unlawful, instead claiming that they are “irrelevant” and that Aereo’s service is distinguishable because Slingbox consumers themselves set up the Slingbox in their homes. (Def. Ex. 41; Pls. Obj. to Aereo’s Proposed FOF ¶¶ 24, 26).

2. Behind the Scenes

Behind the scenes, the process is more complicated. When a user clicks on the “Watch” button, the web browser sends a request to Aereo’s Application Server, which in turn sends a request and certain information about the user and the requested television program to Aereo’s Antenna Server. (Hrg. Tr. at 74:10–21; Kelly Decl. ¶¶ 44–45; *see also* Lipowski Decl. ¶ 35). The Antenna Server allocates resources to the user, including an antenna and transcoder, depending on whether the user is a “static” or “dynamic” user, a distinction based on the user’s subscription plan with Aereo. (Hrg. Tr. at 74:22–78:2; Kelly Decl. ¶¶ 45–46; Lipowski Decl. ¶¶ 32, 35). Static users have a set of previously selected antennas that have been assigned to them, whereas dynamic users—the vast majority of Aereo’s subscribers—are randomly assigned an antenna each time they use Aereo’s system. (Hrg. Tr.

at 74:22–78:2; Kelly Decl. ¶¶ 47–49; *see also* Lipowski Decl. ¶¶ 32, 35). No two users are assigned a single antenna at the same time. (Hrg. Tr. at 104:20–105:1, 234:3–15).

Thus, although any particular antenna can be used by only one user at a time, dynamic users “share” antennas in that a given antenna may be assigned to different users at different times.³ (Hrg. Tr. at 74:22–78:2, 104:20–106:24, 234:3–15). Static users may similarly “share” antennas in the event that the antennas permanently assigned to them are unavailable, in which case the Aereo system will randomly assign them another unused antenna that may at some other time be allocated to another user. (Hrg. Tr. at 74:22–78:2, 104:20–106:24; Kelly Decl. ¶¶ 47–49). However, just as the antennas are not shared when they are in use, the data obtained by a particular antenna while allocated to a particular user is not “shared” with or accessible by any other Aereo user. (Hrg. Tr. at 104:20–106:24, 137:1–7, 139:12–16; Pozar Decl. ¶¶ 10–14, 19; Pozar Rep. at 6; Horowitz Rep. ¶ 59; Volakis Decl. ¶ 66).

Once these resources are allocated, the Antenna Server sends a “tune” request that directs the user’s antenna to “tune into” a particular broadcast frequency band to obtain the desired program. (Hrg. Tr. at

³ Other components of the system are also “shared” resources, such as the computer servers, insofar as the servers hold and process data for multiple users—although the data for each user is kept segregated—and transcoders which also may be randomly assigned. (Hrg. Tr. at 250:5–19; Kelly Decl. ¶¶ 47–49; *see also* Lipowski Decl. ¶ 32)

103:4–21; Kelly Decl. ¶ 50; Volakis Decl. ¶ 58; Lipowski Decl. ¶¶ 33, 35–37; Horowitz Rep. ¶ 64). The Antenna Server also sends a request to the Streaming Server that creates a unique directory, assigned to the user, for storing the output data received by the antennas and processed by the transcoder. (Kelly Decl. ¶ 50). Once this directory is created, an electrical signal is sent from the antenna, processed and converted into data packets, and then sent to the transcoder, which encodes it in a form to be transmitted over the internet. (Hrg. Tr. at 82:13–85:5; Kelly Decl. ¶ 51; Volakis Decl. ¶¶ 59–63, 65; *see also* Lipowski Decl. ¶¶ 37, 41–45; Horowitz Rep. ¶ 62). The encoded data is sent to the Streaming Server, where it is saved on a hard disk to a file in the previously created directory and, once saved, is read from that file into a “RAM memory buffer” that sends the data to the user over the internet once a sufficient amount of data—at least six or seven seconds of programming—has accumulated. (Hrg. Tr. at 85:6–88:3, 106:25–107:8, 139:8–11, 248:18–22; Kelly Decl. ¶ 52; Lipowski Decl. ¶ 42; Horowitz Rep. ¶ 63). As additional data is received from the antenna, that data continues to be saved to the hard disk and then read into the RAM memory buffer to be transmitted to the user. (Hrg. Tr. at 85:6–88:3, 137:1–138:15; Kelly Decl. ¶ 52). Whereas the file saved to the hard disk retains all of the data received by the antenna at least until the user finishes watching the program, allowing the user to pause and rewind, the data in the RAM memory buffer contains only a small packet of data that is continuously replaced as data is sent to the user and new packets of data are fed into the buffer. (Hrg. Tr. at

87:11–88:3, 107:9–108:1, 108:23–110:15, 111:20–112:21, 309:25–311:8).

Essentially the same process occurs when the user engages the “Record” function of Aereo’s system. (Hrg. Tr. at 88:15–90:9, 294:1–300:5). The only substantial difference between the “Watch” and “Record” functions is that when a user engages the “Record” function, the file saved to the hard disk is tagged as permanent and automatically retained, whereas the file saved to the hard disk using the “Watch” function is not automatically retained unless the user clicks “Record” while the show is still open on the user’s web browser. (Hrg. Tr. at 88:15–90:9, 112:22–114:17, 121:15–25, 141:7–13).

B. Aereo’s Antennas

The only significant factual dispute concerns the operation of Aereo’s antennas. Aereo contends that each of its antennas functions separately to receive the incoming broadcast signals. Plaintiffs assert that Aereo’s antennas function collectively as a single antenna, aided by a shared metallic substructure. (Volakis Decl. ¶¶ 58, 66, 68).

Each of Aereo’s antennas consists of a pair of metal loops roughly the size of a dime. (Volakis Decl. ¶¶ 2, 53–54). Eighty such antennas are packed on one end of a circuit board, with a metal rail that separates the area with the antenna elements from an area housing the electronic components used to operate the antennas and process the signal. (Hrg. Tr. at 80:11–82:12; Volakis Decl. ¶¶ 2–3, 53, 55; Horowitz Rep. ¶ 59; Pls. Ex. 80). Sixteen such boards are stored parallel to one another

in a metal housing, like books on a shelf, with the portion of the circuit board containing the antennas sticking out of the housing. (Hrg. Tr. at 80:11–82:12; Volakis Decl. ¶¶ 2, 52–53; Pls. Ex. 80; Pls. Ex. 81). When the boards are placed in the housing, the metal rails fit close together and form a barrier between the antennas and the other electronic elements of Aereo’s system. (Hrg. Tr. at 80:11–82:12; Volakis Decl. ¶ 2).

In support of their contention that single Aereo antennas cannot function on their own to receive usable television signals, Plaintiffs submit the declaration of Dr. John Volakis. According to Dr. Volakis, minimizing antenna size is challenging, because smaller antennas tend to have lower bandwidth and higher “impedance mismatch” than larger antennas, both of which impair their performance. (Volakis Decl. ¶¶ 33–34, 41, 43–44). Although these problems can be reduced or eliminated, doing so typically means the antenna will need to receive a more powerful broadcast signal to function. (Volakis Decl. ¶¶ 45–49). These principles lead Dr. Volakis to opine that Aereo’s antennas do not function independently. Instead, according to Dr. Volakis, the antennas are packed on the board so close together that the incoming signal “does not see the loops as separate elements, but rather as one continuous piece of metal,” the function of which is further aided by a common metal substructure formed by the circuit boards and the metal rails. (Volakis Decl. ¶¶ 71, 73–74; *see also* Pls. Ex. 86 at 200:21–201:11, 204:11–205:2; Pls. Ex. 87 at 36:7–15, 137:4–7, 137:24–138:3; Pls. Ex. 88 at 54:5–12).

Dr. Volakis’s declaration sets forth a series of tests that he claims support this opinion. First, Dr. Volakis

“activate[d] only a single [antenna] element, while leaving the loop elements immediately around it turned off,” and observed an electromagnetic field around not just the active loop, but also the inactive loops as well. (Volakis Decl. ¶ 79–80). Second, he made “metallization changes” on the circuit board, and found that none of the changes affected reception, contrary to what he would expect if the antenna were functioning independently. (Volakis Decl. ¶¶ 81, 83). Third, he obstructed roughly half of the antenna loops with radio absorbing material to suppress their presence and monitored reception of a single unobstructed loop element, and saw a substantial drop in signal received by that antenna as compared to when the other antenna loops were unobstructed. (Volakis Decl. ¶ 82).

Aereo’s experts note two overarching flaws in the tests Dr. Volakis performed. First, Dr. Volakis oriented the antennas vertically and with the antenna board “broadside” to the signal transmitter, whereas Aereo orients the antennas horizontally, with the board oriented “edge-on” toward the transmitter, a significant change according to Dr. Horowitz. (Hrg. Tr. 323:17–325:1; Pozar Decl. ¶¶ 24–26; Horowitz Decl. ¶¶ 36–37; Pls. Ex. 80). Second, Aereo also notes the lack of a “control” in several of Dr. Volakis’s experiments, because Dr. Volakis did not perform these tests on a single, stand-alone antenna element.⁴ (Pozar Decl. ¶¶ 27–28; Horowitz Decl. ¶¶ 32, 46).

⁴ As previously explained in the Court’s April 30, 2012 order, whether due to inadvertence or strategy, Plaintiffs failed to request permission to conduct destructive testing on Aereo’s antenna board until the close of discovery and well after the

Aereo's experts also dispute the reliability of each of Dr. Volakis's particular tests. As to the test in which Dr. Volakis activated only a single loop element (Volakis Decl. ¶¶ 79–80), Aereo notes that Dr. Volakis's conclusions were drawn from a computer simulation which inaccurately positioned the antennas and did not properly model the antennas resistive elements, and that Dr. Volakis was unable to precisely reproduce or explain his results at his deposition. (Hrg. Tr. at 318:13–319:3, 322:13–323:14; Pozar Decl. ¶¶ 22, 30–32; Horowitz Decl. ¶¶ 29–31, 33). As to Dr. Volakis's metallization experiments (Volakis Decl. ¶¶ 81, 83), Dr. Volakis could not identify precisely how he changed the metallization of the board and, according to Aereo's experts, his results could be fairly interpreted to mean that the antennas at issue simply are not affected by nearby metallization and do, in fact, function independently. (Pozar Decl. ¶ 27; Horowitz Decl. ¶¶ 34, 40, 48–49; *see also* Hrg. Tr. at 239:9–12). Finally, Aereo's experts opine that Dr. Volakis's tests using radio absorbing material were flawed because the size of the absorbing material and its proximity to the

service of their expert reports, despite their awareness since the outset of this litigation that the function of Aereo's antennas would be at issue in this case. (Order, *WNET v. AEREO, Inc.*, No. 12-cv-01543, Docket Entry 67). To the extent that Plaintiffs' questioning of witnesses at the hearing suggests that they believe their decision not to perform such testing during the discovery period in this case hindered their ability to conduct such "control" experiments, the Court notes that it has numerous other reasons to credit Aereo's experts' conclusions that the antennas function independently. In particular, the live testimony of Dr. Horowitz and Mr. Lipowski, detailed herein, was highly credible and persuasive.

measured antenna element would have disrupted the electromagnetic field around the antenna being measured. (Pozar Decl. ¶ 28; Horowitz Decl. ¶¶ 42–45, 47).

Because Plaintiffs did not offer Dr. Volakis as a witness at the hearing or otherwise defend his results, these substantial criticisms are largely un rebutted. Moreover, Plaintiffs provide only a general description of the tests Dr. Volakis performed rather than explaining the details of this testing, which renders his experiments difficult to assess or credit in the first instance; combined with the flaws Aereo points out in these tests, the Court cannot accept their reliability at this stage of the proceedings.

In contrast, Aereo presented significant evidence that each antenna functions independently. Dr. Pozar and Dr. Horowitz maintain that the construction of the antenna system requires the antennas to function independently, and Dr. Horowitz has observed numerous (if small) differences in recordings of the same program created by two different antennas. (Hrg. Tr. at 240:23–241:1, 300:16–304:14; Pozar Decl. ¶¶ 10–14, 19; Pozar Rep. at 6; Horowitz Rep. ¶ 59; Def. Ex. 55 at 54:13–55:20, 71:20–72:3). Aereo’s chief technology officer, Joe Lipowski, attests that his experience with the antennas suggests that the proximity of one antenna to another does not improve and may actually degrade signal reception, a point on which Aereo’s experts concur. (Lipowski Decl. ¶¶ 62–63; Pozar Decl. ¶ 19; Horowitz Decl. ¶ 28; Def. Ex. 50 at 42:20–43:4, 78:13–79:11). Moreover, tests performed at the Aereo site demonstrate that the signal received by Aereo’s

antennas is 1,000 times stronger than that needed for reliable reception, allowing Aereo to circumvent the difficulties associated with creating small antennas, discussed above. (Horowitz Decl. ¶ 26; Lipowski Decl. ¶ 61; Hrg. Tr. at 319:8–320:24). Such evidence goes to the heart of whether Aereo’s antennas are capable of functioning independently, as even Dr. Volakis testified at his deposition that a sufficiently strong signal would overcome the problems he identified relating to small antenna size. (Def. Ex. 49 at 205:3–23). Finally, Aereo’s expert Dr. Pozar also tested a single Aereo antenna which he observed to function with a signal level well above that required to generate the television picture. (Pozar Rep. at 10–12; *see also* Hrg. Tr. at 245:12–246:23). Dr. Volakis argues that such tests are not meaningful because the antenna was mounted on a circuit board with a metal plate that served as a substructure enhancing the performance of the antenna.⁵ (Volakis Decl. ¶¶ 85–87, 90; *see also* Pls. Ex.

⁵ Plaintiffs also argue that the antenna used in Dr. Pozar’s tests was not the final production version of the antenna. (Volakis Decl. ¶ 88; Pls. Ex. 87 at 118:6–22, 120:23–123:8; Pls. Ex. 88 at 211:23–212:18, 215:5–21). Aereo responds that the antennas used in Dr. Pozar’s tests were “designed to be electronically the same as the production antennas” and were the “test pair and board from which the production antennas were created.” (Lipowski Decl. ¶ 58–59; *see also* Def. Ex. 55 at 212:13–18, 216:2–11). Dr. Pozar testified that he did not believe that such differences affected his analysis or the results he obtained during his testing. (Def. Ex. 55 at 243:4–244:8). Although Plaintiffs have identified certain differences between the antenna used for Dr. Pozar’s tests and those used at Aereo’s facilities, they have not demonstrated that the differences are sufficient to render Dr. Pozar’s tests unreliable in demonstrating that Aereo’s antennas can function independently. (*See also* Volakis Decl. ¶ 88–89).

88 at 223:15–22). However, Dr. Pozar testified at his deposition that he could “pretty much guarantee” that the metal plate was not going to have any effect on whether the single antenna loop could function given the strength of the signal received at Aereo’s facilities, a point on which Dr. Horowitz agrees. (Pls. Ex. 88 at 232:14–233:21; Def. Ex. 55 at 233:22–235:7, 270:13–271:9; *see also* Pls. Ex. 88 at 239:16–240:24; Horowitz Decl. ¶¶ 52–53).

Based on the evidence at this stage of the proceedings, the Court finds that Aereo’s antennas function independently. That is to say, each antenna separately receives the incoming broadcast signal, rather than functioning collectively with the other antennas or with the assistance of the shared metal substructure.

IV. LIKELIHOOD OF SUCCESS

The first consideration in the preliminary injunction analysis is the probability of success on the merits. *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010). “[T]o make out a *prima facie* case of copyright infringement, a party must establish ownership of a valid copyright and that the defendant violated an exclusive right conferred by the ownership.” *Blue Moon Media Group, Inc. v. Field*, No. 08–cv–01000, 2011 WL 4056068, at *15, 2011 U.S. Dist. LEXIS 108066, at *46–47 (E.D.N.Y. Apr. 11, 2011) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)); *see also Arista Records LLC v. Doe*, 604 F.3d 110, 117 (2d Cir. 2010). Plaintiffs may make a *prima facie* showing of a valid copyright by submitting certificates of registration of the copyrights

at issue, *see* 17 U.S.C. § 410(c), and there appears to be no dispute for purposes of this motion that Plaintiffs' works are copyrighted or that Aereo's users will access those works using Aereo's service. (Pls. Ex. 83).

A. *Cablevision*

At issue in this case is the applicability of the Second Circuit's decision in *Cablevision*, which held, *inter alia*, that Cablevision's Remote Storage DVR ("RS-DVR") system did not infringe the plaintiffs' public performance right under the Copyright Act. *Cablevision*, 536 F.3d at 139–40. In particular, *Cablevision* construed the "transmit clause" in 17 U.S.C. § 101, which provides in relevant part that

[t]o perform or display a work "publicly" means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101. The same provision is at issue here.

Aereo argues that as in *Cablevision* it effectively rents to its users remote equipment comparable to what these users could install at home, and that its activities are materially identical to those in *Cablevision* such that the Second Circuit's analysis and holding in that case are directly applicable, precluding any public-performance liability. Plaintiffs contend that there are factual distinctions between *Cablevision* and the present case that render that decision inapplicable

and require the Court to find that Aereo engages in a public performance under the transmit clause. Because this case turns on determining if the analysis in *Cablevision* is controlling or, as Plaintiffs maintain, there are factual distinctions sufficient to escape *Cablevision's* holding, the Court must undertake a detailed review of that case, including the mechanics of Cablevision's RS-DVR system.

1. The Mechanics of the *Cablevision* RS-DVR System

The RS-DVR system in Cablevision was designed to allow customers who did not have a stand-alone DVR in their homes to record cable programming on central hard drives housed and maintained by Cablevision at a remote location. See *Cablevision*, 536 F.3d at 124. Customers could receive playback of those programs using a remote control on their home television sets, allowing those consumers to achieve DVR functionality without actually possessing an in-home set-top DVR. See *id.* at 124–25.

To provide this service, Cablevision took the single stream of data that it received containing the programming of various television channels and split it into two separate streams. *Id.* at 124. The first stream was treated as standard cable programming and routed immediately to customers. See *id.* The second stream of data was used for Cablevision's unlicensed RS-DVR service. See *id.* at 124–25. The second stream of data was first sent to a primary ingest buffer, which queried whether any consumer wanted to record any of the programming contained in the data stream. *Id.* at 124–25. If so, the data for that program moved to a

secondary buffer, and then onto a portion of the hard disk allocated to that consumer where a copy was created and stored for playback by the consumer. *See id.* A unique “playback copy” of the television program was thus stored on the hard drive for each individual subscriber, to be sent to the consumer when they requested to watch the program. *See id.* at 125, 130, 135, 138–39. As a result, Cablevision’s RS–DVR system allowed numerous consumers to watch the same television program with DVR functionality, although each consumer did so through playback of a unique copy that he or she created and that was accessible only to that consumer.

2. The District Court’s Decision

Considering these facts, then-District Court Judge Chin concluded that, notwithstanding the specifics of how Cablevision’s system operated, Cablevision was engaged in a public performance of the plaintiffs’ copyrighted works. *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 624 (S.D.N.Y. 2007). In doing so, the district court rejected Cablevision’s argument that any “performance is fundamentally private . . . [because] each streaming emanates from a distinct copy of a program uniquely associated with one customer’s set-top box and intended for that customer’s exclusive viewing in his or her home.” *Id.* at 622. Instead, the district court focused on the fact that each of Cablevision’s RS–DVR subscribers were being transmitted the same underlying program, and found that this resulted in a public performance. *See id.* at 622–23.

In reaching this conclusion, the district court found two out-of-circuit cases particularly instructive, *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991) and *Columbia Pictures Indus. v. Redd Horne*, 749 F.2d 154 (3d Cir. 1984). Both cases involved infringers who delivered copyrighted programming to multiple people, albeit at different times and in different places, and in both cases the court found that the infringers engaged in public performances under the transmit clause. In *Columbia Pictures*, 749 F.2d at 156–57, the defendants operated video rental stores and set up private booths in which customers could watch copyrighted videotapes played by a VCR at the front of the store. Similarly, in *On Command*, 777 F. Supp. at 788–89, the infringing plaintiff developed a system through which a hotel could use a bank of VCRs to play videotapes to rooms in the hotel. The district court explained that, as in these cases, Cablevision’s service fell within the scope of the transmit clause and that it made no difference that the subscribers may have viewed the programs at different times and in different places. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 623–24. Thus, the district court effectively viewed the transmit clause broadly, with the “same time or . . . different times” and “same place or . . . different places” language controlling the outcome of the case because the relevant transmission was that of the underlying program, and not each playback copy to each particular user.

3. The Second Circuit's Decision

The Second Circuit approached the problem posed by *Cablevision* from a substantially different starting point, one that led it to reverse the district court. *See Cablevision*, 536 F.3d at 140. In particular, the Court of Appeals began its analysis with two crucial premises in mind. First, the Court of Appeals explained that under the “transmit clause,” “a transmission of a performance is itself a performance” for infringement purposes. *Cablevision*, 536 F.3d at 134–35, 139. This meant that, in determining whether there has been a public performance, courts are to look to the transmission being made as the performance at issue, rather than simply to whether the public receives the underlying work. *See id.* at 134–36 (“[W]e believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission.”); *see also United States v. Am. Soc’y of Composers*, 627 F.3d 64, 73–74 (2d Cir. 2010) (“[T]ransmittal of a work’ is distinct from a transmittal of ‘a performance’—the former being a transmittal of the underlying work and the latter being a transmittal that is itself a performance of the underlying work.”). Second, the Court of Appeals found that the transmit clause directs courts to “examine who precisely is ‘capable of receiving’ a particular transmission of a performance” to determine if a performance is public. *Cablevision*, 536 F.3d at 135.

From this perspective, the Second Circuit’s view of the transmit clause was substantially narrower than the district court’s. Because the Second Circuit considered the relevant performance to be the discrete

transmission of each user’s unique playback copy of the television program to that user, the potential audience “capable of receiving” that performance was limited to that user, and each such performance was private, not public. *See id.* at 125, 135, 139. Specifically, the Second Circuit explained that because “each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, . . . such transmissions are not performances ‘to the public.’” *Id.* at 139. As such, the Second Circuit held that “the use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made ‘to the public.’” *Id.* at 138. Importantly, the Second Circuit viewed the transmissions in that case as made from each unique playback copy, even though those playback copies could arguably have been viewed as merely part of a “device or process” through which a large-scale transmission to the public was accomplished. *See* 17 U.S.C. § 101; *Cablevision*, 536 F.3d at 124–25, 137.

This reading of the transmit clause also led the Second Circuit to expressly reject the district court’s reasoning, explaining that the transmit clause “speaks of people capable of receiving a particular ‘transmission’ or ‘performance,’ and not of the potential audience of a particular ‘work.’” *Cablevision*, 536 F.3d at 135. Likewise, it concluded that *Redd Horne* and *On Command* were inapposite, in large part because each of those cases involved the retransmission of a copyrighted work from a single “master copy,” rather than unique copies created for each viewer, as in *Cablevision*. *See id.* at 138–39.

Similar reasoning led the Second Circuit to reject the plaintiffs' argument on appeal that Cablevision was engaged in a public performance because it transmitted to the public the "same performance" of any given work—the performance of that work that "occurs when the programming service supplying Cablevision's content transmits that content to Cablevision and the service's other licensees." *Id.* at 136. In other words, the plaintiffs argued that because the upstream content providers transmitted the copyrighted work to Cablevision and other cable companies, which Cablevision retransmitted to its subscribers, the Second Circuit should view the initial transmission from the content providers as the relevant performance (rather than the subsequent transmission of each playback copy to each user) and treat *that* performance as made "to the public." *See id.* The Second Circuit disagreed, explaining that "HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO," and it was therefore inappropriate to look back to the initial transmission made by the plaintiffs as the relevant performance. *Id.* Importantly, the Second Circuit held that courts should look "downstream, rather than upstream or laterally, to determine whether any link in a chain of transmissions made by a party constitutes a public performance." *Id.* at 137.

B. Lawfulness of Aereo's System

Aereo characterizes its system as merely allowing users to rent a remotely located antenna, DVR, and

Slingbox-equivalent device, in order to access content they could receive for free and in the same manner merely by installing the same equipment at home. Housing this argument more specifically in the terms defined by *Cablevision*, Aereo contends that, like the RS-DVR system in *Cablevision*, its system creates unique, user-requested copies that are transmitted only to the particular user that created them and, therefore, its performances are nonpublic. Moreover, Aereo submits that because each of its antennas function independently, even if the Court adopts Plaintiffs' view that these copies are not legally significant, an injunction still should not issue because each user is receiving a distinct transmission generated by their own individually rented antenna.

Plaintiffs disagree, arguing that *Cablevision* does not control and the Court should view Aereo's system as a technological gimmick—a “device or process”—through which Aereo passes along Plaintiffs' copyrighted content to the public. Specifically, Plaintiffs attempt to distinguish *Cablevision* on its facts, arguing that because Aereo's subscribers are watching these programs as they are still being broadcast, they are not using the copies Aereo creates for “time-shifting” and these copies therefore do not “break[] the chain of the [over-the-air] transmission” received by Aereo. (Pls. Br. at 22–23; Pls. Reply at 14). Thus, Plaintiffs contend, Aereo is engaged in a public performance that “emanates from the original broadcast signal” (Pls. Reply at 10), much like a “community antenna” which simply passes along a broadcast signal to the public. In other words,

according to Plaintiffs, Aereo’s copies should be viewed as merely facilitating the transmission of a single master copy—in this case, the broadcast signal—rather than as copies from which a distinct transmission is made.⁶ Having identified this hook on which to hang their legal position, Plaintiffs advocate that the Court is bound only by *Cablevision’s* specific holding as applied to its precise facts and is free to depart from the transmit clause analysis of that case to find that Aereo engages in a public performance. (See, e.g., Hrg. Tr. at 400:5–402:19 (citing *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 899 (2d Cir. 2011) (explaining that “appellate judges cannot make law except insofar as they reach a conclusion based on the specific facts and circumstances presented to the court in a particular appeal”))).

Despite this creative attempt to escape from the express holding of *Cablevision*, for the reasons discussed below this Court finds itself constrained to reject the approach Plaintiffs urge. Contrary to Plaintiffs’ arguments, the copies Aereo’s system creates are not materially distinguishable from those in *Cablevision*, which found that the transmission was made from those copies rather than from the incoming signal. Moreover, Plaintiffs’ attempt to distinguish *Cablevision* based on time-shifting fails when confronted with the reasoning of that case, particularly considering that the Second Circuit’s analysis was directly focused on the significance of *Cablevision’s*

⁶ For the sake of brevity, the Court will refer to the former as “facilitating copies” and the latter as “transmission copies.”

copies but did not say one word to suggest that time-shifting played any part in its holding.

1. *Cablevision* Suggests that the Copies Saved to Aereo's Hard Disks Do Not Merely Facilitate a Broader Transmission

In assessing the parties' arguments, this Court first looks to *Cablevision's* basis for finding that the copies created by Cablevision's RS-DVR system thwarted the plaintiffs' public performance claim, as this holding is necessarily premised on the conclusion that the copies in that case were not mere facilitating copies. *See Cablevision*, 536 F.3d at 139 (“[E]ach RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber”). In doing so, this Court finds that on the key points on which *Cablevision* actually relied, *see id.*, Aereo's system is materially identical to that in *Cablevision*, suggesting that the copies Aereo creates are as significant as those created in *Cablevision*. First, Aereo's system creates a unique copy of each television program for each subscriber who requests to watch that program, saved to a unique directory on Aereo's hard disks assigned to that user. *See id.* at 124 (“If a customer has requested a particular program, the data for that program move from the primary buffer into a secondary buffer, and then onto a portion of one of the hard disks allocated to that customer.”). Second, each transmission that Aereo's system ultimately makes to a subscriber is from that unique copy. *See id.* at 137 (“[T]he RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber”). Third, the transmission of the unique

copy is made *solely* to the subscriber who requested it;⁷ no other subscriber is capable of accessing that copy and no transmissions are made from that copy except to the subscriber who requested it. *See id.* (“[T]he universe of people capable of receiving an RS–DVR transmission is the single subscriber whose self-made copy is used to create that transmission.”). The overall factual similarity of Aereo’s service to *Cablevision* on these points suggests that Aereo’s service falls within the core of what *Cablevision* held lawful.

Another point of similarity between this case and *Cablevision* is found in the undercurrent to the Second Circuit’s reasoning suggesting that the *Cablevision* system merely allowed subscribers to enjoy a service that could also be accomplished using any standard DVR or VCR. *See, e.g., id.* at 125 (“To the customer, however, the processes of recording and playback on the RS–DVR are similar to that of a standard set-top DVR.”); *see also id.* at 131 (noting that it “d[id] not believe that an RS–DVR customer is sufficiently distinguishable from a VCR user to impose liability” for infringement of the reproduction right). As in *Cablevision*, the functionality of Aereo’s system from the user’s perspective substantially mirrors that

⁷ That Aereo users may “share” resources like antennas by using them at different times does not affect this analysis, as it remains clear that the copies Aereo’s system makes are unique for each user and are not “shared.” Moreover, a number of the resources in *Cablevision* were also “shared,” including the servers and, most significantly, the unlicensed signal from which the unique copies were made. *See Cablevision*, 536 F.3d at 124–25, (Hrg. Tr. at 116:1–10).

available using devices such as a DVR or Slingbox, which allow users to access free, over-the-air broadcast television on mobile internet devices of their choosing. (See *supra* Section II.A.1). To the extent that the Second Circuit's holding in *Cablevision* was premised on an inability to distinguish Cablevision's system from otherwise lawful activities, Aereo's system deserves the same consideration.

In addition, beyond the substantial factual similarities of Aereo's copies to those in *Cablevision*, the analysis the Second Circuit undertook in finding that the performance to the end user was made from those copies rather than from, for example, the incoming stream of data, is equally applicable here. For one thing, *Cablevision* held that a public performance does not occur merely because a number of people are transmitted the same television program. See *id.* at 135–36. The Second Circuit was similarly unwilling to accept the plaintiffs' arguments on appeal that, notwithstanding its creation of unique copies, Cablevision was actually transmitting to its users the performance of that work that “occurs when the programming service supplying Cablevision's content transmits that content to Cablevision and the service's other licensees.” *Id.* at 136. Plaintiffs' argument that Aereo's transmissions actually “emanate[] from the original broadcast signal” rather than from the unique copies Aereo's system creates is just another variant of these arguments, rejected by *Cablevision*, that the Court should look back (or “upstream”) to the point at which Aereo's antennas obtain the broadcast content to

conclude that Aereo engages in a public performance in retransmitting this content.

In fact, the Second Circuit expressly refused to look back to the received signal to conclude that Cablevision was engaged in a public performance, finding a dividing line between the transmissions made by the content providers and the transmissions made by Cablevision. *See id.* (“HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO.”). Indeed, in light of this Court’s factual determination that each antenna functions independently, in at least one respect the Aereo system is a stronger case than *Cablevision* for attaching significance to such copies because, unlike *Cablevision* in which multiple copies were all created from a *single* stream of data, *see id.* at 124, each copy made by Aereo’s system is created from a *separate* stream of data. *See id.* at 137 (refusing to accept the plaintiffs’ argument that Cablevision publicly performs a work when it splits and retransmits the incoming programming stream); *see also Am. Soc’y of Composers*, 627 F.3d at 75 (applying the “same distinction” as drawn in *Cablevision* regarding the creation of unique copies to conclude that a performance made from those copies is not public). Taken in conjunction with the substantial factual parallels between Aereo’s service and that in *Cablevision*, that Plaintiffs raise arguments profoundly similar to those already considered and rejected by the Second Circuit demonstrates, in part, why *Cablevision* controls this case.

2. Plaintiffs Cannot Persuasively Distinguish Cablevision Based on Time-Shifting

In the face of these controlling similarities, Plaintiffs try to devise factual distinctions to circumvent *Cablevision's* holding. Primarily, Plaintiffs argue that the copies in this case are unlike those in *Cablevision* because *Cablevision* addressed only copies used for time-shifting—recording programs to view them at a later time—whereas Aereo's system allows users to view television programs close in time to their initial broadcast. Plaintiffs further contend that in order to be time-shifted, there can be no overlap between the over-the-air broadcast of the program and consumer playback of a recorded copy of that program—that any time-shifting must be “complete” to turn a facilitating copy into a transmission copy. (*See, e.g.*, Hrg. Tr. at 386:19–387:8, 416:24–420:15). The Court cannot accept this reading of *Cablevision*, which applies controlling significance to facts on which the Second Circuit did not rely, requests that this Court read volumes into *Cablevision's* silence, and has no foundation in the articulated reasoning on which the Second Circuit's decision was actually grounded.

- a. Plaintiffs apply controlling significance to facts on which *Cablevision* does not rely.

Beginning with the first point, that Plaintiffs attempt to apply controlling significance to facts on which *Cablevision* did not rely, the Second Circuit's holding regarding the meaning of the transmit clause required a focus on who is “capable of receiving” a given performance—*i.e.*, the potential audience—in determining whether that performance was made “to

the public.” See *Cablevision*, at 134–35, 139. The facts on which the Second Circuit relied in holding that the potential audience of the transmissions in *Cablevision* was limited are the same as those present here, namely the use of unique copies, accessible only to the users who requested them, and transmitted only to those users. See *id.* at 139. Notwithstanding the scattered background-section references in *Cablevision* to programs that were “previously recorded” that Plaintiffs cite (Pls. Br. at 17–18; Pls. Reply at 3 n.1, 11, 13; Hrg. Tr. at 420:7–15, 425:5–24), time-shifting is simply not the basis of the Second Circuit’s opinion. Far from it: the Second Circuit never even mentioned time-shifting, whether complete or partial, as a reason to conclude the copies *Cablevision* created were significant or that the performances at issue were non-public. See generally *id.* Thus, even accepting that a distinction based on time-shifting exists in this case, nothing in the Second Circuit’s analysis indicates that this distinction is material, and this Court remains obligated to apply Circuit precedent with fidelity to its underlying reasoning. See, e.g., *Rutherford v. Katonah–Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 247 (S.D.N.Y. 2009); *Shipkevich v. Staten Island Univ. Hosp.*, No. 08–cv–01008, 2009 WL 1706590, at *1–2, 2009 U.S. Dist. LEXIS 51011, at *5 (E.D.N.Y. June 16, 2009). Indeed, even in *Theflyonthewall.com, Inc.*, 650 F.3d at 899, 902, on which Plaintiffs heavily rely for the proposition that “appellate judges cannot make law except insofar as they reach a conclusion based on the specific facts and circumstances presented to the court in a particular appeal,” the Second Circuit still applied

the *reasoning* of controlling precedent to reach its result.⁸

b. *Cablevision's* silence on time-shifting refutes Plaintiffs' argument

Turning to the second basic flaw in Plaintiffs' argument, Plaintiffs admit that nowhere in *Cablevision* did the Second Circuit articulate a requirement that the copies be used for time-shifting in order to “break the chain” of transmission—the distinction on which they now found their case. (Hrg. Tr. at 402:23–412:7). Specifically, Plaintiffs argue that the lawfulness of playback of programs contemporaneous with the initial broadcast of those programs was not before the Second Circuit because *Cablevision* was licensed to make live transmissions of this content. (Hrg. Tr. at 397:5–398:5, 398:19–400:4). *See Cablevision*, 536 F.3d at 124 (“Generally, this stream [of data comprising the content of various television programs] is processed and

⁸ Plaintiffs also direct the Court to the conclusion of the *Cablevision* opinion in which the Second Circuit explains that “[t]his holding . . . does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies.” *Cablevision*, 536 F.3d at 139. (Pls. Reply at 4). Plaintiffs argue that this portion of the opinion limited *Cablevision* to its facts and that, therefore, this Court should not “extend [] *Cablevision* as Aereo urges.” (Pls. Reply at 4). This excerpt from *Cablevision* is better construed as directing that copyright liability may attach to these actions for violations of other exclusive rights provided for by copyright or through contributory liability, not as limiting *Cablevision's* public performance holding to its precise facts. *See id.* at 139–40.

transmitted to Cablevision’s customers in real time. . . . The first [data stream used in the RS–DVR service] is routed immediately to customers as before.”). As such, Plaintiffs contend that the Second Circuit was only called upon to rule on the lawfulness of a system allowing users to access time-shifted programming and that this Court should disregard the Second Circuit’s complete silence on the significance of time-shifting to its analysis.

Plaintiffs’ position that the Second Circuit’s decision in *Cablevision* turned on its unstated reliance on the importance of time-shifting as “breaking the chain of transmission” is unpersuasive. The Second Circuit’s analysis of the public performance claim was entirely directed toward explaining why the copies created by the system in *Cablevision* were significant and resulted in performances to a limited, non-public audience. *See generally id.* Plaintiffs’ view of *Cablevision* requires the dubious conclusion that despite the Second Circuit’s extensive discussion of the importance of these unique copies, the Second Circuit relied on the time-shifted nature of these copies as case-dispositive but left this crucial consideration in the background for subsequent courts to puzzle out on their own. Moreover, Plaintiffs’ contention that the parties in *Cablevision* extensively relied on time-shifting before the district court and Second Circuit (Pls. Prop. COL ¶¶ 40–43, 67) completely undercuts their claim that the Second Circuit did not discuss time-shifting because that issue was not squarely before them. (Hrg. Tr. at 397:5–398:5, 398:19–400:4). By Plaintiffs’ own admission, the purported significance of time-shifting was “actually

presented to the Second Circuit in *Cablevision* ” (Pls. Prop. COL ¶ 43) through Cablevision’s briefing, yet the Second Circuit gave no indication it considered these facts important, let alone controlling. Plaintiffs’ argument relying on time-shifting is, therefore, implausible.

c. Plaintiffs’ arguments are contrary to the reasoning of *Cablevision*

Third, and perhaps most importantly, Plaintiffs’ arguments are simply not consistent with the reasoning of *Cablevision*. For example, although they gesture toward housing their position within the reasoning of *Cablevision* by suggesting that complete time-shifting limits the potential audience of a program, (Pls. Reply at 14; Pls. Proposed COL at ¶ 63); *see id.* at 138 (explaining that “the use of a unique copy *may* limit the potential audience of a transmission and is therefore *relevant* to whether that transmission is made ‘to the public.’” (emphasis added)), the logic of this argument is opaque. Whether a user watches a program through Aereo’s service as it is being broadcast or after the initial broadcast ends does not change that the transmission is made from a unique copy, previously created by that user, accessible and transmitted only to that user, the factors *Cablevision* identified as limiting the potential audience. *See id.* at 134–39. To the extent Plaintiffs mean to suggest that time-shifting limits the potential audience because it “breaks the chain of transmission,” this is merely a restatement of the conclusion that Plaintiffs hope the Court will draw, not an independent argument that explains why *only* a time-shifted copy limits the potential audience of a

transmission to render the resulting performance nonpublic.

In fact, nothing in *Cablevision* suggests that whether a performance is public turns on the times at which individuals receive the transmission. Focusing on the text of the Copyright Act, *Cablevision* explained that “it is of no moment that the potential recipients of the transmission . . . may receive the transmission at different times.” *Id.* at 134; *see also* 17 U.S.C. § 101 (explaining that a transmission may be “to the public . . . whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times.”). Rather, as *Cablevision* instructed, it is not the timing of the receipt of the transmission that courts should look to in determining whether the transmission is to the public, but the factors set forth in *Cablevision*. *See Cablevision*, 536 F.3d at 134 (“The implication from this same language, however, is that it is relevant, in determining whether a transmission is made to the public, to discern who is ‘capable of receiving’ the performance being transmitted.”).⁹

⁹ Consider a television program initially broadcast at 6:00 pm Eastern Standard Time in New York but initially broadcast at 6:00 pm Pacific Standard Time in California. An Aereo user in New York who begins watching his or her recording of that program at 9:00 pm Eastern watches that program fully time-shifted from one perspective, but also concurrently to the over-the-air broadcast of that program to a segment of the public. Similarly, consider a program that is broadcast for the first time at 10:00 pm, and then rebroadcast the next day at 2:00 pm—is a user who watches a recording of the 10:00 pm program the next day at 2:00 pm part of a public performance? If not, how is he or she distinguishable from

Furthermore, in rejecting the plaintiffs' arguments on appeal, the Second Circuit explained in *Cablevision* that certain of these arguments would lead to "odd results," such as imposing public performance liability on "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom." *Id.* at 136. Plaintiffs' position raises a similar concern that "a hapless customer who records a program in his den" and then uses a Slingbox to "transmit[] the recording to a [mobile device] in his bedroom would be liable for publicly performing the work." *Id.* Such a consumer, watching a program "live" on his or her mobile device would not, according to Plaintiffs' logic, "break the chain of transmission" from the initial, over-the-air broadcast. As such, that consumer would merely be passing along a transmission that "emanates from the broadcast signal" (Pls. Reply at 10) distributed to the public generally, and thus would have engaged in a public performance even though the transmission was made from a unique copy stored on his or her DVR, solely to himself.¹⁰

the user using Aereo to watch that program "live" from a recording begun at 2:00? Keying whether a performance is public off of whether it has been time-shifted and whether other users are simultaneously receiving the program "over-the-air" creates odd dilemmas regarding under what circumstances a performance is public or private.

¹⁰ Any attempt to distinguish this hypothetical by arguing that Aereo transmits the broadcast signal to multiple users fails when one considers that each copy is uniquely generated from a single antenna for each user and follows a distinct signal path, much as it would be for the stand-alone hapless consumer. As such, to find that Aereo engages in a public performance the Court must look

Finding *Cablevision* cuts against them, Plaintiffs also try to locate their claimed distinction of *Cablevision* in other precedent, particularly the holding in *NFL v. Primetime 24 Joint Venture* that “a public performance or display includes each step in the process by which a protected work wends its way to its audience.” *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000) (quotation marks omitted). In that case, the Second Circuit addressed whether PrimeTime’s satellite transmissions were an infringing “public performance” under the transmit clause, even though the transmissions from the satellite were received in Canada, where the Copyright Act does not apply. *See id.* at 11–12. The Second Circuit found that PrimeTime’s uplink transmission of the signals, which occurred in the United States, was a step in the process of transmission and, therefore, PrimeTime was making a public performance in the United States subject to the Copyright Act. *See id.* at 13. Moreover, in *American Society of Composers* the Second Circuit explained its conclusion in *NFL*, noting that the fact that “the *immediately sequential* downlink from the satellite to Canadian PrimeTime subscribers was a public performance of the games” was of “controlling significance” to *NFL*’s conclusion that PrimeTime’s satellite uplink was part of this public performance. *Am. Soc’y of Composers*, 627 F.3d at 74 (emphasis added). Plaintiffs hope to persuade the Court that this

back to the over-the-air broadcast signal as the “master copy” being retransmitted—hence the Court’s belief, articulated above, that Plaintiffs’ argument is merely a variant of those rejected by *Cablevision*.

holding in *NFL* should lead it to conclude that Aereo creates mere facilitating copies.

Again, however, this argument simply runs hard against the reasoning and holding of *Cablevision*. Both *Cablevision* and *Composers* expressly distinguished *NFL* based on the creation, in those cases, of unique copies from which the transmissions were made, explaining that such copies meant that the ultimate performance was not “to the public.” *See id.* at 75 (“Just as in *Cartoon Network*, the Internet Companies transmit a copy of the work to the user, who then plays his unique copy of the song whenever he wants to hear it; because the performance is made by a unique reproduction of the song that was sold to the user, the ultimate performance of the song is not ‘to the public.’”); *Cablevision*, 536 F.3d at 137. Moreover, Plaintiffs’ attempts to analogize this case to *NFL* cannot overcome the substantial other points that demonstrate that *Cablevision* controls this case, including *Cablevision*’s rejection of the arguments that it should look back to the receipt of the initial broadcast signal as the relevant performance. (*See supra* at Section IV.B.1); *Cablevision*, 536 F.3d at 136–37 (discussing *NFL*’s holding that courts should consider each step in which a public performance wends its way to its audience and explaining that *NFL* only directs courts to look “downstream” rather than “upstream or laterally” and rejecting the argument that splitting the single data stream in *Cablevision* resulted in a public performance).

Plaintiffs further attempt to rely on cases in which courts have concluded or the parties have conceded

that internet streaming results in a public performance. *See, e.g., Am. Soc’y of Composers*, 627 F.3d at 74 (explaining that “[a] stream is an electronic transmission that renders the musical work audible as it is received by the client-computer’s temporary memory” and that “all parties agree [such stream transmissions] constitute public performances”); *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 601 (S.D.N.Y. 2011) (undisputed that internet streaming at issue was a public performance); *Warner Bros. Entm’t, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1008–11 (C.D. Cal. 2011) (internet streaming of DVDs was a public performance). *But see Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 649–50 (S.D.N.Y. 2011) (finding that a data compression algorithm that eliminated redundant digital data from stored copies did not result in the creation of a “master copy” storage system and, under *Cablevision*, there was no public performance liability). Such cases, however, have generally not considered the impact of the creation of unique copies—the focus of *Cablevision*’s analysis—on whether internet streaming transmissions involve a public performance and thus did not address the question currently before the Court. *See, e.g., Am. Soc’y of Composers*, 627 F.3d at 74–75 (using streaming transmissions to distinguish downloading unique copies of songs); *ivi, Inc.*, 765 F. Supp. 2d at 601; *Warner Bros. Entm’t Inc.*, 824 F. Supp. 2d at 1008–11 (C.D. Cal. 2011) (streaming was accomplished from master copies of “rented” DVDs).

Even though these cases did not address the question presented by *Cablevision*, Plaintiffs suggest

that they are persuasive because they present facts similar to this case, arguing that the copies Aereo creates are equivalent to the buffer copies generally used in internet streaming. (*See* Hrg. Tr. at 92:5–96:7). In particular, Plaintiffs emphasize that the copies Aereo creates in the “Watch” mode—in contrast to those created using “Record”—are retained only until the user finishes watching the program. (*See, e.g.*, Pls. Reply at 3–4, 10 & n.6, 11–15; *see generally* Pls. Br. (describing Aereo’s copies as “buffer” copies)). The difference between the “Watch” and “Record” services has always been tenuous, hinging as it does on this sole point of distinction, and Plaintiffs cannot persuasively analogize the copies stored on Aereo’s hard disk to “buffer” copies. Even the copies created by the “Watch” mode are not “buffer” copies, as they are stored for the duration of the user’s viewing experience, and are not purely fleeting repositories of data as it is immediately passed to the user. *See, e.g., Cablevision*, 536 F.3d at 124–25, 127–30 (describing the fleeting nature of these buffer copies). This difference is established by, among other things, the testimony of Dr. Horowitz—which Plaintiffs repeatedly misconstrue (*see, e.g.*, Pls. Prop. FOF at 13 n.4; Pls. Obj. to Aereo’s Prop. FOF at 3–4, 8, 25–26). In particular, Dr. Horowitz contrasted the “firehose” nature of buffer copies, which act purely to pass through data, with the copies saved to Aereo’s hard disk, which are “nonvolatile storage” as typically used to make a recorded copy on a standard DVR. (Hrg. Tr. at 310:8–311:6; *see also* Hrg. Tr. at 106:25–107:24, 111:12–114:17, 298:14–23; Lipowski Decl. ¶¶ 51–55). Moreover, by clarifying that their present challenge in this motion encompasses all

retransmissions of their content while the initial broadcast is occurring (*Compare* Pls. Br. at 3, 5 n.1 *with* Hrg. Tr. 255:6–18, 267:14–23), including through the “Record” mode in which Plaintiffs’ own expert conceded the copies made are “permanent” (Hrg. Tr. at 90:7–9, 113:6–19), even the tenuous point of distinction between the “Watch” and “Record” function vanishes, and Aereo’s copies cannot be viewed as purely “temporary.”

Finally, Plaintiffs try to side-step *Cablevision* and refocus this Court on the text of the transmit clause which provides that “[t]o ‘perform’ a work ‘publicly’ means ‘to *transmit* or *otherwise communicate* a performance or display of the work . . . to the public, by means of *any device or process*.” (Pls. Br. at 9–10 (quoting 17 U.S.C. § 101)). In doing so, Plaintiffs claim that Aereo is engaged in a “quintessential public performance” because it uses a device or process to communicate performances of Plaintiffs’ copyrighted work to members of the public. (Pls. Br. at 9–10). But *Cablevision* makes this argument a non-starter. If Plaintiffs’ view of the transmit clause were correct, the Second Circuit in *Cablevision* would have affirmed the result reached by the district court, as *Cablevision* likewise used a “device or process” to “transmit” the copyrighted works to multiple subscribers. Indeed, *Cablevision* expressly rejected the argument, advanced again here, that the mere fact that a content provider is making a given work available to all of its subscribers results in a public performance. *See id.* at 135–36. Thus, although the text of the transmit clause suggests that Congress intended that clause’s coverage to sweep

broadly, absent a persuasive distinction that demonstrates Aereo's copies—unlike those in *Cablevision*—are merely such a “device or process,” Plaintiffs gain no ground through reliance on this language.

3. Plaintiffs' Reliance on “Complete” Time-Shifting Further Undermines Their Arguments

Plaintiffs' proposed requirement of “complete” time-shifting is even less justified than their contention that *Cablevision* *sub silentio* relied on time-shifting in reaching its holding.¹¹ Plaintiffs' sole legal rationale for this argument is an attempt to locate it in the Supreme Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), by claiming that *Sony* defined what it means to time-shift a television program, and that the technology at issue in *Sony* only allowed “complete” time-shifting. (Hrg. Tr. at 385:21–386:10, 420:1–6, 428:19–429:6). This argument is wholly misplaced. First, the Court in *Sony* never required that time-shifting of a program be “complete.” The Court merely described time-shifting as “the practice of recording a program to view it once at a later time, and thereafter erasing it.” *Id.* at 423, 104 S.Ct. 774. Second, Plaintiffs' argument that *Sony* only

¹¹ Another way of phrasing this argument for complete time-shifting is that the copy saved on Aereo's system must be complete before viewing begins. Regardless of how this argument is articulated, this Court's analysis does not change and *Cablevision* did not give any indication its conclusion turned on this factor.

addressed complete time-shifting because the technology at issue required that the programming be broadcast in full before the recording could be watched is incorrect. Nothing prevents a person from recording the first half of a show on a VCR, stopping that recording, and watching that recording while the second half of that program continues to be broadcast. Finally, as Plaintiffs concede, the *Sony* court discussed time-shifting in the context of fair use and infringement of the right of reproduction, *see id.* at 447–56, 104 S.Ct. 774 (*see also* Pls. Reply at 18), not in the context of Plaintiffs’ novel argument regarding whether a copy sufficiently “breaks the chain of transmission” to avoid liability for a public performance. Thus, even if Plaintiffs were right regarding how the *Sony* Court defined time-shifting, they have provided no principled reason to apply this definition here.

More fundamentally, the basis for Plaintiffs’ argument that time-shifting is required to “break the chain of transmission” is that copies immediately used to retransmit a signal are more akin to simply passing along that signal than those also used for substantial time-shifting. Such immediacy also is the other part of the basis for Plaintiffs’ attempt to analogize Aereo’s service to cases involving standard internet streaming and “buffer” copies, as well as the arguable basis for analogizing this case to *NFL*. As already explained, it is difficult to locate this requirement in *Cablevision* in the first place, but Plaintiffs’ position requiring “complete” time-shifting is even more difficult, as it is no longer tied to the immediacy of the retransmission but rather would require the Court to conclude that even if there

has inarguably been substantial time-shifting, Aereo still engages in a public performance.

For example, as Plaintiffs would have it, an Aereo user who begins watching a recording of the Academy Awards, initially broadcast at 6:00 pm, one minute before the program ends at 11:00 pm has not allowed the chain of transmission to be broken, despite the nearly five hours of time-shifting that has occurred. In contrast, a user who begins watching a standard half-hour sitcom just a minute after its initial broadcast ends would “break the chain of transmission” for that program after just 31 minutes of time shifting. These examples suggest the extent to which Plaintiffs’ position regarding “complete” time-shifting is unmoored from its foundation in “breaking the chain of transmission.”

Indeed, Plaintiffs concede that their position that copies must be completely time-shifted for *Cablevision’s* analysis to apply is not “completely principled.” (Hrg. Tr. 416:24–420:6, 428:6–429:6). In particular, Plaintiffs were unable to provide an argument as to why a user who begins watching a recording of a program one minute (or five minutes, or ten minutes) before the broadcast ends is part of a public performance but a user who begins watching a minute after the program ends is not, instead asserting that complete time-shifting provides a bright line rule. (Hrg. Tr. 416:24–420:6, 428:6–429:6). The mere existence of a potential bright-line is not, in itself, a sufficient basis to draw such a line. *Cf., e.g., Colon v. Howard*, 215 F.3d 227, 235–36 (2d Cir. 2000) (Walker, J., concurring) (discussing bright-line rules and noting

that “any rule we announce must be justified as necessary to its present application”).

As this Court has concluded, Plaintiffs’ attempt to distinguish *Cablevision* from this case based on time-shifting is unsustainable, and Plaintiffs proposal that the Court require “complete” time-shifting further drives home why the Court cannot adopt this position.

4. *Cablevision* Is Not Distinguishable Based on Aereo’s Transmissions to Different Devices, Mediums, and Places than the Broadcast Transmission

Plaintiffs also suggest that *Cablevision* addressed only transmissions using the same medium as the initial broadcast that were made to the same device and to the same place as the initial transmission. (*See, e.g.*, Pls. Br. at 17). Although these may be points of distinction from *Cablevision*, there is no reason to believe that they are material. Plaintiffs made no showing at the hearing that whether a transmission is made over co-axial cable or the internet, and whether it is to a user’s television in their home or their mobile device on the street has any bearing, in itself, on who is “capable of receiving” that transmission or whether Aereo “breaks the chain of transmission.”

5. Jurisprudential Principles Caution Against Plaintiffs’ Creative Approach

Plaintiffs raise the specter of congressional intervention should this Court find that Aereo’s system is lawful, noting Congress’s overruling of the Supreme Court’s decisions in *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176

(1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974), cases which held that “cable systems were not ‘performing’ broadcast programming when retransmitting its signals” and thus were not infringing any copyrights. *ivi, Inc.*, 765 F. Supp. 2d at 602 (summarizing these cases); (Pls. Br. at 7–8, 10 n.6; Pls. Pre–Hearing Br. at 6–8). Plaintiffs maintain that in doing so, Congress evinced an intent that the transmit clause be construed broadly (Pls. Pre–Hearing Br. at 7–8), and that this Court should follow suit. (Pls. Reply at 10).

This argument, however, cuts both ways, as it also demonstrates that to the extent that a court concludes that the Copyright Act does not cover an activity, it is Congress’s prerogative to step in if it “view[s] this result as an ‘injustice.’” (Pls. Pre–Hearing Br. at 7). In fact, the Supreme Court has cautioned that “it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors.” *Sony*, 464 U.S. at 429, 104 S.Ct. 774. As such, the “judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme” in copyright jurisprudence and, in “case[s] like this, in which Congress has not plainly marked [the Court’s] course, [it] must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.” *Id.* at 431–32, 104 S.Ct. 774. This Court must be guided by the law as it has been written by Congress and,

importantly for present purposes, how that law has been interpreted by the Second Circuit.

Such caution is additionally warranted in light of the value of preserving the expectations of parties, like Aereo, who rely on binding precedent. *Republic of Aus. v. Altmann*, 541 U.S. 677, 693, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (noting, in the retroactivity context, that predictability and stability are matters of prime importance in considering contractual or property rights); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992) (noting that adherence to precedent promotes stability, predictability, and respect for judicial authority); *cf. McDonald v. City of Chicago*, 130 S.Ct. 3020, 3102, 177 L.Ed.2d 894 (2010) (Stevens, J., dissenting) (explaining that stare decisis is a rule of judicial process “prizing stability and order in the law” and “respecting reliance interests”). As detailed below, 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. Particularly considering the role of district courts to faithfully apply their best understanding of the Second Circuit’s precedent, this Court does not believe it would be appropriate to blaze a trail that runs opposed to the direction dictated by *Cablevision*.

In urging the Court to depart from the course set by the Second Circuit, Plaintiffs have relied on statements in the brief of the United States opposing *certiorari* in *Cablevision* that arguably criticize that decision. In particular, Plaintiffs cite to then-Solicitor

General Kagan’s brief stating: “scattered language in [*Cablevision*] could be read to endorse overly broad, and incorrect, propositions about the Copyright Act” and, as such, the Second Circuit “carefully tie[d] its actual holdings to the facts of [the] case.” Brief of the United States as Amicus Curiae at 6, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S.Ct. 2890 (2009). To the extent that the Solicitor General’s brief suggests that the Second Circuit’s interpretation of the transmit clause was “overly broad and incorrect,” this Court is still bound by the Second Circuit’s decision. Moreover, to the extent that this brief suggests that *Cablevision*’s holding is limited, the precise limiting factors the Solicitor General identified are *all* present here. *See id.* at 21 (“The Second Circuit repeatedly explained that its rejection of petitioners’ public-performance claim depended on a range of factors: not only that each transmission would be sent to a single recipient, but also that (1) each transmission would be made using a unique copy of the relevant program; and (2) each transmission would be made solely to the person who had previously made that unique copy.”); *see also supra* Section IV.B.1.

For all of the reasons articulated above, this Court concludes that faithful application of *Cablevision* requires the conclusion that Plaintiffs are unlikely to succeed on the merits of their public performance claim.

6. Scope of the Court’s Decision

A few words are in order regarding the scope of the Court’s decision. First, the Court need not, and does not, accept Aereo’s position that the creation of any fixed copy from which a transmission is made always

defeats a claim for a violation of the public performance right. (Hrg. Tr. at 451:7–454:4). This position would eviscerate the transmit clause given the ease of making reproductions before transmitting digital data, and *Cablevision* does not require such a far sweep. See *United States v. Aleynikov*, 676 F.3d 71, 81 (2d Cir. 2012) (“[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”).

Neither does the Court need to resolve Aereo’s argument that their antennas, standing alone, defeat Plaintiffs’ claim that Aereo engages in a public performance. Aereo’s use of single antennas does, however, reinforce the conclusion that the copies created by Aereo’s system are unique and accessible only to a particular user, as they indicate that the copies are created using wholly distinct signal paths. Moreover, Aereo’s antennas also reinforce the dividing line between the over-the-air signal the Aereo antennas receive and the transmissions Aereo’s system makes to its users. Because the copies are created from a signal received independently by each antenna, in order to find a “master” copy that is arguably being transmitted, the Court would be required to look back to the incoming over-the-air signal rather than simply an earlier step in Aereo’s process. Aereo’s antennas thus reinforce the significance of the copies its system creates and aid the Court in finding that Aereo does not create mere facilitating copies.

As such, the Court’s holding that Plaintiffs have not demonstrated a likelihood of success is limited. There

may be cases in which copies are purely facilitory, such as true buffer copies or copies that serve no function whatsoever other than to pass along a clearly identifiable “master” copy from which the transmission is made. These facts, however, are not before the Court today.

Finally, Aereo has argued that it cannot be held liable for copyright infringement because it does not engage in “volitional conduct” sufficient to impose such liability, contending that it is Aereo’s users, rather than Aereo itself, who direct the operation of Aereo’s system. (Aereo Prop. COL at ¶¶ 45–48). Because the Court concludes that Plaintiffs have failed to demonstrate they are likely to succeed in establishing that Aereo’s system results in a public performance, the Court need not reach the issue of whether Aereo escapes liability because it is “the consumer, not Aereo, who makes the transmissions that Plaintiffs complain of.” (Aereo Prop. COL at ¶ 48).

V. IRREPARABLE HARM

Having determined that Plaintiffs have not persuasively distinguished *Cablevision* and therefore are not likely to prevail on the merits, the Court could conclude its analysis here. *See, e.g., Pope v. County of Albany*, 687 F.3d 565, 570 n.2 (2d Cir. 2012). However, this Court recognizes that this case turns on important legal questions and Plaintiffs’ have indicated that they are likely to seek interlocutory appeal to the Second Circuit. (3/13/12 Tr. at 42:2–10). Accordingly, the Court will set forth its analysis of the remaining factors to ensure that the record is fully developed. Moreover, district courts deciding preliminary injunction motions

routinely consider alternative bases for their holdings, even if they find that one or more of the preliminary injunction factors would itself dispose of the case. *See, e.g., Int'l Bhd. of Teamsters v. Nason's Delivery, Inc.*, No. 11-cv-00186S, 2011 WL 3862322, at *2-7, 2011 U.S. Dist. LEXIS 98422, at *6-18 (W.D.N.Y. Aug. 31, 2011); *Pope v. County of Albany*, No. 11-cv-00736, 2011 WL 3651114, at *2-3, 2011 U.S. Dist. LEXIS 93103, at *5-7 (N.D.N.Y. Aug. 18, 2011); *Stokely-Van Camp, Inc. v. Coca-Cola Co.*, 646 F. Supp. 2d 510, 530-31 (S.D.N.Y. 2009).

The second preliminary injunction factor is whether Plaintiffs will suffer irreparable harm in the absence of an injunction. “The relevant harm is the harm that (a) occurs to the parties’ legal interests and (b) cannot be remedied after a final adjudication, whether by damages or a permanent injunction.” *Salinger*, 607 F.3d at 81. The Court may not presume irreparable harm, but rather must consider the injury Plaintiffs will suffer if they lose on the preliminary injunction but ultimately prevail on the merits. *Id.* at 82; *ivi, Inc.*, 765 F. Supp. 2d at 617. However, “it may well be the case” that “most copyright plaintiffs who have shown a likelihood of success on the merits would . . . be irreparably harmed absent preliminary injunctive relief,” and that the historical tendency to readily issue such injunctions in copyright cases reflects this possibility. *Salinger*, 607 F.3d at 82; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (Roberts, C.J., concurring) (“Th[e] ‘long tradition of equity practice’ [of granting injunctions in patent cases] is not surprising, given the

difficulty of protecting a right to exclude through monetary remedies. . .”). *But see MGM Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1216 (C.D. Cal. 2007).

“The showing of irreparable harm is perhaps the single most important prerequisite for the issuance of a preliminary injunction.” *Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 621 (S.D.N.Y. 2010) (quoting *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)). “Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure, or that it is a loss that one should not be expected to suffer.” *Salinger*, 607 F.3d at 81. Courts have tended to issue injunctions in the copyright context because proving loss of sales due to infringement is “notoriously difficult.” *Id.*; *see also MGM Studios, Inc.*, 518 F. Supp. 2d at 1215 (explaining that proof of irreparable harm in the copyright context is not difficult to establish in the run-of-the-mill copyright case based on, for example, the infringing acts).

A. Plaintiffs Have Demonstrated That They Will Suffer Irreparable Harm

The evidence establishes that Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs have identified a number of categories of irreparable harm, several of which have been accepted in similar cases as supporting the issuance of a preliminary injunction.

First, Aereo will damage Plaintiffs’ ability to negotiate with advertisers by siphoning viewers from

traditional distribution channels, in which viewership is measured by Nielsen ratings, into Aereo' service which is not measured by Nielsen, artificially lowering these ratings. (Franks Decl. ¶¶ 18–20; Davis Decl. ¶¶ 12–20; Bond Decl. ¶¶ 23–25; Brennan Decl. ¶¶ 7–9; Hrg. Tr. at 48:10–49:2, 57:4–18, 62:20–64:6, 351:7–22, 357:9–22). The record establishes the importance of Nielsen ratings to Plaintiffs' ability to negotiate with advertisers to monetize their programming, as well as the importance of such advertising revenue. (*See, e.g.*, Hrg. Tr. at 57:4–18, 58:23–59:5, 351:8–11, 357:14–19). Harm of this sort has been accepted as irreparable based, at least in part, on the difficulty of proving or quantifying such damages—even if Plaintiffs can generally track declines in advertising revenue, as Aereo suggests (Def. Ex. 51 at 55:20–56:13), this does not necessarily allow them to determine the extent to which such declines are attributable to Aereo.¹² *See ivi, Inc.*, 765 F. Supp. 2d at 618 (explaining that allowing viewers to access programming from unsanctioned sources would inevitably damage the plaintiffs' ability to profit from sanctioned sources, and that such losses a notoriously difficult to prove and “nearly impossible to quantify”); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming finding of irreparable harm based on inability to quantify or

¹² That Aereo is willing to have its subscriber's viewing habits measured by Nielsen (Kanojia Decl. ¶ 39), or that other distribution media are not or, in the case of standard DVRs, previously were not measured by Nielsen (Hrg. Tr. at 48:23–49:8, 51:15–52:6) does not detract from this harm, as it appears undisputed that Nielsen presently does not measure Aereo's subscribers.

measure harm resulting from damage to business relationships); *Pearson Educ., Inc. v. Vergara*, No. 09-cv-06832, 2010 WL 3744033, at *4, 2010 U.S. Dist. LEXIS 101597, at *11-12 (S.D.N.Y. Sept. 27, 2010); *Les Ballets Trockadero de Monte Carlo v. Trevino*, 945 F. Supp. 563, 574 (S.D.N.Y. 1996) (damage to licensing negotiations constituted irreparable harm).

Similarly, the evidence shows that by poaching viewers from cable or other companies that license Plaintiff's content, Aereo's activities will damage Plaintiffs' ability to negotiate retransmission agreements, as these companies will demand concessions from Plaintiffs to make up for this decrease in viewership. (Franks Decl. ¶¶ 11, 23-26; Davis Decl. ¶¶ 21-26; Bond Decl. ¶¶ 7-19; Brennan Decl. ¶¶ 10, 14; Hrg. Tr. at 59:6-60:21; Pls. Ex. 89 at 158:6-160:7; Def. Ex. 43); *ivi, Inc.*, 765 F. Supp. 2d at 618. The record reflects that such agreements amount to billions of dollars of revenue for broadcasters. (Pls. Ex. 5; Bond Decl. ¶ 15). Because these harms go to Plaintiffs' negotiating position with the cable companies, they are difficult to measure. *See Register.com, Inc.*, 356 F.3d at 404; *ivi, Inc.*, 765 F. Supp. 2d at 618; (*See, e.g.*, Bond Decl. ¶¶ 16-17; Davis Decl. ¶ 25). This lack of quantifiability is compounded by the difficulty of determining whether consumers have "cut the cord" with their cable company due to Aereo's service or for other reasons. (Bond Decl. ¶ 19).

This harm is not speculative. For example, Sherry Brennan, a Fox executive, testified that based on her many years of experience, cable companies will demand such concessions or refuse to pay retransmission fees

based on Aereo's refusal to do so. (Hrg. Tr. at 357:9–358:7; Brennan Decl. ¶ 10; *see also* Hrg. Tr. at 40:10–41:2; Def. Ex. 43 (identifying suppression of retransmission fees as a threat)). Ms. Brennan further testified that such retransmission agreements are currently being renegotiated. (Hrg. Tr. at 361:10–15). Martin Franks, a CBS executive, similarly testified that cable companies were concerned about free-riders such as Aereo and suggested they would be unwilling to pay “when other people can take the exact same product for free.” (Hrg. Tr. at 60:8–21).

Although Aereo has submitted evidence that cable companies have not yet raised Aereo's service during retransmission agreement negotiations (Def. Ex. 53 at 157:2–158:5; Def. Ex. 52 at 56:4–8; Def. Ex. 51 at 77:5–13), Aereo's service has only just begun to operate on any significant scale and Aereo has conceded that, if not enjoined, it intends to expand its operations. (Hrg. Tr. at 225:19–226:23). The record reflects evidence that Aereo may expand beyond its limited New York market over the next year. (Hrg. Tr. at 225:22–25; Pls. Ex. 2). Moreover, even if Aereo does not intend to grow beyond the New York market until after this case is decided, it is clear that it has the capacity to grow rapidly in this market (Hrg. Tr. 229:16–230:5) and is, in fact, doing so, having gone from 100 users earlier this year to 3,500 users by the time of the preliminary injunction hearing a few months later. “The standard for preliminary injunctive relief requires a *threat* of irreparable harm, not that irreparable harm already have occurred,” *Mullins v. City of New York*, 626 F.3d

47, 55 (2d Cir. 2010), and Plaintiffs have demonstrated such a threat.

In fact, Aereo has conducted surveys suggesting its services could prompt a substantial proportion of its subscribers to cancel their cable subscriptions. (Hrg. Tr. at 209:5–13; Pls. Ex. 41 at 6, 24). Moreover, Aereo’s CEO, Chaitanya Kanojia, has explained that part of the idea behind Aereo was to allow consumers to bypass cable companies to watch broadcast television, including live television, and the record is replete with other evidence that Aereo recognizes that its service will likely prompt cable subscribers to cancel their subscriptions. (Kanojia Decl. ¶¶ 6–7; Hrg. Tr. at 202:17–203:21; *see also* Hrg. Tr. at 130:1–25, 184:20–185:12, 188:9–190:21, 201:21–24; Pls. Ex. 13; Pls. Ex. 33 at 5–6; Pls. Ex. 34; Pls. Ex. 47; Def. Ex. 37; Potenza Decl. Ex. 1 at 293:8–298:16).

Plaintiffs’ loss of control over their content is likely to harm them in other ways. For example, Plaintiffs stream their content over their own websites, in which they have invested substantial sums, and which provide an opportunity for Plaintiffs to engage in marketing and demographic research, and to build goodwill. (Brennan Decl. ¶ 9, 18; Franks Decl. ¶ 18; Davis Decl. ¶¶ 29–30). Moreover, Aereo’s activities may damage Plaintiffs’ relationships with content providers, advertisers, or licensees to the extent that Aereo’s internet streaming of Plaintiffs’ programs causes Plaintiffs to violate agreements with these entities. (*See, e.g.*, Segaller Decl. ¶¶ 4–5, 9, 11; Davis Decl. ¶ 29; Franks Decl. ¶ 12; Hrg. Tr. at 61:8–62:3).

The Court does not, however, believe that Plaintiffs will suffer the full magnitude of their claimed irreparable harm during the pendency of this litigation. *See Jayaraj v. Scappini*, 66 F.3d 36, 40 (2d Cir. 1995) (“[I]rreparable harm is measured in terms of the harm arising during the interim between the request for an injunction and final disposition of the case on the merits. . . .”). For example, Plaintiffs’ attempt to claim dramatically at oral argument that free broadcast of major television events such as the Super Bowl would become a thing of the past if Aereo is not enjoined (Hrg. Tr. at 429:25–430:7; *see also* Bond Decl. ¶ 12) is flawed because there is no evidence such harm would actually occur during the pendency of this litigation (*cf.*, *e.g.*, Pls. Ex. 4 (noting the execution of a nine-year contract)). Similarly, although Plaintiffs assert that cable companies may abandon their present business model of licensing content from Plaintiffs in favor of adopting a content delivery service similar to Aereo’s (Davis Decl. ¶ 26, Franks Decl. ¶ 26; Bond Decl. ¶ 18; Hrg. Tr. at 216:7–217:14; Pls. Ex. 38; Pls. Ex. 39), Plaintiffs have not demonstrated that this shift is likely to occur before this case is disposed of on the merits.

Similarly, the Court does not find that the evidence establishes that Aereo’s continued activities during this litigation would irreparably damage Plaintiffs’ ability to enter the mobile viewing market. (*See* Dalvi Decl. ¶¶ 5–13; Bond Decl. ¶¶ 20–21; Brennan Decl. ¶ 16). Although Plaintiffs have submitted evidence that they are investing in such platforms, which may launch later this year, (*see, e.g.*, Bond Decl. ¶¶ 20–22; Def. Ex. 51 at 180:16–181:5; Def. Ex. 54:16–57:16; Pls. Ex. 53; 54; 71),

they have provided little evidence that Aereo will impede this launch beyond the bare assertion that if Aereo continues to operate, television stations and device manufacturers may not be willing to incur the expenses associated with launching this service (Bond Decl. ¶ 22; Dalvi Decl. ¶ 13). Plaintiffs have not, for example, established that Aereo's service has prompted them to forgo their plans to launch this venture (Def. Ex. 51 at 102:24–103:11; Hrg. Tr. at 372:25–373:23), nor have they provided a foundation for their claim that Aereo's service threatens the survival of their mobile venture. Particularly given that other products are already available that can provide broadcast content to mobile devices contemporaneous with its initial broadcast (Hrg. Tr. at 306:23–307:4), Plaintiffs have not established that this harm is imminent and non-speculative.

Plaintiffs also maintain that Aereo's geographic limitation on its service is easily overridden by Aereo's users, which may damage Plaintiffs' relationships with local licensed broadcasters or advertisers. *See ivi, Inc.*, 765 F. Supp. 2d at 618. While the evidence suggests that Aereo users willing to disable Aereo's location verification measures and lie about their location may circumvent Aereo's geographic restrictions (Hrg. Tr. at 166:14–167:22), and that this may cause harm to the Plaintiffs (*see, e.g.*, Hrg. Tr. at 348:22–350:11), there is no evidence on the frequency with which users actually do so. Likewise, Plaintiffs' witnesses were unable to provide sufficient details as to how Aereo's service would increase the risk of viral infringement for the Court to accept this testimony as non-speculative, and

the Court therefore does not rely on this claimed element of Plaintiffs' irreparable harm. (Franks Decl. ¶¶ 27–30; Dalvi Decl. ¶ 16; Bond Decl. ¶¶ 6, 26–27; Brennan Decl. ¶ 11; Hrg. Tr. at 46:6–48:9).

In sum, the Court concludes that Aereo threatens Plaintiffs with irreparable harm by luring cable subscribers from that distribution medium into Aereo's service, diminishing Plaintiffs' ability to benefit from their content in ways that are fundamentally difficult to measure or prove with specificity. Plaintiffs' showing of imminent irreparable harm is substantial, but not overwhelming.

B. Plaintiffs Did Not Unduly Delay

Aereo points out that most of the Plaintiffs were aware of its existence for roughly a full year before seeking this injunction and, during that time, took no meaningful steps to seek to have Aereo shut down. (Franks Decl. ¶¶ 31–33; Davis Decl. ¶¶ 32–34; Dalvi Decl. ¶¶ 17–21; Bond Decl. ¶¶ 28–30; Brennan Decl. ¶ 21; Segaller Decl. ¶ 16). Aereo submits that this delay rebuts Plaintiffs' claims of irreparable harm and the Court should therefore disregard Plaintiffs' evidence of such harm. (Aereo Br. at 22–24).

Unexcused delay in seeking a preliminary injunction has been held to undermine or rebut a claim of irreparable harm.¹³ *See, e.g., MGM–Pathe Commc'ns*

¹³ Plaintiffs claim that Aereo's delay argument is a vestige of a line of cases in which delay rebutted a presumption of irreparable harm and that such cases are now abrogated after the Supreme Court's decision in *eBay* that no such presumption exists. (Pls. Prop. COL ¶ 115; Hrg. Tr. at 475:14–476:10); *see Salinger*, 607 F.3d

Co. v. Pink Panther Patrol, 774 F. Supp. 869, 873 (S.D.N.Y. 1991) (collecting cases). However, where plaintiffs have demonstrated that they did not unduly sleep on their rights, courts have discounted delay as an argument against irreparable harm. *See King v. Innovation Books*, 976 F.2d 824, 831–832 (2d Cir. 1992) (eight month delay excused where, during that time, plaintiff sought information regarding the alleged unlawful conduct and objected to the conduct at issue); *MGM–Pathe Commc’ns Co.*, 774 F. Supp. at 873 (roughly six month delay in seeking a preliminary injunction excused because plaintiffs were “caught in a bind” with regard to whether to file suit). These cases demonstrate that delay undermines a claim of irreparable harm not as an absolute rule, but rather because undue delay tends to be counter to the sense of urgency that typically accompanies the prospect of irreparable harm. *See King*, 976 F.2d at 831 (“This is not conduct that undercuts a sense of urgency or of an imminent threat. . . .”); *MGM–Pathe Commc’ns Co.*, 774 F. Supp. at 873.

Here, Plaintiffs’ delay was for roughly one year and was based on the limited availability of Aereo’s service, its status in beta testing, and the prospect that litigation was unnecessary until it became clear that Aereo posed a viable threat of harm. (Franks Decl. ¶¶

at 82. This is a dubious proposition given the reasons, discussed herein, why delay has been found to rebut irreparable harm. In addition, Plaintiffs have not explained why evidence that is sufficient to rebut a presumption of irreparable harm—*i.e.*, evidence courts have held suggests irreparable harm does not exist—cannot also rebut a factual showing of such harm.

31–33; Davis Decl. ¶¶ 32–34; Dalvi Decl. ¶¶ 17–21; Bond Decl. ¶¶ 28–30; Brennan Decl. ¶ 21; Segaller Decl. ¶ 16; Kanojia Decl. ¶ 17; Hrg. Tr. at 34:12–17, 38:1–24, 42:2–45:19, 55:20–25, 356:10–357:4; Def. Ex. 42; Def. Ex. 44). Although this claim is undercut by Aereo’s April 2011 announcement which disclosed that it had already received a substantial \$4.5 million in seed financing and the media attention this announcement received (Hrg. Tr. at 147:17–25, 149:16–24, 375:9–18; Pls. Ex. 45 at 2), the evidence suggests that Aereo’s service was not an imminent threat of harm to Plaintiffs until substantially later. Until January 2012, just months before Plaintiffs filed suit, Aereo had only about 100 total subscribers and to this day remains an “invitation only” product, although it now has roughly 3,500 users. (Hrg. Tr. at 164:25–165:20; 218:25–219:10). Moreover, there is testimony that suggests at least some of the Plaintiffs believed that Aereo’s technology, as described, was simply not viable. (Hrg. Tr. at 356:20–25). With this in mind, it was not unreasonable for Plaintiffs to wait until Aereo’s February 2012 announcement that it had received yet more venture financing and that it would publicly launch in New York to conclude that Aereo posed a substantial and imminent threat of irreparable harm. (Franks Decl. ¶¶ 31–33; Davis Decl. ¶¶ 32–34; Dalvi Decl. ¶¶ 17–21; Bond Decl. ¶¶ 28–30; Brennan Decl. ¶ 21; Def. Ex. 39). Plaintiffs promptly filed suit after this announcement.

As such, Plaintiffs’ delay in this case does not suggest that Plaintiffs will avoid the harms described

above or that those harms will be reparable.¹⁴ See *Tom Doherty Assocs. v. Saban Entm't Inc.*, 60 F.3d 27, 39 (2d Cir. 1995) (“The cases in which we have found that a delay rebutted the presumption of irreparable harm are trademark and copyright cases in which the fair inference was drawn that the owner of the mark or right had concluded that there was no infringement but later brought an action because of the strength of the commercial competition.”); *Guinness United Distillers & Vintners B.V. v. Anheuser-Bush, Inc.*, No. 02-cv-00861, 2002 WL 1543817, at *6, 2002 U.S. Dist. LEXIS 12722, at *19–20 (S.D.N.Y. July 12, 2002) (“Based on the limited distribution and media penetration of ‘Red Label From Budweiser’ to date, this Court will not deny injunctive relief based on plaintiff’s delay in seeking relief.”); cf. *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 68 (2d Cir. 2002). A contrary holding would require plaintiffs to rush to court at the first sign of potential infringement, even if the prospect of harm is remote, and is thus counter to

¹⁴ Aereo notes that, before filing suit, representatives of Plaintiffs or their affiliates met with Aereo personnel, expressed interest in Aereo’s system, or indicated that they might be interested in doing business with Aereo. (Kanojia Decl. ¶ 18; Hrg. Tr. 150:7–151:15, 162:13–24). The Court does not find credible claims that Aereo was caught off guard by Plaintiffs’ decision to sue (Hrg. Tr. at 172:16–173:1), particularly given the evidence that Aereo knew its activities would likely be viewed as infringement (Hrg. Tr. at 142:16–22), its knowledge of the likelihood it would be sued and its decisions to earmark funds for defending an infringement suit (Hrg. Tr. at 175:8–177:4; see also Pls. Ex. 77), and media coverage suggesting that it was likely to be sued (Hrg. Tr. at 174:6–10; Pls. Ex. 20).

the requirement that irreparable harm must be “imminent.” *See Rex Med. L.P.*, 754 F. Supp. 2d at 621.

VI. BALANCE OF HARDSHIPS

The third factor that the Court must consider is the balance of hardships, issuing an injunction only if the balance of hardships tips in the Plaintiffs’ favor. *Salinger*, 607 F.3d at 80. The harms Plaintiffs are likely to suffer if Aereo is not enjoined are discussed above.

Aereo identifies several hardships that it will suffer should an injunction issue, the majority of which could not be remedied through the requirement of an injunction bond. *See* Fed. R. Civ. Proc. 65(c); *CollaGenex Pharms., Inc. v. IVAX Corp.*, 375 F. Supp. 2d 120, 140 (E.D.N.Y. 2005) (Pohorelsky, M.J.) (financial harm to defendant could be ameliorated by the requirement of a bond). First and foremost, the evidence establishes that an injunction may quickly mean the end of Aereo as a business. *See MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 195 (2d Cir. 2004) (“[I]f a preliminary injunction were issued, D’Agostino would be forced to shut down its online grocery store, at least temporarily, perhaps permanently losing customers.”); *Vanlines.com LLC v. Net-Marketing Group, Inc.*, 486 F. Supp. 2d 292, 297 (S.D.N.Y. 2007). Aereo has sufficient capital to continue operations for just six to seven months, after which it would likely shut down absent investment of further capital. (Hrg. Tr. at 170:10–16, 231:13–232:17). The extent of this harm is further manifest in the substantial investment in both labor and capital that Aereo has already expended to develop and launch its system, at least some of which would come to naught if

Aereo were to go out of business. (Kanojia Decl. ¶¶ 48–49; Hrg. Tr. at 144:10–24, 238:9–239:17). For example, Mr. Kanojia testified that the development of Aereo’s antennas and selecting a site for Aereo’s facilities required substantial investment. (Hrg. Tr. at 144:10–24, 145:19–146:10). Further, because Aereo offers users a free 90–day trial, if it is enjoined at this point it will not be able to recoup the money it has spent so far, as it anticipated at the hearing that it would only begin receiving revenue in June 2012. (Kanojia Decl. ¶ 51).

Aereo also presented testimony that an injunction will diminish or destroy a variety of its intangible resources. For example, an injunction is likely to cause Aereo to lose employees and damage its ability to attract investors to obtain new capital. *See M & G Elecs. Sales Corp. v. Sony Kabushiki Kaisha*, 250 F. Supp. 2d 91, 105 (E.D.N.Y. 2003); (Kanojia Decl. ¶¶ 54–55). A majority of Aereo’s employees left jobs at other companies in order to come to Aereo and, according to Mr. Kanojia’s testimony, would be likely to seek other employment should an injunction issue. (Hrg. Tr. at 160:2–16, 170:5–20, 171:17–172:2). Moreover, Aereo also maintains that an injunction will damage its goodwill with its customers, defeat its substantial investments in launching its service, and diminish its competitive advantage in launching a unique and innovative product. *See id.*; (Kanojia Decl. ¶¶ 52–53). For example, Aereo has expended substantial funds to develop its brand and market its service, and to develop favorable media coverage. (Hrg. Tr. at 159:3–12, 163:2–164:24). Mr. Kanojia testified

that, should an injunction issue, Aereo likely would lose all of its customers and the goodwill it has generated. (Hrg. Tr. at 170:21–23; Kanojia Decl. ¶ 52)

Plaintiffs put forward only a limited factual challenge to Aereo’s claimed hardships.¹⁵ Rather, Plaintiffs’ primary argument on this point is to cite *ivi* for the proposition that Aereo’s harms are not cognizable because Aereo’s business is based on infringement. *See ivi, Inc.*, 765 F. Supp. 2d at 620–21 (“Having found that *ivi* has infringed plaintiffs’ copyrights, it follows that *ivi* is not legally harmed by the fact that it cannot continue streaming plaintiffs’ programming, even if this ultimately puts *ivi* out of business.”). *ivi*’s conclusion on this point is unpersuasive in the present case, however, because it is founded on at least a strong showing of likelihood of success, if not a firm conclusion of liability, and does not adequately contemplate the possibility that the infringer’s service may be lawful. Having concluded, in this case, that Aereo’s service is likely lawful, the Court cannot disregard the harms to Aereo that an injunction would cause by assuming its business is founded on infringement. *See, e.g., Shred–It USA, Inc. v. Mobile Data Shred, Inc.*, 202 F. Supp. 2d 228, 234 (S.D.N.Y. 2002) (“The harm to Cruz, who operates a new and relatively small business, if she is *improperly* enjoined from operating her business for the few months

¹⁵ Plaintiffs have suggested that Aereo might sell the antenna technology it has developed, but have not put forth evidence as to the feasibility of doing so (Hrg. Tr. at 232:24–233:17), and this possibility does not respond to the prospect that Aereo’s business model, as it currently stands, could be disrupted or destroyed.

required to hold a trial in this case will be much greater than the harm to Shred-It”) (emphasis added); *Ottoman’s v. Sunshine State Laboratories*, No. 92-cv-05386, 1992 WL 212473, at *1-2, 1992 U.S. Dist. LEXIS 12710, at *3-4 (S.D.N.Y. Aug. 24, 1992); *see also Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988).

In light of this evidence, the Court finds that the balance of hardships certainly does not tip “decidedly” in favor of Plaintiffs.

VII. PUBLIC INTEREST

Finally, the Court must consider whether an injunction is in the public interest. *Salinger*, 607 F.3d at 82; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (courts must consider whether the public interest would be disserved by granting an injunction). There is limited Second Circuit precedent on where the public interest lies because the Court only recently began considering this factor. *Salinger*, 607 F.3d at 80 n.8 (“This Court has rarely considered the public’s interest before deciding whether an injunction should issue. . . . [T]he public’s interest has not in the past been a formal factor in this Court’s standard for when to issue copyright injunctions.”). However, the Court finds that an injunction in this case would not disserve the public interest.

There is a strong public interest in the copyright system’s function of motivating individuals to make available their creative works and increase the store of public knowledge. *See id.* at 82 (“The object of

copyright law is to promote the store of knowledge available to the public. But to the extent it accomplishes this end by providing individuals a financial incentive to contribute to the store of knowledge, the public's interest may well be already accounted for by the plaintiff's interest."); *CJ Prods. LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 146 (E.D.N.Y. 2011) (noting the strong public interest in protecting copyrights and concluding that this supported issuing an injunction); *WPIX, Inc. v. ivi, Inc.*, No. 10-cv-07415, 2011 WL 1533175, at *4, 2011 U.S. Dist. LEXIS 43582, at *13-14 (S.D.N.Y. Apr. 18, 2011) ("The programming that defendants wish to make available to the public is not a natural resource that may be exploited by whomever obtains access. It is proprietary material that plaintiffs spend millions of dollars to develop and protect. The public is served by enjoining those who seek to illegally exploit the statutory rights of copyright holders."). In particular, Plaintiffs note the public interest in maintaining the copyright system and protecting the content that they generate, arguing that the disruption to their business model by activities like Aereo's jeopardizes the creation of such content.

Aereo and *amici* argue that the public interest would be disserved by an injunction because the public has an interest in the availability of the broadcast and the free receipt of Plaintiffs' content in the marketplace of ideas. This argument is not persuasive, as there are numerous other methods through which the public can lawfully receive access to Plaintiffs' content, including standard broadcast transmission, cable television, and

licensed internet streaming sites, among others. There is a logical gap—one that Aereo and *amici* fail to bridge—between any public interest in receiving broadcast television signals generally and the public interest in receiving them from Aereo’s particular service.

Relatedly, *amici* argue that there is a public interest in the free access to and reception of broadcast television. (EFF Br. at 19). The Court notes, however, that even setting aside the other lawful methods through which consumers may access broadcast television even in Aereo’s absence, Aereo is a business and does not provide “free” access to broadcast television. Moreover, although this argument carries some force to the extent that there is a public interest in access to television broadcast over the free public airwaves and Aereo facilitates such access, it cannot be afforded substantial weight because it proves too much. The same logic would support a finding that the public interest favors imposing no copyright restrictions on any form of redistribution of Plaintiffs’ broadcast television, as unrestrained piracy of that content would also increase public access to content broadcast over the free public airwaves. For example, distributing over the internet an infringing bootleg copy of a television program that was initially broadcast on the public airwaves increases access to that program. *Amici*’s argument thus bears an unacceptable resemblance to advocacy that copyright infringement of broadcast television is generally in the public interest, a point on which this Court cannot agree.

CONCLUSION

Because the Court concludes that it cannot accept Plaintiffs' novel attempt to distinguish *Cablevision*, Plaintiffs have not shown a likelihood of success on the merits. And although they have demonstrated that they face irreparable harm, they have not demonstrated that the balance of hardships decidedly tips in their favor. As such, the Court DENIES Plaintiffs motion for a preliminary injunction.

SO ORDERED.

Dated: July 11, 2012

New York, New York

/s/

ALISON J. NATHAN

United States District Judge

127a

Appendix C

United States Court of Appeals
Second Circuit

WNET, THIRTEEN, Fox Television Stations, Inc.,
Twentieth Century Fox Film Corporation,
WPIX, Inc., Univision Television Group, Inc.,
The Univision Network Limited Partnership,
and Public Broadcasting Service,
Plaintiffs–Counter–Defendants–Appellants,

v.

AEREO, INCORPORATED, fka Bamboom Labs, Inc.,
Defendants–Counter–Claimants–Appellees.

American Broadcasting Companies Inc.,
Disney Enterprises, Inc., CBS Broadcasting Inc.,
CBS Studios Inc., NBCUniversal Media, LLC,
NBC Studios, LLC, Universal Network Television,
LLC, Telemundo Network Group LLC,
WNJU–TV Broadcasting LLC,
Plaintiffs–Counter–Defendants–Appellants,

v.

Aereo, Inc.,
Defendant–Counter–Claimant–Appellee.

Nos. 12–2786, 12–2807.
July 16, 2013.

ORDER

Following disposition of this appeal on April 1, 2013, Plaintiffs-Appellants, filed petitions for rehearing *in banc*. An active judge of the Court requested a poll on whether to rehear the cases *in banc*. A poll having been conducted and there being no majority favoring *in banc* review, rehearing *in banc* is hereby **DENIED**.¹

DENNY CHIN, Circuit Judge, joined by RICHARD C. WESLEY, Circuit Judge, dissenting from the denial of rehearing en banc.

Aereo, Inc. (“Aereo”) captures over-the-air broadcasts of copyrighted television programs and retransmits them to subscribers by streaming them over the Internet. For a monthly fee, Aereo’s customers—members of the public—may watch the programs live or record them for later viewing. Aereo retransmits the programming without authorization of the copyright holders and without paying a fee. The question is whether, by doing so, Aereo is infringing on the exclusive right of the copyright owners “to perform the copyrighted work publicly.” 17 U.S.C. § 106(4).

Aereo argues that its transmissions are not “public” performances. Rather, Aereo contends, its transmissions are “private” performances because its system uses thousands of individual, dime-sized antennas that enable subscribers to make their own purportedly “unique” copies of the programming for retransmission back to themselves. Under this theory,

¹ José A. Cabranes, *Circuit Judge*, was recused from consideration of the matter.

Aereo maintains that it may, for example, stream the Super Bowl “live” to 50,000 subscribers and yet, because each subscriber has an individual antenna and a “unique” copy of the broadcast, these are not “public” but “private” performances.

Based on this Court’s decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009) (mem.) (“*Cablevision*”), the panel majority in these tandem cases accepted this argument and held that Aereo is not engaging in copyright infringement. *See WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013). Now this Court has denied the petitions for rehearing *en banc*. I dissented from the majority’s panel decision, 712 F.3d at 696, and I now dissent from the Court’s denial of rehearing *en banc*.

First, we should consider the two cases *en banc* because they raise “a question of exceptional importance,” Fed. R. App. P. 35(a)(2), and because “en banc consideration is necessary to secure or maintain uniformity of the court’s decisions,” *id.* R. 35(a)(1). Second, the text of the Copyright Act and its legislative history make clear that Aereo’s retransmissions are public performances. Third, Aereo’s reliance on *Cablevision* is misplaced because, in my view, *Cablevision* was wrongly decided. Finally, even assuming *Cablevision* was correctly decided, *Cablevision* has been misapplied by the majority and should not be extended to the circumstances of this case. I discuss each of these issues in turn.

I. *En Banc* Review

The petitions for rehearing should be granted because these cases merit *en banc* review.

A. *Question of Exceptional Importance*

Federal Rule of Appellate Procedure 35 provides that an *en banc* rehearing is appropriate if “the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a)(2). These cases present such a question. Indeed, the panel majority’s decision has already had a significant impact on the entertainment industry.

Industry observers predict that the decision will encourage other companies that retransmit public television broadcasts to seek elimination of, or a significant reduction in, their retransmission fees.¹ Time Warner Cable has already announced its intention to look into adopting an Aereo-like system to avoid these fees entirely,² and Dish Network is in talks

¹ See John M. Gatti & Crystal Y. Jonelis, *Second Circuit Deals Blow to Rights of Broadcasters Under the Copyright Act*, *Intell. Prop. & Tech. L.J.*, July 2013, at 16, 18 (“This decision is a significant setback for broadcasters, who maintain that their works are being stolen by Aereo, and may very well embolden Aereo and other similar start-up ventures.”); Tristan Louis, *Aereo: The Future of TV Is Here Today*, *Forbes*, Apr. 13, 2013, available at <http://www.forbes.com/sites/tristanlouis/2013/04/13/aereo-the-future-of-tv-is-here-today/>.

² See Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, *FierceCable*, Apr. 26, 2012, <http://www.fiercecable.com/story/britt-aereo-couldhelp-time-warner-cablestop-paying-retransmission-consent/2012-04-26>.

to acquire Aereo itself.³ To protect their copyrighted material, FOX, Univision, and CBS have reportedly threatened to move their free public broadcasts to paid cable if Aereo is permitted to continue with its service.⁴ CBS has already had discussions with cable companies about taking its local signals off the air in the New York metropolitan area to prevent Aereo from retransmitting its broadcasts for free.⁵

Meanwhile, Aereo has announced plans to expand to twenty-two cities in 2013, including Boston, Atlanta, Chicago, Washington, D.C., and Philadelphia.⁶ In February 2013, while still awaiting the panel's decision,

³ Christopher S. Stewart & William Launder, *Diller Wins a Broadcast-TV Clash*, Wall St. J., July 12, 2012, at B1, available at <http://online.wsj.com/article/SB10001424052702303644004577521362073162108.html>; Janko Roettgers, *Does Dish Want To Buy Aereo? Broadcasters Would Love To Know*, paidContent (April 4, 2013), <http://paidcontent.org/2013/04/04/does-dish-want-to-buy-aereo-broadcasters-would-love-to-know>.

⁴ See Louis, *supra* note 1; Aimee Ortiz, *Fox Threatens to Leave Network TV in Protest Over Aereo Lawsuit*, Christian Sci. Monitor, Apr. 11, 2013, available at <http://www.csmonitor.com/Innovation/Pioneers/2013/0411/Fox-threatens-to-leave-network-TV-in-protest-over-Aereo-lawsuit>; Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. Times, Apr. 9, 2013, available at <http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html>.

⁵ See Stetler, *supra* note 4.

⁶ See Press Release, Aereo, Inc., *Aereo Announces Expansion Plans for 22 New U.S. Cities* (Jan. 8, 2013), available at https://aereo.com/assets/marketing/mediakit/press_release_20130108.pdf.

Aereo cautiously expanded from New York City to the entire New York metropolitan area, which includes some parts of New Jersey, Connecticut, and Pennsylvania.⁷ Since the panel's decision was filed in April, Aereo has already expanded to the Boston and Atlanta markets and will expand to Chicago in September, making its services available to residents of Massachusetts, New Hampshire, Vermont, Georgia, Alabama, North Carolina, Illinois, and Indiana.⁸

In recent years, with greater competition from cable and the Internet, television broadcasters have come to rely more heavily on retransmission fees, rather than advertising revenue, to make their free public broadcasts profitable.⁹ In fact, as with newspaper companies, broadcasters are relying increasingly on subscriber fees to fund the creation of content. The majority's decision, which permits Aereo

⁷ See Press Release, Aereo, Inc., Aereo Announces Expansion of Consumer Access to Its Groundbreaking Technology Across the New York City Greater Metropolitan Area (Feb. 25, 2013), *available at* https://aereo.com/assets/marketing/mediakit/press_release_20130225.pdf.

⁸ See Press Release, Aereo, Inc., Aereo Announces Launch Date for Chicago (June 27, 2013), *available at* https://aereo.com/assets/marketing/mediakit/press_release_20130627.pdf; Press Release, Aereo, Inc., Aereo Sets Launch Date for Atlanta (May 14, 2013), *available at* https://aereo.com/assets/marketing/mediakit/press_release_20130514.pdf; Press Release, Aereo, Inc., Aereo Sets Launch Date for Boston (Apr. 23, 2013), *available at* https://aereo.com/assets/marketing/mediakit/press_release_20130423.pdf.

⁹ See Stelter, *supra* note 4.

to retransmit television broadcasts without paying a fee, undermines this model. Indeed, the filing of this Court's decision on April 1, 2013 caused the share price for major media firms to drop because of the threat it posed to a vital source of their revenue.¹⁰

In a decision we issued last year, *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1585 (2013), we addressed the harm that would result from permitting a company (in that case, ivi) to stream copyrighted television programming over the Internet without licenses:

Indeed, ivi's actions—streaming copyrighted works without permission—would drastically change the industry, to plaintiffs' detriment. The absence of a preliminary injunction would encourage current and prospective retransmission rights holders, as well as other Internet services, to follow ivi's lead in retransmitting plaintiffs' copyrighted programming without their consent. The strength of plaintiffs' negotiating platform and business model would decline. The quantity and quality of efforts put into creating television programming, retransmission and advertising revenues, distribution models and schedules—all would be adversely affected. These harms would extend to other copyright holders of television programming. Continued live retransmissions of

¹⁰ See *Signalled Out*, Economist, Apr. 13, 2013, available at <http://www.economist.com/news/business/21576161-aereo-smallst-art-up-hasinfuriated-television-executives-signalled-out>.

copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry.

691 F.3d at 286 (citations omitted). These concerns apply with equal force here.

B. *Uniformity of the Court's Decisions*

En banc rehearing is also appropriate when “necessary to secure or maintain uniformity of the court’s decisions.” Fed. R. App. P. 35(a)(1). Here, the majority’s decision conflicts with our precedent, as this Court has repeatedly acknowledged that activity similar to Aereo’s constitutes copyright infringement.

In *ivi*, for example, although the issue was not even contested, we recognized that retransmitting copyrighted television programming by streaming it live over the Internet constituted a public performance in violation of the Copyright Act. *See* 691 F.3d at 278, 286–87. Similarly, in *United States v. American Society of Composers, Authors & Publishers*, 627 F.3d 64 (2d Cir. 2010) (“ASCAP”), *cert. denied*, 132 S.Ct. 366 (2011), where, again, the issue was not even contested, we observed that the streaming of a song, like the streaming of a “television or radio broadcast,” is a public performance. *Id.* at 74 (but holding that downloads of music do not constitute public performances). Finally, in *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), it was undisputed that providing users with access to receivers connected to private phone lines—arguably the equivalent of the individual antennas here—so they could listen to public radio broadcasts in remote

locations was a public performance. *Id.* at 106–07, 111–12.¹¹

There is no substantive difference between what the retransmitters in *ivi*, *ASCAP*, and *Kirkwood* did and what Aereo does here. While Aereo argues that its purportedly individual antennas and unique copies render its performances private, the tiny antennas and copies are technologically superfluous. The majority’s decision, if permitted to stand, casts doubt on all these cases.

II. *Aereo’s Service Violates the Copyright Act*

In my dissent from the panel majority’s decision, I explained why Aereo’s unlicensed retransmissions are illegal public performances under the Copyright Act. 712 F.3d at 697–701. I summarize those reasons here.

A. *The Language of the Statute*

The text of the Copyright Act makes clear that Aereo is infringing upon the broadcasters’ exclusive right “to perform the copyrighted work[s] publicly.” 17

¹¹ See also *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, No. CV 12–6921, 2012 WL 6784498, at *1, *3–6 (C.D. Cal. Dec. 27, 2012) (holding that a service “technologically analogous” to Aereo was publically performing television broadcasts by streaming them over the Internet); *Warner Bros. Entm’t, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1007–12 (C.D. Cal. 2011) (holding that allowing customers to “rent” a remote DVD player and stream movies over the Internet was a public performance); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (holding that streaming movie clips over the Internet was a public performance), *aff’d*, 342 F.3d 191 (3d Cir. 2003).

U.S.C. § 106(4). The Copyright Act defines “[t]o perform or display a work ‘publicly’” as:

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

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times [the “transmit clause”].

Id. § 101. To “transmit” a performance means “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.*

Aereo’s system fits squarely within the plain meaning of the transmit clause. The system is a “device or process,” which Aereo uses first to receive copyrighted images and sounds and then to transmit them to its subscribers “beyond the place from which they are sent,” that is, beyond the point of origination. Its subscribers are strangers—paying “members of the public”¹²—and under the statute, it matters not

¹² While “the public” and “members of the public” are undefined, some guidance is provided by the performance clause, which defines “[t]o perform or display a work ‘publicly’” as “to perform or display it at a place open to the public or at any place where a

whether they are receiving the images “in the same place or in separate places, [or] at the same time or at different times.” Under any reasonable construction of the statute, Aereo is performing the broadcasts publicly as it is transmitting copyrighted works “to the public.” Therefore, Aereo is committing copyright infringement within the plain meaning of the statute.

B. The Legislative History

To the extent the statute is ambiguous, its legislative history supports the conclusion that Aereo is engaging in public performances. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Supreme Court held that community antenna television (“CATV”) systems—which captured public television broadcasts with antennas set on hills and retransmitted them to their subscribers without a license—were not “performing” the works and thus were not committing copyright infringement. Congress, however, expressly rejected this outcome when it passed the 1976 Copyright Act. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984). It revised the definitions of “perform” and “publicly” in the 1976 Act specifically to render the CATV systems’ unlicensed retransmissions illegal. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 469 n.17 (1984); H.R. Rep. No. 94-1476, at 63, *reprinted in* 1976 U.S.C.C.A.N.

substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” 17 U.S.C. § 101 (emphasis added).

5659, 5677 (“[A] cable television system is performing when it retransmits the broadcast to its subscribers. . . .”).

Congress was not just concerned about the then-newly-emerging CATV systems. Rather, it broadly defined the term “transmit” to ensure that all future technological advances would be covered. It explained that:

The definition of “transmit” . . . is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a “transmission,” and *if the transmission reaches the public in [any] form*, the case comes within the scope of clauses (4) or (5) of section 106.

H.R. Rep. No. 94–1476, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (emphasis added). Congress also specified that a public performance could be received in different places and at different times. *Id.* at 64–65, *reprinted in* 1976 U.S.C.C.A.N. at 5678. Congress thus made clear its intent to require a license for “[e]ach and every method by which the images or sounds comprising a performance or display are picked up and conveyed”—“if the transmission reaches the public.” *Id.* Hence, no matter how Aereo’s system functions as a technical matter, because its unlicensed retransmissions reach the public, it is surely engaging in copyright infringement as Congress intended the statute to be interpreted.

III. *Cablevision Was Wrongly Decided*

The panel majority's decision is based entirely on *Cablevision*. In my view, however, as some of the broadcasters argue, *Cablevision* was wrongly decided. Of course, I was the district judge in *Cablevision*, and I recognize that the panel was bound by the Court's decision in *Cablevision*, to the extent the decision is controlling. But rehearing these cases *en banc* would also give the Court the opportunity to reconsider *Cablevision*.

Cablevision involved a cable operator (Cablevision) with licenses to retransmit broadcast and cable programming to its paying subscribers. *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F.Supp.2d 607, 610 (S.D.N.Y. 2007), *rev'd sub nom. Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). Television content providers sought to enjoin Cablevision's Remote Storage Digital Video Recorder system (the "RS-DVR"), which allowed customers to record Cablevision's licensed live retransmissions with equipment located at Cablevision's facilities and then to play back those programs on their home television sets. *Cablevision*, 536 F.3d at 124-25. In essence, the RS-DVR functioned just like a set-top digital video recorder ("DVR"), except that Cablevision had to transmit the copies from its remote facility to the user's household. *See id.* The content providers argued that Cablevision needed additional licenses to do so because it was transmitting their copyrighted content to the public. *Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 609. This Court rejected that argument "[b]ecause each

RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber . . . [and thus] such transmissions are not performances ‘to the public.’” *Cablevision*, 536 F.3d at 139.

Since that decision was filed in 2008, *Cablevision’s* interpretation of the transmit clause has been the subject of much academic criticism.¹³ Even the

¹³ See, e.g., 2 Paul Goldstein, *Goldstein on Copyright* § 7.7.2, at 7:168 (3d ed. Supp. 2012) (“The error in the Second Circuit’s construction of the transmit clause was to treat ‘transmissions’ and ‘performance’ as synonymous, where the Act clearly treats them as distinct—and different—operative terms.”); Daniel L. Brenner & Stephen H. Kay, *ABC v. Aereo, Inc.: When Is Internet Distribution a “Public Performance” Under Copyright Law*, *Intell. Prop. & Tech. L.J.*, Nov. 2012, at 12, 15 (“In a world of digital server technology, why should infringement turn on whether the defendant uses a less efficient, separate copy system than using a common master copy for each customer requesting one?”); Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?* 26 (Columbia Pub. Law & Legal Theory Working Papers 2008), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1050&context=columbia_pllt [hereinafter Ginsburg, *Recent Developments*] (“The phrase ‘members of the public capable of receiving the performance’ is not intended to narrow the universe of ‘the public.’ On the contrary, its role is to clarify that a transmission is still ‘to the public’ even if its receipt is individualized.”); Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, *Media Inst.*, Apr. 23, 2013, www.mediainstitute.org/IPI/2013/042313.php [hereinafter Ginsburg, *Poor (Cable)Vision*] (“[T]he decision offered a roadmap that would considerably undermine the public performance right, possibly evading its application to new business models for digital content delivery.”); Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 Or.

United States, in its amicus brief opposing the grant of certiorari in *Cablevision*, argued that this portion of the decision “could be read to endorse overly broad, and incorrect, propositions about the Copyright Act.”¹⁴ Specifically, the government acknowledged the argument that *Cablevision* could be construed to authorize a legally “suspect” service “in which the subscriber ‘will simply send an electronic request first to ‘copy’ and then to ‘play’ the desired work.’”¹⁵ More recently, the Central District of California has declined to follow *Cablevision*, in a case involving a system “technologically analogous” to Aereo’s system, after concluding that *Cablevision*’s “focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.” *Fox Television*

L.Rev. 505, 532 (2010) (“The statute does not say ‘capable of receiving the transmission.’ Switching the words ‘performance’ and ‘transmission’ changed the outcome of the case. . . .”); Mary Rasenberger & Christine Pepe, *Copyright Enforcement and Online File Hosting Services: Have Courts Stuck the Proper Balance?*, 59 J. Copyright Soc’y U.S.A. 627, 693 (2012) (“The ability to hold a service directly liable for publicly performing copyrighted works online has also been severely curtailed by the potential loophole created by the *Cablevision* decision and its recent progeny, Aer[e]o.”).

¹⁴ See Brief for the United States as Amicus Curiae at 6, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S.Ct. 2890 (2009) (No. 08–448), 2009 WL 1511740 [hereinafter “U.S. *Cablevision* Amicus Br.”].

¹⁵ *Id.* at 21. The government nonetheless opposed the granting of certiorari because it believed the procedural posture of the case made it “an unsuitable vehicle for clarifying the proper application of copyright principles to technologies like the one at issue.” *Id.* at 6.

Stations, Inc. v. BarryDriller Content Sys., PLC, No. CV 12–6921, 2012 WL 6784498, at *1, *3–5 (C.D. Cal. Dec. 27, 2012), *appeal docketed sub nom., Fox Television Stations, Inc. v. Aereokiller, LLC*, No. 13–55156 (9th Cir. filed Jan. 25, 2013).

These criticisms are well-founded. In my opinion, the Court should take this opportunity to reconsider *Cablevision’s* interpretation of the transmit clause because the decision conflicts with the text of the statute in the following ways.

1. “*Transmission*” Instead of “*Performance*”

First, *Cablevision* held that “the transmit clause directs us to identify the potential audience of a given transmission” and if the “transmission is made to a single subscriber using a single unique copy produced by that subscriber,” then the transmission is a private performance because no one else can receive it. *Cablevision*, 536 F.3d at 139. In reaching this conclusion, this Court erroneously conflated the phrase “performance or display” with the term “transmission,” shifting the focus of the inquiry from whether the transmitter’s audience receives the same content to whether it receives the same transmission.¹⁶

¹⁶ See Malkan, *supra* note 13, at 536 (“[E]ven though the transmit clause refers, as [*Cablevision*] put it, to ‘the performance created by the act of transmission,’ a transmission and a performance remain, technically and legally, two distinct things. The difference between them is that a transmission is the medium through which a performance is delivered ‘to the public.’ This is why there may be more than one transmission of the same performance, that is, why members of the public may receive a public performance at ‘different times.’” (citations omitted)).

This Court in *Cablevision* reasoned that “[t]he fact that the statute says ‘capable of receiving the performance,’ instead of ‘capable of receiving the transmission,’ underscores the fact that a transmission of a performance is itself a performance.” *Cablevision*, 536 F.3d at 134 (emphasis added). But unless a contrary result is readily apparent, we generally presume Congress intends different terms in the same statute to have different meanings. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S.Ct. 817, 825 (2013). Here, there is no reason to assume Congress intended “performance” and “transmission” to have the same meaning. Although Congress defined “[t]o perform . . . a work ‘publicly’” as “to transmit . . . to the public,” this is the definition of “publicly,” not “perform.” See 17 U.S.C. § 101. Neither “to perform”¹⁷ nor “to display”¹⁸ is defined as “to transmit.” See *id.* In fact, like “publicly,” the definition of “to transmit”¹⁹ also distinguishes the “performance or display” from the process by which they are transmitted. See *id.* Even within the transmit

¹⁷ “To ‘perform’ a work means to recite render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101.

¹⁸ “To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” 17 U.S.C. § 101.

¹⁹ “To ‘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.” 17 U.S.C. § 101.

clause itself, it would be counterintuitive to conclude that “transmission” is synonymous with “performance” because “the members of the public capable of receiving *the performance or display* . . . [can receive it] in the same place or in separate places and at the same time or at different times.” *Id.* (emphasis added). It is difficult to imagine a single transmission capable of reaching people “in separate places” and “at different times.”²⁰

Thus, there is no indication Congress meant anything other than what it said: the public must be capable of receiving the *performance or display*, not the *transmission*. All that matters is whether the transmitter is enabling members of the public to receive the copyrighted work embodied in the *performance or display*, not whether they can receive the same legally insignificant transmission. *See Fox Television Stations, Inc.*, 2012 WL 6784498, at *4 (“Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast

²⁰ As Professor Jane C. Ginsburg has noted:

Reading the statute to equate “transmission” with “performance” reads “different times” out of the statute. Once one recognizes that it is not possible for the two people to receive the *same transmission* “at different times,” then it becomes clear that the “public” character of the transmission cannot turn on capacity to receive a transmission. Rather, what makes a transmission, whether simultaneous or individualized on-demand, and whatever the number of source copies, “public” is its communication to “*members of the public.*”

Ginsburg, *Poor (Cable) Vision*, *supra* note 13.

transmission.”). It makes no difference whether each member of the public receives the work by means of several individualized, asynchronous transmissions or a single, shared transmission.

2. *Aggregation and “Copies”*

Second, having conflated the terms “performance” and “transmission,” the Court tried to accommodate the problematic “in separate places” and “at different times” language. By focusing on the unique transmission, *Cablevision* first discerned a rule that individualized transmissions should not be aggregated when determining whether a transmission is a public performance. *See Cablevision*, 536 F.3d at 138. The Court then recognized an exception to that rule, however, when multiple private transmissions are made from the same copy of the work. *See id.* According to this exception, “*if the same copy of a given work is repeatedly played (i.e., ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.*” *Id.* (alteration and internal quotation marks omitted) (quoting 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][3], at 8–142 (2007)); *see also WNET, Thirteen*, 712 F.3d at 688–89 & n.11 (explaining that *Cablevision’s* “exception to this no-aggregation rule,” although “in some tension” with the Court’s focus on the particular transmission, is “a way to reconcile the ‘different times’ language” that *Cablevision* otherwise “would essentially read out” of the statute).

The Court derived these principles from a Third Circuit case and a treatise, even though—as the Court

acknowledged—neither source “explicitly explain[ed] *why* the use of a distinct copy affects the transmit clause inquiry.” *Cablevision*, 536 F.3d at 138 (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984); 2 Nimmer on Copyright § 8.14[C][3]). Nevertheless, the Court agreed with “their intuition” because “the use of a unique copy may limit the potential audience of a transmission.” *Id.* Perhaps when it was more costly to make copies, the use of a unique copy could limit a transmitter’s potential audience, but advancements in technology have rendered such reasoning obsolete.²¹

But even assuming this logic were still to hold true today, it ignores the fact that the definition of “to perform . . . a work ‘publicly’” does not use the terms “copy” or “copies.” Nor does the legislative history. See *Fox Television Stations*, 2012 WL 6784498, at *3–4. If Congress had intended the definition to turn on whether a unique copy was used, it knew how to say so. Indeed, Congress defined “copies” in the same section of the Copyright Act. See 17 U.S.C. § 101. Moreover, it defined that term as “material objects . . . in which a work is *fixed*,” and it included the following sentence in the definition of “fixed”: “A work consisting of sounds, images, or both, that are being *transmitted*, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its *transmission*.” *Id.*

²¹ See Dennis S. Karjala, “Copying” and “Piracy” in the Digital Age, 52 Washburn L.J. 245, 263 (2013) (“In the early days of digital technology, when memory was costly, such designs may have been prohibitively expensive, but now that memory is cheap, they simply become technologically inefficient or inelegant.”).

(emphases added). In other words, Congress plainly envisioned transmissions that did not involve any copies.²² Thus, it is unlikely that Congress intended the transmit clause inquiry to turn on the existence of “copies.” See *Fox Television Stations*, 2012 WL 6784498, at *4 (“*Cablevision’s* focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.”).

3. “Transmission” Instead of “Transmitting”

Third, the problem of determining which individual transmissions to aggregate only arises because the Court disaggregated the act of transmitting into isolated transmissions. The Copyright Act does not use the *noun* “transmission,” nor the *nouns* “public performance” nor “private performance,” but instead uses the *verbs* “to perform . . . a work ‘publicly’ “ and “to transmit . . . to the public.” 17 U.S.C. § 101. It is the transmitter’s *actions* that render him liable, not his individual *transmissions*,²³ and he can “transmit” by

²² Compare H.R. Rep. No. 94-1476 at 63, reprinted in 1976 U.S.C.C.A.N. at 5676-77 (“[A] sing[er] is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether *simultaneously or from records*) . . .” (emphasis added)), with *Cablevision*, 536 F.3d at 137 (“[N]o transmission of an audiovisual work can be made, *we assume*, without using a copy of that work . . .” (emphasis added)).

²³ See H.R. Rep. No. 94-1476 at 63, reprinted in 1976 U.S.C.C.A.N. at 5676-77 (“[T]he concepts of public performance or public display cover not only the initial rendition or showing, but also *any further act* by which that rendition or showing is transmitted or communicated to the public.” (emphasis added)).

sending one transmission or multiple transmissions. Thus, there is no textual reason why each individual transmission must be able to reach the public. Based on the plain language, it is sufficient if the actor is “transmit[ting]” the same performance or display and his recipients are members of the public.²⁴

4. *Transmit Clause, but not Performance Clause*

Fourth, the Court erred by looking at the transmit clause in isolation, rather than in context with the performance clause. *See Cablevision*, 536 F.3d at 134. Congress clearly meant for the two clauses to work in conjunction. The performance clause covers the act of performing or displaying a work at a single place open to the public, while the transmit clause covers the act of transmitting the work either to such a public place or to any other place (or places) where the public can receive it. *See* 17 U.S.C. § 101. Thus, only the performance clause requires that the public be able to view the performance or display at the same time and place; the transmit clause expressly removes that limitation.²⁵ Moreover, the performance clause identifies at least one group included within the meaning of “the public”:

²⁴ *See* Ginsburg, *Recent Developments*, *supra* note 13, at 26.

²⁵ *See* H.R. Rep. No. 94–1476 at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (“Clause (2) of the definition of ‘publicly’ in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process.”).

“a substantial number of persons outside of a normal circle of a family and its social acquaintances.” *Id.* This explanatory phrase, turning on the relationship between the transmitter and the recipients, accords with the plain meaning of “the public,” *see WNET, Thirteen*, 712 F.3d at 698–99 (Chin, J., dissenting), and provides a textual basis for distinguishing between public and private performances.²⁶

5. “Copies” Instead of “Any Device or Process”

Finally, the Court’s reliance on “copies” ignores Congress’s specification that transmitting “to the public, *by means of any device or process*,” constitutes performing the work publicly. 17 U.S.C. § 101 (emphasis added). Not only is the word “any” naturally expansive, *see United States v. Gonzales*, 520 U.S. 1, 5 (1997), but Congress also defined both “device” and “process” broadly as “one[s] now known or later developed,” 17 U.S.C. § 101. It is obvious from the text that Congress intended “any device or process” to have the broadest possible construction so that it could capture technologies that were unimaginable in 1976.²⁷

²⁶ *See* H.R. Rep. No. 94–1476 at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (“One of the principal purposes of the [performance clause] definition was to make clear that . . . performances in ‘semipublic’ places such as clubs, lodges, factories, summer camps, and schools are ‘public performances’ subject to copyright control. The term ‘a family’ in this context would include an individual living alone, so that a gathering confined to the individual’s social acquaintances would normally be regarded as private.”).

²⁷ *See David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988) (“[I]t would strain logic to conclude that Congress would have intended the degree of copyright protection

Even if the statute were ambiguous in this regard, the legislative history removes all doubt about Congress's intentions.²⁸

Furthermore, Congress used this same expansive language to protect against unforeseen methods of *copying* copyrighted works. See 17 U.S.C. § 101 (defining “[c]opies” as “material objects . . . in which a work is fixed *by any method now known or later developed*” (emphasis added)). It is inconceivable that Congress would use these broad terms to protect against future methods of both copying and transmitting, but also intend to create a loophole by which transmitters can avoid liability by *first* copying works and *then* transmitting the copies (rather than originals) to individual members of the public.²⁹ Such a system is still just a “device or process” by which the transmission is made to the public.

to turn on the mere method by which television signals are transmitted to the public.”); see also *Nat'l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 12–13 (2d Cir. 2000) (adopting *David's* reasoning).

²⁸ See H.R. Rep. No. 94–1476 at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (explaining that “transmit” was defined broadly to “include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them”).

²⁹ See U.S. *Cablevision* Amicus Br., *supra* note 14, at 21 (considering the argument that *Cablevision* permitted companies to “provide [video on-demand] services without a license by establishing a system in which the subscriber ‘will simply send an electronic request first to ‘copy’ and then to ‘play’ the desired work” and concluding that the “legality of [this] conduct would be suspect at best”).

Cablevision's focus on whether the public is capable of receiving each individual transmission and the technicalities of how that transmission process works is incompatible with the statute. By declining to rehear these cases *en banc*, the Court misses an opportunity to reconsider *Cablevision* and correct its misinterpretation of the Copyright Act.

IV. *Cablevision Should Not Be Extended*

Even assuming that *Cablevision* was correctly decided, its holding should be limited to its facts. *Cablevision* primarily reasoned that the RS-DVR was no different than a set-top DVR, and that *Cablevision* should not have additional liability for transmitting the RS-DVR copies to its subscribers when it already paid licensing fees to retransmit the material live. The *Cablevision* panel never considered how its rationale might apply to a device like Aereo's, which uses individual antennas and unique copies as a means to avoid paying licensing fees altogether. The Court did, however, "emphasize" that its holding "does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies." *Cablevision*, 536 F.3d at 139. Likewise, when the United States opposed the grant of certiorari in *Cablevision*, it argued that "the court of appeals' analysis of the public-performance issue should not be understood to reach . . . other circumstances beyond

those presented.”³⁰ Accordingly, *Cablevision* should never have been extended to Aereo’s unlicensed service. Even *Cablevision* itself has submitted an amicus brief in these cases arguing that *Cablevision* should not be extended to the facts here.

Admittedly, there are some technological similarities between the RS-DVR and Aereo’s system, but there are also important differences. Most significantly, *Cablevision* *paid* statutory licensing and retransmission consent fees for the content it retransmitted, while Aereo pays no such fees. *Cablevision* subscribers already had the ability to view television programs in real-time through their authorized cable subscriptions, and the RS-DVR was merely a supplemental service that allowed subscribers to store that authorized content for later viewing. The RS-DVR system made copies only as part of its storage and time-shifting functions, and the copies were made only of material that *Cablevision* already had a license to retransmit to its subscribers. In contrast, no part of Aereo’s system is authorized. Instead, its storage and time-shifting functions are an integral part of an unlicensed retransmission service that captures broadcast television programs and streams them live over the Internet. It produces copies not to supplement its authorized retransmission service, but to *enable* it to retransmit programming to its subscribers without a license. Hence, Aereo’s system of antennas and copies are the *means* by which

³⁰ U.S. *Cablevision* Amicus Br., *supra* note 14, at 6, 21.

Aereo transmits copyrighted broadcasts to the public. See 17 U.S.C. § 101.

By extending *Cablevision*, the panel decision eviscerates the Copyright Act: although it is generally unlawful to capture and retransmit public television over the Internet without a license, *see ibi*, 691 F.3d at 278, entities may now do so as long as they utilize individual antennas and unique copies, even though the antennas and copies functionally are unnecessary, and even though the programs are retransmitted to members of the public, *see WNET, Thirteen*, 712 F.3d at 689–94. These sorts of legal pronouncements, based solely on the technology of the day, are sure to be short-lived. “Instead of the law adapting itself to meet the needs of society under conditions of new technology, these judicial interpretations [merely] push technology in odd directions as systems engineers seek to avoid falling on the wrong side of what is essentially an arbitrary line.” Dennis S. Karjala, “*Copying*” and “*Piracy*” in the Digital Age, 52 Washburn L.J. 245, 263 (2013). This is precisely what has happened here. *Cablevision*’s reliance on unique copies in 2008 has opened the door in 2013 for Aereo to design a Rube Goldberg-like contraption using miniature antennas and unique copies to flout Congress’s licensing regime.

Congress purposely declined to identify specific technologies or processes in the Copyright Act because it realized that such definitions would be destined for obsolescence. Indeed, the hardware and technology in *Cablevision* and the antennas and wiring at issue here are fast becoming obsolete in this era of the “Cloud” and wireless technology. Courts should follow

Congress's lead and resist the urge to look "under the hood" at how these processes technically work. Instead, our inquiry should be a functional one, as set forth in the statute: does the device or process transmit a copyrighted performance or display to the public? In Aereo's case, the answer is clearly yes.³¹

CONCLUSION

As I wrote in my panel dissent, the majority's decision elevates form over substance. It holds that a commercial enterprise that sells subscriptions to paying strangers for a broadcast television retransmission service is *not* performing those works publicly. It reaches that conclusion by accepting Aereo's argument that its system of thousands of tiny antennas and unique copies somehow renders these transmissions "private." In my view, however, the system is a sham, as it was designed solely to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law purportedly created by *Cablevision*. Both the majority's decision and *Cablevision's* interpretation of the transmit clause are inconsistent with the language of the statute and

³¹ See 17 U.S.C. § 101; H.R. Rep. No. 94-1476 at 64, reprinted in 1976 U.S.C.C.A.N. at 5678 ("Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106."); see also *Nat'l Football League*, 211 F.3d at 13 ("[T]he most logical interpretation of the Copyright Act is to hold that a public performance or display includes 'each step in the process by which a protected work wends its way to its audience.'" (citation omitted)).

congressional intent. This decision upends settled industry expectations and established law. It should not be permitted to stand, and the Court should have taken this opportunity to clarify that *Cablevision* does not provide “guideposts” on how to avoid compliance with our copyright laws. Because it declines to do so, I respectfully dissent.

Appendix D

Relevant Statutory Provisions Involved

17 U.S.C. § 101

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

* * *

A “device”, “machine”, or “process” is one now known or later developed.

* * *

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

* * *

To perform or display a work “publicly” means—

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

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the

same place or in separate places and at the same time or at different times.

* * *

To “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.

17 U.S.C. 106

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * *

(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

* * *