

## **ANNEX II**

1. Email from the International Federation of the Phonographic Industry (IFPI) with legal note, 15/07/2016, (Ref.Ares(2017)2268842)
4. Email from the International Federation of the Phonographic Industry (IFPI), with legal note, 02/08/2016, (Ref. Ares(2017)2269094)
5. Email from the International Federation of the Phonographic Industry (IFPI) with legal note, 05/08/2016, (Ref. Ares(2017)2269139)

(CNECT)

**From:** Olivia Regnier <Olivia.Regnier@ifpi.org>  
**Sent:** 15 July 2016 18:26  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED] (CNECT); [REDACTED] (CNECT); [REDACTED] (CNECT);  
 ; [REDACTED] ; Frances Moore  
**Subject:** FW: Legal Note  
**Attachments:** Legal note on [REDACTED] ....docx

Dear [REDACTED],

FYI. Do not hesitate to contact us if you have any questions in relation to this note.

We would be happy to catch up with you next week on the latest developments and the preparation of the Directive.

Have a good week-end.  
 Kind regards,

Olivia

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**From:** [REDACTED] On Behalf Of Frances Moore  
**Sent:** vendredi 15 juillet 2016 18:19  
**To:** [guenther-oettinger-contact@ec.europa.eu](mailto:guenther-oettinger-contact@ec.europa.eu)  
**Cc:** [anna.herold@ec.europa.eu](mailto:anna.herold@ec.europa.eu); [michael.hager@ec.europa.eu](mailto:michael.hager@ec.europa.eu); Olivia Regnier <[Olivia.Regnier@ifpi.org](mailto:Olivia.Regnier@ifpi.org)>  
**Subject:** Legal Note [REDACTED]

Dear Commissioner

Thank you for inviting IFPI to participate in the 8th July Round Table consultation on the Commission's proposal to deal with the Value Gap in the forthcoming Copyright package.

[REDACTED] . Art.  
 4(3);  
 Art. 4  
 (2)(2)

We will follow up with your cabinet to discuss and enquire whether anything further is needed.

Thank you again, Commissioner for your engagement on this issue.

Best regards  
 Frances Moore

Frances Moore  
**Chief Executive Officer**

IFPI – representing the recording industry worldwide

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[www.ifpi.org](http://www.ifpi.org) – representing the recording industry worldwide

[www.pro-music](http://www.pro-music) – for all you need to know about getting music on the internet

@IFPI\_org





representing the  
recording industry  
worldwide

[REDACTED]

## Legal analysis

Art. 4(2)(2)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Response	Percentage
Yes	75%
No	25%

Government	Percentage
Current government	85%
Previous government	15%

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Government	Percentage
Current government	85%
Previous government	15%

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Government	Percentage
Current government	85%
Previous government	15%

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[illegible]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(CNECT)

**From:** [REDACTED]@ifpi.org>  
**Sent:** 02 August 2016 18:16  
**To:** [REDACTED] (CNECT); [REDACTED] (CNECT); [REDACTED] (CNECT)  
**Cc:** Olivia Regnier  
**Subject:** [REDACTED]  
**Attachments:** ifpi advice 28.7.16.docx; Aereo 13-461\_I537.pdf; 13-461 tsac IFPI.PDF

Dear [REDACTED],

I attach some materials [REDACTED]

:

Art. 4(2)  
(2)

- In addition to our legal note that we have already sent to you, I attach a short legal advice [REDACTED]  
[REDACTED], [REDACTED] [REDACTED]
- US Supreme Court decision in the case Aereo, where the Court found that Aereo, which provided a service allowing its users to watch TV programs online near – live, fell under the exclusive right of public performance. The Court argued that Aereo was not merely an equipment provider and that Aereo, and not just its subscribers, “performed” (or “transmitted”), and its activities were similar to those of cable systems.
- IFPI amicus brief in the Aereo case

We hope that you will find these materials useful. Note that we are looking into some further arguments, and might send you additional papers in the coming days. Do not hesitate to let us know if you would like to discuss further.

Kind regards,  
[REDACTED]

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## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

AMERICAN BROADCASTING COS., INC., ET AL. *v.*  
AEREO, INC., FKA BAMBOOM LABS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

No. 13–461. Argued April 22, 2014—Decided June 25, 2014

The Copyright Act of 1976 gives a copyright owner the “exclusive righ[t]” to “perform the copyrighted work publicly.” 17 U. S. C. §106(4). The Act’s Transmit Clause defines that exclusive right to include the right to “transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” §101.

Respondent Aereo, Inc., sells a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air. When a subscriber wants to watch a show that is currently airing, he selects the show from a menu on Aereo’s website. Aereo’s system, which consists of thousands of small antennas and other equipment housed in a centralized warehouse, responds roughly as follows: A server tunes an antenna, which is dedicated to the use of one subscriber alone, to the broadcast carrying the selected show. A transcoder translates the signals received by the antenna into data that can be transmitted over the Internet. A server saves the data in a subscriber-specific folder on Aereo’s hard drive and begins streaming the show to the subscriber’s screen once several seconds of programming have been saved. The streaming continues, a few seconds behind the over-the-air broadcast, until the subscriber has received the entire show.

Petitioners, who are television producers, marketers, distributors, and broadcasters that own the copyrights in many of the programs that Aereo streams, sued Aereo for copyright infringement. They sought a preliminary injunction, arguing that Aereo was infringing

## Syllabus

their right to “perform” their copyrighted works “publicly.” The District Court denied the preliminary injunction, and the Second Circuit affirmed.

*Held:* Aereo performs petitioners’ works publicly within the meaning of the Transmit Clause. Pp. 4–18.

(a) Aereo “perform[s].” It does not merely supply equipment that allows others to do so. Pp. 4–10.

(1) One of Congress’ primary purposes in amending the Copyright Act in 1976 was to overturn this Court’s holdings that the activities of community antenna television (CATV) providers fell outside the Act’s scope. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. 390, the Court determined that a CATV provider was more like a viewer than a broadcaster, because its system “no more than enhances the viewer’s capacity to receive the broadcaster’s signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer’s television set.” *Id.*, at 399. Therefore, the Court concluded, a CATV provider did not perform publicly. The Court reached the same determination in respect to a CATV provider that retransmitted signals from hundreds of miles away in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U. S. 394. “The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer,” the Court said. *Id.*, at 408. Pp. 4–7.

(2) In 1976, Congress amended the Copyright Act in large part to reject the *Fortnightly* and *Teleprompter* holdings. The Act now clarifies that to “perform” an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible.” §101. Thus, *both* the broadcaster *and* the viewer “perform,” because they both show a television program’s images and make audible the program’s sounds. Congress also enacted the Transmit Clause, which specifies that an entity performs when it “transmit[s] . . . a performance . . . to the public.” *Ibid.* The Clause makes clear that an entity that acts like a CATV system itself performs, even when it simply enhances viewers’ ability to receive broadcast television signals. Congress further created a complex licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts to the public. §111. Congress made all three of these changes to bring cable system activities within the Copyright Act’s scope. Pp. 7–8.

(3) Because Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach, Aereo is not simply an equipment provider. Aereo sells a service that allows subscribers to watch television programs, many of which are

## Syllabus

copyrighted, virtually as they are being broadcast. Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes. By means of its technology, Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnighly, supra*, at 400.

This Court recognizes one particular difference between Aereo's system and the cable systems at issue in *Fortnighly* and *Teleprompter*: The systems in those cases transmitted constantly, whereas Aereo's system remains inert until a subscriber indicates that she wants to watch a program. In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. Pp. 8–10.

(b) Aereo also performs petitioners' works "publicly." Under the Clause, an entity performs a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." §101. What performance, if any, does Aereo transmit? Petitioners say Aereo transmits a *prior* performance of their works, whereas Aereo says the performance it transmits is the *new* performance created by its act of transmitting. This Court assumes *arguendo* that Aereo is correct and thus assumes, for present purposes, that to transmit a performance of an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Under the Court's assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

What about the Clause's further requirement that Aereo transmit a performance "to the public"? Aereo claims that because it transmits from user-specific copies, using individually-assigned antennas, and because each transmission is available to only one subscriber, it does not transmit a performance "to the public." Viewed in terms of Congress' regulatory objectives, these behind-the-scenes technological differences do not distinguish Aereo's system from cable systems, which do perform publicly. Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Under the Clause, an entity may transmit a performance through multiple transmissions, where the performance is of the same work. Thus when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it "transmit[s] . . . a per-

## Syllabus

formance” to them, irrespective of the number of discrete communications it makes and irrespective of whether it transmits using a single copy of the work or, as Aereo does, using an individual personal copy for each viewer.

Moreover, the subscribers to whom Aereo transmits constitute “the public” under the Act. This is because Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. In addition, neither the record nor Aereo suggests that Aereo’s subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute “the public” often depends upon their relationship to the underlying work. Finally, the statute makes clear that the fact that Aereo’s subscribers may receive the same programs at different times and locations is of no consequence. Aereo transmits a performance of petitioners’ works “to the public.” Pp. 11–15.

(c) Given the limited nature of this holding, the Court does not believe its decision will discourage the emergence or use of different kinds of technologies. Pp. 15–17.

712 F. 3d 676, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

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No. 13–461

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AMERICAN BROADCASTING COMPANIES, INC.,  
ET AL., PETITIONERS *v.* AEREO, INC., FKA  
BAMBOOM LABS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 25, 2014]

JUSTICE BREYER delivered the opinion of the Court.

The Copyright Act of 1976 gives a copyright owner the “exclusive righ[t]” to “perform the copyrighted work publicly.” 17 U. S. C. §106(4). The Act’s Transmit Clause defines that exclusive right as including the right to

“transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” §101.

We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.

## Opinion of the Court

I  
A

For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast. Much of this programming is made up of copyrighted works. Aereo neither owns the copyright in those works nor holds a license from the copyright owners to perform those works publicly.

Aereo's system is made up of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse. It works roughly as follows: First, when a subscriber wants to watch a show that is currently being broadcast, he visits Aereo's website and selects, from a list of the local programming, the show he wishes to see.

Second, one of Aereo's servers selects an antenna, which it dedicates to the use of that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show. The antenna begins to receive the broadcast, and an Aereo transcoder translates the signals received into data that can be transmitted over the Internet.

Third, rather than directly send the data to the subscriber, a server saves the data in a subscriber-specific folder on Aereo's hard drive. In other words, Aereo's system creates a subscriber-specific copy—that is, a “personal” copy—of the subscriber's program of choice.

Fourth, once several seconds of programming have been saved, Aereo's server begins to stream the saved copy of the show to the subscriber over the Internet. (The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo's service is not before us.) The subscriber can watch the streamed program on the screen of his personal computer, tablet, smart phone, Internet-connected television, or other Internet-connected device. The streaming continues, a mere few seconds

## Opinion of the Court

behind the over-the-air broadcast, until the subscriber has received the entire show. See A Dictionary of Computing 494 (6th ed. 2008) (defining “streaming” as “[t]he process of providing a steady flow of audio or video data so that an Internet user is able to access it as it is transmitted”).

Aereo emphasizes that the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular antenna allotted to him. Its system does not transmit data saved in one subscriber’s folder to any other subscriber. When two subscribers wish to watch the same program, Aereo’s system activates two separate antennas and saves two separate copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions—each from the subscriber’s personal copy.

## B

Petitioners are television producers, marketers, distributors, and broadcasters who own the copyrights in many of the programs that Aereo’s system streams to its subscribers. They brought suit against Aereo for copyright infringement in Federal District Court. They sought a preliminary injunction, arguing that Aereo was infringing their right to “perform” their works “publicly,” as the Transmit Clause defines those terms.

The District Court denied the preliminary injunction. 874 F. Supp. 2d 373 (SDNY 2012). Relying on prior Circuit precedent, a divided panel of the Second Circuit affirmed. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2013) (citing *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2008)). In the Second Circuit’s view, Aereo does not perform publicly within the meaning of the Transmit Clause because it does not transmit “to the public.” Rather, each time Aereo streams a program to a subscriber, it sends a *private* transmission that is avail-

## Opinion of the Court

able only to that subscriber. The Second Circuit denied rehearing en banc, over the dissent of two judges. *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2013). We granted certiorari.

## II

This case requires us to answer two questions: First, in operating in the manner described above, does Aereo “perform” at all? And second, if so, does Aereo do so “publicly”? We address these distinct questions in turn.

Does Aereo “perform”? See §106(4) (“[T]he owner of [a] copyright . . . has the exclusive righ[t] . . . to *perform* the copyrighted work publicly” (emphasis added)); §101 (“To *perform* . . . a work ‘publicly’ means [among other things] to transmit . . . a performance . . . of the work . . . to the public . . .” (emphasis added)). Phrased another way, does Aereo “transmit . . . a performance” when a subscriber watches a show using Aereo’s system, or is it only the subscriber who transmits? In Aereo’s view, it does not perform. It does no more than supply equipment that “emulate[s] the operation of a home antenna and [digital video recorder (DVR)].” Brief for Respondent 41. Like a home antenna and DVR, Aereo’s equipment simply responds to its subscribers’ directives. So it is only the subscribers who “perform” when they use Aereo’s equipment to stream television programs to themselves.

Considered alone, the language of the Act does not clearly indicate when an entity “perform[s]” (or “transmit[s]”) and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo’s performs.

## A

History makes plain that one of Congress’ primary purposes in amending the Copyright Act in 1976 was to



## Opinion of the Court

overturn this Court’s determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act’s scope. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. 390 (1968), the Court considered a CATV system that carried local television broadcasting, much of which was copyrighted, to its subscribers in two cities. The CATV provider placed antennas on hills above the cities and used coaxial cables to carry the signals received by the antennas to the home television sets of its subscribers. The system amplified and modulated the signals in order to improve their strength and efficiently transmit them to subscribers. A subscriber “could choose any of the . . . programs he wished to view by simply turning the knob on his own television set.” *Id.*, at 392. The CATV provider “neither edited the programs received nor originated any programs of its own.” *Ibid.*

Asked to decide whether the CATV provider infringed copyright holders’ exclusive right to perform their works publicly, the Court held that the provider did not “perform” at all. See 17 U. S. C. §1(c) (1964 ed.) (granting copyright holder the exclusive right to “perform . . . in public for profit” a nondramatic literary work), §1(d) (granting copyright holder the exclusive right to “perform . . . publicly” a dramatic work). The Court drew a line: “Broadcasters perform. Viewers do not perform.” 392 U. S., at 398 (footnote omitted). And a CATV provider “falls on the viewer’s side of the line.” *Id.*, at 399.

The Court reasoned that CATV providers were unlike broadcasters:

“Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public

## Opinion of the Court

and carry them by private channels to additional viewers.” *Id.*, at 400.

Instead, CATV providers were more like viewers, for “the basic function [their] equipment serves is little different from that served by the equipment generally furnished by” viewers. *Id.*, at 399. “Essentially,” the Court said, “a CATV system no more than enhances the viewer’s capacity to receive the broadcaster’s signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer’s television set.” *Ibid.* Viewers do not become performers by using “amplifying equipment,” and a CATV provider should not be treated differently for providing viewers the same equipment. *Id.*, at 398–400.

In *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), the Court considered the copyright liability of a CATV provider that carried broadcast television programming into subscribers’ homes from hundreds of miles away. Although the Court recognized that a viewer might not be able to afford amplifying equipment that would provide access to those distant signals, it nonetheless found that the CATV provider was more like a viewer than a broadcaster. *Id.*, at 408–409. It explained: “The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.” *Id.*, at 408.

The Court also recognized that the CATV system exercised some measure of choice over what to transmit. But that fact did not transform the CATV system into a broadcaster. A broadcaster exercises significant creativity in choosing what to air, the Court reasoned. *Id.*, at 410. In contrast, the CATV provider makes an initial choice about which broadcast stations to retransmit, but then “‘simply carr[ies], without editing, whatever programs [it] receive[s].’” *Ibid.* (quoting *Fortnightly*, *supra*, at 400 (altera-

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tions in original)).

## B

In 1976 Congress amended the Copyright Act in large part to reject the Court’s holdings in *Fortnightly* and *Teleprompter*. See H. R. Rep. No. 94–1476, pp. 86–87 (1976) (hereinafter H. R. Rep.) (The 1976 amendments “completely overturned” this Court’s narrow construction of the Act in *Fortnightly* and *Teleprompter*). Congress enacted new language that erased the Court’s line between broadcaster and viewer, in respect to “perform[ing]” a work. The amended statute clarifies that to “perform” an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible.” §101; see *ibid.* (defining “[a]udiovisual works” as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . , together with accompanying sounds”). Under this new language, *both* the broadcaster *and* the viewer of a television program “perform,” because they both show the program’s images and make audible the program’s sounds. See H. R. Rep., at 63 (“[A] broadcasting network is performing when it transmits [a singer’s performance of a song] . . . and any individual is performing whenever he or she . . . communicates the performance by turning on a receiving set”).

Congress also enacted the Transmit Clause, which specifies that an entity performs publicly when it “transmit[s] . . . a performance . . . to the public.” §101; see *ibid.* (defining “[t]o ‘transmit’ a performance” as “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent”). Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this language to cover. See H. R. Rep., at 63 (“[A] cable television system is perform-

## Opinion of the Court

ing when it retransmits [a network] broadcast to its subscribers”); see also *ibid.* (“[T]he concep[t] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public”). The Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers’ ability to receive broadcast television signals.

Congress further created a new section of the Act to regulate cable companies’ public performances of copyrighted works. See §111. Section 111 creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts. H. R. Rep., at 88 (Section 111 is primarily “directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works”).

Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act.

## C

This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, “perform[s]” (or “transmit[s]”). Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. See *id.*, at 89 (“[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material”). Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users’

## Opinion of the Court

homes. By means of its technology (antennas, transcoders, and servers), Aereo’s system “receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers.” *Fortnightly*, 392 U. S., at 400. It “carr[ies] . . . whatever programs [it] receive[s],” and it offers “all the programming” of each over-the-air station it carries. *Id.*, at 392, 400.

Aereo’s equipment may serve a “viewer function”; it may enhance the viewer’s ability to receive a broadcaster’s programs. It may even emulate equipment a viewer could use at home. But the same was true of the equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*.

We recognize, and Aereo and the dissent emphasize, one particular difference between Aereo’s system and the cable systems at issue in *Fortnightly* and *Teleprompter*. The systems in those cases transmitted constantly; they sent continuous programming to each subscriber’s television set. In contrast, Aereo’s system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber’s request, does Aereo’s system activate an antenna and begin to transmit the requested program.

This is a critical difference, says the dissent. It means that Aereo’s subscribers, not Aereo, “selec[t] the copyrighted content” that is “perform[ed],” *post*, at 4 (opinion of SCALIA, J.), and for that reason they, not Aereo, “transmit” the performance. Aereo is thus like “a copy shop that provides its patrons with a library card.” *Post*, at 5. A copy shop is not directly liable whenever a patron uses the shop’s machines to “reproduce” copyrighted materials found in that library. See §106(1) (“exclusive righ[t] . . . to reproduce the copyrighted work”). And by the same token, Aereo should not be directly liable whenever its patrons use its equipment to “transmit” copyrighted television programs to their screens.

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In our view, however, the dissent's copy shop argument, in whatever form, makes too much out of too little. Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. The subscribers of the *Fortnightly* and *Teleprompter* cable systems also selected what programs to display on their receiving sets. Indeed, as we explained in *Fortnightly*, such a subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." 392 U. S., at 392. The same is true of an Aereo subscriber. Of course, in *Fortnightly* the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob. Here the signals pursue their ordinary course of travel through the universe until today's "turn of the knob"—a click on a website—activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet. But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."

In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo "perform[s]."

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## III

Next, we must consider whether Aereo performs petitioners' works "publicly," within the meaning of the Transmit Clause. Under the Clause, an entity performs a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." §101. Aereo denies that it satisfies this definition. It reasons as follows: First, the "performance" it "transmit[s]" is the performance created by its act of transmitting. And second, because each of these performances is capable of being received by one and only one subscriber, Aereo transmits privately, not publicly. Even assuming Aereo's first argument is correct, its second does not follow.

We begin with Aereo's first argument. What performance does Aereo transmit? Under the Act, "[t]o 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Ibid.* And "[t]o 'perform'" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." *Ibid.*

Petitioners say Aereo transmits a *prior* performance of their works. Thus when Aereo retransmits a network's prior broadcast, the underlying broadcast (itself a performance) is the performance that Aereo transmits. Aereo, as discussed above, says the performance it transmits is the *new* performance created by its act of transmitting. That performance comes into existence when Aereo streams the sounds and images of a broadcast program to a subscriber's screen.

We assume *arguendo* that Aereo's first argument is correct. Thus, for present purposes, to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Cf. *United States v. American Soc. of Composers, Authors and Publishers*,

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627 F. 3d 64, 73 (CA2 2010) (holding that a download of a work is not a performance because the data transmitted are not “contemporaneously perceptible”). When an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby “communicate[s]” to the subscriber, by means of a “device or process,” the work’s images and sounds. §101. And those images and sounds are contemporaneously visible and audible on the subscriber’s computer (or other Internet-connected device). So under our assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

But what about the Clause’s further requirement that Aereo transmit a performance “to the public”? As we have said, an Aereo subscriber receives broadcast television signals with an antenna dedicated to him alone. Aereo’s system makes from those signals a personal copy of the selected program. It streams the content of the copy to the same subscriber and to no one else. One and only one subscriber has the ability to see and hear each Aereo transmission. The fact that each transmission is to only one subscriber, in Aereo’s view, means that it does not transmit a performance “to the public.”

In terms of the Act’s purposes, these differences do not distinguish Aereo’s system from cable systems, which do perform “publicly.” Viewed in terms of Congress’ regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens. They do not render Aereo’s commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo’s subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they



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arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Aereo's argument to the contrary relies on the premise that "to transmit . . . a performance" means to make a single transmission. But the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions. That is because one can "transmit" or "communicate" something through a *set* of actions. Thus one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once. So can an elected official communicate an idea, slogan, or speech to her constituents, regardless of whether she communicates that idea, slogan, or speech during individual phone calls to each constituent or in a public square.

The fact that a singular noun ("a performance") follows the words "to transmit" does not suggest the contrary. One can sing a song to his family, whether he sings the same song one-on-one or in front of all together. Similarly, one's colleagues may watch a performance of a particular play—say, this season's modern-dress version of "Measure for Measure"—whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public "whether the members of the public capable of

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receiving the performance . . . receive it . . . at the same time or at different times.” §101. Were the words “to transmit . . . a performance” limited to a single act of communication, members of the public could not receive the performance communicated “at different times.” Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.

We do not see how the fact that Aereo transmits via personal copies of programs could make a difference. The Act applies to transmissions “by means of any device or process.” *Ibid.* And retransmitting a television program using user-specific copies is a “process” of transmitting a performance. A “cop[y]” of a work is simply a “material objec[t] . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated.” *Ibid.* So whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it “transmit[s] . . . a performance” to all of them.

Moreover, the subscribers to whom Aereo transmits television programs constitute “the public.” Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. This matters because, although the Act does not define “the public,” it specifies that an entity performs publicly when it performs at “any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” *Ibid.* The Act thereby suggests that “the public” consists of a large group of people outside of a family

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and friends.

Neither the record nor Aereo suggests that Aereo’s subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute “the public” often depends upon their relationship to the underlying work. When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars “to the public.” We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cars to the public, for it sells cars to individuals who lack a pre-existing relationship to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to “the public,” whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.

Finally, we note that Aereo’s subscribers may receive the same programs at different times and locations. This fact does not help Aereo, however, for the Transmit Clause expressly provides that an entity may perform publicly “whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” *Ibid.* In other words, “the public” need not be situated together, spatially or temporally. For these reasons, we conclude that Aereo transmits a performance of petitioners’ copyrighted works to the public, within the meaning of the Transmit Clause.

## IV

Aereo and many of its supporting *amici* argue that to apply the Transmit Clause to Aereo’s conduct will impose copyright liability on other technologies, including new

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technologies, that Congress could not possibly have wanted to reach. We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect.

For one thing, the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo “perform[s],” but it does not determine whether different kinds of providers in different contexts also “perform.” For another, an entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work. See Brief for Respondent 31 (“[I]f a distributor . . . sells [multiple copies of a digital video disc] by mail to consumers, . . . [its] distribution of the DVDs merely makes it possible for the recipients to perform the work themselves—it is not a ‘device or process’ by which the *distributor* publicly performs the work” (emphasis in original)).

Further, we have interpreted the term “the public” to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content. See Brief for United States as *Amicus Curiae* 31 (distinguishing cloud-based storage services because they “offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired” (emphasis in original)). In addition, an entity does not trans-

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mit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.

We also note that courts often apply a statute’s highly general language in light of the statute’s basic purposes. Finally, the doctrine of “fair use” can help to prevent inappropriate or inequitable applications of the Clause. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984).

We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that “[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.” Brief for United States as *Amicus Curiae* 34 (quoting *Sony, supra*, at 431 (alteration in original)). And we note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress. Cf. Digital Millennium Copyright Act, 17 U. S. C. §512.

\* \* \*

In sum, having considered the details of Aereo’s practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act. Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo’s activities outside the scope of the Act.

For these reasons, we conclude that Aereo “perform[s]”

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petitioners' copyrighted works "publicly," as those terms are defined by the Transmit Clause. We therefore reverse the contrary judgment of the Court of Appeals, and we remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

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## SUPREME COURT OF THE UNITED STATES

No. 13–461

AMERICAN BROADCASTING COMPANIES, INC.,  
ET AL., PETITIONERS *v.* AEREO, INC., FKA  
BAMBOOM LABS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 25, 2014]

JUSTICE SCALIA, with whom JUSTICE THOMAS and  
JUSTICE ALITO join, dissenting.

This case is the latest skirmish in the long-running copyright battle over the delivery of television programming. Petitioners, a collection of television networks and affiliates (Networks), broadcast copyrighted programs on the public airwaves for all to see. Aereo, respondent, operates an automated system that allows subscribers to receive, on Internet-connected devices, programs that they select, including the Networks’ copyrighted programs. The Networks sued Aereo for several forms of copyright infringement, but we are here concerned with a single claim: that Aereo violates the Networks’ “exclusive righ[t]” to “perform” their programs “publicly.” 17 U. S. C. §106(4). That claim fails at the very outset because Aereo does not “perform” at all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard (“looks-like-cable-TV”) that will sow confusion for years to come.

### I. Legal Standard

There are two types of liability for copyright infringement: direct and secondary. As its name suggests, the

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former applies when an actor personally engages in infringing conduct. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 433 (1984). Secondary liability, by contrast, is a means of holding defendants responsible for infringement by third parties, even when the defendants “have not themselves engaged in the infringing activity.” *Id.*, at 435. It applies when a defendant “intentionally induc[es] or encourag[es]” infringing acts by others or profits from such acts “while declining to exercise a right to stop or limit [them].” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U. S. 913, 930 (2005).

Most suits against equipment manufacturers and service providers involve secondary-liability claims. For example, when movie studios sued to block the sale of Sony’s Betamax videocassette recorder (VCR), they argued that Sony was liable because *its customers* were making unauthorized copies. See *Sony, supra*, at 434–435. Record labels and movie studios relied on a similar theory when they sued Grokster and StreamCast, two providers of peer-to-peer file-sharing software. See *Grokster, supra*, at 920–921, 927.

This suit, or rather the portion of it before us here, is fundamentally different. The Networks claim that Aereo *directly* infringes their public-performance right. Accordingly, the Networks must prove that Aereo “perform[s]” copyrighted works, §106(4), when its subscribers log in, select a channel, and push the “watch” button. That process undoubtedly results in a performance; the question is *who* does the performing. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F. 3d 121, 130 (CA2 2008). If Aereo’s subscribers perform but Aereo does not, the claim necessarily fails.

The Networks’ claim is governed by a simple but profoundly important rule: A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act. See 3 W. Patry, Copyright §9:5.50 (2013).



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This requirement is firmly grounded in the Act’s text, which defines “perform” in active, affirmative terms: One “perform[s]” a copyrighted “audiovisual work,” such as a movie or news broadcast, by “show[ing] its images in any sequence” or “mak[ing] the sounds accompanying it audible.” §101. And since the Act makes it unlawful to copy or perform copyrighted works, not to copy or perform in general, see §501(a), the volitional-act requirement demands conduct directed to the plaintiff’s copyrighted material, see *Sony*, *supra*, at 434. Every Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted that rule. See *Fox Broadcasting Co. v. Dish Network LLC*, 747 F. 3d 1060, 1066–1068 (CA9 2014); *Cartoon Network*, *supra*, at 130–131 (CA2 2008); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F. 3d 544, 549–550 (CA4 2004).<sup>1</sup> Although we have not opined on the issue, our cases are fully consistent with a volitional-conduct requirement. For example, we gave several examples of direct infringement in *Sony*, each of which involved a volitional act directed to the plaintiff’s copyrighted material. See 464 U. S., at 437, n. 18.

The volitional-conduct requirement is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant’s conduct is infringing (*e.g.*, Does the defendant’s design copy the plaintiff’s?), rather than whether the defendant has acted at all (*e.g.*, Did this defendant create the infringing design?). But it comes right to the fore when a direct-infringement claim is

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<sup>1</sup>An unpublished decision of the Third Circuit is to the same effect. *Parker v. Google, Inc.*, 242 Fed. Appx. 833, 836–837 (2007) (*per curiam*).

The Networks muster only one case they say stands for a different approach, *New York Times Co. v. Tasini*, 533 U. S. 483 (2001). Reply Brief 18. But *Tasini* is clearly inapposite; it dealt with the question whether the defendants’ copying was permissible, not whether the defendants were the ones who made the copies. See 533 U. S., at 487–488, 492, 504–506.

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lodged against a defendant who does nothing more than operate an automated, user-controlled system. See, e.g., *Fox Broadcasting*, *supra*, at 1067; *Cartoon Network*, *supra*, at 131. Internet-service providers are a prime example. When one user sends data to another, the provider's equipment facilitates the transfer automatically. Does that mean that the provider is directly liable when the transmission happens to result in the "reproduc[tion]," §106(1), of a copyrighted work? It does not. The provider's system is "totally indifferent to the material's content," whereas courts require "some aspect of volition" directed at the copyrighted material before direct liability may be imposed. *CoStar*, 373 F.3d, at 550–551.<sup>2</sup> The defendant may be held directly liable only if the defendant *itself* "trespassed on the exclusive domain of the copyright owner." *Id.*, at 550. Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers. See *Cartoon Network*, *supra*, at 131–132.

A comparison between copy shops and video-on-demand services illustrates the point. A copy shop rents out photocopiers on a per-use basis. One customer might copy his 10-year-old's drawings—a perfectly lawful thing to do—while another might duplicate a famous artist's copyrighted photographs—a use clearly prohibited by §106(1). Either way, *the customer* chooses the content and activates the copying function; the photocopier does nothing except in response to the customer's commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. See *CoStar*, *supra*, at 550.

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<sup>2</sup>Congress has enacted several safe-harbor provisions applicable to automated network processes, see, e.g., 17 U.S.C. §512(a)–(b), but those provisions do not foreclose "any other defense," §512(l), including a volitional-conduct defense.

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Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content*. When a user signs in to Netflix, for example, “thousands of . . . movies [and] TV episodes” carefully curated by Netflix are “available to watch instantly.” See How [D]oes Netflix [W]ork?, online at <http://help.netflix.com/en/node/412> (as visited June 20, 2014, and available in Clerk of Court’s case file). That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.

The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act. See *Cartoon Network*, 536 F. 3d, at 132–133. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track. See Brief for 36 Intellectual Property and Copyright Law Professors as *Amici Curiae* 7. Thus, in the example given above, the fact that the copy shop does not choose the content simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules. See *Sony*, *supra*, at 434–442; *Cartoon Network*, *supra*, at 132–133.

## II. Application to Aereo

So which is Aereo: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card. Aereo offers access to an automated system consisting of routers, servers, transcoders, and dime-sized antennae. Like a photocopier or VCR, that system lies dormant until a subscriber activates it. When a subscriber selects a program, Aereo’s system picks up the relevant broadcast signal, translates its audio and video components into

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digital data, stores the data in a user-specific file, and transmits that file's contents to the subscriber via the Internet—at which point the subscriber's laptop, tablet, or other device displays the broadcast just as an ordinary television would. The result of that process fits the statutory definition of a performance to a tee: The subscriber's device “show[s]” the broadcast's “images” and “make[s] the sounds accompanying” the broadcast “audible.” §101. The only question is whether those performances are the product of Aereo's volitional conduct.

They are not. Unlike video-on-demand services, Aereo does not provide a prearranged assortment of movies and television shows. Rather, it assigns each subscriber an antenna that—like a library card—can be used to obtain whatever broadcasts are freely available. Some of those broadcasts are copyrighted; others are in the public domain. The key point is that subscribers call all the shots: Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. Aereo's operation of that system is a volitional act and a but-for cause of the resulting performances, but, as in the case of the copy shop, that degree of involvement is not enough for direct liability. See *Grokster*, 545 U. S., at 960 (BREYER, J., concurring) (“[T]he producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying”).

In sum, Aereo does not “perform” for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, it cannot be held directly liable for infringing the Networks' public-performance right.<sup>3</sup> That conclusion does not necessarily mean that Aereo's service complies with the Copyright Act. Quite the

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<sup>3</sup>Because I conclude that Aereo does not perform at all, I do not reach the question whether the performances in this case are to the public. See *ante*, at 10–15.

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contrary. The Networks’ complaint alleges that Aereo is directly *and* secondarily liable for infringing their public-performance rights (§106(4)) *and also* their reproduction rights (§106(1)). Their request for a preliminary injunction—the only issue before this Court—is based exclusively on the direct-liability portion of the public-performance claim (and further limited to Aereo’s “watch” function, as opposed to its “record” function). See App. to Pet. for Cert. 60a–61a. Affirming the judgment below would merely return this case to the lower courts for consideration of the Networks’ remaining claims.

### III. Guilt By Resemblance

The Court’s conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts;<sup>4</sup> (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs. *Ante*, at 4–10. That reasoning suffers from a trio of defects.

First, it is built on the shakiest of foundations. Perceiving the text to be ambiguous, *ante*, at 4, the Court reaches out to decide the case based on a few isolated snippets of legislative history, *ante*, at 7–8 (citing H. R. Rep. No. 94–1476 (1976)). The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress. Little else need be said here about the severe shortcomings of that interpretative methodology. See *Lawson v. FMR LLC*, 571 U. S. \_\_\_, \_\_\_ (2014) (SCALIA, J., concurring in principal part and concurring in judgment) (slip op., at 1–2).

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<sup>4</sup>See *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. 390 (1968).

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Second, the Court’s reasoning fails on its own terms because there are material differences between the cable systems at issue in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. 390 (1968), on the one hand and Aereo on the other. The former (which were then known as community-antenna television systems) captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmits only specific programs selected by the user, at specific times selected by the user. The Court acknowledges this distinction but blithely concludes that it “does not make a critical difference.” *Ante*, at 10. Even if that were true, the Court fails to account for other salient differences between the two technologies.<sup>5</sup> Though cable systems started out essentially as dumb pipes that routed signals from point A to point B, see *ante*, at 5, by the 1970’s, that kind of service “no longer exist[ed],” Brief for Petitioners in *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, O. T. 1973, No. 72–1633, p. 22. At the time of our *Teleprompter* decision, cable companies “perform[ed] the same functions as ‘broadcasters’ by deliberately selecting and importing distant signals, originating programs, [and] selling commercials,” *id.*, at 20, thus making them curators of content—more akin to video-on-demand services than copy shops. So far as the record reveals, Aereo does none of those things.

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<sup>5</sup>The Court observes that “[t]he subscribers of the *Fortnightly* and *Teleprompter* cable systems . . . selected what programs to display on their receiving sets,” but acknowledges that those choices were possible only because “the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob.” *Ante*, at 10. The latter point is dispositive: The signals were “ready to emerge” because the cable system—much like a video-on-demand provider—took affirmative, volitional steps to *put* them there. As discussed above, the same cannot be said of the programs available through Aereo’s automated system.

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Third, and most importantly, even accepting that the 1976 amendments had as their purpose the overruling of our cable-TV cases, what they were meant to do and how they did it are two different questions—and it is the latter that governs the case before us here. The injury claimed is not violation of a law that says operations similar to cable TV are subject to copyright liability, but violation of §106(4) of the Copyright Act. And whatever soothing reasoning the Court uses to reach its result (“this looks like cable TV”), the consequence of its holding is that someone who implements this technology “*perform[s]*” *under that provision*. That greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work. If that test is not outcome determinative in this case, presumably it is not outcome determinative elsewhere as well. And it is not clear what the Court proposes to replace it. Perhaps the Court means to adopt (invent, really) a two-tier version of the Copyright Act, one part of which applies to “cable companies and their equivalents” while the other governs everyone else. *Ante*, at 9–10, 16.

The rationale for the Court’s ad hoc rule for cable-system lookalikes is so broad that it renders nearly a third of the Court’s opinion superfluous. Part II of the opinion concludes that Aereo performs because it resembles a cable company, and Congress amended the Act in 1976 “to bring the activities of cable systems within [its] scope.” *Ante*, at 8. Part III of the opinion purports to address separately the question whether Aereo performs “publicly.” *Ante*, at 10–15. Trouble is, that question cannot remain open if Congress’s supposed intent to regulate whatever looks like a cable company must be given legal effect (as the Court says in Part II). The Act reaches only public performances, see §106(4), so Congress could not have regulated “the activities of cable systems” without

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deeming their retransmissions public performances. The upshot is this: If Aereo’s similarity to a cable company means that it performs, then by necessity that same characteristic means that it does so publicly, and Part III of the Court’s opinion discusses an issue that is no longer relevant—though discussing it certainly gives the opinion the “feel” of real textual analysis.

Making matters worse, the Court provides no criteria for determining when its cable-TV-lookalike rule applies. Must a defendant offer access to live television to qualify? If similarity to cable-television service is the measure, then the answer must be yes. But consider the implications of that answer: Aereo would be free to do exactly what it is doing right now so long as it built mandatory time shifting into its “watch” function.<sup>6</sup> Aereo would not be providing *live* television if it made subscribers wait to tune in until after a show’s live broadcast ended. A subscriber could watch the 7 p.m. airing of a 1-hour program any time after 8 p.m. Assuming the Court does not intend to adopt such a do-nothing rule (though it very well may), there must be some other means of identifying who is and is not subject to its guilt-by-resemblance regime.

Two other criteria come to mind. One would cover any automated service that captures and stores live television broadcasts at a user’s direction. That can’t be right, since it is exactly what remote storage digital video recorders (RS-DVRs) do, see *Cartoon Network*, 536 F.3d, at 124–125, and the Court insists that its “limited holding” does not decide the fate of those devices, *ante*, at 16–17. The other potential benchmark is the one offered by the Government: The cable-TV-lookalike rule embraces any entity

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<sup>6</sup>Broadcasts accessible through the “watch” function are technically not live because Aereo’s servers take anywhere from a few seconds to a few minutes to begin transmitting data to a subscriber’s device. But the resulting delay is so brief that it cannot reasonably be classified as time shifting.



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that “operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers.” Brief for United States as *Amicus Curiae* 20. The Court sensibly avoids that approach because it would sweep in Internet service providers and a host of other entities that quite obviously do not perform.

That leaves as the criterion of cable-TV-resemblance nothing but th’ol’ totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation). It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances.) The Court vows that its ruling will not affect cloud-storage providers and cable-television systems, see *ante*, at 16–17, but it cannot deliver on that promise given the imprecision of its result-driven rule. Indeed, the difficulties inherent in the Court’s makeshift approach will become apparent in this very case. Today’s decision addresses the legality of Aereo’s “watch” function, which provides nearly contemporaneous access to live broadcasts. On remand, one of the first questions the lower courts will face is whether Aereo’s “record” function, which allows subscribers to save a program while it is airing and watch it later, infringes the Networks’ public-performance right. The volitional-conduct rule provides a clear answer to that question: Because Aereo does not select the programs viewed by its users, it does not perform. But it is impossible to say how the issue will come out under the Court’s analysis, since cable companies did not offer remote recording and play-back services when Congress amended the Copyright Act in 1976.

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\* \* \*

I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it. As discussed at the outset, Aereo's secondary liability for performance infringement is yet to be determined, as is its primary and secondary liability for reproduction infringement. If that does not suffice, then (assuming one shares the majority's estimation of right and wrong) what we have before us must be considered a "loophole" in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude "looks-like-cable-TV" solution the Court invents today.

We came within one vote of declaring the VCR contraband 30 years ago in *Sony*. See 464 U. S., at 441, n. 21. The dissent in that case was driven in part by the plaintiffs' prediction that VCR technology would wreak all manner of havoc in the television and movie industries. See *id.*, at 483 (opinion of Blackmun, J.); see also Brief for CBS, Inc., as *Amicus Curiae*, O. T. 1982, No. 81-1687, p. 2 (arguing that VCRs "directly threatened" the bottom line of "[e]very broadcaster").

The Networks make similarly dire predictions about Aereo. We are told that nothing less than "the very existence of broadcast television as we know it" is at stake. Brief for Petitioners 39. Aereo and its *amici* dispute those forecasts and make a few of their own, suggesting that a decision in the Networks' favor will stifle technological innovation and imperil billions of dollars of investments in cloud-storage services. See Brief for Respondents 48-51; Brief for BSA, The Software Alliance as *Amicus Curiae* 5-

SCALIA, J., dissenting

13. We are in no position to judge the validity of those self-interested claims or to foresee the path of future technological development. See *Sony*, *supra*, at 430–431; see also *Grokster*, 545 U. S., at 958 (BREYER, J., concurring). Hence, the proper course is not to bend and twist the Act’s terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade. I conclude, as the Court concluded in *Sony*: “It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be [affirmed].” 464 U. S., at 456.

I respectfully dissent.

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**OPINION**

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- A horizontal bar chart titled "Percentage of respondents who believe the U.S. should take action to address climate change." The chart displays data for two age groups (18-29 and 30-49) and three education levels (High school or less, Some college, and Bachelor's or higher). The x-axis represents the percentage of respondents, ranging from 0 to 100. The y-axis lists the categories. The bars are color-coded: blue for 18-29, orange for 30-49, and green for the education levels. The data shows that a higher percentage of respondents in the 18-29 age group believe the U.S. should take action to address climate change, with the percentage increasing as education level increases. The 30-49 age group shows a more mixed response, with a higher percentage of respondents with a bachelor's or higher degree believing the U.S. should take action.

Age Group	Education Level	Percentage of respondents who believe the U.S. should take action to address climate change
18-29	High school or less	~65%
	Some college	~75%
	Bachelor's or higher	~85%
30-49	High school or less	~55%
	Some college	~65%
	Bachelor's or higher	~75%

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Government	Percentage
Current government	85%
Previous government	15%

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Government	Percentage
Current government	85%
Previous government	15%

\_\_\_\_\_

Responsibility	Percentage
Current government	85%
Opposition	15%

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

28 July 2016

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<sup>1</sup> [REDACTED]

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**In The  
Supreme Court of the United States**

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◆

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

*Petitioners,*

v.

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

*Respondent.*

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**On Writ Of Certiorari To The United States  
Court Of Appeals For The Second Circuit**

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◆

**BRIEF OF AMICI CURIAE INTERNATIONAL  
FEDERATION OF THE PHONOGRAPHIC  
INDUSTRY (IFPI); ASOCIACIÓN MEXICANA  
DE PRODUCTORES DE FONOGRAMAS Y  
VIDEOGRAMAS (AMPROFON); ASSOCIATION  
LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE  
DU CANADA (ALAI CANADA); AUSTRALIAN  
COPYRIGHT COUNCIL (ACC); BRITISH  
COPYRIGHT COUNCIL (BCC); CANADIAN  
MEDIA PRODUCTION ASSOCIATION (CMPA);  
INTERNATIONAL CONFEDERATION OF  
MUSIC PUBLISHERS (ICMP); INTERNATIONAL  
CONFEDERATION OF SOCIETIES OF AUTHORS  
AND COMPOSERS (CISAC); INTERNATIONAL  
FEDERATION OF ACTORS (FIA); INTERNATIONAL  
FEDERATION OF MUSICIANS (FIM); MUSIC  
CANADA; SOCIETY OF COMPOSERS, AUTHORS  
AND MUSIC PUBLISHERS OF CANADA (SOCAN);  
INTERNATIONAL COPYRIGHT SCHOLARS,  
ET AL., IN SUPPORT OF PETITIONERS**

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◆

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

This brief is filed by a number of international and foreign associations with economic or professional stakes in the proper interpretation of copyright law, including international copyright treaties, and by a number of scholars engaged in researching, writing and teaching about international copyright law issues. More detailed descriptions of each of the *amici* may be found in the Appendix.

*Amici* wish to bring to the attention of the Court a number of international treaties and other agreements into which the United States has entered. These commitments impose obligations on the United States that must be taken into account when interpreting domestic copyright law. International rights holders – including the associations joining this brief – rely upon the rights guaranteed by the international agreements, which provide a legal framework that promotes the creation and dissemination of copyright works worldwide. *Amici* include associations based in Canada and Mexico, parties to the

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<sup>1</sup> No counsel for a party (and no party) authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* von Lewinski (a legal scholar based outside the United States) and the British Copyright Council rely on counsel and other *amici* in relation to the U.S. law discussed in Part I, but directly endorse the submissions set out in Parts II to IV. The parties have consented to the filing of this brief.

North American Free Trade Agreement discussed herein, and Australia, a party to the U.S.-Australia Free Trade Agreement discussed herein, as well as associations representing authors, performers and rightholders internationally and scholars from various countries.



## **SUMMARY OF ARGUMENT**

Copyright law is an increasingly harmonized international system supported by bilateral, regional and multilateral treaties. These treaties help creators and businesses in the United States disseminate copyright works worldwide. They also reflect an agreement among the treaty parties on the minimum standards for copyright protection of works.

One of the most important underpinnings of this international system is technological neutrality. Starting in the 1990s, the United States negotiated important bilateral, regional and multilateral treaties and trade agreements in the knowledge that new communications technologies were transforming the ways in which copyright works were consumed. With an eye to the unpredictability of these technologies, these treaties were drafted to apply reliably and comprehensively to the provision of access to content, regardless of the specific mechanism used to deliver it. These treaties were entered into by the Executive Branch, ratified by the Senate and implemented by domestic legislation. The trade agreements were

entered into by the Executive Branch, approved in public laws enacted by both Houses of Congress, and signed by the President. In each case, Congress confirmed its satisfaction that the scope of the domestic copyright law fulfilled international standards.

Numerous international agreements provide a right of communication to the public, which applies even when the technology used to effect the transmissions enables members of the public to access works or performances of works “from a place and at a time individually chosen by them.” WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. Treaty Doc. 105-17 (1997), 36 I.L.M. 65 (“WCT”); WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, S. Treaty Doc. 105-17 (1997), 36 I.L.M. 76 (“WPPT”); Free Trade Agreement, U.S.-Australia, art. 17.5, May 18, 2004, K.A.V. 7141. The North American Free Trade Agreement requires the United States to ensure that the term “public” includes “any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works” *even if* those individuals engage with the works “at the same or different times or in the same or different places.” North American Free Trade Agreement, art. 1721(2), Dec. 17, 1992, H.R. Doc. No. 103-159, vol. 1 (“NAFTA”) (definition of “public”). These agreements render the particular method of transmission irrelevant.

Even before the treaties were executed, this core concept of technological neutrality was long embedded in U.S. copyright law. Passed in 1976 to reverse

technology-specific outcomes reached by this Court in a trio of cases under the prior copyright statute, the definitions section of the Copyright Act confirms that to perform or display a work “publicly” means, *inter alia*:

to transmit or otherwise communicate a performance or display of the work \* \* \* to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. §101 (2012) (defining “To perform or display a work ‘publicly’”).

The definition of “transmit” – to communicate a performance or display – in what has become known as the “Transmit Clause,” was intended to be “broad enough to include all conceivable forms and combinations of wired or wireless communications media.” H.R. Rep. No. 94-1476, at 64 (1976). “Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106.” S. Rep. No. 94-473, at 61 (1975).

As has been observed by respected commentators, the decision of the Second Circuit neglected to consider important elements of this statutory definition. By

following its prior, incorrect test of examining “who precisely is ‘capable of receiving’ a particular transmission of a performance,” the Second Circuit read out the “at different times” criterion from the Act. It also ignored the “by means of any device or process” language that is at the heart of the technologically neutral definition of the Transmit Clause.<sup>2</sup> In doing so, the Second Circuit failed to construe the public performance right consistently with the treaty obligations of the United States. These obligations require protection for the transmissions of performances to the public even when they are delivered by numerous separate transmissions.

The highest courts of America’s major trading partners have construed these treaties in analogous cases. They have recognized that these treaties anticipated and dealt with services that claim as “private” a series of performances delivered to the public at large. Such decisions have closed the door to all “Rube Goldberg-like contrivances” (Pet. App. 40a, dissent of Judge Chin) that seek to bypass the communication to the public right by using point-to-point technologies.

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<sup>2</sup> Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, Media Inst., Apr. 23, 2013, [www.mediainstitute.org/IPI/2013/042313.php](http://www.mediainstitute.org/IPI/2013/042313.php).



The Petitioners have extensively described how the Second Circuit’s decisions in *Cablevision*<sup>3</sup> and *Aereo* have misconstrued the Copyright Act. This brief does not repeat their arguments. The purpose of this brief is to describe how the technology-specific outcome in *Cablevision* and *Aereo* is fundamentally at odds with the international treaty commitments entered into by the United States and with its domestic legislative history, each of which demonstrates the understanding that existing public performance rights comply with those obligations.



## ARGUMENT

### I. THE *CHARMING BETSY* DOCTRINE REQUIRES CAUTION IN DEVIATING FROM TREATY COMMITMENTS

More than two hundred years ago, Chief Justice Marshall articulated what has become a fundamental canon of U.S. statutory construction: “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This principle extends to avoidance of conflict with the treaty commitments of the United States. “If the United States is to be able

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<sup>3</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. den. sub nom., Cable News Network v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) (“*Cablevision*”).

to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.” *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (cautioning against courts “run[ning] interference in such a delicate field of international relations \* \* \* [without] the affirmative intention of Congress clearly expressed.”). The same canon applies to trade agreements. *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002).

Such an approach is especially appropriate in interpreting domestic copyright law, which has gone through a process of increasing harmonization with international treaty standards over the years. As this Court recently recognized in rejecting a constitutional challenge to legislation that removed foreign copyrights from the public domain, Congress has “adopted measures to ease the transition from a national scheme to an international copyright regime” and “ensured that most works, whether foreign or domestic, would be governed by the same legal regime,” as part of a “trend toward a harmonized copyright regime.” In doing so, “Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad,

and remedying unequal treatment of foreign authors.” *Golan v. Holder*, 585 U.S. \_\_\_, \_\_\_, \_\_\_, 132 S. Ct. 873, 891, 893, 894 (2012). *See also Eldred v. Ashcroft*, 537 U.S. 186, 205-206 (2003); *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc) (cautioning that an impolitic approach might “undermine Congress’s objective of achieving effective and harmonious copyright laws among all nations”).

The clear import of treaty language controls this Court’s assessment. *Maximov v. United States*, 373 U.S. 49, 54 (1963) (holding that it is “particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty \* \* \* when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories”). It is also settled that the Executive Branch’s interpretation of a treaty “is entitled to great weight.” *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982).

Last, a treaty’s drafting and negotiating history and the post-ratification understanding of the contracting parties may serve as aids to its interpretation. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

As described below, the Second Circuit’s interpretation of the Transmit Clause cannot be squared with the 210-year old *Charming Betsy* doctrine. While *amici* believe that the language of the Transmit

Clause unambiguously leads to the conclusion that Aereo’s transmissions are public performances, the treaty obligations entered into by the United States on multiple occasions would require the same conclusion even if the statutory text was ambiguous.

## II. THE DECISION BELOW PLACES THE UNITED STATES IN VIOLATION OF ITS MULTILATERAL TREATY COMMITMENTS

This Court has acknowledged that copyright involves an international system in which the United States is now a full partner. Since the 1970s, a deliberate Congressional and Executive Branch policy has allowed the United States to “‘play a leadership role’ in the give-and-take evolution of the international copyright system.” *Eldred*, 537 U.S. at 195, 205-206 n. 13; *Golan*, 585 U.S. at \_\_\_, 132 S. Ct. at 879-883.

The first international treaty commitment of the United States bearing examination arises under Arts. 11, 11*bis*, 11*ter*, 14, and 14*bis* of the Berne Convention.<sup>4</sup> Each of these articles contains language designed to capture innovations in technology. Article 11 grants authors of dramatic, dramatico-musical and musical works the exclusive right of authorizing “(i) the public performance of their works, including such public performances *by any means or process*; [and]

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<sup>4</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221.

(ii) any communication to the public of the performance of their works.” (Emphasis added.) The second part of the right is understood to encompass “any technology by which a performance can be transmitted other than broadcasting.”<sup>5</sup>

Art. 11*bis*(1) of Berne grants authors an exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public *by any other means* of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;. . . .<sup>6</sup>

Art. 11*bis*(1)(ii) encompasses both cable retransmission (communication to the public by wire) and rebroadcasting (communication to the public by wireless means “over the air” of broadcast works in all cases where such secondary communication (transmission) is made “by an organization other than the original one.”) As a result, a third party’s

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<sup>5</sup> Paul Goldstein & P. Bernt Hugenholtz, *International Copyright* 327 (2013); *see also* Berne Art. 11*ter* (covering recitations of literary works through communications technologies).

<sup>6</sup> Emphasis added. Art. 11*ter*(1) contains, *mutatis mutandis*, the same provisions on public recitation of literary works and the communication to the public of such recitations as Art. 11(1).

retransmissions of broadcasts come within the scope of the Berne rights.<sup>7</sup>

Separately, Art. 14(1)(ii) gives authors a right to authorize “the public performance and communication to the public by wire” of cinematographic adaptations and reproductions of their works. Under Art. 14*bis*(1) of Berne, the owner of copyright in a cinematographic work such as a television program or movie must also be given the same rights as the author of an original work.<sup>8</sup>

The committee convened by the State Department in 1988 to study Berne implementation raised no questions as to the compliance of the existing U.S. law with these requirements.<sup>9</sup>

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<sup>7</sup> Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond* 12.37-12.51 (2006); Silke von Lewinski, *International Copyright Law and Policy* 5.144 (2008).

<sup>8</sup> WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* 89 (Nov. 2003) (“WIPO Guide”); Ricketson & Ginsburg, *supra* note 7 at 12.32, 12.40.

<sup>9</sup> The Committee reported that the only conflicts involving Art. 11*bis* were (i) an exemption for instructional television transmissions granted under 17 U.S.C. §110(2) and (ii) a public broadcast compulsory license imposed under 17 U.S.C. §118. See William Belanger, *U.S. Compliance with the Berne Convention*, 3 Geo. Mason L. Rev. 373, 395-396 (1995); *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 Colum.-VLA J.L. & Arts 513, 519-520, 526-527 (1986).

In passing the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, Congress declared, “The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention.” *Id.* §2(3) (*quoted in Golan*, 132 S. Ct. at 879). Given this unambiguous statement, it must be taken that the Executive Branch and Congress were satisfied that sections 101 and 106 fulfilled the Berne broadcasting, retransmission, and communication rights.

The United States became a party to Berne in 1989. By ratifying the TRIPs Agreement in 1994, the United States imported this Berne obligation into the WTO dispute settlement regime, giving “teeth” to Berne’s requirements.<sup>10</sup> *Golan*, 132 S. Ct. at 881.

The United States’ alignment with the international community was taken a step further when it acceded to the WIPO Copyright Treaty (“WCT”). A key purpose of the WCT was to ensure adequate worldwide protection of copyrighted works “at a time when borderless digital means of dissemination [were] becoming increasingly popular.” H.R. Rep. No. 105-551, at 9 (1998). The WCT also strengthened legal frameworks enabling rights holders to fight

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<sup>10</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1) Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (requiring compliance with Arts. 1 through 21 of Berne).

“pirates who aim to destroy the value of American intellectual property.” *Id.* at 10.

In Article 8, the WCT provided for a “technologically neutral and all-encompassing” communication to the public right that united the scattered Berne rights and applied regardless of the means by which the communication is made or the nature of the protected work.<sup>11</sup> It was agreed that the right had to be “technologically neutral” in order to support evolving delivery models enabled by advances in technology in order to avoid being rendered obsolete by any particular change in communications technology.<sup>12</sup> It also had to apply consistently to different kinds of works which Berne treated under separate headings.<sup>13</sup>

A “main achievement” of the WCT was its inclusion within the authors’ communication to the public right of a right of “making available to the public of

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<sup>11</sup> Ricketson & Ginsburg, *supra* note 7 at 12.54, 12.17, 12.43, 12.46-12.51; Goldstein & Hugenholtz, *supra* note 5, at 335.

<sup>12</sup> Ricketson & Ginsburg, *supra* note 7 at 12.59; Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996* 109 (2002); WIPO Guide, at 208; WIPO Committee of Experts, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference*, WIPO/CRNR/DC/4 at 10.10-10.11, 10.14 (Aug. 30, 1996) (“Basic Proposal”).

<sup>13</sup> Basic Proposal at 10.05, 10.09; Ricketson & Ginsburg, *supra* note 7, at 12.43, 12.56.



their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”<sup>14</sup> This “making available” right was crafted to be broad enough to enable rightholders to control all means of making works available over the Internet and other digital technologies, including by making available access to streams, downloads, and other hybrid or future forms of consumption by members of the public from different places and at different times.<sup>15</sup> It was intended to cover *any* process of providing public *access* to works,

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<sup>14</sup> Goldstein & Hugenholtz, *supra* note 5 at 335 (celebrating the second portion of Article 8 as “one of the treaty’s ‘main achievements,’ that for many countries has charted new territory by securing the right to control individualized, interactive uses of copyrighted works”); Ricketson & Ginsburg, *supra* note 7 at 12.54, 12.43, 12.46-12.51. Analogous rights were granted for fixed performances and sound recordings in Arts. 10 and 14 of the WPPT and in Art. 10 of the WIPO Audiovisual Performances Treaty (Jun. 24, 2012), [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295837](http://www.wipo.int/treaties/en/text.jsp?file_id=295837), which the United States has signed but not yet ratified. Art. 6 of the WCT relates to the making available of *tangible* copies of an author’s work; it is not relevant to the online setting. Art. 15 of the WPPT gives performers and producers of phonograms a right to equitable remuneration for the broadcasting or communication to the public of phonograms.

<sup>15</sup> WIPO Guide, at 208-209; Basic Proposal at 10.05, 10.10-10.11; Mihály Ficsor, *Copyright in the Digital Environment*, WIPO/CR/KRT/05/7 ¶59 (Feb. 2005); Mihály Ficsor, *The Law of Copyright and the Internet* 496-499 (2002); Goldstein & Hugenholtz, *supra* note 5, at 335-336.

including through numerous discrete transmissions to individual members of the public.<sup>16</sup>

This purpose was fulfilled by Article 8 of the WCT,<sup>17</sup> which provided:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

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<sup>16</sup> Basic Proposal at 10.10-10.11; Reinbothe & von Lewinski, *supra* note 12, at 108-110; Ricketson & Ginsburg, *supra* note 7, at 12.58; Goldstein & Hugenholtz, *supra* note 5, at 335.

<sup>17</sup> The WPPT, which enumerates rights of producers and performers of phonograms (the term used to describe what are called phonorecords under U.S. law), also provides for a right of making available, using similar language to the “making available” language in Art. 8 of the WCT, but provides for a separate right of equitable remuneration for communication to the public. WPPT, Arts. 10, 14, and 15. To the extent that the words “perform . . . publicly” in 17 U.S.C. §106(6) (establishing the right to perform sound recordings publicly “by means of a digital audio transmission”) have the same meaning as the identical words in 17 U.S.C. §106(4) (establishing the right to perform certain other kinds of works publicly), the WPPT plays the same role in interpreting the section 106(6) right that the WCT and Berne play in interpreting the section 106(4) right.

Article 8 removed any doubt remaining under Berne as to coverage for on-demand transmissions of performances: it required all member states to extend the communication to the public right to all such transmissions, even if the recipients were separated both in space and in time. Article 8 also put to rest any doubts as to whether member states must cover on-demand digital technologies. It required member states to provide coverage regardless of whether members of the public are separated in space or in time.<sup>18</sup> It also covered interactive transmissions that are initiated by users of a service.<sup>19</sup>

A leading international copyright scholar succinctly describes the broad, technologically neutral nature of the right:

The making available right targets on-demand transmissions (whether by wire or wireless means), for it makes clear that the members of the public may be separated both in space and in time. The technological means of ‘making available’ are irrelevant; the right is expressed in technologically neutral terms. The right covers offering the work to members of the public on an individualized basis; “the public” includes subsets of the general public, such as aficionados of tango music, or members of a particular performer’s fan club. As is clear from the

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<sup>18</sup> Ricketson & Ginsburg, *supra* note 7, at 12.54-12.61.

<sup>19</sup> WIPO Guide at 207-208.

formulation “such a way that members of the public *may* access” (emphasis supplied), the right is triggered when the public is invited to access, rather than when any member of the public in fact *has* accessed. Equally importantly, the right applies to the “work”; it is not limited to “performances” of the work. Thus it covers making the work available both as download and as a stream.<sup>20</sup>

Professors Reinbothe and von Lewinski confirm that “the wording and also purpose of Article 8 WCT \* \* \* aims at covering *all situations* involving an individual time and place of access.” (Emphasis added.) They conclude that it makes “no difference” whether one uses “push-technology” or “pull-technology,” each of which is fully covered under the broad meaning of communication to the public.<sup>21</sup>

Together, the Berne Convention and WCT cover all aspects of the Aereo service. The “Watch” function in which performances are streamed to members of the public over the Internet is a communication to the public which is required to be protected under Berne and through the opening clause of WCT Art. 8. The

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<sup>20</sup> Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, *Revue Internationale du Droit d’Auteur* 37 (2008); *see also* Ricketson & Ginsburg, *supra* note 7, at 12.50; Goldstein & Hugenholtz, *supra* note 5, at 335.

<sup>21</sup> Reinbothe & von Lewinski, *supra* note 12, at 110. *See also* Ficsor, *The Law of Copyright and the Internet* at 405; J.A.L. Sterling, *World Copyright Law* 9.33 (2008).

“making available” wording in the latter part of WCT Art. 8 removes any doubt that the “Record” function is covered, as it permits members of the public to access works from a place and at a time individually chosen by them, at the convenience of the person receiving the transmission.<sup>22</sup>

Member states may comply with the obligation to provide a making available right through a variety of means. They may do so either by including it as part of their communication rights, by having a separate free standing right of making available, or, for those countries like the United States which have applied the distribution right to transmissions of digital copies, through a combination of a right of public performance and a right to digitally distribute copies. This “umbrella solution” was adopted at the urging of the United States during the drafting period.<sup>23</sup>

The United States took the path of implementing the communication to the public right, including the making available right, by using its existing public performance and distribution rights, depending on

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<sup>22</sup> Pet. App. 7a (describing Aereo’s functions); Ricketson & Ginsburg, *supra* note 7, at 12.40 (confirming Berne 11*bis*, 14 and 14*bis* application to retransmissions), 12.51-12.52 and 12.56-12.61 (confirming WCT application to on-demand digital transmissions of broadcasts); von Lewinski, *supra* note 7, at 5.138, 17.72-17.78; Goldstein & Hugenholtz, *supra* note 5, at 335-336.

<sup>23</sup> Ricketson & Ginsburg, *supra* note 7, at 12.59; Ficsor, *The Law of Copyright and the Internet* at 4.130, 4.135, 4.140; Reinbothe & von Lewinski, *supra* note 12, at 108; WIPO Guide at 209.

the circumstances surrounding a particular communication. It thereby avoided having to amend the Copyright Act to establish a new right of making available for works.<sup>24</sup>

There is compelling evidence that both Congress and the Executive Branch were satisfied that Article 8 was fully consistent with U.S. law. While the WCT and WPPT were ratified by the required two-thirds majority of the Senate, the President could not deposit instruments of ratification with WIPO until the U.S. enacted domestic legislation implementing the treaties. *See* S. Treaty Doc. No. 105-17, at III (1997).

Accordingly, it was necessary for both the House and the Senate to hold extensive hearings, draft legislation, and commission committee reports.

While the Senate Report confirmed that “[w]ith this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials,” it did *not* recommend any changes to exclusive rights in

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<sup>24</sup> Ginsburg, *Recent Developments*, *supra* note 21, at 37; U.S. Dep’t. of Commerce, *Copyright Policy, Creativity, and Innovation in the Digital Economy* 14-16 (July 2013); Ficsor, *The Law of Copyright and the Internet* at 496-504; David O. Carson, *Making the Making Available Right Available: 22nd Annual Horace S. Manges Lecture, February 3, 2009*, 33 Colum.-VLA J.L. & Arts 135, 143-148, 150-151 (2010); Jane C. Ginsburg, *Aereo in International Perspective: Individualized Access and U.S. Treaty Obligations*, Media Inst., Feb. 18, 2014 (“*U.S. Treaty Obligations*”).

order to implement the WCT's "broad right of communication to the public that includes the Internet." S. Rep. No. 105-190, at 2, 10 (1998). Rather, as the House Report confirmed, "The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law." H.R. Rep. No. 105-551, at 9.

Based on these conclusions, Congress enacted the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 as part of the Digital Millennium Copyright Act of 1998, 105 Pub. L. 304, §§101-105, 112 Stat. 2860 (1998). President Clinton then deposited with WIPO ratifications of the WCT and WPPT on September 14, 1999.<sup>25</sup>

As with Berne, TRIPs, and the bilateral and regional treaties discussed directly below, the United States' accession to the WCT and WPPT required a Presidential determination, ratified by the Senate, that United States law fulfilled all treaty obligations. None of the domestic enactments altered the public performance right or the distribution right – nor did the United States add an explicit right of communication to the public or making available right – reflecting the determination of Congress and the Executive Branch that no legislative amendments were necessary to implement that obligation. *See generally*

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<sup>25</sup> Ratification by the United States of America, WCT Notification No. 10, [http://www.wipo.int/edocs/notdocs/en/wct/treaty\\_wct\\_10.html](http://www.wipo.int/edocs/notdocs/en/wct/treaty_wct_10.html)

Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998); Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994); Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (1988).

Under the principle stated by this Court in *Vimar Seguros*, 515 U.S. at 539, these determinations should be assigned great weight because they link to binding commitments with numerous international partners. They are not merely domestic in nature, but also have significant international repercussions.

### **III. THE DECISION BELOW PLACES THE UNITED STATES IN VIOLATION OF ITS BILATERAL AND REGIONAL AGREEMENTS**

The United States is also bound internationally by a series of bilateral and regional treaty commitments similar in scope to its WCT commitment.

The first of these is the North American Free Trade Agreement (NAFTA), concluded with Canada and Mexico in 1992, signed into law on December 8, 1993, and effective January 1, 1994. *See* 19 U.S.C. §3311(a), approving NAFTA and the statement of administrative action submitted to the Congress on November 4, 1993.

NAFTA's intellectual property chapter extends Arts. 11, 11*bis*, 11*ter*, 14 and 14*bis* of Berne by requiring all parties to protect any communication of works to the public. The NAFTA protection applies to:



any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works, regardless of whether they can do so at the same or different times or in the same or different places, provided that such an aggregation is larger than a family and its immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of work.

NAFTA art. 1721(2) (defining “public”); *see also* art. 1705(2)(c) (requiring that authors be provided the right to authorize or prohibit the communication of a work to the public).

By focusing on communication of a work to an “aggregation of individuals *intended to be the object of* \* \* \* communications or performances of works” regardless of whether those individuals are separated in time or space, NAFTA makes it clear that what counts is the communication to such individuals, and *not* the technological methods used to do so. (Emphasis added.) Further, it clarified that the relevant “public” need not be vast in size.<sup>26</sup> It applies as an

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<sup>26</sup> See Ysolde Gendreau, *Intention and Copyright Law in Internet and Copyright Law* 1, 18 (1999) (explaining that NAFTA looks to the communicator’s intention to reach out to “small groups of listeners or watchers in more or less private surroundings,” which together “form a public.”); von Lewinski, (Continued on following page)

independent international commitment of the United States, which should not be departed from under the *Charming Betsy* canon.

After NAFTA, and following its accession to the WCT and WPPT on September 14, 1999, the United States engaged in a series of bilateral Free Trade Agreements (FTAs), each requiring the parties to provide a communication to the public right, including a making available right. For example, the 2005 U.S.-Australia FTA requires the parties to provide an:

exclusive right to authorise or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.<sup>27</sup>

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*supra* note 7 at 11.11 (confirming that NAFTA was the first multilateral treaty specifically capturing on-demand uses and similar interactive communications within the communication right); 5.147 (explaining why “public” should not be undermined by a narrow interpretation).

<sup>27</sup> Free Trade Agreement, U.S.-Austl. Art 17.5, May 18, 2004, K.A.V. 7141. Similar FTAs requiring provision of the making available right have also been concluded with Bahrain, Sept. 14, 2004, K.A.V. 6866; Chile, Jun. 6, 2003, K.A.V. 6375; Jordan, Oct. 24, 2000, K.A.V. 5970; Morocco, Jun. 15, 2004, K.A.V. 7206; Oman, Jan. 19, 2006, K.A.V. 8673; Panama, Jun. 28, 2007, K.A.V. 9546; Peru, Apr. 12, 2006, K.A.V. 8674; Singapore, May 6, 2003, K.A.V. 6376 and South Korea, Feb. 10, 2011, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. In 2004, the U.S. also negotiated a making available

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The U.S.-Australia FTA also provided that “neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal.”<sup>28</sup> There is no question that retransmission technologies such as Aereo are encompassed within this treaty obligation.

Each of these FTAs required review by the Executive Branch and Congress of whether sections 101 and 106 of the Copyright Act provided the agreed-upon making available right. Before FTAs enter into force, the President must present to Congress (1) the final legal text of the FTA, (2) a statement of any administrative action proposed to implement the FTA, (3) proposed implementing legislation that conforms U.S. law to the agreement, and (4) an explanation as to how the implementing bill and proposed administrative action will change or affect existing law. 19 U.S.C. §§3805(a)(1)(C), (a)(2)(A).

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right in Art. 15.6 of the Dominican Republic-Central America-U.S. Free Trade Agreement (CAFTA-DR), K.A.V. 7157, entered into with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.

<sup>28</sup> U.S.-Australia FTA at Art. 17.4.10(b). Similar prohibitions exist in the Bahrain FTA at 14.4.10(b); South Korea FTA at 18.4.10(b); Morocco FTA at 15.5.10(b); Oman FTA at 15.4.10(b); Panama FTA at 15.5.10(b); Peru FTA at 16.7.9; Singapore FTA at 16.4(2)(b); CAFTA-DR at 15.5.10(b).

In respect of the U.S.-Australia FTA, the President confirmed that “No statutory or administrative changes will be required” to implement the Intellectual Property Rights chapter dealing with, *inter alia*, the making available right and the prohibition against the unauthorized retransmission of television signals on the Internet.<sup>29</sup> Congress then passed, and the President signed, the U.S.-Australia Free Trade Agreement Implementation Act, in which Congress approved the President’s statement of administrative action containing the assurances with respect to making available. Pub. L. 108-286 at §101(a)(2), 118 Stat. 919 (2004). Like approvals have been provided in respect of the other bilateral FTAs requiring that a making available right be embodied in domestic law.<sup>30</sup>

<sup>29</sup> *Statement of Administrative Action, U.S.-Austl. Free Trade Agreement*, <http://waysandmeans.house.gov/media/pdf/australia/hr4579saa.pdf> at 25-26.

<sup>30</sup> See §101(a)(2) of: U.S.-Bahrain Free Trade Agreement Implementation Act, Pub. L. 109-169, 119 Stat. 3581 (2006); U.S.-Chile Free Trade Agreement Implementation Act, Pub. L. 108-177, 117 Stat. 909 (2003); U.S.-Jordan Free Trade Area Implementation Act, Pub. L. 107-143, 115 Stat. 243 (2001); U.S.-Korea Free Trade Agreement Implementation Act, Pub. L. 112-141, 125 Stat. 428 (2011); U.S.-Morocco Free Trade Agreement Implementation Act, Pub. L. 108-302, 118 Stat. 1103 (2004); U.S.-Oman Free Trade Agreement Implementation Act, Pub. L. 109-283, 120 Stat. 1191 (2006); U.S.-Panama Trade Promotion Agreement Implementation Act, Pub. L. 112-143, 125 Stat. 497 (2001); U.S.-Peru Trade Promotion Agreement Implementation Act, Pub. L. 110-138, 121 Stat. 1455 (2007); U.S.-Singapore Free Trade Agreement Implementation Act, Pub. L. 108-178, 117 Stat. 948 (2003); Dominican Republic-Central America-U.S. Free

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Consequently, Congress has now enacted and the President has signed numerous laws recording Presidential confirmations that then-existing U.S. law provided a required making-available right. These confirmations should also be given deference.

#### **IV. THE UNITED STATES ADOPTED A TECHNOLOGY-NEUTRAL PATH *PRIOR* TO ENTERING INTO THE INTERNATIONAL AGREEMENTS**

Long before U.S. accession to the aforementioned international obligations, Congress faced the problem raised by Aereo and defined the exclusive copyright rights in technology-neutral terms so that they would continue to apply in the face of dramatic technological developments. The technologically neutral norms reflected in the agreements were adopted in United States copyright reforms before the United States made those commitments.<sup>31</sup>

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Trade Agreement Implementation Act, Pub. L. 109-153, 119 Stat. 462 (2005).

<sup>31</sup> This reform effort dates at least to 1965, when a Report of the Register of Copyrights noted:

Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. \* \* \* A real danger to be guarded against is

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As this Court has recognized, the Copyright Act of 1976 was “the culmination of a major legislative reexamination of copyright doctrine.” *Harper & Row Pubs., Inc. v. Nation Ent.*, 471 U.S. 539, 552 (1985).

One important trigger for this legislative reexamination involved *Fortnightly Corp. v. United Artists Tel., Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974), where this Court found that cable-television systems retransmitting distant broadcast television programs were not engaging in performances. See also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). Congress viewed these decisions as a “narrow construction of the word ‘perform’ in the 1909 statute,” which was “completely overturned by the present bill and its broad definition of ‘perform’ in section 101.” H.R. Rep. No. 94-1476, at 86-87.

While spurred chiefly by the *Fortnightly*, *Teleprompter* and *Aiken* trilogy, Congress was mindful of earlier cases in which unanticipated technological advances had led to gaps in protection.

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that of confining the scope of an author’s rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

Staff of House Comm. on The Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision PART 6: Supplementary Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law*, 13-14 (Comm. Print 1965).

In confirming that “Copyright protection subsists in any tangible medium of expression, now known or later developed” under §102(a), the House Report explained that:

This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.

H.R. Rep. No. 94-1476, at 52.

The expansive §101 definition of “perform” under the 1976 Act reflected the Berne Art. 11 provisions protecting performances “by any means or process,” the Berne Art. 11*bis*, Art. 14 and Art. 14*bis* rights of communication to the public, and anticipated the WCT Art. 8 commitment to give rightholders the exclusive right of communication to the public including making available to the public of works “in such a way that members of the public may access these works from a place and at a time individually chosen by them.” It did so by confirming that performances of works may be rendered “*either directly or 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.*” (Emphasis added.) Likewise, the definition of the verb “transmit” confirmed that a performance or

display can be communicated “*by any device or process* whereby images or sounds are received beyond the place from which they are sent.”<sup>32</sup> (Emphasis added.) The legislative history further confirms that, as of 1976, technological neutrality was desired, with the House Report confirming that the term “any device or process” was meant to capture “any sort of transmitting apparatus,” including “techniques and systems not yet in use or even invented.”<sup>33</sup>

The Second Circuit misinterpreted the Transmit Clause including by failing to construe it in accordance with the United States’ treaty obligations. According to a leading scholar:

Thus, “to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process” means to communicate the work in a way that members of the public can immediately listen to or view its performance, whether or not they are separated in space

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<sup>32</sup> This Court has previously observed that even before the United States acceded to Berne in 1989, the 1976 Copyright Act brought United States law into compliance with Berne standards in some respects. *See Eldred*, 537 U.S. at 195 (1976 Act aligned United States law with Berne with respect to term of copyright protection), 206 n.13 (isolationist approach rejected); *see also* H.R. Rep. No. 100-609, at 21 (1988), confirming that “It can safely be stated that Congress drafted and passed the 1976 Act with a ‘weather eye’ on Berne. \* \* \* [M]any obstacles to adherence were removed by the 1976 revision and a willingness to modify further our laws in order to join the Union.”

<sup>33</sup> H.R. Rep. No. 94-1476, at 63-64.



or time. The Second Circuit deviated from the international norm by incorrectly reading “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” as a limitation on the scope of the communication, rather than as confirmation of the coverage of individualized transmissions. The court compounded the error by rewriting “it” to mean a particular transmission from a particular copy of a performance, rather than adhering to the grammatical referent, the statutory phrase performance of the work – that is, a communication that permits the members of the public to view or listen to the work as it is being communicated to them. Only the latter reading of “it” corresponds to the scope of the right in both the U.S. statute and the WCT.<sup>34</sup>

In reviewing this case, this Court should thus appreciate that the concept of technological neutrality is a principle that was not only embraced by the United States through treaties, but was also long ago embedded within U.S. law as the result of a deliberate Congressional determination.

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<sup>34</sup> Ginsburg, *U.S. Treaty Obligations*; see also Mihály Ficsor, *The WIPO ‘Internet Treaties’ and Copyright in the “Cloud”* 17-18 ALAI Congress, Kyoto (Oct. 16-18, 2012), <http://bit.ly/1fnP0WX>

## V. INTERNATIONAL CASE LAW CONFIRMS THE BREADTH OF THE TRANSMIT CLAUSE

In interpreting treaty text or to support its reading, the Court may also turn to authorities from foreign jurisdictions that have confronted the question before the Court. *Abbott v. Abbott*, 560 U.S. \_\_\_, 130 S. Ct. 1983, 1993-1994, 2007 (2010). Such decisions have been rendered in the European Union and Canada, each with direct reference to the multilateral treaties that also bind the United States.

In the *TVCatchup* case, the Court of Justice of the European Union (CJEU) considered a service that permitted its users to receive, via the Internet, ‘live’ streams of free-to-air television broadcasts. As in this case, viewers could obtain access only to content which they were already legally entitled to watch. As well, the defendant’s server allowed only a “one-to-one” connection for each subscriber whereby each individual subscriber established his or her own internet connection to the server and every data packet sent by the server onto the internet was addressed to only one individual subscriber. Case C-607-11, *ITV Broadcasting Ltd. v. TVCatchup Ltd.*, 2013 ECR I-\_\_\_, [2013] 3 C.M.L.R. 1 (CJEU), ¶9-10, 18(2)(a).

The CJEU was called upon to interpret Art. 3(1) of the InfoSoc Directive,<sup>35</sup> which incorporates Art. 8 of the WCT by requiring that:

Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

It also considered Recital 23 to the Directive, which explains that the right of communication to the public:

should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover *any* such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

(Emphasis added.)

The CJEU noted that a terrestrial broadcast was being converted into technical means different from that of the original communication, an act that would

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<sup>35</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L.167) 10.

require permission if to a “public.” *Id.* at ¶26, 39.<sup>36</sup> It rejected the view that the “one-to-one” nature of the transmissions could convert a “public” activity into a plurality of individual and private communications.

In construing the term “public,” it held that regard must be paid to “the cumulative effect of making the works available to potential recipients \* \* \* it is in particular relevant to ascertain the number of persons who have access to the same work at the same time and successively.” *id.* at ¶33. Accordingly:

it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.

*Id.* at ¶34.

In so concluding, the CJEU relied on its earlier *Rafael Hoteles* decision. This decision is notable because it concludes, in harmony with *Charming*

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<sup>36</sup> At ¶39, the CJEU found that when a broadcast is retransmitted using a “different technical means” – that is, different than the means originally used to transmit it, such as from terrestrial to Internet – it is not necessary to consider whether the retransmission reaches a “new public.” This distinguishes *TVCatchup* from the recent CJEU decision in Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 ECR I- \_\_\_\_ (February 13, 2014), a linking case involving the “same technical means,” where the CJEU found at ¶24 that providing an ordinary hyperlink to a file posted at a website by the copyright holder made the file available to the public, but not a “new public.”

*Betsy*, that “Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement.” Case 306/05, *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA*, [2006] ECR I-11519, [2006] All ER (D) 103 (CJEU), ¶35. With that principle in mind, the CJEU held that the communication to the public right “must be interpreted broadly” in order to protect authors and allow them to obtain “an appropriate reward for the use of their works.” *Id.* at ¶36. It considered the cumulative economic effects of making the works available to potential television viewers, and refused to interpret Article 8 of the WCT in a way that would render it “meaningless.” *Id.* at ¶39, 43, 50-51.

In February, the CJEU again affirmed a broad and technologically neutral interpretation of the communication to the public right, confirming that “the concept of ‘communication’ must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used.” Case C 351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.*, [2014] ECR 1-\_\_\_ (February 27, 2014).

Similarly, the Supreme Court of Canada recently construed Article 8 of the WCT in the broadest possible terms. In *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,

2012 SCC 35, the Supreme Court of Canada was called upon to decide whether music streamed on demand by separate transmissions to individual subscribers over the Internet was a communication to the public.<sup>37</sup>

The appellants in *Rogers* adopted the *Cablevision/Aereo* position of contending that “each transmission must be analyzed on its own, as a separate transaction, regardless of whether another communication of the same work to a different customer may occur at a later point in time.” *Id.* at ¶27.

The Supreme Court of Canada unanimously rejected this stance. It concluded that viewing the question from the perspective of the recipient of each transmission would “produce arbitrary results,” and thus create an incentive to avoid copyright simply by executing a task serially rather than through a mass transmission. In its view, “If the nature of the activity in both cases is the same, albeit accomplished through different technical means, there is no justification for distinguishing between the two for copyright purposes.” *Id.* at ¶29; *see also* ¶40. “Focusing on each individual transmission loses sight of the true character of the communication activity in question and makes copyright protection dependent

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<sup>37</sup> A stream is a transmission of data that allows the user to listen to or view the content transmitted at the time of the transmission, resulting only in a temporary copy of the file on the user’s hard drive. *Id.* at ¶1.

on technicalities of the alleged infringer’s chosen method of operation.” *Id.* at ¶30.<sup>38</sup>

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<sup>38</sup> Although the Supreme Court of Canada declined to follow *Cablevision*, partly on the basis of differences between the Canadian communication right and the U.S. Transmit clause, *id.* at ¶50-51, the Court clearly rejected the arguments based on *Cablevision* that would prevent individual transmissions of the work from being communications that are to “the public.” The *Rogers* decision focuses on “the true character of the communication activity in question,” and rejected an approach that did not provide “principled” copyright protection. *Id.* at ¶30, 40. It is also noteworthy that the Japanese Supreme Court also rejected the “one to one” argument in the “Maneki TV” case, *NHK (Japan Broadcasting Corporation), et al. v. Nagano Shōten Co. Ltd.* (65-1 Minshū 121, Case No. 653 (ju) of 2009, January 18, 2011). It found that one-to-one transmissions of television programming over the Internet to individual customer’s personal viewing devices were to the “public” under Article 23 of the Japanese Copyright Act which grants the author “the exclusive right to effect a public transmission of his work (including, in the case of automatic public transmission, making his work transmittable).”

In Australia, the Full Court of the Federal Court adopted a similar position in *National Rugby League Investments Pty. Ltd. v. Singtel Optus Pty. Ltd.* [2012] FCAFC 59, although its ruling was based on the reproduction right. It ruled that a communications provider was jointly and severally liable with its subscribers for infringement of the reproduction right by recording free to air television programs which were then used to transmit the programming for viewing at the time and place of the subscriber’s choosing on a mobile device or personal computer. See *Telstra Corporation Limited v. Australasian Performing Right Association* (1997), 146 ALR 649, 656-659, 686-695 (High Court of Australia found music on hold was “to the public” even though it was transmitted to each caller individually by means of his or her mobile telephone and could be received in private or domestic circumstances.).

In so concluding, the Court considered the obligations flowing between the United States and Canada via the Canada-U.S. Free Trade Agreement, which required both parties to implement a technologically neutral communication to the public right to deal with evolutions in cable technologies. *Id.* at ¶37. In remarkably similar language to the House and Senate reports in the 1976 U.S. reform, the Court affirmed that “the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. . . . [I]t exists to protect the rights of authors and others as technology evolves.” *Id.* at ¶39, citing *Robertson v. Thomson Corp.*, 2006 SCC 43 at ¶49.

Although Canada was not a WCT member at the time of the *Rogers* decision, the Court also assessed whether its approach was consistent with its norms. It concluded that the WCT “resolves an ambiguity as to whether the old communication to the public rights [under the Berne Convention] accommodated or excluded ‘pull technologies’” and made it clear that it “targets on-demand transmissions” regardless of whether members of the public are “separated both in space and in time.” *Id.* at ¶46, 48.<sup>39</sup> Accordingly, the

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<sup>39</sup> In so concluding, the Supreme Court of Canada cited Ricketson & Ginsburg, *supra* note 7 at 12.57, and Jane C. Ginsburg, *The (New?) Right of Making Available to the Public*, in *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, 234, 246 (David Vaver and Lionel Bently, eds. 2004).



Supreme Court was satisfied that its interpretation was consistent with an agreement which Canada had signed but not yet ratified.

The import of the *Rogers* decision is twofold. The first crucial point is that it locates technological neutrality in treaty commitments with the United States that tracked the 1976 reforms that reversed *Fortnightly*, *Teleprompter* and *Aiken*. This is another instance in which the doctrine of technological neutrality was an innovation *exported* by the United States to its trading partners, and not vice-versa. The second crucial point is the clear unwillingness of the Canadian Supreme Court to accept a situation “where the existence of copyright protection depends merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity.” *Id.* at ¶40. Faced with the same problem, and with international comity in mind, this Court should adopt the same solution.



## CONCLUSION

Aereo’s use of thousands of antennas to make over-the-air broadcasts available to members of the public does not transform them into private performances merely because they are accessed by members of the public at a time or place of their choosing. When all is said and done, Aereo’s audience is the general public, notionally anyone able to pay to have broadcasts streamed over the Internet.

The statutory language in the Copyright Act, its legislative history, and treaty history make clear that Congress intended to enact a broad technologically neutral public performance right that would not leave open the loophole argued for by Aereo. It did so by clarifying that a public performance may be made by transmitting or otherwise communicating a performance of a work “by means of any device or process” *regardless* of whether the members of the public “receive it in the same place or in separate places and at the same time or at different times.” That is the only conclusion that is consistent with the United States’ international obligations. Viewed against this entire backdrop, the Second Circuit’s decision in *Aereo* cannot stand.

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**APPENDIX**

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*LIST OF AMICI CURIAE*

This *amicus* brief is joined by the following international copyright scholars and associations:

**International Copyright Scholars\***

*Amicus* Professor F. Jay Dougherty is a tenured professor at Loyola Law School Los Angeles, and Director of its Entertainment & Media Law Institute. He teaches Copyright Law and is the author of published articles on the subject in the U.S., Europe and China, as well as an article about comparative right of publicity laws, among others. He teaches International Copyright & Neighboring Rights at the Loyola International IP Institute in London, and international and comparative Entertainment Law at the Munich Intellectual Property Law Center, and in Paris and London. He is the Co-Editor in Chief of the Journal of the Copyright Society of the USA, and co-author of an Entertainment Law casebook. A former President of the Los Angeles Copyright Society, he has also been a Trustee of the Copyright Society of the USA.

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\* Affiliations are listed for identification purposes only.

*Amicus* Dr. Mihály Ficsor was Assistant Director General of the World Intellectual Property Organization (WIPO) during the preparation and adoption of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty and played a decisive role in the working out and adoption of the provisions on a technology-neutral general right of communication to the public. Since then he has published a number of books and articles on this topic. Dr. Ficsor is currently the Chairman of the Central and Eastern European Copyright Alliance (CEECA), a professional organization with permanent observer status at WIPO. The Alliance's objective is to promote well-balanced but effective copyright protection in that part of Europe where the creators and small- and medium-size producers are particularly vulnerable to online infringements.

*Amica* Professor Ysolde Gendreau has been a professor at the Faculty of Law of the Université de Montréal since 1991, where she teaches intellectual property law and competition law. Her main field of expertise is copyright law, especially comparative and international issues. She is a member of the Bar of Quebec. She has also taught at McGill University, Université de Paris II, Université de Paris XII, Université de Nantes, Université de Strasbourg III, Université de Lyon 2, University of Victoria (summer programme in Victoria and Oxford), University of San Diego (summer programme in Florence), and Monash University (Australia). She has published extensively, both in Canada and abroad. Among her more recent

publications are contributions to two books she has edited: *A Shifting Empire: 100 Years of the Copyright Act 1911* (2013) (edited with U. Suthersanen) and *Langues et droit d'auteur/Language and Copyright* (2009) (edited with A. Drassinower). She has been the President of ATRIP (Association for the Advancement of Teaching and Research in Intellectual Property) (2003-2005) and of ALAI Canada (2006-2011). She is a member of the Executive Committee of ALAI and an associate member of the International Academy of Comparative Law.

*Amicus* Justin Hughes is the William H. Hannon Professor of Law at Loyola Law School in Los Angeles, where he teaches intellectual property and international trade courses. From 2002 until 2013, he taught at Cardozo Law School in New York, where he remains a Senior Lecturer and Co-Director of the SIPO-Cardozo Program. From 2009 until 2013, Professor Hughes also served as Senior Advisor to the Undersecretary of Commerce for Intellectual Property. In that capacity, he was chief negotiator for the U.S. at the Diplomatic Conferences that completed the Beijing Treaty on Audiovisual Performances (2012) and the Marrakesh Treaty to Facilitate Access to Printed Works for the Blind (2013).

*Amicus* Professor Marshall Leaffer is Distinguished Scholar in Intellectual Property Law and University Fellow at Indiana University School of Law. He received his J.D. at the University of Texas and his LLM in Trade Regulation at New York University Law School. In addition to his law review

articles, he is the author of *Copyright Law: Cases and Materials* (2013), *Understanding Copyright* (2010), and *International Treaties on Intellectual Property* (1997). Before becoming a full time teacher, Professor Leaffer practiced trademark law in New York City with American Home Products Corporation, and the firm of Haseltine, Lake and Waters. He also served in the United States government as Attorney-Advisor in the United States Patent and Trademark Office, and as staff member with the General Counsel of the United States Copyright Office. He represents the United States on the International Executive Board of the Association Littéraire Artistique Internationale (ALAI), a non-governmental organization that defends authors' rights worldwide.

*Amica* Professor Silke von Lewinski is tenured at the Max Planck Institute for Innovation and Competition, Department of Intellectual Property and Competition Law, Munich and specializes in international and European copyright law. She is also Adjunct Professor at Franklin Pierce Center for Intellectual Property at the University of New Hampshire Law School, Concord, New Hampshire. Her book publications include *The WIPO Treaties 1996* (2002) (with J. Reinbothe); the treatise *International Copyright Law and Policy* (2008); *European Copyright Law* (2010) (with M. M. Walter et al.); and, as editor, *Copyright throughout the World* (2008, with annual updates). Dr. von Lewinski is also an Adjunct Professor at the Munich Intellectual Property Law Center, Munich. She has been a visiting professor at

many universities worldwide, including Paris XI, Toulouse 1; Université Laval, Québec, and University of Melbourne. She was the first Walter Minton Visiting Scholar at Columbia University School of Law, New York; the First Distinguished Visitor to the Intellectual Property Research Institute of Australia (IPRIA); and The Hosier Distinguished Visiting IP Scholar, DePaul University, Chicago, July 2005. Professor von Lewinski frequently has been an expert consultant for the European Commission, in particular regarding the WIPO Diplomatic Conference 1996 (preparation, and member of the EC delegation).

*Amicus* Professor Victor Nabhan has taught at Laval University (Canada) as a full-time professor since 1999. His areas of expertise are intellectual property, contract law and consumer protection. He has advised the Canadian Government with respect to the drafting of four revisions of the Copyright Act, as well as the Quebec Ministry of Culture on copyright matters. From 1999-2005, he served as a WIPO consultant, assisting a number of developing countries in drafting their copyright laws in compliance with TRIPS and/or WCT and WPPT. Since 2005, he has been a guest professor at the University of Ottawa (Canada), Osgoode Hall Law School (Toronto), Institut des Études Politiques (Paris) and Nottingham University (UK). He also acts as a consultant with different organizations and developing countries. He is Counsel with the law firm of Kimbrough and Associés (Paris) and Chairman of ALAI (Association Littéraire et Artistique Internationale). He has

authored a number of articles and publications and has exhibited as an occasional artist.

*Amicus* Professor Barry Sookman is the author of the leading six-volume treatise, *Sookman: Computer, Internet and E-Commerce Law* (1999-2013); *Copyright: Cases and Commentary on the Canadian and International Law*, co-authored with Steven Mason (2013); *Intellectual Property Law in Canada: Cases and Commentary*, co-authored with Steven Mason and Daniel Glover (2012); *Computer, Internet and E-Commerce Terms: Judicial, Legislative and Technical Definitions* (2001-2013); and *Sookman: Computer Law: Acquiring and Protecting Information Technology* (1989-1999). He is a contributing author to other books including Gordon Henderson *Copyright Law in Canada* (1994). He is a senior partner with McCarthy Tétrault LLP and is the former head of its Intellectual Property Group. He is also an adjunct Professor of intellectual property law at Osgoode Hall Law School in Toronto, Canada.

### **International Associations**

*Amicus* International Federation of the Phonographic Industry (IFPI) represents the recording industry worldwide, with a membership comprising some 1300 record companies in 66 countries and affiliated industry associations in 55 countries. IFPI's mission is to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music



worldwide. IFPI also represents the recording industry before courts, national legislatures, executive authorities and international organizations.

*Amicus* Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) is the national organization of professional performers working in the English-language recorded media in Canada. ACTRA represents the interests of 22,000 members across Canada – the foundation of Canada’s highly acclaimed professional performing community.

*Amicus* Asociación Mexicana de Productores de Fonogramas y Videogramas (Amprofon) represents, coordinates and defends the rights and common interests of producers of phonograms and videograms in Mexico; it is an IFPI member. Amprofon conducts the necessary negotiations and arrangements with national and foreign authorities, as well as with international organizations for the benefit of its members, regarding any matter of general or particular nature involving the interests of all or some of its members. The association studies and addresses issues related to promoting the development of the recording industry and fostering the development of music culture. It cooperates with the Government of Mexico in the regulatory process to protect the intellectual property rights of phonogram producers. Its members comprise 13 major and independent recording companies, having over 70% of the Mexican market.

*Amicus* Association Littéraire et Artistique Internationale du Canada (ALAI Canada) is the Canadian branch of ALAI, an international organization founded in Paris in 1878 by La Société des Gens de Lettres de France under the sponsorship of Victor Hugo. ALAI's efforts gave rise to the Berne Convention signed on September 9, 1886, established in view of protecting literary and artistic works. The Canadian branch was founded in 1978. ALAI's purpose is to promote and protect copyright as well as to study questions regarding the protection and applicability of copyright. ALAI Canada holds conferences and seminars. As well, it publishes and distributes documents dealing with copyright. These activities combine a strict scientific analysis with a practical approach to the various topics considered. They are available to specialists as well as to the public at large.

*Amicus* Australian Copyright Council (ACC) is an independent, non-profit organization. Founded in 1968, it has 24 members consisting of associations representing professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. In addition to providing advice and information on copyright, the ACC is an advocate for Australian copyright owners.

*Amicus* British Copyright Council (BCC) is a not-for-profit organization that provides a forum for discussion of copyright law and related issues at UK, European and International levels. The BCC is independent, receives no government funding and is

the only organization of its kind in the UK. The BCC aims to provide an effective, authoritative and representative voice for the copyright community. It represents those who create, hold interests in or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which there are rights of copyright or related rights; and those who perform such works. In the UK the BCC is consulted by government departments, agencies and regulators. It follows copyright developments in the European Union and is an NGO Observer Member of the World Intellectual Property Organization. It maintains links with similar bodies in other countries.

*Amicus* Canadian Media Production Association (CMPA) represents the interests of Canadian screen-based media companies engaged in the production and distribution of Canadian English-language television programs, feature films, and new media content in all regions of Canada. The CMPA is also a founding member of the Canadian Retransmission Collective (CRC), which collects and distributes copyright royalties pursuant to a Canadian Copyright Board-approved tariff when Canadian independently-produced programs in over-the-air broadcast signals are retransmitted into distant Canadian markets by Canadian cable, satellite and telecommunications companies.

*Amicus* International Confederation of Societies of Authors and Composers (CISAC) is the umbrella organization representing collective management

organizations for authors worldwide. Founded in 1926, CISAC is a non-governmental, not-for-profit organization based in Paris, France, with regional offices in Hungary, Chile, Burkina Faso and China. CISAC counts 227 authors' societies as its members. These societies are based in 120 countries, including the US. Together, CISAC societies around the world represent over 3 million creators from all artistic disciplines including music, film, literature, drama and visual arts. The majority of royalties collected by CISAC societies on behalf of creators come from public performance and communication rights (75% of all royalties collected, for all categories of repertoire, around the world), hence CISAC's and its members' interests in these proceedings.

*Amicus* International Confederation of Music Publishers (ICMP) is the world trade association representing the interests of the music publishing community internationally. Constituent members of ICMP are music publishers' associations from Europe, Middle East, North and South America, Africa and Asia-Pacific. Included are the leading independent, multinational, and international companies and regional and national music publishers, mainly small and medium enterprises, throughout the world. As the voice and point of reference of music publishers, and the community of composers and songwriters, ICMP's mission is to increase copyright protection internationally, encourage a better environment for the music business, and act as an industry forum for consolidating global positions.

*Amicus* International Federation of Actors (FIA) represents some 80 trade unions, guilds and associations in more than 70 countries around the world voicing the interests of professional performers in the audiovisual sector. FIA serves as a membership forum to promote good practices and as an advocate of performers' social and economic rights internationally. FIA campaigns vigorously for the intellectual property rights of performers as they serve to enhance their livelihood and protect their reputation.

*Amicus* International Federation of Film Producers Associations (FIAPF) is a trade organization dedicated to the defense and promotion of the legal, economic and creative interests of film producers throughout the world. FIAPF's members are 33 national producers' organizations from 28 countries from Africa, Asia-Pacific, Europe, North and Latin America.

*Amicus* International Federation of Musicians (FIM), founded in 1948, is the international organization for musicians' unions, guilds and professional associations, with about 70 members in 60 countries throughout the world. FIM's main objective is to protect and further the economic, social and artistic interests of musicians represented by its member unions. To achieve that objective, FIM engages in a number of activities, including the promotion of national and protective legislation and other initiatives in the interests of musicians, working with collecting societies administering performers' rights, working with other international organizations in the

interests of member unions and of the profession, and close collaboration with the World Intellectual Property Organization (WIPO), which administers the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, as well as with the International Labour Office (ILO) and UNESCO.

*Amicus* International Video Federation (IVF) unites associations representing companies active in all segments of the film and audiovisual sector in Europe. Their activities include the development, production, and distribution of films and audiovisual content as well as the publication of film and audiovisual content on digital media and in online channels.

*Amicus* Music Canada is a non-profit trade association that represents major music companies in Canada and a number of the leading Canadian independent recording and music distribution companies. Music Canada's members are engaged in all aspects of the recording industry, including the manufacture, production, promotion and distribution of music. Music Canada member companies actively develop and nurture Canadian talent throughout the world. Music Canada also works with some of the leading recording studios, live music venues, concert promoters, managers and artists in the promotion and development of its members' music.

*Amicus* Societies' Council for the Collective Management of Performers' Rights (SCAPR) is an international organization focused on the development of the practical cooperation between sound recording and audiovisual performers' collective management organizations. Founded in 1986 and with 50 collective management organization members from 40 countries, SCAPR's primary aim is to develop strategies, formats, and administrative systems to improve the exchange of data and performers' rights payments across borders.

*Amicus* Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a not-for-profit organization that represents the Canadian performing rights of millions of Canadian and international music creators and publishers. SOCAN is proud to play a leading role in supporting the long-term success of its more than 100,000 Canadian members, as well as the Canadian music industry. SOCAN licenses more than 125,000 businesses in Canada and distributes royalties to its members and peer organizations around the world. SOCAN also distributes royalties to its members for the use of Canadian music around the world in collaboration with its peer societies.

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(CNECT)

**From:** [REDACTED] <[REDACTED]@ifpi.org>  
**Sent:** 05 August 2016 17:49  
**To:** [REDACTED] (CNECT); [REDACTED] (CNECT); [REDACTED] (CNECT)  
**Cc:** Olivia Regnier; Frances Moore; [REDACTED]  
**Subject:** [REDACTED] of Copyright Directive  
**Attachments:** [REDACTED] ifpi advice 5.8.16 final.pdf; Note [REDACTED]  
 [REDACTED] s.docx; Annex - National cases citing  
 Recital 27 Copyright Directive.docx; 0609\_001.pdf

Art.4(2)(2)

Dear ladies,

I attach several papers [REDACTED]  
 [REDACTED]:

- Updated opinion [REDACTED]
- IFPI note [REDACTED]  
 [REDACTED] and an annex to the note with examples of national case – law citing  
 Recital 27
- Extract from the “Commentary of the WIPO treaties” by Reinbothe and Lewinski where they  
 explain the notion of mere physical facilities in the WCT

FYI, we will share these materials with [REDACTED] from the cabinet on a confidential basis.

Do not hesitate to let us know if you wish to discuss this.

Kind regards,  
 [REDACTED][REDACTED]  
 [REDACTED]  
 IFPI – representing the recording industry worldwide

European Regional Office | Square de Meeûs 40 | 1000 Brussels | Belgium | T: +32 (0)2 511 9208 |  
 [REDACTED] [@ifpi.org](mailto:[REDACTED]@ifpi.org)

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[www.pro-music.org](http://www.pro-music.org)  
 @IFPI\_org





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5 August 2016





**Note** [redacted]  
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05 August 2016

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**ANNEX** – National cases citing Recital 27 of the Copyright Directive 2001/29/EC

	<b>Court</b>	<b>Parties</b>	<b>Reference to Recital 27</b>
ES	Madrid Civil Court of Appeal, 14 January 2014, No. 11/2014	Telecinco v YouTube	No specific reference to Recital 27 but Youtube submitted that it was only operating a technical infrastructure but court seemed to implicitly reject this argument. It held that even if YouTube’s claim that it only provided a technical infrastructure was correct, this would not automatically result in YouTube’s liability being limited by to the E-Commerce safe harbours. Ultimately, Youtube’s liability was rejected because it was entitled to safe harbour protection.
BE	Brussels First Instance Court, 13 March 2015 No. 13/12839/A	SABAM v Belgacom	Only reference to physical facilities in Para 44 – no further assessment.
UK	High Court, 20 February 2012, [2012] EWHC 268 (Ch)	Dramatico Entertainment Ltd v British Sky Broadcasting Ltd	Reference to physical facilities but no detailed consideration.  Finding of infringement by The Pirate Bay and its users.
UK	High Court, 18 July 2011, [2011] EWHC 1874 (Pat)	ITV Broadcasting Ltd v TV Catchup Ltd	“43 Given the broad meaning which the Directive requires to be given to “communication to the public”, it seems that any limitations on the natural meaning of the expression need to be kept within tight bounds.”  “49 Thirdly, TVC do not in the Court’s judgment merely provide technical means to ensure or improve reception in the catchment area of the broadcast. The service which TVC provide is an alternative service to that of the original broadcaster, including its own advertising content, and which is in competition with the service provided by the original broadcaster. It is operated for profit. It is intended to attract its own public audience. Its activities are therefore, in this Court’s view an independent exploitation, of the works and other subject matter. They are not merely supportive of the original exploitation of the work.”
NL	Court of Appeal of Amsterdam, Fifth Division for Civil Matters, Case No.1157/04, 15 June 2006	Stichting Bescherming Rechten	“4.7 Techno Design cannot be deemed to be a kind of ISP (an internet service provider), as its actions go considerably further than those of an ISP. That means that it does not qualify for the same protection as an ISP, in view of its significance

		Entertainment Industrie Nederland (BREIN) v Techno Design “Internet Programming” B.V.	<p>in society. In the words of the “Agreed Statement” to Art.8 of the WIPO Copyright Treaty:</p> <p>“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11 bis (2)”.</p> <p>Techno Design's actions were most certainly not restricted to the passive role reflected in Art.8. After all, Techno Design not only made it possible for its music-loving visitors to communicate with other music-lovers, but it also manipulated the data it had compiled in such a way that it greatly simplified its visitors' search for mp3 music files. It furthermore gave its visitors the necessary information on those files.”</p>
UK	High Court, 13 November 2013, [2013] EWHC 3479 (Ch)	Paramount Home Entertainment International Ltd, Sony Pictures Home Entertainment Ltd, Twentieth Century Fox Film Company Ltd, Universal Pictures (UK) Ltd, Warner Bros. Entertainment UK Ltd, Disney Enterprises, Inc v British Sky Broadcasting Ltd, British Telecommunications Plc, Everything	<p>Site-blocking action against two sites enabling access to content on third party, and providing search facilities in respect of the content. Links to content are supplied by registered users of the websites or by the operators of the websites. Users who wish to access content via one of the websites are provided with a number of these links in response to searches or when browsing. Clicking on a link enables the user to view a stream of the chosen content on an embedded player.</p> <p>Summarising CJEU case law:</p> <p>“(9) Mere provision of physical facilities does not as such amount to “communication”: SGAE at [46].</p> <p>(10) Nevertheless, the installation of physical facilities which distribute a signal and thus make public access to works technically possible constitutes “communication”: SGAE at [46]–[47], Organismos (C-136/09) at [39]–[41].”</p> <p>Held: The host sites communicate the claimants’ works to the public and that the operators of the websites in the case are jointly liable.</p>

		Everywhere Ltd, Talktalk Telecom Ltd, Telefónica UK Ltd, Virgin Media Ltd	
NO	Supreme Court of Norway, 10 May 2016 Case no. 2015/1101	Nowaco v Get AS	The case concerned the liability of a Norwegian cable operator (GET AS) for the transmission of TV broadcasts that it received via encrypted secure fibre connection from the broadcaster SBS. GET AS argued that it was not retransmitting any content to the public and that the entire copyright clearance was in the responsibility of the broadcaster. The Supreme Court held that GET's involvement is not limited to providing the broadcaster SBS with mere technical broadcasting assistant, i.e. GET was not just providing technical means for SBS to communicate content. In addition, the Supreme Court held that GET's cable network were "primary broadcasting" activities, i.e. it was not a retransmission of SBS broadcasts. Lastly and importantly, the Court held that both SBS and GET were jointly liable for the rights clearance by the broadcaster SBS.

## Article 8 WCT: Right of Communication to the Public

to whom the works are made available and on the definition of 'public' under the relevant national law.<sup>48</sup> On the contrary, the electronic mailing of a work, such as an article, to one particular person does not constitute making available 'to the public' – even if the person is a member of the public rather than a family member or a close friend.

The act of making available to the public, including the actual transmission (if it takes place), has to be looked upon in its entirety. Accordingly, even if the actual transmission, when looked upon as an isolated act, is not considered to be made 'to the public' (meaning that members of the public would have to receive the transmission simultaneously), it is sufficient for the application of the right of making available that the initial part of this kind of communication (the 'making available') is made to the public.

## (c) The agreed statement

The agreed statement, phrase 1 concerning Article 8 WCT clarifies that the 'mere provision of physical facilities for enabling or making a communication does not in itself amount to communication' either within the meaning of the WCT or the Berne Convention. This statement repeats the idea which has already been expressed in note 10.10 of the Basic Proposal, according to which 'the mere provision of server space, communication connections, or facilities for the carriage or routing of signals' would not constitute an act of making a work available. For example, those who manufacture and sell the cables or computers or other devices necessary for making works available as set out in Article 8 WCT do not themselves engage in making works available. This clarifying statement does however not exclude *per se* anyone who operates online networks from potential liability in respect of the making available of works on these networks. The question of whether and, if so, under what conditions, a network operator, telecommunications company or online service provider infringes the right of making available of works on networks, and be it through persons using the networks, depends upon the activity in question and has to be decided under national law on a case-by-case basis. The agreed statement only excludes the provision of physical facilities from the act of communication, not however any operation of networks including the exploitation of works thereon. 'Mere' provision indicates that this exclusion from the act of communication must be interpreted restrictively. Besides, and in more general terms, this phrase of the agreed statement has to be understood to apply without prejudice to provisions on liability in national law.<sup>49</sup>

Phrase 2 of the agreed statement concerning Article 8 WCT simply restates the existing legal situation under which the rights under Article 11<sup>bis</sup>(1) Berne Convention may be restricted as determined in its paragraph 2. It does not,

48 A different question in this context is whether the additional conditions of making available, in particular the individual choice of place and time of access, are fulfilled in such cases; see hereon, in particular above, note 20.

49 The agreed statement does not deal with the question of liability in the context of online

however, mean, that such restrictions would be permissible in relation to any other rights, such as the right of making available under Article 8 WCT; this right is not covered by Article 11<sup>bis</sup>(1) Berne Convention and therefore cannot be subject to Article 11<sup>bis</sup>(2) Berne Convention. This interpretation is confirmed by the historical background: phrase 2 of the agreed statement was introduced to reassure a country that it may continue to provide for a non-voluntary licence for the retransmission of broadcasts.<sup>50</sup>