

# AMERICAN BROADCASTING COMPANIES v. AEREO, INC.

Supreme Court of the United States.

134 S.Ct. 2498 (2014)

3 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.

4 **JUSTICE BREYER, delivered the opinion of the Court.**

5 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

6 "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.

7 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.

## I

### A

10 For a monthly fee, Aereo offers subscribers broadcast television programming over the  
Internet, virtually as the programming is being broadcast. Much of this program-  
ming 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.

11 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.

12 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.

13 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.

- 14 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 behind the over-the-air broadcast, until the subscriber has received the entire show. [...]
- 15 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

- 17 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.
- 18 The District Court denied the preliminary injunction. [...]Relying on prior Circuit precedent, a divided panel of the Second Circuit affirmed. [...]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 available only to that subscriber. [...]We granted certiorari.

## II

- 20 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.
- 21 Does Aereo "perform"? [...]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)]." [...] 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.
- 22 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

- 24 History makes plain that one of Congress' primary purposes in amending the Copyright Act in 1976 was to 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." [...]The CATV provider "neither edited the programs received nor originated any programs of its own." [...]
- 25 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. [...]The Court drew a line: "Broadcasters perform. Viewers do not perform." [...]And a CATV provider "falls on the viewer's side of the line." [...]
- 26 The Court reasoned that CATV providers were unlike broadcasters:
- 27 "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 and carry them by private channels to additional viewers." [...]
- 28 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. [...]
- 29 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. [...]

## B

- 32 In 1976 Congress amended the Copyright Act in large part to reject the Court's holdings 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. [...]

- 33 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. [...]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.
- 34 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. [...]
- 35 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

- 37 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' 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.
- 38 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*.
- 39 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.

- 40 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]," [...]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." [...]A copy shop is not directly liable whenever a patron uses the shop's machines to "reproduce" copyrighted materials found in that library. [...]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.
- 41 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." [...]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."
- 42 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]."

### III

- 44 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.
- 45 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." [...] And "[t]o `perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." [...]

- 46 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.
- 47 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*, 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. [...] 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.
- 48 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."
- 49 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 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.

- 50 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.
- 51 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.
- 52 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 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.
- 53 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." [...] 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." [...] 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.
- 54 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." [...] The Act thereby suggests that "the public" consists of a large group of people outside of a family and friends.
- 55 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.

- 56 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." [...] 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

- 58 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 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.
- 59 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. [...]
- 60 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 cloudbased storage services because they "offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired"[...]. In addition, an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.

- 61 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. [...]
- 62 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." [...] 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.[...]
- 64 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.
- 65 For these reasons, we conclude that Aereo "perform[s]" 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.
- 66 *It is so ordered.*
- 67 **JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.**
- 68 This case is the latest skirmish in the long-running copyright battle over the delivery of television program-ming. 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." [...] 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

- 73 [...] 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). 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, [...]the volitional-act requirement demands conduct directed to the plaintiff's copyrighted material[...]. Every Court of Appeals to have considered an automated-service provider's direct liability for copyright infringement has adopted that rule. [...] Although we have not opined on the issue, our cases are fully consistent with a volitional-conduct requirement. [...]

- 74 The volitional-conduct requirement is not at issue in most direct-infringement cases[...]. But it comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system. [...] 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]," [...]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.[2] 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. [...]
- 75 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. [...]
- 76 Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content.* [...] 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.
- 77 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. [...] 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. [...] 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. [...]

## II. Application to Aereo

- 79 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 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.
- 80 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[...].
- 81 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.[...] That conclusion does not necessarily mean that Aereo's service complies with the Copyright Act. Quite the 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). [...] Affirming the judgment below would merely return this case to the lower courts for consideration of the Networks' remaining claims.[...]
- 92 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.

[Notes:]

- 98 [2] 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(j), including a volitional-conduct defense.