

No. 13-461

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *ET AL.*,

Petitioners,

v.

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

Respondent.

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

**BRIEF OF COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION AND MOZILLA
CORPORATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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**BRIEF OF COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION AND MOZILLA
CORPORATION AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENT**

INTEREST OF *AMICI CURIAE*

The Computer & Communications Industry Association (“CCIA”) represents more than 20 large, medium-sized, and small companies in the high technology products and services sectors, including providers of computer hardware and software, electronic commerce, telecommunications, and Internet products and services. These companies collectively generate more than \$250 billion in annual revenues, and comprise many of the leaders in the Internet sector: Google, Yahoo!, Intuit, TiVo, Samsung, LightSquared, Microsoft, Motorola Mobility, Sprint, Netaccess System Technologies, Aereo, BT, Facebook, eBay, Data Foundry, T-Mobile, DISH, Allegro Group, Nvidia, Foursquare, OpenConnect, Redhat, XO Communications, and Pandora.¹

Mozilla Corporation has been a pioneer and advocate for the Web for more than a decade. Mozilla creates and promotes open standards that enable innovation and advance the Web as a platform for all. Today, hundreds of millions of people worldwide use

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Respondent Aereo is a member of CCIA but took no part in the preparation of this brief. On February 7 and 12, 2014, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs.

Mozilla Firefox to discover, experience and connect to the Web on computers, tablets and mobile phones.

The proper interpretation of the Copyright Act's public performance right is critical to Mozilla and CCIA's members alike. Communicating information and content from one physical place to another is at the heart of Internet-based technologies. Mozilla and the numerous businesses represented by CCIA have relied upon the Second Circuit's interpretation of the Copyright Act's Transmit Clause (17 U.S.C. § 101) and public performance right (17 U.S.C. § 106(4)), as a basis for investing enormous resources in the development and operation of innovative products and services with transmission functions, including cloud computing, that are now in widespread use by businesses and individual consumers.

In light of this widespread reliance, *amici* respectfully submit that this Court should consider and avoid the unintended consequences that might flow from overturning the Second Circuit's interpretation of those provisions of the Copyright Act. CCIA's *amicus* brief in the Second Circuit raising such concerns was cited in that court's opinion. Pet App. 32a-33a. *Amici* also submit that the tests proposed by petitioners, their *amici*, and the United States to distinguish Aereo's technology from the burgeoning cloud computing industry are unworkable and, should the decision below be reversed, would create an existential threat to that industry. Finally, *amici* submit that Congress is the body best suited to balance the competing societal interests at stake and to adapt the Copyright Act as needed in the face of evolving technologies.

SUMMARY OF ARGUMENT

Adoption of petitioners' position would threaten one of the most important emerging industries in the U.S. economy: cloud computing. Cloud computing—ubiquitous, on-demand network access to shared computing resources—offers benefits for businesses and consumers. As several neutral *amici* have stated, “the cloud computing revolution is fundamentally reshaping information technology.” Br. *Amicus Curiae* of BSA | The Software Alliance (“BSA”) in Support of Neither Party at 3. Already “becoming an increasingly important sector of the U.S. economy,” Br. *Amici Curiae* of Center for Democracy & Technology, *et al.* (“CDT”) in Support of Neither Party at 8; *accord* Br. *Amicus Curiae* of Cablevision Systems Corp. (“Cablevision”) in Support of Petitioners at 14, the cloud computing industry not only reduces the costs of computing, but also has the further potential to create hundreds of new businesses, thousands of jobs, and trillions of dollars in new revenue.

The dramatic expansion of the cloud computing sector, bringing with it real benefits previously imagined only in science fiction, depends upon an interpretation of the Copyright Act that allows adequate breathing room for transmissions of content. The Copyright Act affords a copyright holder the right to control only those performances or displays of a copyrighted work that are made “publicly,” 17 U.S.C. § 106(4), and defines the concept of performing or displaying a work “publicly” to mean:

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

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

17 U.S.C. § 101. The second clause, known as the Transmit Clause, leaves private performances unaffected. The court below correctly interpreted the Transmit Clause to hold that a one-to-one transmission from a unique copy is a private performance. *See* Pet. App. 22a-23a, 30a-31a. Petitioners would upend that interpretation by treating a single transmission to one person at one time as a public performance if the transmission can be “aggregated” with other transmissions at other times of the same copyrighted work.

Petitioners, the United States, and *amicus curiae* Cablevision admit that cloud computing is an important technology, but claim that their arguments as to why the court below erred will “not threaten the future of ‘cloud computing’ technology.” Pet. Br. 45-46; *see* Br. *Amicus Curiae* of the United States in Support of Petitioners at 31 (“reversal of the decision below need not call into doubt the general legality of cloud technologies and services”); Cablevision *Amicus* Br. 28 (because Aereo “is not meaningfully different from services that have long been required to pay royalties,” Aereo is “sharply distinguish[able] . . . from cloud technologies”). But the tests they propose to distinguish between cloud computing and “other such services” are unworkable and will endanger the thriving cloud computing industry just as it starts to mature. Clarifying the contours of these new tests,

moreover, would take years of costly litigation, chilling much valuable innovation in the meantime; by contrast, Congress is well-positioned to draw clear lines that operate prospectively.

First, petitioners and the United States propose to distinguish Aereo’s technology from cloud computing services on the ground that direct copyright liability attaches only to those services that “provide[] a means by which consumers can gain access to copyrighted content *in the first instance*.” U.S. *Amicus* Br. 31; see also Pet. Br. 46 (purporting to differentiate between a service that “provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large”). But this purported “first instance” test lacks any principled basis, and fails to adequately distinguish Aereo’s model from cloud computing, as many cloud services may be deemed to supply copyrighted content “in the first instance.”

Second, the United States (but not petitioners) suggests that Aereo’s technology (but not cloud computing) satisfies the requirement for direct copyright liability, which depends on “volitional conduct.” That test stems from this Court’s decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and distinguishes a volitional copyist from, for example, “the owner of a traditional copying machine whose customers pay a fixed amount per copy” of a copyrighted work. U.S. *Amicus* Br. 19 (quotation mark omitted). But the United States would alter the volitional conduct test to hold a service directly liable when it provides equipment that is “integral to the process by which content is *transmitted* to the subscriber.” *Id.* at 20. And while cloud services should be

treated as non-volitional because they automatically provide copyrighted content to third parties without human intervention, the United States’ “integral to the process” test would sweep in cloud services along with Aereo, because any part of a device or service used to transmit copyrighted material can be cast as “integral to the process” of infringing a copyright. *Accord* CDT *Amicus* Br. 17-20; BSA *Amicus* Br. 26-28.

Third, amicus Cablevision, after arguing at length that the Second Circuit properly construed the Transmit Clause, proposes a test that turns on whether “transmissions from the separate copies are better viewed as distinct transmissions or as mere links in a chain of some longer transmission.” Cablevision *Amicus* Br. 31. This formulation lacks a basis in the Transmit Clause’s text, fails to sensibly distinguish among devices and cloud services that provide identical capabilities to users, and affords little guidance for innovators attempting to apply the Transmit Clause in arenas remote from broadcast television. By offering such weak safeguards, this test would put legal, billion-dollar business operations in jeopardy.

In sum, petitioners, the United States, and Cablevision offer ambiguous tests unmoored from the statutory language of the Transmit Clause and incapable of charting an administrable path among different technologies. Their tests thus imperil socially beneficial innovations and current businesses that build on the efficiencies promised by cloud computing, and defining the boundaries of these tests, even if possible, would entail massive wasteful and costly litigation.

Given the difficulty that petitioners and their *amici* have in distinguishing Aereo’s technology from cloud computing, and the reliance the cloud computing

industry has placed on the Second Circuit’s interpretation of the public/private performance line, *amici* respectfully submit that the Court should continue its “consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” *Sony*, 464 U.S. at 431. Congress is the branch of government best equipped to balance the competing societal interests at stake and to draw a narrow rule that would eliminate any unintended consequences from the sweeping reinterpretation of the Transmit Clause petitioners propose. Nor is this simply a hypothetical, as Congress has addressed this precise issue no fewer than five times since 1976 to account for new means of retransmitting broadcasters’ content. Congress can do so again here, and petitioners and their supporting *amici* are well-versed in expressing their substantive policy preferences.

The decision below correctly construes the Transmit Clause in its current form; because any change to the Copyright Act should be made by Congress, not the courts, the decision below should be affirmed.

ARGUMENT

I. CLOUD COMPUTING IS AN IMPORTANT NEW FRONTIER IN THE AMERICAN ECONOMY

As *amici curiae* CDT *et al.* and BSA correctly explain, the emerging cloud computing industry is one that millions of consumers already use, and one that holds the potential for significant economic growth. *See* CDT *Amici* Br. 7-8; BSA *Amicus* Br. 5-13. CCIA agrees with and adopts herein those portions of these *amici*’s briefs.

Cloud computing offers “ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.”² In other words, cloud computing allows a user to access a vast array of computing power through an Internet connection, without the user having to purchase, maintain, and transport the necessary physical hardware.

This innovation—moving hardware off-site while maintaining access to it via the Internet—has unlocked an array of new services, trillions of dollars in revenues, and thousands of jobs. Cloud computing allows consumers to more freely access their data and to “share [that data], communicate with others, use, process and manipulate, collaborate, edit and display material anywhere.”³ For businesses, cloud computing has the potential to create \$1.1 trillion in revenue per year by 2015.⁴ And for American workers, cloud computing has the potential to create 685,000 jobs over the next 5 years, on top of the nearly 80,000 U.S. jobs that were created as a result of cloud computing

² Peter Mell & Timothy Grance, Recommendations of the Nat’l Inst. of Standards & Tech., U.S. Dep’t of Commerce, *NIST Special Publication 800-145: The NIST Definition of Cloud Computing* (2011), at 2, available at <http://tiny.cc/cbyldx>.

³ Joseph I. Rosenbaum, *Reed Smith Cloud Computing Initiative*, in *Transcending the Cloud: A Legal Guide to the Risks and Rewards of Cloud Computing* at 2 (Joseph I. Rosenbaum ed., 2010), available at <http://tiny.cc/pi5bdx>.

⁴ John F. Gantz, et al., *Cloud Computing’s Role in Job Creation* at 2, IDC White Paper (2012), available at <http://tiny.cc/zuotbx>.

in 2010 alone.⁵ Cloud computing is especially important to small businesses, relieving such companies of the need to heavily invest in fixed computing resources and network security. *See* BSA *Amicus* Br. 8-9.

These many benefits, moreover, have arisen only in the last five years, and due in significant part to the cloud computing industry's reliance on the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* ("*Cablevision*"), 536 F.3d 121 (2d Cir. 2008). One recent study, for example, found that venture capital "investment in cloud computing firms increased significantly in the U.S. . . . after the *Cablevision* decision," such that the decision "led to additional incremental investment in U.S. cloud computing firms" on the order of approximately a billion dollars in two and a half years.⁶ Another study concluded that *Cablevision* generated "the equivalent of \$2 to \$5 billion in traditional R&D investment."⁷ "[T]he Court has not hesitated to recognize the legitimacy of protecting reliance and expectational interests," *Nordlinger v. Hahn*, 505 U.S. 1, 14 n.4 (1992), and should not do so here where *Cablevision's* reasoning has inspired substantial investment in the cloud computing industry.

⁵ Sand Hill Group, *Job Growth in the Forecast: How Cloud Computing is Generating New Business Opportunities and Fueling Job Growth in the United States* at 13 (2012), available at <http://tiny.cc/99wldx>.

⁶ Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*, at 1 (2011), available at <http://tiny.cc/9dxldx>.

⁷ Chris Borek *et al.*, *Lost in the Clouds: The Impact of Copyright Scope on Investment in Cloud Computing Ventures*, at 2 (2012), available at <http://tiny.cc/kexldx>.

In sum:

The “virtual” services offered in the cloud have created enormous and tangible value in the economy, spawning new businesses and a spurring innovation and further growth of the tech sector. As communications and networks become faster and more data intensive, this sector will continue to create new jobs and more opportunities for investors and innovators.⁸

II. THE TESTS OFFERED BY PETITIONERS, THE UNITED STATES, AND CABLEVISION TO DISTINGUISH AEREO’S CONDUCT FROM CLOUD COMPUTING AND OTHER TECHNOLOGIES ARE UNWORKABLE

Neither petitioners, the United States, nor Cablevision denies the importance of cloud computing. *See* Pet. Br. 45-46; U.S. *Amicus* Br. 31-34; Cablevision *Amicus* Br. 14. Nor do they deny that the cloud computing industry’s success depends upon a consistent interpretation of the Transmit Clause that allows for private transmissions of copyrighted content. *See also* CDT *Amici* Br. 10-12; BSA *Amicus* Br. 13-21. It is for this reason that even *amici* supporting petitioners “urge[] the Court to approach this issue cautiously.” Br. *Amicus Curiae* of American Intellectual Property Law Association (“AIPLA”) in Support of Petitioners at 9.

⁸ *ECPA Reform and the Revolution in Cloud Computing: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 39 (2010) (written testimony of Richard Salgado, Senior Counsel, Law Enforcement and Information Security, Google Inc.), available at <http://tiny.cc/wfxldx>.

The approaches offered by petitioners, the United States, and Cablevision, however, are anything but cautious. While both petitioners and the United States profess adherence to the “technology neutral” nature of the Copyright Act, in reality both embrace an outcome that protects existing business models at the expense of a neutral application of the Copyright Act to new technologies. None of the tests that they propose presents a workable means of preserving the private performance right that lies at the heart of the cloud computing industry, and none of them sensibly distinguishes among different technologies that offer consumers capabilities similar to Aereo. Respondent’s test, in contrast, would cause the least disturbance to the current copyright system. *See* Resp. Br. 22-26, 52-53. The unworkable tests offered by petitioners and their *amici* will fail to avert serious risks for major businesses such as Mozilla or CCIA’s members. Such risks threaten *amici*’s past, present, and future investments in cloud computing technology, and the concomitant benefits such technology creates.

A. Tests Designed To Yield A Particular Outcome For Aereo Will Have Unintended Consequences For Other Technologies Like Cloud Computing

Three examples, each involving technologies already in the market, illustrate the perils of replacing the statutory text with an improvised test intended to provide a particular outcome for Aereo.

First, consider “cloud music locker” services, such as those offered by Google, Apple, and Amazon. Those companies offer users the ability to upload their music libraries, legitimately acquired from purchased CDs or authorized digital music platforms, to the cloud.

Those files can then be accessed by (i.e., transmitted to) that particular user's Internet-connected devices. Those services have proved immensely valuable to consumers: "No copying or syncing of music is ever required," the New York Times raved about one; "all your songs are always available everywhere, and they don't hog any storage on the phone itself."⁹ Although each user uploads and accesses his or her own personal music files, there will be considerable overlap among the libraries of different users. Accordingly, it can be assumed that the same songs (albeit sourced from different files) will be transmitted to multiple users, at different times, at different places.¹⁰ Nonetheless, each individual transmission is done on a one-to-one basis from separate copies.

Second, consider the case of Simple.tv, an award-winning technology that provides consumers with capabilities functionally similar to Aereo.¹¹ Simple.tv is a small device that includes an over-the-air HDTV

⁹ David Pogue, *The Cloud that Rains Music*, N.Y. Times, Mar. 30, 2011, available at <http://tiny.cc/9gxldx>.

¹⁰ One brief by *amici* supporting petitioners refers to these cloud-based music locker services as "licensed." Br. *Amici Curiae* of The American Society of Composers, Authors and Publishers, *et al.* in Support of Petitioners at 28. They are not. While companies may obtain licenses from some copyright owners for certain aspects of their services, it is effectively impossible to obtain licenses for *all* the millions of different music files owned by users. And it is impossible for a cloud services provider to license every copyrighted file, photo, video, and piece of software that users may upload for private use.

¹¹ See Devindra Hardawar, *Simple.TV's unique DVR is a cord-cutter's dream (but isn't for everyone)*, VentureBeat.com (Oct. 15, 2012), <http://tiny.cc/4hxldx> ("After debuting at the Consumer Electronics Show in January, Simple.TV walked away with the Best in Show prize in Home Entertainment.").

tuner, to which a customer adds an antenna and hard drive. Once connected to the user's home network, the device provides all the same functions that Aereo does, including the ability to watch TV in real time over the Internet and to record programs for later transmission to other Internet-connected devices; the company plans a cloud-based storage feature as well.¹²

Simple.tv and Aereo differ primarily in the location of the antennae used to receive petitioners' free-to-air broadcasts and the hard drives on which those recordings are stored. Rather than use off-site antennae like Aereo, Simple.tv employs the user's own.¹³ Based on the settings established by the user, broadcast signals are received by that antenna, copied to a hard drive, and potentially transmitted to the cloud.¹⁴ In short, just as with Aereo, Simple.tv uses individual transmissions to separate users from separate copies to enable its users to view their copies of petitioners' copyrighted works via the Internet.

Third, consider NimbleTV, another variation on the Aereo theme already available in the New York City metropolitan area: "The company's innovative model is centered around datacenters full of cable boxes; NimbleTV customers pay for TV service just as they would with an ordinary cable subscription. The end result is the same [as Aereo]; once you've signed up for NimbleTV, you can watch (and record) live TV from

¹² Janko Roettgers, *Simple.tv shows off cloud DVR at CES, readies expansion to U.K.*, GigaOM (Jan. 9, 2014), <http://tiny.cc/vixldx>.

¹³ See Simple.tv, *Overview*, <http://tiny.cc/vjxldx>.

¹⁴ See *id.*; Simple.tv, *Questions & Answers*, <http://tiny.cc/6jxldx>.

anywhere.”¹⁵ Although NimbleTV’s business model is premised on every customer paying for a cable or satellite subscription, petitioners’ *amici* Viacom *et al.* complain that NimbleTV does not separately pay retransmission fees. Br. *Amici Curiae* of Viacom Inc., *et al.* in Support of Petitioners at 17-18.¹⁶ But even Viacom does not dispute that each transmission is capable of being received by one user based on one unique copy per user.

The Second Circuit’s application of the statutory language of the Transmit Clause provides a clear standard to apply to all three of these examples. If the transmissions in question are accessible only by a single user, at the direction of the user, they are private performances outside of the Transmit Clause. Pet. App. 30a-31a; *Cablevision*, 536 F.3d at 138. If not, they are regulated by the Transmit Clause. This application of the Transmit Clause is faithful to the statute as written and is truly technology-neutral—the outcomes do not shift when a hard drive or

¹⁵ Chris Welch, *NimbleTV’s streaming cable service now available to all metro New York residents*, The Verge (Dec. 10, 2013), <http://tiny.cc/xkxldx>.

¹⁶ As respondent points out, broadcasters such as petitioners are entitled to retransmission fees only when a broadcast is retransmitted to a “distant” audience. Resp. Br. 5-6, 34-35 (citing 17 U.S.C. § 111(d)(3)). Moreover, broadcasters make “free and exclusive use of a limited and valuable part of the public domain,” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 506 (2009) (quoting *CBS, Inc. v. F.C.C.*, 453 U.S. 367, 395 (1981)), to transmit signals that are, by definition, “intended to be received by the public,” 47 U.S.C. § 153(7). FCC-licensed broadcasters have an obligation to serve the public interest, convenience, and necessity, *id.* § 307(a), and members of the public, being among the “intended” recipients of local broadcast signals, are thus entitled to receive them.

antenna is moved off-site or when music (rather than free, over-the-air broadcast television) is at issue.

In contrast, petitioners and their *amici* propose to substitute multiple unclear lines in place of the statutory provision. These lines fail to distinguish between Aereo and the three real-world examples described above. They also lack the clarity and predictability needed by businesses such as *amici*, as well as their investors, to sustain the cloud computing industry's rapid growth.

This is not to say that, as a policy matter, any line found to be drawn by the existing language of the Transmit Clause is the best line that can be drawn. New technologies often impel Congress to step in and amend Title 17, after hearing from stakeholders and weighing policy options. As discussed in more detail in Part III, *infra*, this has been done with particular frequency by Congress in the context of the public performance right as applied to broadcast transmissions, and can be done again.

B. Petitioners And The United States' "First Instance" Test Cannot Distinguish Among Numerous Real-World Applications Of The Transmit Clause

Both petitioners and the United States insist that any decision the Court reaches on Aereo's system will not affect the growth of cloud computing, because, they say, cloud computing services "offer consumers more numerous and convenient means of playing back copies that the consumers have already lawfully acquired," whereas Aereo's technology "provides a means by which consumers can gain access to copyrighted content in the first instance." U.S. *Amicus* Br.

31 (emphasis omitted); *see also* Pet. Br. 46 (distinguishing between a cloud computing service “that merely stores and provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large”). But neither petitioners nor the United States explain how their proposed test can be reconciled with the text of the Transmit Clause; neither brief mentions the Transmit Clause in its discussion of why their arguments will not affect cloud computing technology. *See* Pet. Br. 45-46; U.S. *Amicus* Br. 31-34.

Most important, the proposed “first instance” test fails to address either the industry’s current products or its new innovations on the horizon. Consider the example of the cloud music locker. If mobile phone users find music files being offered for download as a free, authorized promotion from a favorite band’s website, why should those users have to download the file to their phones, then re-upload that file to a cloud music locker? It makes more sense for the user to directly transfer the file from the band’s website into the user’s cloud locker. Yet it is not clear whether the “first instance” test would permit that innovation, as the cloud music locker provider might find itself accused of transmitting that song to the user “in the first instance.” Under the Second Circuit’s test, by contrast, such a one-to-one transmission from individual copies is not a “public” performance within the meaning of the Transmit Clause. *See* Pet. App. 22a-23a, 30a-31a.

Both the Simple.tv and NimbleTV examples reveal further reasons that the “first instance” test is unworkable when even a small part of Aereo’s technological setup is altered. Using the Simple.tv device, for

example, a consumer lawfully receives the broadcasters' free-to-air content "in the first instance," and can access the live broadcast directly, or can store recordings in the cloud for later access.¹⁷ Of course, this results in broadcast television being transmitted to, and displayed on, a consumer's device without a license fee paid to broadcasters. Neither petitioners nor the United States offer an explanation as to why Aereo is liable when it stores the antenna and hard drive off-site, but the Simple.tv user is not liable when the same elements are located inside the user's home, even though the transmissions go outside the home. Nor does any part of the Copyright Act justify the imposition of copyright liability when a user receives petitioners' transmission through an antenna located inside the user's home as opposed to on the user's roof, or stored off-site as with Aereo. To the contrary, the Copyright Act suggests that transmitting a work so that it can only be received by a single person is never a "public" performance, because it is not to "a substantial number of persons outside of a normal circle of a family and its social acquaintances," 17 U.S.C. § 101.¹⁸

¹⁷ As explained in note 16, *supra*, broadcasters such as petitioners do not obtain any fee or royalty for making their content available over the public spectrum in their local geographic area.

¹⁸ It is no answer to suggest, as the United States does, that a consumer transmitting to herself is not publicly performing. U.S. *Amicus* Br. 32. This begs the question of *who* is doing the transmitting in a given case, with the answer turning on where the antenna or hard drive is located. As discussed further in Part II.E, *infra*, the United States argues that any provider of an "integral process" should be exposed to direct infringement liability, which leaves Simple.tv to ask whether its system of

The “first instance” test petitioners and the United States propose thus would result in a “one time only” ruling from this Court that Aereo’s particular technological architecture is unlawful, and do little to help courts determine whether a transmission is private or “to the public” within the meaning of the Transmit Clause. The test offered by the court below, by contrast, establishes that such transmissions are not “to the public,” no matter where the user’s antenna is located. *See* Pet. App. 22a-23a, 30a-31a.

Or, recall NimbleTV, where the consumer signs up for cable or satellite TV service and (rather than dealing with the headaches of cable installation) has the cable box delivered to NimbleTV’s facilities. Is the consumer or the service provider receiving the transmission in the “first instance”? The “first instance” test provides no obvious answer. Rather than helping a court decide whether the service is permissible, application of the test to a service like NimbleTV generates only confusion. There is no such confusion, however, using the Second Circuit’s test (*see* Pet. App. 22a-23a, 30a-31a), because only one person is capable of receiving an individual transmission that the user instructs NimbleTV’s service to provide.

Thus, the “first instance” test cannot distinguish between prohibited retransmissions and socially beneficial cloud computing uses, let alone do so in a technology-neutral way. Adoption of such a test would undermine the policy regime that has allowed the cloud computing industry to flourish in reliance on *Cablevision*, while doing nothing to resolve the

devices, software, and cloud services is sufficiently “integral” to satisfy that test.

challenges facing broadcasters as a result of new technologies similar to Aereo's.

C. Petitioners' Aggregation Approach Would Imperil Cloud Computing

Unlike the United States, petitioners propose a standard premised on aggregating "prior" performances. Pet. Br. 36. But that test would threaten cloud computing without changing how consumers can receive today's over-the-air broadcasts.

Petitioners assert that adoption of their approach "need not threaten the future of 'cloud computing' technology" because, they say, "[t]here is an obvious difference between a service that merely stores and provides an individual user access to copies of copyrighted content that the user already has legally obtained, and a service that offers the copyrighted content itself to the public at large." Pet. Br. 45-46. But as respondent argues, petitioners' proposed distinction has no basis in the text of the Transmit Clause. Resp. Br. 25-26. Take the example of the cloud music locker. Users upload their music files to the cloud, then transmit those files back to their own Internet-connected devices. Those transmissions will result in multiple people listening to multiple transmissions of the same song, albeit at different times and in different places. But each of those transmissions will be accessible only to that single user, transmitting from his or her own copies, uploaded previously. In other words, these transmissions are quintessentially private performances that are not "to the public."

Petitioners, however, argue that the Transmit Clause does not operate at the level of transmissions (despite the words of the statute). Instead, their view would aggregate all the transmissions of any single

copyrighted work, and then ask whether that work was available to multiple people in different places and at different times. See CDT *Amicus* Br. 13 (“Petitioners’ position might be termed the aggregation theory, since it calls for aggregating separate transmissions from different times and places whenever they involve the same work.”). If so, they reason, the transmission falls within the scope of the Transmit Clause.

This view offers little clarity to the cloud music industry or its investors. If multiple users uploaded and later accessed the same sound recording, even if those files were separately stored and made accessible solely to the uploading user, the relevant copyright owner could point to the aggregation theory to argue that a public performance has occurred. As *Cablevision* and neutral *amici* have pointed out, this is a perverse outcome, hinging liability on whether two or more users ever play the same song. *Cablevision*, 536 F.3d at 136 (“[A] hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public.”); CDT *Amicus* Br. 14 (“Whether one person was an infringer would depend on the actions of other, unknown persons.”).

Petitioners’ reading of the Transmit Clause also suffers from a more pragmatic failing—while it imperils some legitimate cloud computing services, it fails to capture others, such as Simple.tv. In keeping with petitioners’ professed technological neutrality, services providing similar capabilities should be treated similarly. A Simple.tv user can transmit either live TV or previously recorded programming

from the living room to the user's Internet-connected devices. Because he or she can do so from a small device located in his or her living room, using his or her home Internet service, there are no other user transmissions to "aggregate" into a public performance.¹⁹ Accordingly, the line that petitioners attempt to draw may encompass Aereo, but excludes functionally similar technologies. And in real-world terms, this is far from a "technology neutral" copyright principle, favoring as it does in-home devices over cloud-based equivalents based on where a hard drive or antenna happens to be located.

D. *Amicus* Cablevision's Proposed "Distinct Transmission" Line Fails To Chart A Sensible Course Among Real-World Technologies

The approach offered by *amicus* Cablevision is similarly flawed. Cablevision devotes the bulk of its brief to attacking petitioners' misconstruction of the Transmit Clause and defending the Second Circuit's contrasting view as elucidated in its *Cablevision* opinion. Cablevision *Amicus* Br. 4-27. *Amici* here endorse those views, as do the technology interests who filed neutral *amicus curiae* briefs. See CDT *Amicus* Br. 13-17; BSA *Amicus* Br. 14-21.

¹⁹ Simple.tv has announced plans to enable users to shift their recordings to cloud-based storage services, from which as use can transmit directly. See Press Release, *Simple.TV and Rovi Entertainment Store Collaborate to Add Live & Recorded Broadcast Television Capabilities* (June 11, 2013), <http://tiny.cc/6sxldx>. There are many other devices that offer the same functionality, such as TiVo Stream, Tablo, or Channel Master DVR+. See, e.g., TiVo, *TiVo Stream*, <http://tiny.cc/fd0ldx> (last visited Mar. 31, 2014); CNET, *Most anticipated tech of 2014* (Mar. 6, 2014), <http://tiny.cc/9g0ldx>.

In an effort to distinguish itself from Aereo, however, Cablevision suggests a test turning on whether “transmissions from the separate copies are better viewed as distinct transmissions or as mere links in a chain of some longer transmission.” Cablevision *Amicus* Br. 31. Like the tests proposed by petitioners and the United States, this formulation has no basis in the statutory language of the Transmit Clause, which includes no mention of “distinct” or “linked chain” transmissions. Nor does the test offer any technical guidance, since any transmission can be conceived of as part of a longer “chain.” Cablevision’s test affords little predictable guidance, either legal or technological, for cloud computing innovators attempting to understand the scope of the Transmit Clause in arenas remote from broadcast television. A user, for example, might fill his or her cloud music locker from multiple different sources, such as uploading music copied from lawfully purchased CDs, purchased from authorized music download stores, or recorded off-the-air from radio or webcasts. How would Cablevision’s proposed test apply to each of these sources, and how would a cloud provider be able to determine which sources represent a “link in a chain” versus a “distinct transmission”?

Cablevision’s proposed test also fails to distinguish technologies that provide users with capabilities identical to those provided by Aereo. NimbleTV, for example, would appear to pass Cablevision’s test, as it is premised on two “distinct” services almost identical to those that Cablevision supplies to its RS-DVR customers—a cable service paid for by the individual subscriber, joined with a cloud hosting solution for the cable box provided by NimbleTV. And what of Simple.tv, with its cloud DVR that resembles Cablevision’s own RS-DVR? Here, Cablevision’s

emphasis on “distinct” transmissions gives little guidance unless and until a court determines *who* is doing the transmitting—is it the company that manufactures the Simple.tv system, the customer who purchases and operates the device, or the cloud provider that transmits recordings back to the user after they have been uploaded from Simple.tv? Other than a footnote urging this Court to “avoid prejudging the issue here,” Cablevision *Amicus* Br. 13 n.4, Cablevision provides no clear answer.

Cablevision’s proposed “distinct transmission” test thus creates uncertainty for cloud computing innovators, without providing clear guidance for functionally similar technologies.

E. The United States’ Version Of The Volitional Conduct Test Would Create Substantial Uncertainty For Numerous Businesses

Although petitioners do not address the issue, the United States also argues that services such as that provided by Aereo’s technology should be held directly liable because they take volitional steps to “perform” petitioners’ copyrighted works. *See* U.S. *Amicus* Br. 18-21. The “volitional conduct” test is a useful one that has been endorsed by every circuit court of appeals to consider it, and while the United States purports to apply this test, it in fact alters that test by finding “volitional conduct” where a service provides “shared equipment” that is “integral to the process by which content is *transmitted* to the subscriber.” U.S. *Amicus* Br. 20. Much like the “first instance” test, this “integral to the process” test would create an inquiry filled with “internal inconsistencies” that presents, as respondent argues, no “clear standard for determining

when a technology company, rather than its customer, has engaged in volitional conduct.” Resp. Br. 45 (quotation marks and brackets omitted).

This Court implicitly recognized the requirement of voluntary conduct as a prerequisite to copyright liability in *Sony*, 464 U.S. 417, where it rejected the respondent studios’ argument that Sony was liable for its television-recording devices under the inducement theory adopted in *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911):

Petitioners in the instant case do not supply Betamax consumers with respondents’ works; respondents do. Petitioners supply a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied. The Betamax can be used to make authorized or unauthorized uses of copyrighted works, but the range of its potential uses is much broader than the particular infringing use of the film Ben Hur involved in Kalem.

Sony, 464 U.S. at 436-37 (emphases added); see also *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 960 (2005) (Breyer, J., concurring) (“As *Sony* itself makes clear, the producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying—a fact that makes the attachment of copyright liability to the creation, production, or distribution of the technology an exceptional thing.”). The absence of a volitional act by Sony in furtherance of direct copyright liability was thus an essential part of the Court’s ruling that Sony

was not liable, either directly or secondarily, for infringing respondents' copyrights.

Since *Sony*, four courts of appeals have held that, in order to be liable for *direct* copyright infringement, a plaintiff must show “something more . . . than mere ownership of a machine used by others to make illegal copies,” specifically “some aspect of volition and meaningful causation.” *Costar Grp., Inc. v. Loopnet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).²⁰ And while the decision below did not squarely address this issue, it suggested, in line with *Cablevision*, that it is Aereo's users, not Aereo itself, who exercise “volitional control” over whether and when Aereo will make a copy to transmit to an individual user. Pet. App. 28a.

Aereo's lack of volitional conduct in creating a copy of a work to privately transmit provides an independent ground for this Court to affirm the decision below. Such a ruling would not only be consistent with this Court's past decisions, but would make practical sense. Aereo's technology, like the VCR in *Sony*, is

²⁰ See also *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1119-20 (9th Cir. 2013) (holding that online service provider made videos available “at the direction of the user,” even though service provider altered the format of the videos to make them more accessible, because “this automated process for making files accessible is initiated entirely at the volition of [the service's] users” (quotation marks omitted)); *Cablevision*, 536 F.3d at 131 (adopting volitional conduct requirement because, “[i]n the case of a VCR, it seems clear . . . that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufacturers, maintains, or . . . owns the machine”); *Parker v. Google, Inc.*, 242 F. App'x 833, 836 (3d Cir. 2007) (unpublished) (“[T]o state a direct copyright infringement claim, a plaintiff must allege volitional conduct on the part of the defendant.”).

indifferent to what content is copied or transmitted to individual users. Aereo does not even make a copy or a transmission until “the Aereo user selects what program he wishes a copy to be made of and then controls when and how that copy is played.” Pet. App. 29a. It is not Aereo that “transmits” petitioners’ works except in the most technical of senses, much as it was not Sony that copied the works at issue except in the narrow sense that Sony’s products literally made the copies. As the Fourth Circuit correctly reasoned, “[t]o conclude that [service providers] are copyright infringers simply because they are involved in the ownership, operation, or maintenance of a transmission facility that automatically records material—copyrighted or not—would miss the thrust of the protections afforded by the Copyright Act.” *CoStar*, 373 F.3d at 551. And as always, “the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works.” *Cablevision*, 536 F.3d at 132.

The United States purports to adopt this test, endorsing *CoStar*’s reasoning that “the owner of a traditional copying machine whose customers pay a fixed amount per copy and operate the machine themselves’ is not directly liable for infringing the reproduction right when a customer duplicates a copyrighted work.” U.S. *Amicus* Br. 19 (quoting *CoStar*, 373 F.3d at 550). And the United States would seem to agree that Aereo is like the copying machine in the above example, conceding that Aereo creates a unique copy of a program to send to an individual user “only after the subscriber has logged in and has requested a transmission of a particular copyrighted work.” U.S. *Amicus* Br. 21 (citing Pet. App. 3a, 6a).

But the United States nonetheless would hold Aereo liable for this non-volitional conduct under its “integral to the process” test. That test proves too much. Any piece of equipment can be described as “integral to the process” of an alleged copyright violation. For example, a consumer trying to record an episode of Mr. Rogers would have been hard-pressed to do so without a VCR or Betamax device, which was similarly “integral to the process” of copying a copyrighted program. *See Sony*, 464 U.S. at 422-23. Likewise, a user of a cloud-based email service such as Gmail would not be able to send such an email unless the user had access to the “integral” email service in the first place. *See BSA Amicus Br. 11*. The “integral to the process” test would thus sweep in any device or process that any lawyer can argue is central to the means by which a copyrighted work is sent from one person to another. Because the “integral to the process” test “call[s] into doubt the general legality of cloud technologies and services,” U.S. *Amicus Br. 31*, it should be rejected.²¹

²¹ The sole authority on which the United States relies for its test is, moreover, an inapposite decision that is no longer good law. Specifically, the United States cites a district court decision for the proposition that it is “the[] businesses, rather than their customers, that ‘transmit’ and thereby ‘perform’ the relevant copyrighted works.” U.S. *Amicus Br. 19* (citing *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011)). But *Warner Brothers* is, by its own terms, distinguishable: “In this case, unlike *Cablevision*, Defendants’ customers do not produce their own unique copy of Plaintiffs’ Copyrighted Works. Instead . . . the same DVD is used over and over again to transmit performances of Plaintiffs’ Copyrighted Works.” 824 F. Supp. 2d at 1011 n.7; *cf.* Pet. App. 23a (emphasizing that, “when an Aereo user chooses to watch the recorded program . . . the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo

III. CONGRESS IS THE BRANCH OF GOVERNMENT BEST SUITED TO RESOLVE THE POLICY BALANCE AT ISSUE

In light of the difficulty of drawing a consistent line that will preserve private performances and not affect the burgeoning cloud computing industry and other innovative technologies, respondent is correct to argue (Resp. Br. 47-49) that the Court should allow Congress, not the courts, to balance the competing societal interests through amendment of the Copyright Act after full fact-finding and democratic deliberation. Such prospective line-drawing would likewise save valuable resources spent by litigants attempting to discern the contours of the tests proposed by petitioners and their *amici*.

“As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their product.” *Sony*, 464 U.S. at 429. In considering this express textual grant to Congress, this Court has highlighted that

user can ever receive a transmission from that copy”). And while *Warner Brothers* also concluded that “the Second Circuit’s volitional requirement in direct copyright infringement cases, such as this one, is unpersuasive,” *id.*, just two years later the Ninth Circuit adopted the volitional conduct requirement, *UMG Recordings*, 718 F.3d at 1020, *see also Fox Broad. Co. v. Dish Network L.L.C.*, --- F.3d ---, 2014 WL 260572, at *5 (9th Cir. Jan. 24, 2014) (holding that “operating a system used to make copies at the user’s command does not mean that the system operator, rather than the user, caused copies to be made”). Hence, this part of the *Warner Brothers* decision is no longer good law in the Ninth Circuit, and should not be exported to the rest of the country.

[t]he judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Id. at 431 (citations omitted); *see also Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (“We have also stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”); *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“This evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces. . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve.”); *cf. Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 440 (2007) (rejecting expansive reading of patent law offered because “the patent-protective determination AT&T seeks must be left to Congress”).

This Court’s policy of allowing Congress to balance competing interests concerning the scope of copyright is especially sound here, as Congress has shown itself fully capable of amending the Copyright Act to address retransmission of broadcasters’ content. As petitioners acknowledge, Pet. Br. 26, even before the Court issued its decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974), Congress had begun drafting the modern Copyright Act to account for cable

technology's ability to retransmit broadcast technology. See Pub. L. No. 94-553, § 111, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 111). Congress revised the law again in 1988, enacting Section 119 to address satellite technology's retransmission of broadcast technology by creating a statutory license. See Pub. L. No. 100-667, Title II, 102 Stat. 3935 (codified as amended at, *inter alia*, 17 U.S.C. § 119). In 1994, Congress amended the Copyright Act to bring microwave technology into the cable operators' statutory license to retransmit broadcasters' content. See Pub. L. No. 103-369, § 3(a), 108 Stat. 3477 (codified as amended at 17 U.S.C. § 111(f)(3)). And in 1999, Congress again amended the Copyright Act to further account for retransmissions of broadcast television via satellite. See Pub. L. No. 106-113, § 1002, 113 Stat. 1501 (codified as amended at 17 U.S.C. § 122). Congress has made numerous other revisions to the Copyright Act regarding the public performance right, see AIPLA *Amicus* Br. 5-9; Br. *Amici Curiae* of Profs. Menell & Nimmer in Support of Petitioners at 32 (describing additional legislation in 2004 and 2010), all of which "reflect congressional balancing of the interests of copyright owners against the interest of others, including the public," AIPLA *Amicus* Br. 7.

Congress's repeated efforts to analyze and accommodate competing policy goals underscores the wisdom of allowing Congress to decide how to address petitioners' concerns here. Petitioners are not political naïfs; they are part of some of the largest companies in the world, see Pet. Br. iii-v, well equipped to express their concerns and desires to the legislature. This is therefore a quintessential "battle that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *14 Penn Plaza LLC v.*

Pyett, 556 U.S. 247, 270 (2009) (brackets and quotation marks omitted) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)); cf. *McMillan v. Pennsylvania*, 477 U.S. 79, 102 n.5 (1986) (Stevens, J., dissenting) (The Court’s intervention “appropriately exists for those situations where representative government cannot be trusted, not those where we know it can.” (quotation mark omitted) (quoting J. Ely, *Democracy and Distrust* 183 (1980))). Moreover, only Congress can definitively resolve this issue, which will likely recur given the numerous other providers of services functionally identical to that provided by Aereo’s technology that already exist (such as Simple.tv, discussed in Part II.A, *supra*). Petitioners’ request to redraw the line between public and private performances is thus one that is best made to Congress, not this Court, and one that Congress will likely address.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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