

# THE REVOLUTION WAS NOT TELEVISED: EXAMINING COPYRIGHT DOCTRINE AFTER *AEREO*

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The rapid advancement of technology has put tremendous strain on the language of the Copyright Act, the majority of which was written nearly half a century ago.<sup>1</sup> The judiciary has struggled to craft workable interpretations of an increasingly creaky statutory regime.<sup>2</sup> This strain manifested with particular prominence in the Supreme Court's recent decision in *American Broadcasting Cos. v. Aereo, Inc.*,<sup>3</sup> a case focusing on copyright's public performance right as applied to an automated system that retransmitted broadcast television signals. At the most basic level, the service operated by capturing over-the-air television signals and retransmitting them over the internet to customers, who could view over-the-air television content on any internet-capable device.<sup>4</sup>

*Aereo* represents the latest chapter in an ongoing battle between upstart technology companies and incumbent media industries.<sup>5</sup> The battleground is copyright law. The belligerents are new startups that seek to increase access to television content, and the broadcast television industry, which seeks to preserve its longstanding business practices.<sup>6</sup>

These emerging services, most prominently Aereo, have generated substantial legal controversy. Over the last few years, as Aereo and a rival company (FilmOn X) expanded into markets throughout the United States, broadcasters followed with lawsuits alleging copyright

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1. See, e.g., Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 553–55 (2007).

2. See *id.* at 552 (“Virtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer.”).

3. 134 S. Ct. 2498 (2014).

4. *Id.* at 2503.

5. See Ken Auletta, *Can Aereo Disrupt the TV Business?*, NEW YORKER (Feb. 18, 2013), <http://www.newyorker.com/news/news-desk/can-aereo-disrupt-the-tv-business>; Maxwell Wessel, *The Inevitable Disruption of Television*, HARV. BUS. REV. (Aug. 27, 2012), <https://hbr.org/2012/08/the-inevitable-disruption-of-t/>.

6. See Wessel, *supra* note 5.

infringement.<sup>7</sup> Conflicting decisions were reached by district courts in the First, Ninth, and D.C. Circuits.<sup>8</sup> The Second Circuit held, following its circuit precedent,<sup>9</sup> that Aereo did not infringe the copyrights of broadcasters.<sup>10</sup> Though no circuit split yet existed, the considerable controversy among lower courts set the stage for Supreme Court intervention.<sup>11</sup> And in early 2014, the Supreme Court granted certiorari in the Second Circuit case.<sup>12</sup>

At the center of the controversy is U.S. copyright law's public performance right. The Copyright Act of 1976 provides that copyright holders have the exclusive right, "in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly."<sup>13</sup> In the case of motion pictures and other audiovisual works, "show[ing] [a work's] images in any sequence or . . . mak[ing] the sounds accompanying [the work] audible" constitutes a performance.<sup>14</sup> A "public performance" can occur in two ways. First, an actor can "perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."<sup>15</sup> Second, an actor can "transmit or otherwise communicate a performance . . . of the work . . . by means of any device or process, whether the members of the public capable of receiving the performance

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7. See Eriq Gardner, *Aereo Hit with Second Lawsuit in Utah*, HOLLYWOOD REP. (Oct. 25, 2013, 2:41 PM), <http://www.hollywoodreporter.com/thr-esq/aereo-hit-second-lawsuit-utah-651031>; Jeff John Roberts, *Aereo Expands South and West: TV Streaming Service Announces New Launch Dates*, GIGAOM (Aug. 8, 2013, 5:36 AM), <https://gigaom.com/2013/08/08/aereo-expands-south-and-west-tv-streaming-service-announces-new-launch-dates/>; Ira Teinowitz, *FilmOn Expands to 16 Markets, Despite Court Ruling*, THEWRAP (Sept. 24, 2013, 7:26 PM), <http://www.thewrap.com/filmon-expands-to-16-markets-despite-court-ruling/>.

8. See, e.g., *Fox Television Stations, Inc. v. FilmOn X, LLC*, 966 F. Supp. 2d 30, 52 (D.D.C. 2013) (order granting preliminary injunction); *Hearst Stations, Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 41 (D. Mass. 2013) (order denying preliminary injunction); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1149 (C.D. Cal. 2012) (order granting preliminary injunction).

9. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 140 (2d Cir. 2008) (holding that an online DVR system does not infringe content producers' copyright).

10. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 689–90 (2d Cir. 2013), *rev'd sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

11. Kevin Goldberg, *Aereo Armageddon Ahead?*, COMMLAWBLOG (Dec. 18, 2013), <http://www.commlawblog.com/2013/12/articles/broadcast/aereo-armageddon-ahead/>.

12. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) (order granting certiorari).

13. 17 U.S.C. § 106 (2012).

14. 17 U.S.C. § 101 (2012).

15. *Id.*

or display receive it in the same place or in separate places and at the same time or at different times.”<sup>16</sup> The latter definition, commonly referred to as the Transmit Clause, was the focal issue of *Aereo*.<sup>17</sup> Under that clause, in order to infringe the exclusive right of public performance, an actor must (1) “perform” the work and (2) do so “to the public.”<sup>18</sup>

The application of the Transmit Clause to the technology at issue in *Aereo* presents some troublesome doctrinal problems. At the Supreme Court, the Justices first grappled with the question of whether *Aereo*, a relatively passive retransmitter, “performed” at all within the meaning of the Transmit Clause.<sup>19</sup> The analytical challenge in this instance is primarily attributable to the automated nature of *Aereo*’s technology.<sup>20</sup> *Aereo* established a system where users could rent antennae from *Aereo* to watch broadcast television over the internet.<sup>21</sup> In such an instance, is *Aereo* a liable performer or merely an equipment provider? The Court also confronted the issue of whether or not *Aereo*’s individualized transmissions, whereby a given user had her own antenna and her own transmission, rendered performances of the underlying works “public.”<sup>22</sup>

The Court answered both questions affirmatively, and thus *Aereo* was found to infringe.<sup>23</sup> On remand, the district court granted a preliminary injunction,<sup>24</sup> and a few months later, *Aereo* shuttered its business and entered bankruptcy proceedings.<sup>25</sup> The Supreme Court decision, which relied primarily on the legislative history of the Copyright Act to reach a purposive interpretation of the public performance right,<sup>26</sup> leaves open several questions. The Court, wary of the potential reach of its decision, approached the issue with a great degree of caution.<sup>27</sup> In doing so, the

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16. *Id.*

17. *See Aereo*, 134 S. Ct. at 2502.

18. *Id.* at 2504.

19. *Id.* at 2506.

20. *Id.* at 2514 (Scalia, J., dissenting); *see also* *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008).

21. *Aereo*, 134 S. Ct. at 2503.

22. *Id.* at 2507–08.

23. *Id.* at 2510–11.

24. *Am. Broad. Cos, Inc. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*10 (S.D.N.Y. Oct. 23, 2014).

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

26. *See Aereo*, 134 S. Ct. at 2504, 2507.

27. Eleanor Lackman, *Symposium: Preferring Substance Over Form and Nature Over Manner, Supreme Court Finds that Aereo Runs Afoul of the Purposes of the Copyright Act*, SCOTUSBLOG (June 26, 2014, 4:23 PM) <http://www.scotusblog.com/>

Court sought to answer only the question immediately before it.<sup>28</sup> As a result, the impact of the case is not instantly apparent, but this fact does not render the case doctrinally insignificant. The much-awaited case should not be dismissed as a *sui generis* decision without future application. The Court, by implication and by explicit suggestion, provided identifiable guidance to future courts as to the general contours of the public performance right, and how it may be applied in future cases.

This Note examines the doctrinal impact of *Aereo* by explaining the case and its implications for the public performance right. Though the Court sought to cabin its holding, it exerts force on existing doctrine. This Note will show that the Court's decision achieved two doctrinal results: (1) it transformed the "volitional conduct" test for establishing direct copyright liability into a proximate cause inquiry, and (2) it clarified what constitutes the "public" for purposes of the Transmit Clause, focusing on the relationship between the recipient of a transmission and the underlying copyrighted material.

Part I describes the technological system employed by the Aereo service. Part II outlines the legal background for both elements of the Copyright Act's exclusive right to perform works to the public. Part III details the procedural history of *Aereo* and discusses the Supreme Court's decision. Part IV details how the volitional conduct test and the nature of the "to the public" has been altered by the Court's decision in *Aereo*. Part V concludes.

## I. TECHNICAL BACKGROUND

In order to understand the doctrinal challenges occasioned by Aereo's service, it is first necessary to understand the basics of its technology. Aereo's service permitted subscribers to watch and record broadcast television content over the internet.<sup>29</sup> For a fee, users could view over-the-air broadcasts on any internet-capable device, such as a desktop computer,

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2014/06/symposium-preferring-substance-over-form-and-nature-over-manner-supreme-court-finds-that-aereo-runs-afoul-of-the-purposes-of-the-copyright-act/ ("The Court took efforts to limit its holding to just the technology at bar, but the question remains as to whether the opinion is as narrow as the Court hoped.").

28. *Aereo*, 134 S. Ct. at 2510 (Though the history that "led to the enactment of the Transmit Clause [informed the Court in this instance, said history] does not determine whether different kinds of providers in different contexts also 'perform.'").

29. Steven J. Vaughan-Nichols, *What is Aereo and Why Does It Have the TV Networks in an Uproar?*, ZDNET (Apr. 10, 2013, 1:24 PM), <http://www.zdnet.com/article/what-is-aereo-and-why-does-it-have-the-tv-networks-in-an-uproar/>.

mobile handset, or tablet.<sup>30</sup> Aereo's survival hinged on its technological peculiarities. In each market it served, Aereo maintained warehouses containing thousands of dime-sized, independently-operating antennae which were installed on large circuit boards.<sup>31</sup> This technologically inefficient structure arose in response to the Second Circuit's decision in *Cartoon Network LP v. CSC Holdings, Inc.*<sup>32</sup> (commonly referred to as the "Cablevision" case), the details of which will be discussed in Part II.C.<sup>33</sup>

The user of the Aereo service, upon loading the application, was met with a programming guide not unlike those provided by cable and satellite companies.<sup>34</sup> The user could select a program to "Watch" and/or "Record."<sup>35</sup> Upon selecting "Watch," Aereo tuned the user's assigned antenna (which was shared with no other user) to the appropriate frequency, in order to capture an over-the-air broadcast signal.<sup>36</sup> The service then transcoded the captured signal and stored the content on a hard disk.<sup>37</sup> Storage space on these hard disks was reserved and allocated to a specific user and was not shared.<sup>38</sup> Aereo then streamed the stored data to the user over the internet.<sup>39</sup> In the event that the user selected only to "Watch" the program, the data was promptly erased from the storage disks after viewing.<sup>40</sup> This process enabled the subscriber to watch over-the-air programming with a small delay.<sup>41</sup> While watching the program,

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30. Jordan Crook, *Aereo Switches Up Pricing: \$8/Month For 20 Hours Of DVR, \$12/Month For 60 Hours Starting May 15*, TECHCRUNCH (May 13, 2013), <http://techcrunch.com/2013/05/13/aereo-switches-up-pricing-8month-for-20-hours-of-dvr-12month-for-60-hours-starting-may-15/>; Vaughan-Nichols, *supra* note 29.

31. *See* WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 682 (2d Cir. 2013), *rev'd sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

32. 536 F.3d 121 (2d Cir. 2008).

33. *See* Rebecca Giblin & Jane C. Ginsburg, *We Need to Talk about Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the "Transmit" Clause 7* (Columbia Law and Econ. Working Paper No. 480, 2014), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443595) ("Aereo built its system in reliance on the Second Circuit's interpretation of the transmit clause in *Cartoon Networks v. CSC Holdings.*"); Jessica J. Lehrman, *The Second Circuit's Aereo Math: One Copy + One Subscriber ≠ Public Performance*, SOCIALLYAWARE (May 21, 2013), <http://www.sociallyawareblog.com/2013/05/21/the-second-circuits-aereo-math-one-copy-one-subscriber-%E2%89%A0-public-performance/>.

34. *WNET*, 712 F.3d at 681.

35. *Id.* at 681–82.

36. *Id.*

37. *Id.* at 682.

38. *Id.* at 683.

39. *Id.* at 682.

40. *Id.* at 681–82.

41. *Id.* at 681.

the user could play, pause, rewind, and fast-forward (to a point near-contemporaneous with the over-the-air broadcast).<sup>42</sup> If a user chose to “Record” a program, the service would operate as usual, but would retain the data stored on the hard disk.<sup>43</sup>

## II. LEGAL BACKGROUND

The Supreme Court did not rely much on precedent or on a close reading of the statute’s text, focusing instead on the statute’s purpose as revealed in its legislative history.<sup>44</sup> However, while the Court did not situate its holding within any preexisting copyright framework, the opinion may have considerable impact on future applications of the Transmit Clause. To best understand the potential nature of this impact, it is first important to establish the pre-*Aereo* status of the relevant legal doctrines.

### A. THE STATUTE AND ITS LEGISLATIVE HISTORY

The current statutory regime surrounding the public performance right was enacted, in part, as a response to the Supreme Court’s decisions in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*<sup>45</sup> and *Fortnightly Corp. v. United Artists Television, Inc.*<sup>46</sup> At issue in those cases was community antenna television (“CATV”), the predecessor to contemporary cable television.<sup>47</sup> CATV services would erect antennae at favorable geographic locations and retransmit broadcast signals by cable to the residents of communities with poor signal reception.<sup>48</sup> In both cases, the Court found that these retransmissions did not infringe a performance right.<sup>49</sup> In holding for the defendant CATV company, the Supreme Court in *Fortnightly* stated:

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

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42. *Id.* at 682.

43. *Id.*

44. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504, 2507 (2014).

45. 415 U.S. 394 (1974).

46. 392 U.S. 390 (1968); *see Aereo*, 134 S. Ct. at 2505–06 (citing H.R. REP. NO. 94-1476, at 86–87 (1976)).

47. *Aereo*, 134 S. Ct. at 2504–06.

48. *See Teleprompter*, 415 U.S. at 399–400.

49. *Id.* at 412–13; *Fortnightly*, 392 U.S. at 400–01.

that the antenna system is erected and owned not by its users but by an entrepreneur.<sup>50</sup>

The Supreme Court held that under the language of the then-applicable 1909 Copyright Act, cable television retransmissions of over-the-air signals did not constitute a “performance.”<sup>51</sup> In reaction to this, Congress therefore introduced the Transmit Clause in the 1976 Copyright Act to expand the scope of the exclusive right of public performance.<sup>52</sup> The Transmit Clause provides that copyright holders have the exclusive right to “transmit or otherwise communicate a performance . . . of the work . . . 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.”<sup>53</sup> In adopting this language, Congress intended to encompass, within the scope of the 1976 Copyright Act, the capture and retransmission of television signals by a single entrepreneurial entity to a number of subscribers.<sup>54</sup>

The legislative history did not only address the cable technology that existed at the time of drafting, but also appeared to have predicted the type of technologies at issue in both *Cablevision* and *Aereo*:

[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 direct 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. . . . ; they are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.<sup>55</sup>

Additionally, Congress enacted § 111, which provides that “cable systems” are entitled to a compulsory license to retransmit over-the-air broadcasts, provided they comply with the other requirements of the section,

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50. *Fortnightly*, 392 U.S. at 400.

51. *Id.* at 400–01.

52. *See Aereo*, 134 S. Ct. at 2505–06.

53. 17 U.S.C. § 101 (2012).

54. *See Aereo*, 134 S. Ct. at 2505–06.

55. H.R. REP. NO. 90–83, at 29 (1967).

including a prohibition on modifying the content of the signal.<sup>56</sup> This statutory scheme confirms that the retransmissions of over-the-air television signals by a cable system are public performances under the Copyright Act.<sup>57</sup>

## B. PERFORMANCE AND VOLITION CASES

In the case of any performance, there must be a performer. The question of who is the legally relevant performer for a given performance can be a particularly vexing one. The emergence of automated systems, like the one in *Aereo*, has complicated the issue considerably. An entity may craft a system that, upon the direction of a user, undertakes transmissions or other tasks automatically. Automated systems respond indiscriminately to user input, so it becomes unclear for purposes of copyright liability who the performer is: the engineer or the end user.<sup>58</sup>

The “volitional conduct” doctrine, which seeks to solve this analytical difficulty, is derived from caselaw beginning in the 1990s. The genesis of the doctrine is *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*<sup>59</sup> In that case, a user on a Usenet newsgroup (also called a bulletin board system or “BBS”) posted copyrighted material from the Church of Scientology.<sup>60</sup> At issue was the possible liability of the BBS’s internet service provider (“ISP”).<sup>61</sup> In addressing the liability of the ISP, the court was clearly concerned that a holding that rendered the ISP liable would likely endanger many services that merely “set[] up and operat[ed] a system” and involved no further “human intervention.”<sup>62</sup> To

56. 17 U.S.C. § 111 (2012); *Aereo*, 134 S. Ct. at 2506.

57. *Aereo*, 134 S. Ct. at 2506 (“Section 111 is primarily ‘directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyright works’. . . .” (quoting H.R. REP. NO. 94-1476, at 88 (1976))).

58. It should be noted that this question pertains to the question of who can be held *directly* liable for copyright infringement. This is distinct from theories of secondary liability, which allow a party to be held liable for contributing to or inducing the direct infringement of another party. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (discussing induced infringement); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (discussing contributory infringement). The scope of secondary liability, not addressed by the *Aereo* Court or any lower courts confronted with *Aereo*’s technology, is outside the ambit of this Note.

59. 907 F. Supp. 1361, 1365 (N.D. Cal. 1995); Terry Hart, *Symposium: Series Finale for Aereo, but Will There Be a Spin-off?*, SCOTUSBLOG (June 26, 2014, 3:10 PM), <http://www.scotusblog.com/2014/06/symposium-series-finale-for-aereo-but-will-there-be-a-spin-off/>.

60. *Netcom*, 907 F. Supp. at 1365–66.

61. See *id.* at 1366.

62. *Id.* at 1372, 1368, 1372–73.



limit such extensive liability, Judge Whyte held that there “should still be *some element of volition or causation* which is lacking where a defendant’s system is merely used to create a copy by a third party.”<sup>63</sup> And so was born the so-called “volitional conduct” or “volition” doctrine.<sup>64</sup> Applying the test to the case before him, Judge Whyte ruled that the element of volition was lacking when an alleged infringer’s system is “merely used to create a copy by a third party” and that a finding of liability was not sensible where the third party could be held directly liable for the same act.<sup>65</sup> The Court also emphasized that an ISP provides only “*access* to the Internet,” instead of “suppl[ying] a product . . . by control[ling] the content of information available.”<sup>66</sup>

In many respects, the result in *Netcom* was quite intuitive. The court was unwilling to hold liable a service operator for what was essentially the conduct of its users.<sup>67</sup> Requiring there to be some sort of volition or deliberate action on the part of the service provider “beyond providing access to the internet” seemed a sensible solution for the court.

However, the status of the doctrine became uncertain several years later when Congress, partly to afford greater protection to “online service providers,” enacted the Digital Millennium Copyright Act of 1998 (“DMCA”).<sup>68</sup> The DMCA contained “safe harbors” (immunity from liability) for online service providers, provided that they complied with certain statutory requirements.<sup>69</sup> The enactment of the DMCA safe harbors which—like the volitional conduct doctrine—aim to protect service-providing entities from liability arising from the conduct their users,<sup>70</sup> prompted an important question: does the volition requirement survive the DMCA?

The Fourth Circuit addressed this question directly in *CoStar Group, Inc. v. LoopNet, Inc.*<sup>71</sup> In that case, the plaintiff contended that the volitional conduct doctrine was superseded by the DMCA.<sup>72</sup> The Fourth

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63. *Id.* at 1370 (emphasis added).

64. *See, e.g.,* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512–13 (2014) (Scalia, J., dissenting); Hart, *supra* note 59.

65. *Netcom*, 907 F. Supp. at 1370, 1372.

66. *Id.* at 1372.

67. *Id.* at 1372–73.

68. *See* 17 U.S.C. § 512 (2012); S. REP. NO. 105–190, at 19 (1998).

69. *See* 17 U.S.C. § 512.

70. *See* S. REP. NO. 105–190, at 19 (1998) (In enacting the DMCA, Congress sought “to leave current law in its evolving state and . . . to create a series of ‘safe harbors,’ for certain common activities of service providers.”).

71. 373 F.3d 544 (4th Cir. 2004).

72. *Id.* at 548.

Circuit disagreed, holding that Congress intended the safe harbor provisions of the DMCA “to be a floor, not a ceiling of protection” and that the volitional conduct requirement survived the enactment of the DMCA.<sup>73</sup> The court noted that the DMCA explicitly provided for non-exclusivity, meaning that the failure to meet the requirements for the safe harbors does not preclude the deployment of any other defenses.<sup>74</sup> According to the court, Congress had not supplanted the volitional conduct requirement by simply “codifying” *Netcom* in the DMCA, and further concluded that while early drafts of the DMCA explicitly sought to codify *Netcom*, the version eventually passed by Congress amounted instead to a “compromise between the earlier version and the concerns of copyright-holders.”<sup>75</sup> On these bases, the court held (and other courts have since agreed)<sup>76</sup> that the DMCA did not supplant the volitional conduct test set forth in *Netcom*.<sup>77</sup> However, some commentators argue that the volitional conduct test, as articulated in *CoStar* and later cases, did not survive the DMCA.<sup>78</sup>

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73. *Id.* at 555.

74. *Id.* at 552 (quoting 17 U.S.C. § 512(l)). The court further concluded that Congress did not intend, in passing the DMCA to “preclude[] ISPs from relying on an entire strain of case law.” *Id.*

75. *Id.* at 548, 552–55.

76. Surprisingly, very few courts have addressed the question of whether Congress eliminated the volitional conduct doctrine through the enactment of the DMCA. Aside from the Fourth Circuit in *CoStar*, the question has been squarely addressed in only a few cases. *See, e.g.*, Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 59 (1st Cir. 2012) (not questioning the existence of a “passive involvement” defense, even in the absence of the DMCA’s safe harbors); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“But [r]ather than embarking on a wholesale clarification of” the various doctrines of copyright liability, Congress opted ‘to leave current law in its evolving state . . . .’ (quoting S. REP. NO. 105-190, at 19 (1998))); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1174 (C.D. Cal. 2002) (“These ‘safe harbors’ do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability.” (citing H.R. REP. NO. 105-551(II), at 50 (1998); S. REP. NO. 105-190, at 19 (1998))). Despite the lack of analysis, courts continue to treat the DMCA as a supplement to existing liability principles, rather than a supplanting amendment.

77. *CoStar*, 373 F.3d at 552.

78. *See, e.g.*, 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 12B.06[B][2][c][i], 13.08[C] (2014) (arguing that the DMCA supplanted *Netcom*, so that *Netcom*’s principles should only be applied to the extent that they are embodied in Congress’s amendments); *Reply Comments on “Making Available” Study, Sent by Motion Picture Association of America & Recording Industry Association of America to Copyright Office Request for Additional Comments* 7 (Sept. 15, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/reply/MPAA\\_RIAA.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/reply/MPAA_RIAA.pdf).

Following *Netcom* and *CoStar*, district and appellate courts have struggled to apply the doctrine of volitional conduct consistently.<sup>79</sup> While the doctrine has most frequently arisen in right of reproduction cases, it may be implicated in any case concerning direct liability.<sup>80</sup> However, absent intervening conduct on the part of a defendant,<sup>81</sup> the cases have produced a somewhat coherent standard, one that was—prior to *Aereo*—quite formalistic. This standard was clearly articulated in a decision that was frequently cited by other courts: *Cablevision*.<sup>82</sup>

Before *Aereo*, *Cablevision* stood as the most significant decision on the volitional conduct doctrine. The technology at issue (that had not yet been implemented), the remote storage DVR (“RS-DVR”), operated like an ordinary set-top DVR, but stored recorded content remotely in server hard

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79. Eleanor M. Lackman & Scott J. Sholder, *The Role of Volition in Evaluating Direct Copyright Infringement Claims Against Technology Providers*, 22 BRIGHT IDEAS 3, 7–8 (2013).

80. *See* Am. Broad. Cos. v. Aereo, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting) (“Every Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted th[e] [volitional conduct] rule.”); Lackman & Sholder, *supra* note 79. Additionally, even though nearly all of the volitional conduct cases address the right of reproduction, none make a workable distinction between volitional copying and volitional performance. While some courts have paid lip service to the possibility that the right of reproduction and the right of public performance may vary in the context of the volitional conduct requirement, there is very little analysis on the subject. *See, e.g.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir. 2008) (stating that the “definitions that delineate the contours of the reproduction and performance rights vary,” referencing that “perform” is statutorily defined, while “reproduce” and “copy” are not). The volitional conduct test did not develop from specific statutory language, but rather from the issue of who “acts” for purposes of direct infringement. There appears to be no meaningful distinction. Therefore, for purposes of this Note, the reproduction volition cases will be considered applicable to public performance volition cases.

81. *See* Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 56 (1st Cir. 2012) (finding that the defendant, through an agent, “performed several acts to ensure that copies of the Works were available on his server and posted to his Website”); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (holding that an ISP “should not be found liable” for the actions of a subscriber, unless there is “intervening conduct of the ISP”); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148–49 (S.D.N.Y. 2009) (finding that the defendants “actively engaged” in the infringing process, because the defendants “took active steps, including both automated filtering and human review, to remove access to certain categories of content, and to block certain users” and “took active measures to create servers dedicated to mp3 files and to increase the retention times of newsgroups containing digital music files”). *But see* *Capital Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 657 (S.D.N.Y. 2013) (holding that because “ReDigi’s founders programmed their software to choose copyrighted content,” the volitional element was satisfied).

82. *Cartoon Network*, 536 F.3d at 131–33.

disk space allocated to each subscriber.<sup>83</sup> When a user selected the programming of her choosing, Cablevision initiated a transmission to the user's corresponding hard disk space.<sup>84</sup> Each user could then receive an individual transmission from an individual copy of the content they chose to record.<sup>85</sup>

The Second Circuit acknowledged that the challenge of the case was whether Cablevision was directly liable for "maintaining a system that exists only to produce a copy," or whether a customer was directly liable for "ordering that system to produce a copy of a specific program."<sup>86</sup> The court sided with Cablevision in concluding that the user *made* the copy, and relied primarily on an analogy to an offline VCR.<sup>87</sup> The court declared it clear that it is "the operator of a VCR, the person who actually *presses the button* to make the recording, [who] supplies the necessary element of volition," rather than the manufacturer or owner of the machine.<sup>88</sup> The court further stated that the actions of Cablevision were not "sufficiently proximate to the copying to displace the customer as the person who 'makes' the copies."<sup>89</sup> In so holding, the court emphasized that Cablevision maintained no control "over what programs [were] made available on individual channels or when those programs [would] air."<sup>90</sup> This analysis placed substantial significance on the selection of content. *Cablevision* is thus a prime example in the line of cases adopting a rigid rule which can be described as a who "presses the . . . button" test.<sup>91</sup> If a performance

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83. *Id.* at 124–25.

84. *Id.*

85. *Id.*

86. *Id.* at 131. The court did not see fit to analyze the volitional conduct requirement in the context of the public performance right since the court concluded that even if there were a performance by Cablevision, it was not a public one. *Id.* at 134–35.

87. *Id.* at 131.

88. *Id.* (emphasis added).

89. *Id.* at 132.

90. *Id.*

91. See 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.0.2 (3d ed. Supp. 2015); *Reply Comments on "Making Available" Study, Sent by Copyright Alliance to Copyright Office Request for Additional Comments 2–3*, [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/reply/Copyright\\_Alliance.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/reply/Copyright_Alliance.pdf). A number of other circuits adopted similar or identical reasoning. See, e.g., *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067 (9th Cir. 2014) (The Defendant's "program creates the copy only in response to the user's command" and therefore, "the user . . . makes the copy."); *Parker v. Google, Inc.*, 242 F. App'x. 833, 836–37 (3d Cir. 2007) (holding that "a plaintiff must allege volitional conduct on the part of the defendant" and that an ISP should not be held liable for the actions of its subscribers, absent "intervening conduct [by] the ISP"); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (holding that direct liability requires something more than "mere ownership of a

occurs at the direction of a user—for instance, if the user selects the content—then it is the user who is the relevant performer.

### C. PERFORMING “TO THE PUBLIC” CASES

While many cases have interpreted the “public” element of the public performance right, this Note requires an examination of only one line of cases: those embracing the so-called one-user/one-copy standard.<sup>92</sup> Like volition, this standard—though employed in previous cases<sup>93</sup>—appeared most prominently in *Cablevision*. A brief explanation of the court’s holding regarding “to the public”<sup>94</sup> in that case is crucial to understanding the majority’s decision in *Aereo*.

The facts of *Cablevision* are briefly outlined above.<sup>95</sup> Most significantly, the service allowed users to receive, through Cablevision’s system, individual transmissions from individual copies made for each subscriber.<sup>96</sup> The court concluded, after an extensive analysis of the Transmit Clause, that whether or not Cablevision performed, its performance was not public.<sup>97</sup> In reaching this conclusion, the court reasoned that the key question was “who precisely is ‘capable of receiving’ a particular transmission of a performance.”<sup>98</sup> In other words, for the *Cablevision* court, the “it” in the clause “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” referred to a

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machine” and that there must be a showing of “actual infringing conduct with a nexus sufficiently close and causal to the illegal copying.”).

92. Lois F. Wasoff, *The Aereo Decision—Exploring the Implications*, WIPO MAG. (Sept. 2014), [http://www.wipo.int/wipo\\_magazine/en/2014/05/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2014/05/article_0003.html).

93. *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (holding that when the “*same copy*” of a work is “repeatedly played . . . by different members of the public,” this constitutes a public performance) (citing 2 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 8.14[C][3]) (1983)). In an oft-cited district court case, the court ruled that private transmissions to individual hotel guests at different times constitute a performance to the public. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). However, this case dealt specifically with private transmissions originating from the same copy of a work. *Id.* at 788.

94. The term “to the public,” as used throughout this paper refers to the statutory language in the Transmit Clause: “to transmit or otherwise communicate a performance . . . of the work . . . to the public.” 17 U.S.C. § 101 (2012) (emphasis added).

95. *See supra* Section II.B.

96. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 135 (2d Cir. 2008).

97. *Id.* at 139–40.

98. *Id.* at 135.

given transmission, rather than all transmissions of the underlying work.<sup>99</sup> In the case of Cablevision, since an individual, unique copy was created at the request of each subscriber, Cablevision's transmissions were not to the public.<sup>100</sup> The court further held that transmissions of the same underlying work were not to be aggregated as one performance, unless the transmissions originated from the same *copy* of the underlying work.<sup>101</sup> In short, Cablevision had been successful in crafting a system that delivered private performances to its users.

### III. THE DECISION IN *AEREO*

In early 2012, Aereo, Inc. launched an unlicensed broadcast television retransmission service employing a new technological system that sought to comply with (or circumvent, as broadcasters argued)<sup>102</sup> U.S. copyright law.<sup>103</sup> Shortly after the launch of Aereo, a copycat service dubbed Aereokiller (later renamed FilmOn X) emerged.<sup>104</sup> Broadcast television copyright holders immediately filed suits against both companies, which had started to establish services in markets across the country.<sup>105</sup> In March 2012, two groups of copyright holders and broadcast companies filed separate complaints against Aereo in the Southern District of New York, alleging infringement of the right of public performance, infringement of

99. 17 U.S.C. § 101 (emphasis added); *Cartoon Network*, 536 F.3d at 135. Several commentators criticized this aspect of the decision. See, e.g., 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.7.2 (3d ed. Supp. 2015) (“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.”); Jeffrey Malkan, *The Public Performance Problem 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.’ Switching the words ‘performance’ and ‘transmission’ changed the outcome of the case . . .”).

100. *Cartoon Network*, 536 F.3d at 139–40.

101. *Id.* at 138.

102. Jacob Kastrenakes, *Aereo Loses to Broadcasters in Supreme Court Fight for Its Life*, THE VERGE (June 25, 2014, 10:09 AM), <http://www.theverge.com/2014/6/25/5801052/aereo-supreme-court-ruling>.

103. Eriq Gardner, *Aereo, Ivi and the Legal Road That Will Determine the Future of TV Cord-Cutting*, HOLLYWOOD REP. (Feb. 15, 2012, 2:14 PM), <http://www.hollywoodreporter.com/thr-esq/aereo-ivi-tv-chord-cutting-291395>.

104. Paul Sweeting, *FilmOn May Turn Out to Be an Aereo-killer After All*, GIGAOM RES. (Sept. 6, 2013, 9:34 AM), <http://research.gigaom.com/2013/09/filmon-may-turn-out-to-be-an-aereo-killer-after-all/>.

105. WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 683 (2d Cir. 2013), *rev'd sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1140 (C.D. Cal. 2012); Gardner, *supra* note 7.

the right of reproduction, and contributory infringement.<sup>106</sup> On March 13, 2012, the broadcasters moved for a preliminary injunction.<sup>107</sup> The motion was also limited to “aspects of Aereo’s service that allow subscribers to view Plaintiff’s copyrighted television programs contemporaneously with the over-the-air broadcast of these programs.”<sup>108</sup> On July 11, 2012, the district court denied the motion, and an appeal of that decision followed.<sup>109</sup> The Second Circuit agreed with the lower court.<sup>110</sup> Finding that *Cablevision* controlled, the court ruled that Aereo was not engaging in a public performance, but many private ones.<sup>111</sup> Since each subscriber had her own antenna and her own copy of a work, she was receiving her own private transmissions.<sup>112</sup> The Second Circuit believed this shielded Aereo from liability.<sup>113</sup>

While the broadcasters continued to wage battles in other courts across the country, they filed a petition for a writ of certiorari on October 11, 2013.<sup>114</sup> And in January of 2014, the Supreme Court granted certiorari.<sup>115</sup> On July 28th, following months of anticipation, the Court issued its ruling.<sup>116</sup> The Court, in a 6–3 decision, sided with the broadcaster petitioners, and reversed and remanded the case.<sup>117</sup> Justice Breyer wrote the majority opinion, joined by Chief Justice Roberts, Justices Kennedy, Ginsburg, Sotomayor, and Kagan.<sup>118</sup> Justice Scalia authored the dissent, joined by Justices Thomas and Alito.<sup>119</sup> While the Second Circuit and the district court had devoted most of their attention to the “to the public” aspect of the public performance right, the main issue of contention

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106. *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 375–76 (S.D.N.Y. 2012), *rev’d sub nom. WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 682 (2d Cir. 2013), *rev’d sub nom. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

107. *Id.* at 376.

108. *Id.*

109. *WNET*, 712 F.3d at 680.

110. *Id.*

111. *Id.* at 690.

112. *Id.*

113. *Id.*

114. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/american-broadcasting-companies-inc-v-aereo-inc/> (last visited Feb. 2, 2015).

115. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) (order granting certiorari).

116. *Id.*; Harry Cole, *Aereo Update: Supreme Court Rules for Broadcasters!*, COMMLAWBLOG (June 25, 2014), <http://www.commlawblog.com/2014/06/articles/broadcast/aereo-update-supreme-court-rules-for-broadcasters/>.

117. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2502–03 (2014).

118. *Id.* at 2502.

119. *Id.*

between the majority and the dissent was whether Aereo performed at all. To answer this and other questions, the majority relied primarily on the public performance right's legislative history.

A. MAJORITY OPINION

Justice Breyer, writing for the majority, acknowledged that the case required the Court to answer two questions: (1) does Aereo perform, and (2) if so, does it do so publicly?<sup>120</sup> In addressing the first question, Justice Breyer recognized that the Copyright Act provided little guidance as to whether it is the user or the equipment supplier who “performs” for purposes of the Copyright Act.<sup>121</sup> The Court held, however, that in light of the statute's legislative history, a service “that engages in activities like Aereo's performs.”<sup>122</sup>

The Court detailed the legislative history surrounding the Transmit Clause and § 111 and concluded that Congress sought to “bring the activities of cable systems within the scope of the Copyright Act.”<sup>123</sup> Following that conclusion, the Court held that Aereo's activities were “substantially similar to those of the CATV companies.”<sup>124</sup> Like CATV, Aereo used its own equipment to sell a service “that allow[ed] subscribers to watch television programs” and did so by “receiv[ing] programs that have been released to the public and carr[ying] them by private channels to additional viewers.”<sup>125</sup> Accordingly, Aereo's activities were, like the activities of cable companies, within the scope of the Copyright Act; Aereo performed.<sup>126</sup>

While this reasoning may have been sufficient by itself, the Court went on to address arguments advanced by Aereo and by the dissent. First, the Court remarked that it made no difference whether content is broadcasted continuously or in response to a subscriber's request.<sup>127</sup> In other words, whether the television signal “lurked behind the screen, ready to emerge when the subscriber turned the knob” or whether a click “activate[d] machinery” to route signals to “Aereo's subscribers over the

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120. *Id.* at 2504.

121. *Id.*

122. *Id.*

123. *Id.* at 2504–06.

124. *Id.* at 2506.

125. *Id.* (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400 (1968)).

126. *Id.* at 2506–07.

127. *Id.* at 2507.



Internet” made no difference to the subscriber, to the broadcaster, or to the Copyright Act.<sup>128</sup>

The “to the public” aspect of the decision, though the most contentious issue in the lower courts, was disposed of rather quickly by the majority.<sup>129</sup> *Aereo*’s argument, accepted by the Second Circuit, was that each transmission was receivable by only one subscriber, and its performance was therefore private.<sup>130</sup> The Supreme Court, analogizing *Aereo*’s technology to that of a cable system, rejected this argument.<sup>131</sup> The Court dismissed, without much discussion, the “behind-the-scenes way in which *Aereo* deliver[ed] television programming” as insufficient to distinguish *Aereo*’s technology meaningfully from that of traditional cable providers.<sup>132</sup> The Court then explicitly held that “the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions.”<sup>133</sup> An entity may perform publicly through “one or several transmissions, [even] where the performance is of the same work.”<sup>134</sup> To complete this discussion, Justice Breyer mentioned several analogies, including sending “a message to one’s friends, . . . whether [by] send[ing] separate identical e-mails to each friend or a single e-mail to all at once.”<sup>135</sup> The existence of a user-specific copy made no difference to the majority, as it regarded such as only a “process’ of transmitting a performance.”<sup>136</sup>

*Aereo*<sup>137</sup> and various amici<sup>138</sup> were concerned that the holding in the *Aereo* decision could reach and adversely affect other technologies, such as

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128. *Id.*

129. *See id.* at 2508–09. The dissent did not address the question at all, finding that *Aereo* did not perform. *Id.* at 2515 n.3 (Scalia, J., dissenting).

130. *Id.* at 2508 (majority opinion).

131. *Id.* at 2509.

132. *Id.* at 2508.

133. *Id.* at 2509.

134. *Id.*

135. *Id.*

136. *Id.*

137. Brief for Respondent at 48–49, *Aereo*, 134 S. Ct. 2498 (No. 13–461).

138. *See, e.g.*, Brief of Business Software Alliance as Amicus Curiae in Support of Neither Party at 13–25, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13–461); Brief of Center for Democracy & Technology et al. as Amici Curiae in Support of Neither Party at 9–12, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13–461); Brief of Computer & Communications Industry Association & Mozilla Corporation as Amici Curiae in Support of Respondent at 10–21, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13–461); Brief of FilmOn X, LLC et al. as Amici Curiae in Support of Affirmance at 27–28, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13–461). The concern is ongoing among commentators. *See, e.g.*, David Kravets, *Analysis: Aereo’s Death Leaves Cloud Computing Hanging in the Balance*, ARS TECHNICA (June 25, 2014, 1:36 PM), <http://arstechnica.com/tech-policy/2014/06/analysis-aereos-death-leaves-cloud-computing-hanging-in-the-balance/>; Matthew Schruers, *Symposium: Aereo*

cloud computing. In response to those concerns, the majority briefly elaborated on several ways in which future technologies could distinguish themselves from Aereo. First, the Court noted that an entity performs only when “it communicates contemporaneously perceptible images and sounds of a work.”<sup>139</sup> Second, the Court was careful to note that in cases involving other technologies, the “user’s involvement” with the equipment and “selection of content” could impact the question of whether the equipment provider performs.<sup>140</sup> Third, the holding does not necessarily “extend to those who act as owners or possessors of” the underlying work.<sup>141</sup> Fourth, it remains an open question whether “the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content.”<sup>142</sup>

In summation, the majority rested its reasoning not directly on the text of the statute, but on the text of the statute’s legislative history. The ambiguities of the statutory language were easily resolved by looking to legislative history that provided specific guidance about cable systems to which Aereo bore a vivid resemblance. The holding was narrow, but to assuage concerns about uncertainty, the majority pointed to several considerations which may come into play in future cases involving new technologies and the public performance right.

## B. DISSENTING OPINION

The dissent, authored by Justice Scalia, focused entirely on the performance aspect of the public performance right. Where the majority found that Aereo did perform under the Copyright Act, the dissent would have held that Aereo, a passive equipment provider, did not engage in volitional conduct as required for liability.<sup>143</sup>

In support of this conclusion, the dissent relied explicitly on the volitional conduct line of cases, stating that direct liability requires “volitional conduct” and that “the volitional-act requirement demands

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*Copyright Decision Creates Uncertainty for the Cloud*, SCOTUSBLOG (June 26, 2014, 12:55 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-copyright-decision-creates-uncertainty-for-the-cloud/>; Mitch Stoltz, *Symposium: Aereo Decision Injects Uncertainty into Copyright*, SCOTUSBLOG (June 27, 2014, 2:18 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-decision-injects-uncertainty-into-copyright/>.

139. *Aereo*, 134 S. Ct. at 2510.

140. *Id.* at 2507.

141. *Id.* at 2510.

142. *Id.* at 2511.

143. *Id.* at 2512–14 (Scalia, J., dissenting).

conduct directed to the plaintiff's copyrighted material."<sup>144</sup> The dissent distinguished direct liability from the secondary liability seen in cases like *Sony Corp. of America v. Universal City Studios, Inc.*<sup>145</sup> and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>146</sup> In the context of secondary liability, "defendants [are held] responsible for infringement by third parties."<sup>147</sup>

In cases implicating the volitional conduct requirement, the dissent suggested that "[m]ost of the time [the] issue will come down to who selects the copyrighted content: the defendant or its customers."<sup>148</sup> In the former instance, the defendant has itself "trespassed on the exclusive domain of the copyright owner," while in the latter instance, the customer is the relevant actor.<sup>149</sup> Like the majority, the dissent deployed a comparative metaphor: the distinction between copy shops and video-on-demand services.<sup>150</sup> The dissent would have direct liability attach to the service provider in the former instance—where the service selected content—but not in the latter—where the customer selected the content.<sup>151</sup> Applying this standard to *Aereo*, the dissent argued that *Aereo* did "not 'perform' for the sole and simple reason that it d[id] not make the choice of content."<sup>152</sup>

The dissent then set out to discredit the approach put forth by the majority. Justice Scalia characterized the majority's reasoning as employing a looks-like-cable standard, undergirded by an improper reliance on legislative history.<sup>153</sup> In support of this criticism, the dissent noted that the legislative history was derived from just one House Report and that there were "material differences" between CATV and *Aereo*'s services: most significantly, that CATV retransmitted all channels persistently, while *Aereo* transmitted content only at the direction of a user.<sup>154</sup> Lastly, the dissent reiterated its charge that the court's decision disrupted the settled doctrine that direct liability hinges on "volitional conduct directed at the copyrighted work."<sup>155</sup>

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144. *Id.* at 2512.

145. 464 U.S. 417 (1984).

146. 545 U.S. 913 (2005).

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

148. *Id.* at 2513.

149. *Id.* (quoting *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 500 (4th Cir. 2004)).

150. *Id.*

151. *Id.* at 2514.

152. *Id.*

153. *Id.* at 2515.

154. *Id.*

155. *Id.* at 2516.

### C. SCOPE AND APPLICABILITY OF THE DECISION

In the wake of *Aereo*, some have argued that the decision applies a special *sui generis* standard to cable companies (or technologies that *look like* cable).<sup>156</sup> This view, while finding some basis in the text of the opinion, is untenable.

The majority opinion notes on several occasions that its holding is limited. When holding that *Aereo* performed, the Court stated that the “history of cable broadcast transmissions . . . informs [the] conclusion that *Aereo* ‘perform[s],’ but does not determine whether different kinds of providers in different contexts also ‘perform.’”<sup>157</sup> Additionally, as discussed throughout this Note, the Court repeatedly provided various grounds on which the holding in *Aereo* could be distinguished from future cases.<sup>158</sup>

This limiting language may appear to restrict the Court’s holding to cable or cable-like systems, but that restriction is not supported by the statute. First of all, the public performance right does not distinguish between the types of technology at issue.<sup>159</sup> In fact it does the opposite, by using the technology-neutral phrase “any device or process.”<sup>160</sup> Second, although the legislative history is replete with references to CATV,<sup>161</sup> that emphasis is explained by the fact that CATV was the main impetus for the public performance amendments and, further, was one of the few

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156. See, e.g., *Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 719 (S.D.N.Y. 2014) (“Because the third-party domains here are not ‘substantially similar’ to a community antenna television provider, they are beyond *Aereo*’s reach.”); *Reply Comments on “Making Available” Study, Sent by Public Knowledge & Electronic Frontier Foundation to Copyright Office Request for Additional Comments* 4 (Sept. 15, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/reply/PK\\_EFF.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/reply/PK_EFF.pdf); David Post, *Symposium: A Win, Though a Narrow One (Thanks to Breyer, J.), for Copyright Owners*, SCOTUSBLOG (June 26, 2014, 3:47 PM), <http://www.scotusblog.com/2014/06/symposium-a-win-though-a-narrow-one-thanks-to-breyer-j-for-copyright-owners/>; Mitchell Zimmerman, *Copyright Alert: ABC v. Aereo: What the Supreme Court Decided - And What It Did Not*, FENWICK & WEST LLP (June 25, 2014), <https://www.fenwick.com/publications/Pages/Copyright-Alert-ABC-v-Aereo-What-the-Supreme-Court-Decided-And-What-It-Did-Not.aspx>.

157. *Aereo*, 134 S. Ct. at 2510.

158. *Id.* at 2507, 2510–11.

159. See Giblin & Ginsburg, *supra* note 33, at 3 (“It is undesirable for legal outcomes to depend so heavily on technical design,” so the Copyright Act should be read to “enable[] copyright’s exclusive rights to remain effective without discouraging technological innovation.”).

160. 17 U.S.C. § 101 (2012).

161. *Aereo*, 134 S. Ct. at 2504–05.

cable-delivered public performance technologies in existence at the time.<sup>162</sup> Moreover, the statute makes explicit reference to possible future technologies: “as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.”<sup>163</sup> Taking all this into account, there does not seem to be anything that makes cable doctrinally special, aside from it being the primary technology to which Congress was reacting when it drafted the 1976 Copyright Act.

Additionally, *stare decisis* and a generally applicable statute belie the notion that there can be some sort of ticket-valid-for-this-day-only ruling.<sup>164</sup> Congress crafted the public performance right in response to the rise of CATV, but did not craft it to encompass *only* CATV and its technological analogues.<sup>165</sup> And while the Court’s opinion resolved the dispute for the parties before it in *Aereo*, the disposition does not apply *only* to those parties. When the Court announces an opinion, it becomes precedent, suitable for consumption by lower courts hungry for guidance.<sup>166</sup> Given the confusion among lower courts prior to *Aereo*, the Court’s discussion regarding the contours of the public performance right—despite its disclaimers—will be examined by lower courts.

The Court’s position can best be summarized by the following passage: “[q]uestions involving cloud computing, . . . DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the]

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162. *Evolution of Cable Television*, FCC.GOV, <http://www.fcc.gov/encyclopedia/evolution-cable-television> (last visited Feb. 11, 2015).

163. H.R. REP. NO. 90-83, at 29 (1967).

164. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921). Also, the Second Circuit sought to limit the *Cablevision* case to its facts. As *Aereo* demonstrates, that attempt was rather unsuccessful. See Lackman, *supra* note 27. Where there is precedent that could logically be extended to a novel and challenging fact pattern, courts—finding no clear point of distinction other than attempts in dicta to limit a holding—will do as logic commands. Cf. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (“The Court disguises the vast (and scary) scope of its holding by promising a limitation it cannot deliver. . . . At the end of the day, *logic will out*.” When there arises a future case, “the Court will predictably (and quite rightly) say, ‘We can find no significant difference between this case and *King*.”).

165. The statute is cast in terms that are technologically neutral. 17 U.S.C. § 101 (2012) (“To ‘perform’ a work means to . . . render . . . it, either directly or by means of *any device or process* . . .” (emphasis added)).

166. *Anastasoff v. United States*, 223 F.3d 898, 899–900 (8th Cir. 2000) (Arnold, J.), *vacated as moot*, 235 F.3d 1054. *But see* *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.).

course,' should await a case in which they are squarely presented."<sup>167</sup> The majority's decision is cautious to limit the immediate scope of its holding, since it relied on a specific aspect of the legislative history.<sup>168</sup> That does not preclude the future application of *Aereo*, nor does it mean the outcome in *Aereo* is limited to cable technologies. The Court is apprehensive about applying a grossly outdated statute to new, complex technology. So it treads carefully and incrementally. While it limited its holding to the technology at issue, it did not do so blithely. It resolved the case before it, but went on to explain how future cases may be decided, and in doing so, altered the contours of some existing copyright doctrines.

#### IV. THE IMPACT OF *AEREO* ON EXISTING COPYRIGHT DOCTRINE

In deciding *Aereo*, the majority focused on the overwhelming similarity of *Aereo* to a cable company and on the legislative history aimed directly at the latter technology. With such a clear legislative guide, Justice Breyer was not obliged to grapple with the challenging questions occasioned by diffuse, automated systems. Assuming the holding has applicability beyond the limited context of cable TV and services that resemble cable TV, *Aereo* marks a potentially significant reinterpretation of one of copyright's most important exclusive rights: the right of public performance.

As for volitional conduct, the Court's holding, though devoid of any explicit volitional conduct analysis, effectively alters (and likely lowers) the standard of volition that was espoused in cases like *Cablevision*. While the contours of the doctrine are still very much uncertain, there appears to be a move closer toward a proximate cause analysis. As for the question of what constitutes performance "to the public," the Second Circuit's one-user/one-copy approach to the "public" aspect of the right of public performance has been clearly discarded. In addition, the Court has provided some guidance as to who, in future cases, may constitute "the public."

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167. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014) (quoting Brief for United States as Amicus Curiae in Support of Petitioners at 34, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13-461) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 341 (1984))).

168. See also Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 245 (1958) ("Like an Alpinist ascending an unknown slope, [a judge may leave] inconspicuous little handholds to facilitate his retreat if the route should lead to danger.").

## A. VOLITIONAL CONDUCT AND PERFORMANCE

The majority devoted little attention to the text of the statute or to the volitional conduct doctrine, choosing instead to rest its conclusion on Aereo's similarity to the CATV systems addressed by the statute's legislative history.<sup>169</sup> Given that the majority did not even address the volitional conduct doctrine, the status of the doctrine appears somewhat murky. However, a close examination of the decision evinces a number of principles.

First, to the extent the volitional conduct doctrine maintains vitality, it is clear that the interpretation espoused by the dissent is untenable. Justice Scalia declared that the requirement that a defendant engage in volitional conduct is "firmly grounded in the Act's text, which defines 'perform' in active, affirmative terms."<sup>170</sup> Flowing from this reading, the dissent argued, is the conclusion that the Copyright Act requires a sort of push the button or selection of content test.<sup>171</sup> That is, if an entity does not select the content, it is not a volitional actor, and therefore Aereo did not perform. This standard, previously articulated in cases like *Cablevision*, was rejected by the majority.<sup>172</sup> The Court expressly noted that the mere "turn[ing] [of] the knob" and the determination of whether a user prompts the initiation of a transmission are both irrelevant to the direct liability inquiry.<sup>173</sup>

However, recognizing that the dissent's approach is not the state of the law after *Aereo* does little to elucidate the practical consequences of *Aereo*. Though the Court made no explicit statement, it seems to have discarded the bright-line volitional conduct test, in favor of a more free-form proximate cause inquiry. Not only is the result in *Aereo* consistent with this reading, Justice Breyer outlined several factors to be considered in determining whether a given entity "performs" for purposes of the Copyright Act.

The Court first drew a distinction between an entity that merely supplies equipment and one that "engages in activities like Aereo's."<sup>174</sup> Therefore, a finding of liability requires something more than the bare furnishing of equipment. Precisely what actions may transform an equipment supplier into an Aereo remains nebulous. Aereo, a relatively passive entity, was found to perform; but from the opinion, it's not

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169. *See Aereo*, 134 S. Ct. at 2504–06.

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

171. *Id.* at 2514.

172. *Id.* at 2508–09 (majority opinion).

173. *Id.* at 2507.

174. *Id.* at 2504.

immediately clear what Aereo did to reach some threshold beyond supplying equipment. In fact, there seems to be little distinction between the passive activities of Aereo and those of Cablevision, yet Aereo failed to be shielded from liability by leaving many of the pertinent and final actions—initiating a given transmission—to its users. This marks a departure from the prevailing volitional conduct cases, but one with a sensible justification.

Without any express statement thereof, the Court appears to be endorsing a type of proximate cause test. The Court recognized that there was infringement effectuated through the use of an automated system. The perplexing question was whether it was the engineer of the system or the user of the system that should be deemed the performer. The Court needed to determine who *most* caused the infringement to occur, or: whose “conduct has been so significant and important a cause that [he or she] should be legally responsible.”<sup>175</sup> This approach to determining direct liability has been endorsed not only by some commentators,<sup>176</sup> but by Judge Whyte himself in *Netcom*: “there should still be some element of volition or *causation*.”<sup>177</sup> While most courts have focused on the language of “volitional conduct,” the key analytical weight is best derived from “causation.” When the infringement of an exclusive right has occurred, a court must determine whether the end user or the system operator has caused the infringement. While there are numerous and diverse but-for causes, the conduct of one party will constitute a cause “with a nexus sufficiently close and causal to the illegal copying that one could” deem it the proximate one.<sup>178</sup>

While copyright infringement is a strict liability wrong,<sup>179</sup> proximate cause is frequently an element of strict liability torts.<sup>180</sup> In the case of

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175. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008) (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 42 (5th ed. 1984)). The Second Circuit also formulated the inquiry as whose conduct has been “more proximate to the creation of illegal copying.” *Id.* Essentially, the court conceived of the volitional conduct standard as a type of proximate cause test, borrowed from general tort law.

176. Terry Hart, *Making Copies! Retiring the Volitional Conduct Test in Favor of Proximate Causation*, COPYHYPE (Apr. 7, 2014), <http://www.copyhype.com/2014/04/making-copies-retiring-the-volitional-conduct-test-in-favor-of-proximate-causation/>; see also Stoltz, *supra* note 138.

177. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Serv.s, Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (emphasis added).

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

179. See *Faulkner v. Nat’l Geographic Soc’y*, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008) (“Copyright infringement is a strict liability wrong in the sense that a plaintiff need



copyright infringement, the putative infringer must *cause* the infringing event to transpire. This question does not typically arise since the identity of the infringer is often quite clear.<sup>181</sup> The purpose of this analysis is not to determine merely who pushed the button or turned the dial, but rather who is to be held liable for encroachment into the copyright holder's exclusive domain. In reaching this conclusion, courts rely not on logic, but on legal line-drawing, the purpose of which is to show who is close enough to the event to be considered the most important cause.<sup>182</sup> In the proximate cause inquiry, the structure of the content-delivery system, any ongoing control exercised by its engineers, the user's interaction with the technology, and the user's selection of content may all be relevant to the determination of who is the most important cause in a chain of events which caused a performance to occur.

The Court did think aloud about what this proximate cause inquiry might look like. It did so by mentioning some factors that may be taken into consideration in the proximate cause analysis. Though there are apparently no bright-line rules, courts can—through an interpretive framework—determine who has sufficiently caused the infringement for purposes of direct liability. Within this context, it is important to note that it is irrelevant whether the various causes of infringement “have been accomplished through human intervention or through the intervention of . . . automated processes.”<sup>183</sup>

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not prove wrongful intent or culpability in order to prevail . . . .”); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (stating that “copyright is a strict liability statute”); A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 52 (1989) (“Liability for direct infringement is imposed on a strict liability basis.”).

180. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring) (There was no “no indication that Congress,” upon enacting a statute, “intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct.” (citing *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* 559–60 (5th ed. 1984))); *DAN DOBBS ET AL., DOBBS' LAW OF TORTS* § 199 n.5 (2d ed. 2014) (“Proximate cause rules or some close analog have been applied, for example, in some strict liability cases . . . .”).

181. See *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2513 (2014) (Scalia, J., dissenting).

182. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting) (“What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”).

183. 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 7.0.2 (3d ed. Supp. 2015).

First, the Court apparently attached some significance to the fact that Aereo used its own equipment and its own facilities to retransmit content to its users.<sup>184</sup> This emphasis suggests that the volition calculus may change in instances where a retransmitter like Aereo does not actually establish a system that is in its possession and under its control. For instance, the result may have been different if Aereo chose to sell antennae to users, which could then (for a subscription fee) be used to watch shows using the Aereo web interface, with the program content transcoded and written to the user's own hard drive.<sup>185</sup> The key thrust of this factor is there is a willingness to find that a given entity is the relevant performer when its own<sup>186</sup> equipment has initiated the transmissions at issue.

Second, the majority remarked that the user's involvement with the technology and the "selection of the content transmitted may well bear on" the determination of whether an entity "performs."<sup>187</sup> The opinion contains no explanation of these phrases, and the latter seems ostensibly to contradict the Court's previous holding that the user's act of selecting content is not relevant to the question of whether one performs.<sup>188</sup> Since this dicta is bereft of almost any explanation, those who hope to derive a workable rule are left to rely almost entirely on conjecture. The Court seems to be intimating that although "turning the knob" does not automatically render an end-user a "performer," that act of knob-turning or otherwise selecting content is not irrelevant to the volition analysis. If a service chooses which content is available to its users, that fact may bear on whether its actions are the proximate cause in the performance of copyrighted material.

From these factors emerges an analysis that resembles a proximate cause inquiry wherein legal liability is rooted in the determination of who is best deemed to have caused an infringement to occur. While the Court never stated this explicitly, courts and commentators in search of a standard to determine the relevant performer will look to the case's

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184. *Aereo*, 134 S. Ct. at 2506 ("Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes.").

185. A similar service is employed by a company called Simple.TV. That service "includes either one or two HDTV tuners that record TV to a[n] external storage that you provide." *Frequently Asked Questions*, SIMPLE.TV, <https://us.simple.tv/faq#q1> (last visited Feb. 23, 2015).

186. The Court did not elaborate on what is meant by "its own," but it presumably referred to control, rather than actual ownership, since the subscribers in *Aereo* rented the equipment controlled by Aereo. In a scenario where a service like Aereo sold antennae, but maintained *control* over them, it is not clear how this factor would weigh.

187. *Aereo*, 134 S. Ct. at 2507.

188. *Id.*

outcome and to the Court's suggestions. And what the opinion reveals is not that the Court has "jettisoned . . . by implication"<sup>189</sup> the limiting principles of the volitional conduct doctrine, but that the doctrine needs to be recalibrated. The action of pressing the button is not a shortcut to liability, but one factor to be considered in a proximate cause inquiry. In *Aereo*, the defendant operated its service from its own facilities.<sup>190</sup> Additionally, *Aereo* limited the type of content available to its users.<sup>191</sup> This exercise of control influenced the outcome of the analysis, and it hearkens back to Judge Whyte's distinction in *Netcom* between a service that merely provides *access* to content and one that *supplies* content in some meaningful way.<sup>192</sup>

In this theoretical framework, liability is not premised solely on who has selected the content or who has provided the last bit of human intervention, but from who, upon considering a number of factors, may be most accurately deemed to have *caused* the infringing performance. And while the Court did not delve into any comparisons or explain how this analysis may be applied in different contexts, it seems that the Court has not foreclosed the possibility that there *can* still exist a mere supplier of equipment who transmits copyrighted content to end users. That is, a passive entity could be saved from liability by the proximate cause formulation of the "volitional conduct" doctrine. The previous formalistic conceptualization of the doctrine has been eliminated in favor of a more expansive proximate cause framework.

To summarize, it is not evident what the boundary between performance and non-performance is, but if the *Aereo* decision is to have any weight at all, it appears the threshold for performance is a relatively low one. And while there are apparently no bright-line rules, the opinion begins to outline the contours of a test. If the threshold for whether a given entity performs a copyrighted work is indeed a low one, there is

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189. *Fox Broad. Co. v. Dish Network LLC*, No. CV 12-4529 DMG (SHx), 2015 U.S. Dist. LEXIS 23496, at \*33 (C.D. Cal. Jan. 21, 2015).

190. *Aereo*, 134 S. Ct. at 2503.

191. In the case of *Aereo*, the service limited the type of content available in the sense that it chose a specific type of input source: over-the-air television signals. *See id.* Given that most broadcasted programs are subject to copyright, the user's selection may be less significant than in the instance of, for example, an ISP. In the case of *Aereo*, the user is only given access to linear streams of copyrighted content, while in the case of an ISP, the user has been given access to nearly limitless bodies of content.

192. *See Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995).

great significance attached to the latter part of the Court's holding: whether a given performance is to the public.

#### B. PERFORMING "TO THE PUBLIC"

As with the Court's holding regarding whether Aereo performed, numerous commentators have criticized the Court's "to the public" holding as embracing an unworkable "looks like cable" test that may imperil future technologies.<sup>193</sup> This is not so. Although the Court supported its reading with legislative history, it ultimately concluded that the statute encompassed the activities undertaken by Aereo.<sup>194</sup> That is, when a service transmits copyrighted content to members of the public, it is engaging in a public performance. And while the majority was cautious about the possible breadth of its decision, it saw fit to offer some potential guideposts in the determination of whether a given performance is a public one.

First, and perhaps of the most immediate significance, the Court made clear that the "to the public" interpretation adopted by the Second Circuit has been retired.<sup>195</sup> To put it tersely, the Court held that there is no statutory justification for the one-user/one-copy interpretation. The disaggregation of a performance, through multiple transmissions, does not shield an entity from liability. The statute makes no distinction between a performance of a work through one transmission or through one million. In reaching this conclusion, Justice Breyer relied primarily on the fact that the end result of a disaggregated transmission is identical to that of a single aggregated transmission.<sup>196</sup> To further bolster this conclusion, Justice Breyer made several illustrative analogies, detailed in Section III.A *supra*.

However, the mere dismissal of *Cablevision* does little to illuminate the contours of the public performance right, particularly in context of services

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193. See e.g., Kevin Drum, *Supreme Court: Aereo Looks Just Like Cable TV, So It Has to Follow the Same Laws as Cable TV*, MOTHER JONES (June 25, 2014, 1:17 PM), <http://www.motherjones.com/kevin-drum/2014/06/supreme-court-aereo-looks-just-cable-tv-so-it-has-follow-same-laws-cable-tv>; Mike Masnick, *Supreme Court Uses The Bizarre 'Looks Like A Cable Duck' Test To Outlaw Aereo*, TECHDIRT (June 25, 2014, 9:48 AM), <https://www.techdirt.com/articles/20140625/09340227683/supreme-court-uses-bizarre-looks-like-cable-duck-test-to-outlaw-aereo.shtml>; Matthew Schruers, *Symposium: Aereo Copyright Decision Creates Uncertainty for the Cloud*, SCOTUSBLOG (June 26, 2014, 12:55 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-copyright-decision-creates-uncertainty-for-the-cloud/>.

194. *Aereo*, 134 S. Ct. at 2511.

195. *Id.* at 2507–10.

196. *Id.* at 2508–09.

bearing little resemblance to *Aereo* or traditional cable systems. While the Court rested its holding narrowly on *Aereo*'s similarity to CATV, it went on to articulate what may come to be valuable guidance on what constitutes a performance "to the public."<sup>197</sup> Given the increasing prominence of video streaming services, cloud storage, and other content delivery methods—all of which may be found to perform—this aspect of the public performance right is of paramount importance. Recognizing the potentially precarious status of many technologies, the majority advanced several ways in which the activities of other services may be differentiated from those of *Aereo*: a user's underlying relationship to the work and whether the user pays primarily for something other than copyrighted content.<sup>198</sup>

The Court stated that the determination of whether a set of people (to which the work is performed) "constitute[s] the public . . . depends upon their relationship to the underlying work."<sup>199</sup> Justice Breyer then attempted to substantiate this assertion by crafting an analogy: a valet who returns cars to their owners can be distinguished from a car dealership that provides cars to the public.<sup>200</sup> This language serves as a point of distinction between locker services and streaming services. In the former instance, there are individualized private transmissions of the same underlying work, while in the latter instance, transmissions of the underlying work are to be aggregated as one performance (and thus a public one). The distinction hinges on whether a given service is more analogous to a valet or a dealership. And therein lies the key analytical difficulty introduced by the majority. The Court did not wrangle with the question, but the key difference seems to be whether a service acts as a viewing apparatus for content supplied by the user, or as an intermediary for content originating from a source outside the user's control. Like a valet, a service of the former category delivers content back to the user who supplied it. And like a dealership, a system of the latter category supplies content to the user, who receives it, at the first instance, from the service.

The key question, for the Court, is who, as between the user and the service provider, may be described as "owner[] or possessor[] of the underlying work[]."<sup>201</sup> While there may be something intuitive about the above analysis, the practical application of this "ownership" test may

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197. See Lackman, *supra* note 27.

198. *Aereo*, 134 S. Ct. at 2510–11.

199. *Id.* at 2510 (quotation marks omitted).

200. *Id.*

201. *Id.*

present considerable challenges. For one, the majority does not make clear what exactly is meant by “ownership.” The Copyright Act does not define “owners” or “possessors” and the Court’s reference to the term seems, “at best, very imprecise.”<sup>202</sup> It seems unlikely that the Court equated ownership with authorization to view, as the viewers in *Aereo* had the legal authority—by nature of over-the-air broadcasts—to view the copyrighted works at issue (though only in a certain manner, as evidenced by the Court’s holding). Instead, the Court was likely referring to some sort of pre-existing access. In cases where a consumer already has an electronic or physical copy of a work (or has gained, at some other instance, access to the work) they have a distinct status. When an entity transmits an underlying work to many such “owners” of that particular work, there may be many private performances rather than a single public performance. In other words, under the ownership test it appears that certain “members of the public”<sup>203</sup> are segmented off and transformed into individuals of a different legal status. When an entity transmits to them in a certain context, it is not in their capacity as “members of the public.”<sup>204</sup> In other words, an individual to whom a service transmits copyrighted content will be considered a “member of the public” when the transmitting entity could be considered a content supplier. In such instances, its many transmissions are to disparate, indeterminate members of the public. But when it performs to owners who have supplied their own content inputs, the performing entity’s service acts like a virtual VCR, the fruits of which—though borne of the same tree—are enjoyed by separate and distinct owners (predetermined recipients), rather than by collective members of the public.

For purposes of clarification, we can look to several illustrative examples. If 1,000 unrelated people each store a digital copy of the same episode of a television show in their remote storage folders, does a service like Dropbox<sup>205</sup> publicly perform when each person plays the episode, whether at different places at different times or in the same place at the same time? To put it abstractly, are all these transmissions to be aggregated into the same performance, thus rendering the performance a

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202. *Reply Comments on “Making Available” Study, Sent by Jane C. Ginsburg to Copyright Office Request for Additional Comments* 7 (Sept. 3, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/reply/Ginsburg\\_Jane.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/reply/Ginsburg_Jane.pdf); *see* 17 U.S.C. § 101 (2012).

203. 17 U.S.C. § 101.

204. *Id.*

205. *Dropbox Tour*, DROPBOX, <https://www.dropbox.com/tour/1> (last visited Feb. 27, 2015).

public one? The *Aereo* Court’s “ownership test” suggests that the answer to that question may be no. However, when a service like Netflix,<sup>206</sup> itself a supplier of content, transmits a single episode to one thousand unrelated people, these one thousand unrelated people—receiving content, at the first instance, from Netflix—comprise members of the public, and the performance *is* likely a public one.

The Court’s reading of the statute may pack a great deal of analysis into the “public” component of the statutory language. And it does so by introducing an unexpected heuristic: ownership. Though novel in its exact articulation, this interpretation is not unprecedented. A variation on this analysis was employed by the dissent in the Second Circuit’s decision that preceded *Aereo*. There, the dissent drew a distinction between *Aereo*, which had no license to retransmit the copies it “produce[d] . . . to transmit . . . to its subscribers,” and Cablevision, which had a license to retransmit material and “promoted its RS-DVR as a mechanism for recording and playing back programs.”<sup>207</sup> After *Aereo*, the district court in *Fox. Broad. Co. v. Dish Network LLC*<sup>208</sup> has employed precisely the analysis proposed by Justice Breyer. In the case, Fox sued Dish for allowing its users to stream broadcast programming over the internet using a service called Dish Anywhere.<sup>209</sup> Dish had a license to retransmit the copyrighted content over their standard video service, but not *over the internet* to its subscribers. In deciding against the broadcasters in a motion for summary judgment, the district judge emphasized that Dish could be distinguished from *Aereo*, because it had a license for its “initial retransmissions of the [over-the air] programming [content],” and because the subscriber could only “gain access to . . . authorized recorded content.”<sup>210</sup> By contrast, *Aereo* carried programs that “had been released to the public and carried them by private channels to additional viewers.”<sup>211</sup> Thus, *Aereo* supplied content to its subscribers at the first instance, while Dish allowed users to privately perform works that they already possessed. At this point, it remains to be seen how courts will apply *Aereo*, but this approach finds support in the language of the statute and the opinion in *Aereo*.

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206. *How Does Netflix Work?*, NETFLIX, <https://help.netflix.com/en/node/412> (last visited Feb. 27, 2015).

207. WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 702 (2d Cir. 2013) (Chin, J., dissenting), *rev’d sub nom. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

208. No. CV 12-4529 DMG (SHx), 2015 U.S. Dist. LEXIS 23496 (C.D. Cal. Jan. 21, 2015).

209. *Id.* at \*4–5.

210. *Id.* at \*35.

211. *Id.* at \*34–35.

The second consideration mentioned by the majority in *Aereo*—whether the user pays primarily for something other than the retransmission of copyrighted content<sup>212</sup>—is somewhat baffling. Again, the Court made no effort to expound on the precise nature of this inquiry, so we are left to guess. As a result, it isn't clear how this would hook into the statutory language. At best, it seems duplicative of the previous analysis pertaining to ownership or possession in the underlying content. In the case of Dropbox, the user pays primarily for storage capability, rather than content. In the context of something like the RS-DVR, perhaps the user pays primarily for recording capability, rather than content. While primarily paying for something other than copyrighted content may be characteristic of systems that do not perform to the public, it is hard to imagine what this adds to the previous analysis. Further, it is unclear how a user's payment for features beyond transmission could render private what is an otherwise public performance. While this may serve as a later basis for distinguishing *Aereo* from other cases, it is unclear what the systems in those cases would look like, or how this consideration would comport with the statute.

## V. CONCLUSION

The Copyright Act of 1976 sits in an awkward position. New technological realities, anticipated by neither drafters nor judges, have exerted tremendous strain on language authored shortly after the emergence of color TV.<sup>213</sup> Yet the statute remains the primary governing law in the area of copyright. Confronted with a challenging technology and ambiguous statutory language, the Supreme Court in *Aereo* looked to legislative history to divine the intent behind that language. There, the Court discovered a convenient path to an intuitive result. Congress sought to encompass the activities of a service like *Aereo* when it amended the Copyright Act, and so, the Court could work backwards: if *Aereo* was liable, it must have performed and it must have performed to the public. In arriving at this conclusion, the Court potentially altered the volitional conduct doctrine and the nature of “public” performances. Fearful of the effects of a broad ruling, the Court carefully limited its holding, but not without offering some lessons. This guidance may be of significant

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212. *Aereo*, 134 S. Ct. at 2510–11.

213. See Samuelson, *supra* note 1, at 553–55; *The Color Revolution: Television in the Sixties*, TELEVISION OBSCURITIES, <http://www.tvobscurities.com/articles/color60s/> (last visited Jan. 22, 2015).



importance, given that the Court did not engage much with existing copyright doctrine or the statute's text.

The *Aereo* case can be plausibly read to have a measurable effect on the public performance right. The volitional conduct doctrine, espoused in a nearly uninterrupted line of cases, has been altered by the Court. Though not done so explicitly, the Court's opinion defies the somewhat formalistic volitional conduct standard developed by the lower courts.<sup>214</sup> Additionally, the Court has discarded the faulty one-user/one-copy rule. And to alleviate concerns about cloud-storage and other technologies, the Court proposed two ways to categorize performances in future cases. These analytical guideposts may prove vital in later cases involving performing technologies that, while implicating the public performance right, differ substantially from *Aereo*.

The true impact of the *Aereo* decision will be revealed in the future, and only by the ongoing evolution of copyright law. What is immediately evident is that the Court experienced discomfort about *Aereo*'s activities, but was understandably apprehensive about handing down a broad rule. The result is a decision that may later be cited either for broad pronouncements regarding statutory interpretation, or as a one-off rule, relegated to its factual context.

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214. See *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

