

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 AMERICAN INTELLECTUAL PROPERTY
LAW ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST

The American Intellectual Property Law Association (“AIPLA”) is a national, voluntary bar association with approximately 15,000 members who are lawyers in private or corporate practice, judges, patent agents, academics, law students, and U.S. Copyright Office and USPTO professionals. Our members practice in a wide and diverse range of intellectual property fields, including patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Members represent both owners and users of intellectual property, as well as those who litigate, prosecute, and appear before the copyright, patent and trademark offices, giving AIPLA a unique and varied perspective on copyright law.¹

AIPLA has no interest in any party to this litigation or stake in the outcome of this case, other than its interest in seeking a correct and consistent

¹ In accordance with Supreme Court Rule 37.6, AIPLA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than AIPLA or its counsel. After reasonable investigation, AIPLA also believes that no member of its Board or Amicus Committee who voted to file this brief, and no attorney in the law firm or corporation of such a member, represents a party to this litigation.

interpretation of the law affecting intellectual property.²

SUMMARY OF ARGUMENT

This case requires the Court to apply the provisions of the Copyright Act of 1976 that define the right of public performance. Although this Court has never specifically construed those provisions, the issue presented is familiar: a new technology has been employed to deliver copyrighted content without the copyright owner's permission.³ As in prior cases, a balance should be struck between protecting the owner's rights in that content and the public's reasonable demands for access.

The history of the interpretation and ambit of the public performance right reflects recurring efforts by Congress, in the face of new technology, to strike the appropriate balance between the interests of creators and consumers of content. Congress has not addressed the specific technology employed by Aereo. The Court should, therefore, apply the specific terms of the 1976 Act to Aereo's technology and to the manner in which it is being used.

Under the language of the 1976 Act, the case presents two key issues:

² AIPLA has obtained consent to file this brief as required by Supreme Court Rule 37.3(a). Counsel for the parties have filed general letters of consent with the Clerk.

³ Familiar prior examples include the advent of the player piano, cable and satellite television, and the internet.

- Does Aereo transmit a performance of petitioners' works?
- Does Aereo transmit this performance to members of the public?

AIPLA believes that the specific facts of this case, together with the lack of a specific provision by Congress addressing those facts, requires affirmative answers to these questions. But AIPLA also believes that, in deciding this case, the Court should tread carefully. Content-storage and distribution technologies continue to rapidly develop and be deployed in many different ways. Congress may yet weigh in on the permissible bounds of license-free distribution of content over the internet, or it may develop a new compulsory-license scheme for such distribution.⁴ AIPLA therefore urges the Court to issue a narrow decision based upon the record in this case. Sweeping language should be avoided lest it have unintended consequences when applied to emerging technologies or in factual contexts other than the one present here.

BACKGROUND

Petitioners own or license the copyright in the television programs that they broadcast. These programs are protected as “audiovisual works,” which, as defined in the Copyright Act, “consist of a

⁴ *Cf.* 17 U.S.C. §§ 111, 119 (establishing statutory licenses for secondary transmissions by cable systems and satellite carriers, respectively).

series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any.”⁵ The 1976 Act gives petitioners the exclusive right to perform such works publicly and to authorize others to do so.⁶

Aereo has developed and deployed technology that captures over-the-air broadcasts using thousands of miniature antennas, each of which can be assigned to an individual subscriber. After buffering the broadcast signals (i.e., copying and processing them), Aereo sends the programs to its subscribers at remote locations for near-simultaneous performance or replay on any internet-connected device, such as a smart phone, a tablet, a computer, or a television set.⁷ Aereo does this without petitioners’ authorization.

⁵ 17 U.S.C. § 101. Section 102 provides that copyright protection subsists in original works of authorship, including audiovisual works.

⁶ 17 U.S.C. § 106(4).

⁷ The district court found that “an electrical signal is sent from the antenna, processed and converted into data packets, and then sent to the transcoder, which encodes it in a form to be transmitted over the internet. . . . The encoded data is sent to the Streaming Server, where it is saved on a hard disk to a file in the previously created directory and, once saved, is read from that file into a ‘RAM memory buffer’ that sends the data to the user over the internet once a sufficient amount of data—at least six or seven seconds of programming—has accumulated. . . . As additional data is received from the

ARGUMENT

A. As the history of the public performance right reflects, Congress has often rebalanced the interests of content creators and those supplying content to consumers.

The public performance right can be traced back to 1856, when it was given to dramatic compositions “designed, or suited for public representation.”⁸ In 1897 Congress granted a public performance right for musical compositions.⁹ The landscape of rights soon changed, however, with the introduction of phonograph records and motion pictures. The Copyright Act of 1909 responded to these changes by introducing a “for-profit” limitation on the performance right and by addressing the performance of musical works by “coin-operated machines.”¹⁰

In the 1930s, this Court issued a series of public performance decisions involving radio technology. These include *Buck v. Jewell-Lasalle Realty Co.*, 283 U.S. 191 (1931), in which Justice

antenna, that data continues to be saved to the hard disk and then read into the RAM memory buffer to be transmitted to the user.” *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F.Supp.2d 373, 378 (S.D.N.Y. 2012) (record citations omitted).

⁸ Act of August 18, 1856, 34th Cong., 1st Sess., 11 Stat. 138.

⁹ Act of January 6, 1897, 44th Cong., 2d Sess., 29 Stat. 481.

¹⁰ Section 1(e) of the Copyright Act of 1909.

Brandeis wrote that “the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.” *Id.* at 198.

In the 1960s and 1970s, however, the Court backed away from the apparent rationale for the *Buck* decision—namely, that new technological means of communicating copyrighted works were encompassed by the 1909 statute. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the Court held that an unauthorized retransmission of a copyrighted work from an over-the-air broadcast by a community antenna television (CATV) system did not produce a public performance under the 1909 Copyright Act. And in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 450 U.S. 394 (1974), the Court held that a cable system’s use of technology to import signals not otherwise available to viewers also did not produce a public performance.

When the Court issued these decisions, Congress was developing what would ultimately be enacted as the Copyright Act of 1976. And in the 1976 Act, Congress determined to change the law as it had been interpreted in *Fortnightly* and *Teleprompter*.¹¹ The new law required CATV and

¹¹ H.R. Rep. 94-1476 at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703; *see Capital Cities Cable, Inc., v. Crisp*, 467 U.S. 691, 709, 104 S. Ct. 2694, 81 L.Ed.2d 580 (1984).

cable systems to obtain a license in order to retransmit broadcast programming. The language used in the 1976 Act was not limited to then-current technology, but rather encompassed later technologies that could provide, in one way or another, the functional equivalent of a CATV system.

The 1976 Act sets forth the exclusive rights of copyright owners in Section 106, and it uses rather expansive terms in that provision. But the rights in Section 106 are expressly made subject to Sections 107 – 122.¹² The limitations and restrictions in those sections reflect congressional balancing of the interests of copyright owners against the interests of others, including the public.

With respect to the public performance right, Congress set forth in Section 110 eleven kinds of performances that are not infringements of copyright.¹³ In Section 111, Congress exempted

¹² “Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following . . .” 17 U.S.C. § 106.

¹³ Section 110(1) (performance of a work in the course of face-to-face instruction not infringing); Section 110(2) (carve-out for educational broadcasting); Section 110(3) (performances in the context of religious services not infringing); Section 110(4) (certain nonprofit performances not infringing); Section 110(5) (small business exception); Section 110(6) (performances at agricultural and horticultural fairs not infringing); Section 110(7) (performances in record stores not infringing); Sections 110(8) and (9) (performances directed at blind or other handicapped individuals not infringing); Section 110(10) (certain performances for nonprofit veterans and fraternal

certain secondary transmissions of television programs and created a statutory licensing scheme for cable systems. Sections 114 – 116 spell out detailed rules governing public performances of sound recordings. The statutory balancing process has continued. For example, Congress addressed secondary transmissions of television programs by satellite carriers when it adopted Section 119 in the Satellite Home Viewer Act of 1988.¹⁴ The Satellite Home Viewer Improvements Act of 1999¹⁵ amended those provisions and added Section 122.¹⁶

Congress has not addressed Aereo's specific technology or variants on it. Nor has Congress considered whether there are policy reasons, such as market failures or imperfections, to limit the rights of content owners in the sphere of internet distribution. In such a debate the copyright holders would doubtless point out that cable and satellite providers, acting in accordance with the terms of their licenses, currently authorize subscribers to access broadcast content via internet-connected devices. One way of viewing the question presented here is whether Aereo may do the same thing, only without a license.

organizations not infringing); and Section 110(11) (parental controls).

¹⁴ Act of November 16, 1988, Pub. L. No 100-667, title II, 100th Cong., 2d Sess., 102 stat. 3935, 3949.

¹⁵ Act of November 29, 1999, Pub. L. No. 106-113, title I, 106th Cong., 2d Sess., 113 stat. 1536, 1501A-523.

¹⁶ Section 122 has been amended in 2002, 2004, 2008, and 2010.

In the absence of a statutory provision that specifically addresses Aereo’s technology, the Court must decide whether the definitions in the 1976 Act that set forth the right of public performance encompass or exclude what Aereo does. AIPLA urges the Court to approach this issue cautiously, for two reasons. First, both the policy debates and the balancing of interests that characterize decision-making in this area are better left to Congress. And second, the Court should be leery of potentially stunting technological developments that hold the promise of expanding public access to information. The Court should, therefore, focus on the facts in the record before it and language of the 1976 Act.

B. The definition of “public performance” encompasses what Aereo specifically does.

1. Petitioners publicly perform their copyrighted works.

The 1976 Act begins by defining its terms. To “perform” an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible.”¹⁷ To show a television program, at least beyond the monitors located on the broadcaster’s premises, requires using one or more technologies or processes to convey the **performance** to someone at a distance who has a device that can redisplay the pictures and replay the sounds. The 1976 Act calls this **transmitting** a

¹⁷ 17 U.S.C. § 101.

performance, which it defines as follows: “To ‘transmit’ a performance . . . is to communicate it by any device or process where images or sounds are received beyond the place from which they are sent.”¹⁸

Petitioners’ over-the-air broadcasts transmit performances of copyrighted works to members of the public, actions that fall squarely within their exclusive right of public performance. To perform or display a work “publicly,” the 1976 Act says, means—

- (1) To perform or display it at a place open to the public or 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.**¹⁹

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

Petitioners' over-the-air broadcasts are public performances of their works under clause (2) above (the transmit clause). Although broadcasts are by definition transmissions to members of the public broadly speaking, petitioners could equally well exercise their right of public performance by transmitting a performance to members of the public one at a time. The transmit clause expressly encompasses reception of the performance by members of the public in separate places and at different times.²⁰

2. Aereo transmits a performance of petitioner's works.

To intercept petitioners' broadcasts and retransmit them to remote customers constitutes a transmission no less than the initial broadcasts. Aereo communicates the performance "by [a] device or process where images or sounds are received beyond the place from which they are sent."²¹

Although Aereo claims that it should be regarded only as the agent of its customers, for they select the programs to be transmitted, this argument is not very compelling: while there could be (as discussed below) other arrangements that might

²⁰ One goal of the transmit clause was to make sure that CATV and cable television providers secured authorization to retransmit broadcast signals. But the statute was written in much broader terms than would be required to capture CATV and cable television systems as they existed in the 1970s.

²¹ 17 U.S.C. § 101.

make for a closer case, here Aereo supplies the equipment and pays for the electricity that is required to capture, process, and communicate the broadcast signals.²² It does this for anyone who signs up for the service. Aereo also does not simply provide a fixed, assigned antenna for each customer, at cost (like the community antenna service in *Fortnightly*). Aereo is an economic actor pursuing its own interests, not a mere at-cost agent for others. It is, in short, a commercial transmitter of performances protected by the Copyright Act.

As a transmitter, Aereo plays a role that distinguishes it from consumers who might plug small, personal antennas into their laptops and use that technology to view or record television programs. For such consumers, there is no communication of the images or sounds from one place to another and, hence, no transmission beyond the initial broadcast. And without a transmission, there can be no infringement of the public performance right.

It might be argued that, because Aereo makes an intervening copy of the program or delays a few seconds before sending signals on to its customers, the performance is not transmitted. Neither feature

²² Cf. *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp.2d 1003, 1009-10 (C.D. Cal. 2011) (rejecting defendants' efforts to recharacterize their transmissions as customer "rentals"); *On Command Video Corporation v. Columbia Pictures Industries*, 777 F. Supp. 787, 789-90 (N.D. Cal. 1991) (same).

of Aereo's service changes the analysis under the law. There is nothing in Section 101 that immunizes delayed transmissions. On the contrary, Section 101 acknowledges that each separate transmission can be made at different times. Creation of intervening copies may in fact constitute a separate violation of copyright, but it cannot immunize Aereo from potential liability for a public performance.²³

3. Aereo transmits the performance to members of the public.

The 1976 Act does not define "the public." But that noun phrase is well understood. Dictionaries define "the public" as either "an organized body of people: COMMUNITY, NATION" or "the people as a whole: POPULACE, MASSES."²⁴ The latter sense is more apt here: "the public" as that phrase as used in

²³ There is no basis in the 1976 Act for suggesting that whether transmissions emanate from the same copy or different copies of a work is material to whether the transmissions constitute a public performance. The Second Circuit, however, posits "guideposts" that change the outcome under the transmit clause depending upon whether or not individual transmissions are generated from the same copy. *See WNET v. Aereo, Inc.*, 712 F.3d 676, 689 (2d Cir. 2013).

²⁴ Webster's Third New International Dictionary (unabridged) (1986), p. 1836. *Accord* The Compact Oxford English Dictionary (Second Edition), p. 1463 (defining "public" as "[t]he community or people as an organized body, the body politic; the nation, the state," or as "[t]he community as an aggregate, but not in its organized capacity; hence, the members of the community").

the transmit clause refers to people in general.²⁵ People walking into a business establishment that is open to everyone are members of the public. Equally, those who sign up for Aereo's service and are assigned temporary use of its antennas and servers are members of the public.²⁶

As the 1976 Act reflects, not all transmissions are public. An individual who sends a signal from one room in a home to a device in another room engages in a private transmission. The same thing is probably also true of a consumer who uses a "Slingbox," a product designed for sending a television signal to a personal internet-connected device: the performance is transmitted by the consumer to himself or herself. Because the performance is not communicated to the public, such a transmission is not a violation of the public performance right.

No doubt one could imagine scenarios that fall on a continuum between private transmissions and transmissions to the public. But it is not necessary

²⁵ The public may also be viewed as any large group of people not predefined by the relationships among them. Clause (1) in the definition of public performance reflects this notion: it refers to "a substantial number of persons outside of a normal circle of a family and its social acquaintances." 17 U.S.C. § 101.

²⁶ This case would present a closer question if private individuals leased dedicated antennas and server space from Aereo for long periods. But that is not the fact pattern here. Aereo can be argued to have, in effect, taken a single CATV antenna, divided it into a multitude of tiny antennas, and rented each of them by the hour.

to locate a bright line along such a continuum to conclude that Aereo infringes petitioners' public performance right. Aereo transmits a performance of petitioners' broadcasts to members of the public. The 1976 Act's definition of public performance within the context of the transmit clause is expansive:

- It does not matter what the “device or process” used might be, because the transmission giving rise to a public performance may be “by means of any device or process.”
- The “device or process” that is employed may be altogether novel.²⁷
- It does not matter whether the members of the public capable of receiving the performance “receive it in the same place or in separate places.”
- It does not matter whether the members of the public capable of receiving the performance receive it “at the same time or at different times.”²⁸

²⁷ The 1976 Act says that “[a] ‘device’, ‘machine’, or ‘process’ is one now known or later developed.” 17 U.S.C. § 101.

²⁸ As these provisions reflect, Congress wanted not just standard CATV and cable television providers to be captured by the transmit clause. Congress wanted the transmit clause to cover as well new technologies that provide the functional equivalent of cable television. And this is what Aereo does. *Cf. Community Television of Utah, LLC v. Aereo, Inc.*, No.

Other cases, not at issue here, might present more difficult challenges. In particular, an alternative to the Aereo system might employ a permanent and separate antenna in a local area to provide each subscriber access to remote broadcast programming at cost and as a not-for-profit enterprise. Arguably, such a system might not be “transmitting performances” to the “public,” or indeed might fall within other exceptions to the public performance right. In such a case, it might more plausibly seem that this alternative would function simply as an expedient agent for the individual consumer. On the other hand, similar configurations that might be operated on a for-profit basis may look more like a case of actionable copyright infringement. Even a not-for-profit system could fall into a grey area if it allowed users to access whatever antenna was available. Certainly, a system that uses just one antenna and sends out divided signals starts to look exactly like a cable television network, one covered by the compulsory license provisions of Section 111.

The record in this case reflects that Aereo has developed a novel device or process that:

- enables a customer to identify a program that he or she wishes to see;

2:13CV910DAK (D. Utah 2/19/14), slip op. at 8 (“Aereo’s retransmission of Plaintiffs’ copyrighted programs is indistinguishable from a cable company and falls squarely within the language of the Transmit Clause.”).

- assigns to that customer, on a transitory basis, an individual antenna to capture that program from an over-the-air broadcast for retransmission to the customer;
- processes the broadcast signal for digital recording and transmission;
- records the program on Aereo's server; and
- transmits the program to the customer via the internet, all for profit to Aereo.

Customers receive Aereo's transmissions in separate places and at different times. As the statute clearly establishes, however, neither the novelty of Aereo's system nor the widely varying reception of its transmissions matters for purposes of determining whether there is an infringement of petitioners' public performance right. What matters is that Aereo transmits the copyrighted program performances to all comers who agree to pay Aereo's fee—that is, to members of the public.

The Second Circuit held that “the Transmit Clause directs courts to consider the potential audience of the individual transmission.”²⁹ The court based this holding upon its understanding that a specific transmission is tantamount to a “performance,” and that, in the context of the transmit clause, the only relevant performance is the one embodied in each particular transmission. The

²⁹ *WNET v. Aereo, Inc.*, 712 F.3d 676, 689 (2d Cir. 2013).

Second Circuit’s approach reflects two conceptual confusions: first, between means and ends; and second, between what constitutes a performance and what makes a performance public.

First, the 1976 Act defines “perform” and “transmit” separately and in non-overlapping terms. To perform an audiovisual work, the statute says, is to show its images or make its sounds audible, whereas to transmit a performance is to communicate it, using any device or process, to some place different from where the performance was sent. One transmits a performance in order to show it remotely. The transmission is the means by which this occurs. The end result of a transmission, like the starting point, is a performance.³⁰

Second, the transmit clause uses the term “transmit” not to redefine the term “perform,” but rather to explain when a performance must be regarded as public. A performance is public when it is transmitted to the public. And in that context, it is clear from the language of the statute that it does not matter whether the performance is transmitted to members of the public collectively or individually. The Second Circuit’s interpretation turns what is irrelevant under the statute into a matter of central importance. At the same time, that interpretation reads out of the statute altogether the language on

³⁰ *Cf. Buck*, 283 U.S. at 198 (nothing in the Copyright Act of 1909 “prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit.”).

reception at the same time or at different times since a single transmission can never occur at different times.³¹

In addressing questions of statutory construction, the Court’s task begins—and it often ends—with examining the language that Congress employed in drafting the statute.³² The Court also should consider the provisions and the purpose of the whole law in which that language appears.³³ In this case, the 1976 Act defines broadly both its subject matter and the rights of copyright owners before identifying exceptions and limitations. Those exceptions and limitations do not encompass the technology used by Aereo.

³¹ Yet another example of the Second Circuit’s misreading of the transmit clause is the suggestion that Congress, in referring to the possibility that members of the public who are “capable of receiving the performance . . . receive it” in different places or at different times, intended the word “it” to refer to a transmission rather than the performance. As a matter of grammar and usage, this cannot be a correct interpretation. The antecedent of “it” is the noun or nouns closest to it—namely, “performance or display.” The correctness of this reading is reinforced by the parallel construction of “receiving” and “receive.” The noun “transmission” does not even appear in the transmit clause. See generally J. Ginsburg, “*WNET v. Aereo*: The Second Circuit Persists in Poor (Cable)Vision,” available at www.mediainstitute.org/IPI/2013/042313.php (last visited 2/12/14).

³² See *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

³³ *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

CONCLUSION

The history of the performance right demonstrates repeated efforts by Congress to strike a balance between right holders and users of copyrighted works. In the 1976 Act Congress responded to new technological uses of copyrighted works by adopting expansive definitions of copyright owners' exclusive rights, while also setting forth detailed limitations and caveats with respect to those rights.

This case requires the Court to apply broad-brush definitional language to a novel technology, one that Congress has not had an opportunity to address. The Court must give due regard to both the innovative method of delivery and the fact that the material delivered is someone else's content. In light of the inherent public policy issues raised in striking this balance, as well as the danger of inadvertently stunting technology, AIPLA urges the Court to take a narrow approach, one focused on the facts of this case.

Such a focus shows that Aereo transmits petitioners' broadcasts to its subscribers, and those subscribers are members of the public. Aereo thereby violates petitioners' right of public performance under the 1976 Act. Neither the novelty of Aereo's system nor the multiplicity of its transmissions alters that conclusion. The Second Circuit should be reversed, but on grounds sufficiently narrow to permit the continued

development of truly innovative, non-infringing products and services.

Respectfully submitted,

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