The Supreme Court Performs the Right Notes for Dish in Aereo

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ABSTRACT

In American Broadcasting Companies, Inc. v. Aereo, Inc., the Supreme Court addressed whether a company publicly performs copyrighted works when it allocates separate antennas on its property to customers who individually decide what shows they each want to watch. This case was hotly debated because it provided a new opportunity for the Court to identify the responsible actors when copyrighted materials are transmitted over the Internet. Unfortunately, the Court ruled against Aereo without clearly articulating governing standards that might inform future decisions, relying instead on what the dissent called a “looks-like-cable-TV” approach. The deficiency has already provided additional ammunition for Fox Broadcasting Company to sue Dish Network over certain features that the satellite television provider proudly promotes to customers. This Article articulates some concrete benchmarks the Court could have used to substantiate its decision that would have highlighted the weaknesses in Fox’s latest copyright claims against Dish.

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I. INTRODUCTION

In American Broadcasting Companies, Inc. v. Aereo, Inc., the Supreme Court addressed another issue in an increasingly long line of disputes wherein new innovations challenge old intellectual property laws that were designed to address technologies with different or more limited capabilities. Occasionally, the Court has provided definitive guidance, as it did in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., by emphasizing the importance of intent when addressing contributory liability with copyrights. However, in a string of more recent intellectual property cases, the Court has made decisions using a “you know it when you see it” approach to jurisprudence. Interestingly, in each of these cases, the Court intuitively reached what is probably the correct result, but did so without articulating definitive standards that might help lower courts tackle subsequent technological developments.

3. See Alice Corp. Pty. v. CLS Bank Int’l, 134 S. Ct. 2347, 2354 (2014) (concluding that a computerized trading platform to address settlement risk was not patentable subject matter because it was clearly an abstract idea, even without defining the precise contours of the abstract idea category); Ass’n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2118 (2013) (determining that isolated DNA is not patentable subject matter because it is a discovery in nature and not an invention); Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1298 (2012) (holding that the addition of routine steps to a law of nature does not make a process patentable subject matter); Bilski v. Kappos, 561 U.S. 593, 612 (2010) (deciding that a process for hedging risk is an abstract idea that is not patentable without resorting to categorical rules).
4. See, e.g., Emily M. Morris, Intuitive Patenting, 66 S.C. L. REV. 61, 117 (2014); Jessica Belle, Note, Prometheus v. Mayo: Limited Implications for §101 Jurisprudence, 8 Wash. J.L. TECH. & ARTS 555, 571 (2013); Alex Boguniewicz, Note, Discovering the Undiscernable:
In *Aereo*, the Court addressed whether a company publicly performs copyrighted works when it allocates separate antennas on its property to customers who individually decide what shows they each want to watch. Once again, the Court majority reached the correct conclusion by holding that the system seemed too much like a traditional cable operator to get off the hook from paying public performance fees.\(^5\) However, the Court did not directly define the attributes of Aereo’s system that made it so clearly analogous to traditional cable, leaving the door wide open for future litigation. Indeed, Fox Broadcasting Company has recently used *Aereo* as additional ammunition to sue Dish Network over certain new features that the satellite television provider now offers to customers.\(^6\) As we shall see, the Supreme Court could have easily articulated some concrete benchmarks that would have substantiated its decision and, thus, would have more clearly highlighted some of the weaknesses in Fox’s latest copyright claims that it has raised against Dish.\(^7\)

II. COPYRIGHT AND THE PUBLIC PERFORMANCE RIGHT

The Copyright Act provides copyright owners numerous exclusive rights.\(^8\) The exclusive right to reproduce the work in copies is probably the best known, but there are several others, including the rights to perform and display the copyrighted work publicly.\(^9\) The Act further defines the circumstances under which a person performs or displays a work publicly:

To perform or display a work “publicly” means –

(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.\(^10\)

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\(^5\) *Aereo*, 134 S. Ct. at 2508–09.
\(^7\) See infra Part V.
\(^9\) § 106(4)–(5).
Of these two provisions, the first is probably the easiest to understand. For instance, an individual who rents a DVD of a movie and plays it at home to an audience of family and friends does not make a public performance, which would require permission from the copyright owner. Similarly, a group of friends can watch a television broadcast at a person’s home without violating copyright privileges. On the other hand, a sports bar that shows a movie or allows patrons to watch Monday Night Football on a big screen television would be engaged in a public display or performance.\footnote{The Copyright Act provides numerous limitations to the exclusive rights to perform and display. See 17 U.S.C. § 110 (2012). One exception might allow the sports bar to show the football game under specified conditions. See § 110(5)(B).}

The second provision is intended to address situations in which individuals use technologies to effectively show copyrighted works in a remote location or locations. According to the Supreme Court, the provision was primarily intended to make it clear that broadcasters and cable operators make public performances when they retransmit television programs to customers who then watch them at home or elsewhere.\footnote{See Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2504–06 (2014).} However, Congress clearly thought ahead with the amendment, ensuring it would appropriately cover new technologies within the philosophical and economic considerations underpinning the original concept of a public performance. So, consider the individual who rents a DVD and uses a DVD player to watch it at home. Assuming this person can obtain the necessary technology, the Act would allow him to start the play function of the DVD player and transmit the live performance, or in other words stream it, to a remote location so that he or she could view it there. Thus, the Act directly provides that an individual may engage in personal space shifting by streaming copyrighted material so it can be viewed on a device at an alternative site.\footnote{The public performance provision does not apply to those who wish to reproduce a work on a device so that it can be viewed on that device at a different location. For this to be lawful, the reproduction would have to fall within the fair use exception, 17 U.S.C. § 107 (2012), according to the same form of logic used by the Supreme Court in Sony to legitimize time-shifting with a VCR. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 497 (1984). Fair use is addressed by considering four factors: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . .; and (4) [market] effect . . . " § 107. For further discussion, see infra notes 167–70 and accompanying text.}

Given that copyrights are intended to motivate the distribution of creative new works, this result can be justified because the harm to the copyright owner is minimal, at best.\footnote{It is possible to argue that some individuals who engage in personal streaming might otherwise demand centralized services, and so the exemption for non-public transmissions may reduce the value of the copyright. For this reason, the practice might not satisfy the criteria}
the rented DVD could watch the movie on any DVD player located in a non-public environment. So, why should the law prevent him from streaming that same copy to the remote location? In effect, it is equivalent to a person with a sophisticated telescope watching the movie from afar while it is being played at home. On the other hand, this individual could not stream it to a remote location that is open to the public. Nor could he or she show it to members of the public by simultaneously streaming it to them at separate locations or streaming it to them at different times to those separate places. The latter would circumvent the statutory prohibition, since each transmission might technically constitute a private viewing but the overall effect would allow the public to see the movie from that one DVD.

More to the point of the Aereo litigation, a person who has the right to access and view a television signal at their home, or some other location under their control, similarly may use technologies to retransmit that signal to another place so that he or she can view it there live. However, this person can neither retransmit the signal so that it can be publicly viewed in one particular place nor use separate transmissions to show it to individual members of the public situated in different locations.

The primary ambiguity in the transmission provision is that it does not specifically define the phrases “to the public” or “members of the public.” One interpretation is to assume that “the public” in this provision refers to the same people as are specified in the first clause regarding the contours of a public place. This is the interpretation that the Supreme Court used when addressing the legality of Aereo’s transmission system. The Court stated, “although the Act does not define ‘the public,’ . . . [it] suggests that ‘the public’ consists of a large group of people outside of a family and friends.” This, of course, would mean that an individual may lawfully stream a copyrighted program not only to himself at a remote location but also individually to several other friends and family members who might otherwise watch the content at home or some other private location.

As we shall see, this may provide subscribers to Dish’s Dish Anywhere system tremendous power to provide programming at no

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for a fair use under Section 107, which serves to balance the economic harms from the practice with other social goals, such as free speech. Nevertheless, Congress has categorically determined that the activity is legal, presumably because the perceived economic harms to copyright owners was not sufficiently significant for anyone to meaningfully object to the statutory exclusion. This does not mean, however, that space shifting by other means, such as through reproductions of copyrighted material, is necessarily a fair use. See infra notes 167–70 and accompanying text.

16. Id. (citing 17 U.S.C. § 101 (2012)).
cost to a large set of friends and relatives who live in different places. However, this is not the only possible interpretation. For instance, the public might simply be anyone other than the possessor of the copyrighted content. In this event, only personal space shifting via live transmission would be allowed under the terms of this particular provision. At the moment, the Supreme Court has spoken, and its interpretation is clearly defensible given both the language of the Act and available technologies at the time it was drafted. Thus, Congress may need to reconsider whether the appropriate economic balance is maintained in light of new transmission capabilities that are available via the Internet.

III. COMPANIES TEST THE LIMITS OF PUBLIC PERFORMANCE RIGHTS PRIOR TO AEREO

As one might expect, many companies have attempted to establish business models that would allow them to perform or display copyrighted works without violating the copyright owners’ rights under the Act. Each, in effect, has tested the reach of the statute, and each success or failure within the legal system has helped shape the parameters of subsequent new arrangements.

A. Columbia Pictures v. Redd Horne

*Columbia Pictures Industries, Inc. v. Redd Horne, Inc.* is a good place to start. The defendant, Redd Horne, established two video rental stores, which each had numerous private booths where up to four customers could watch videos. The videos were selected at a central desk and then an employee would put the video in a video cassette machine and transmit it to the appropriate booth. The store was open to the public, but the patrons who watched the videos together in the private booths were typically a small group of family or

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17. Technologies are readily available, separate from Dish’s system, which allow subscribers to retransmit those signals to other locations. Slingbox, for instance, which is the technology utilized by Dish, may also be purchased separately from Sling Media, Inc. Information about the most recent models of Slingbox can be found on Sling Media’s web site at http://www.slingbox.com. Another product that allows remote streaming is Vulkano, which is a product line developed by Monsoon Multimedia, Inc. Information about Vulkano is available on Monsoon Multimedia’s website at http://www.monsoonmultimedia.com.

18. The transmission might nonetheless not violate copyright privileges if it falls within a limitation on those rights, such as fair use.

19. The Supreme Court recognized in *Aereo* that new technologies may present potential new problems and that interested parties may need to seek action from Congress. See *Aereo*, 134 S. Ct. at 2511.

friends. Nonetheless, the court held that the operator was making a public performance despite the fact that transmissions were made to places that appeared to fall outside the strict definition of “public” in the statute. The court first noted that the operation of each store was the functional equivalent of a conventional movie theater, just with additional privacy. In the court’s view, the relevant “place” that each movie was performed was not within a separate room but rather within the entire facility, which overall was open to the public. The court also noted that the same individual video cassette was repeatedly used to transmit performances of its movie to different members of the public over the course of time. According to the court, multiple transmissions from the same copy of the copyrighted material to different unrelated people at different times fell within the second condition of the transmission clause in the definition of public performance. For these reasons, the court held that the defendants had performed the movies publicly without permission from the copyright owners.

B. Columbia Pictures v. Aveco

The next in the list of instructive relevant cases is Columbia Pictures Industries, Inc. v. Aveco, Inc. In that case, patrons again rented videos but, this time, could choose to watch them in rented private rooms within Aveco’s facility using video cassette players located in the rooms themselves. Aveco believed that it had avoided the centralized transmissions problem encountered in Redd Horn by giving customers physical control over the videotapes and the privately located VCRs. After all, since there was no dispute that a customer could rent a video and watch it outside the facility in a private place with friends and family, why would it be any different if they rented the video and watched it privately with the same people

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21. Id. at 156–57.
22. See id. at 158–59.
23. See id. at 159.
24. See id.
25. See id.
26. See id.
28. Id. at 61. Customers had three rental options at Aveco’s facilities: (1) they could rent videos and watch them outside the premises; (2) they could rent rooms within the premises and bring in their own videos; or (3) they could rent videos at the facilities and rent rooms to watch those videos inside the same premises. Id.
29. Id. at 63.
inside the premises? The court, however, perceived a difference. Since each individual room could be used successively by different groups of people, they were, in a sense, open to the public. And since Aveco authorized the viewing in those rooms, it could be held responsible for performing the works in places open to the public. This was true, according to the court, whether Aveco rented the videos, or customers brought in their own videos to watch in Aveco’s rooms.

In reaching its conclusion that Aveco made a public performance, the court focused on the nature or purpose of Aveco’s business, which was to operate a facility that was available to the public for viewing videos. Thus, the type of place where the performance may be viewed is a material factor in determining whether the performance is public. If it is at a place where unrelated individuals can use the same equipment or facilities to watch copyright content, then this increases the likelihood that the operator is performing publicly. In addition, if the operator’s primary purpose is to provide a convenient facility where customers may view copyrighted performances, this too increases the likelihood that it is engaged in public performances.

C. The Hotel Video Cases

The next pair of relevant cases involved hotels that provided guests the opportunity to watch videos in their rooms. The first dispute, Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., involved a hotel that simply rented videodiscs to their guests so they could watch them using DVD players located in their rooms. The copyright owners, following the logic of Aveco, claimed that, since the rooms were rented to successive people, the hotel was making a public performance. The court disagreed, however, finding that the nature of a hotel is to provide private accommodations, which may incidentally include the rental of videodiscs. Thus, once again,

30. The movie producers did not challenge the rental of video cassettes for at-home viewing. Id. at 61.
31. See id. at 63.
32. See id. at 62 (stating that Aveco, by enabling its customers to perform the video cassettes in the viewing rooms, authorized the performances).
33. See id. at 64.
34. See id. at 63.
35. See Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors, Inc., 866 F.2d 278, 278 (9th Cir. 1989).
36. Id. at 280–81.
37. See id. at 281.
the overriding purpose of the enterprise proved to be an important factor for distinguishing whether the service truly involved private showings or rather was a subterfuge to evade the strict application of the law.

The second case, *On Command Video Corp. v. Columbia Pictures Industries*, involved an electronic video delivery system used by hotels so guests could rent and watch videos in their rooms without having to leave their private accommodations. Effectively, when guests wanted to watch a video, they merely had to choose from an on-screen list, and a centralized, preloaded video cassette player would transmit the videotape to the television in the private room. Once the video had started, the guest could not stop, rewind, or fast-forward the playback. Also, since the guest was using the machine containing the selected video, no other room could access and watch it until the playback to the original guest had been completed.

On first blush, the system appears to merely facilitate private hotel viewing, which the court in *Professional Real Estate Investors* had already found lawful. The primary difference was that the guest did not have control over the playback of the video once it had begun. Also, the system increased the physical efficiencies of the hotel’s distribution system by potentially eliminating the time lags between rentals and returns. This may have allowed the hotel to purchase fewer videos to satisfy the rental demands of customers. In any event, the court held that hotels using the system engaged in public performances since they transmitted performances from the same videotape to different groups of private audiences at different times. Apparently, copyrights are intended to provide owners economic incentives by giving them some rights to control individual convenience. This conclusion is not only relevant to the notion of public performances, but may also be important in other debates, such as with reproductions for personal space shifting.

**D. The Zediva Online DVD Service**

Fast-forwarding to a more recent case, WTV Systems tested the limits of the public performance right when it created a service called Zediva, which it described as an online DVD rental service. The system worked much like that in *On Command*, although

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39. *Id.* at 788.
40. *See id.* at 790.
customers had slightly more control over the performance of the content. Specifically, WTV Systems, like a traditional DVD rental service, bought DVDs that it made available for customers to rent. But instead of allowing customers to physically take the DVDs, employees preloaded the DVDs into separate DVD players located at its facilities. Customers then were given the ability to stream selected content over the Internet from appropriate DVD players for a 14-day rental period.\textsuperscript{42} Once a customer started the playback of a DVD from a particular player, he or she could pause the stream, but if the pause lasted more than an hour, another customer would be given access to that DVD player.\textsuperscript{43} When the customer wished to resume viewing, the content would be streamed from another player containing the same movie, but if none were available, the customer would have to wait until a player with the movie was free.\textsuperscript{44} The customers did not have other types of control typically associated with the playback of DVDs, such as rewinding or fast-forwarding capabilities.\textsuperscript{45} They also did not have access to special features or other content on the DVD.\textsuperscript{46}

WTV Systems argued that it merely rented DVDs to customers and that the customers then transmitted the movies to themselves.\textsuperscript{47} However, this argument failed for numerous reasons. For starters, the company’s employees, not the customers, loaded the DVDs into the players.\textsuperscript{48} Further, the system also potentially allowed multiple customers to access the same DVD during a single rental period. Thus, WTV Systems could not even argue that it rented a DVD along with a particular player, which the customer could then exclusively control during the rental period. This serves to distinguish its business model from physical DVD rental services, such as the one found to be legal in Professional Real Estate Investors.\textsuperscript{49} Also, the customer did not have primary control over the transmission; rather, the service significantly constrained the nature, duration, and availability of the transmission, similar to the online hotel DVD rental system found to be illegal in On Command. Therefore, given the

\begin{footnotes}
\item[42] \textit{Id.} at 1006–07.
\item[43] \textit{Id.} at 1007.
\item[44] \textit{Id.}
\item[45] \textit{Id.}
\item[46] \textit{Id.} at 1007 n.2.
\item[47] WTV Systems argued that it did not have the necessary “volition” to be a direct infringer, but rather only established a mechanical system that was used by customers to perform the transmissions. \textit{Id.} at 1011 n.7. The court stated that the argument was unpersuasive and that the Ninth Circuit, in any event, had not adopted the volitional conduct requirement for direct infringement. See \textit{id.} For a discussion of “volition” and its relationship to direct infringement, see infra notes 62–72 and accompanying text.
\item[48] As we shall see, this weakens Zediva’s argument that it acted without “volition.” See infra note 67 and accompanying text.
\end{footnotes}
operation of the system, the court concluded that WTV Systems was clearly transmitting performances of the copyrighted content. In addition, the court also determined that the transmissions were to the public, since it streamed the same content at different times from the same DVDs to multiple unrelated viewers. As in Redd Horn and On Command, this is a signature act of a public performance. The court consequently imposed a preliminary injunction, finding a likelihood of success on the merits and irreparable injury, since the Zediva service threatened the copyright owners’ ability to profit from authorized video-on-demand services.

E. Cablevision’s Remote DVR System

Although preceding WTV Systems, the case that primarily set the stage for the design of Aereo’s technology was Cartoon Network LP v. CSC Holdings, Inc., which sanctioned a particular application of a remote storage DVR (RS-DVR) system. In essence, the cable television distributor, Cablevision, established a process allowing customers to store live programming on Cablevision’s servers, rather than on at-home (or set-top) devices, so that the programs could be viewed later in the same way as they could with traditional personal equipment. The legality of personal television recording devices was first litigated in Sony Corp. of America v. Universal City Studios, Inc., and the Supreme Court held that individuals could legally copy over-the-air television programs so that they could view the programs at more convenient times—a practice called time-shifting. Given that time-shifting was a significant non-infringing use of the machine, the seller of the machine could not be held contributorily liable for impermissible uses of the machine, such as saving the programs for multiple future viewings. This decision legitimized the distribution of recording devices, including DVRs such as TiVo and similar

49. See WTV Sys., 824 F. Supp. 2d at 1009.
50. See id. at 1011 n.7.
51. See id. at 1012–14.
52. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).
54. The Court determined that a seller of copying equipment is not liable for contributory infringement if the machine is capable of substantial noninfringing uses. See id. at 442. It also determined that unauthorized time shifting was a substantial noninfringing use because it fell within the fair use exception. See id. at 447–55. Saving programs for multiple future viewings is known as “librarying.” Making reproductions with VCRs for the purpose of librarying is almost certainly not a fair use due to the substantial economic effects that such reproductions may have on the copyright owners’ ability to profit from their protected content. The Supreme Court made note of this by approving the district court’s finding “that the time-shifting without librarying would result in not a great deal of harm.” Id. at 451 (emphasis added).
machines that are often provided by cable and satellite companies. Cablevision’s goal was to provide customers the exact same functionality that they could have with their own DVR but also allow them to save the programming on computer storage space specially allocated to them on Cablevision’s servers.55

Without getting overly technical, when a cable customer chooses to save a program on a DVR, the system essentially splits the signal that has been lawfully transmitted to the customer’s location so that the signal travels both to the television, where it can be viewed live, and to the set-top DVR, where it is stored for future uses. With Cablevision’s RS-DVR system, the signal is split at Cablevision’s premises and is separately and uniquely stored for the customer on Cablevision’s machines rather than on a personal set-top device.56 When the customer chooses to view the stored content, the signal with the content is automatically transmitted to the customer at the location that the original live signal was delivered.57

Before delving into the court’s legal analysis, it is useful to take a broad view of what is happening here to avoid losing sight of the proverbial forest by focusing on the trees. First, the copyright owners grant Cablevision the legal right to transmit live signals carrying the copyrighted content to customers at specific geographic locations and the customers thereby gain rights, through their subscriptions, to access those signals and view the associated programs. When customers use Cablevision’s RS-DVR, it changes nothing except where the content carried by those signals is temporarily stored. The customers control the operation of the recording device in exactly the same fashion as they would operate set-top boxes.58 This differentiates the situation from the technologies used in Redd Horne, On-Command, and WTV Systems, in which the customers had far less control over the playback of the performances. The customers also end up viewing the same content in the same way at the same places as they could have if they had used set-top boxes instead of Cablevision’s remote storage system. Thus, the technology does not make life more convenient for customers, as it does not save them trips to rental stores or hotel front desks, or allow them to take or view content in other places.

55. Cartoon Network, 536 F.3d at 125. The court stated that to the customer, the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR. The principle difference in the operation is that the viewer sends signals to Cablevision’s remote facility instead of to an on-set box. Id.
56. Id. at 124–25.
57. The customer’s unique copy is encrypted and can only be decoded by the customer’s particular cable box. Id. at 135.
58. Id. at 125.
Again, this distinguishes the situation from On Command, in particular, where customer convenience was a significant goal. Therefore, even if copyrights were intended to provide owners some rights to control customer convenience over obtaining access to protected content, those rights would not be implicated here. In fact, the only thing that is changed by Cablevision’s system is the character of the machine that is used to carry out the exact same operations. But, as the US Court of Appeals for the Ninth Circuit so clearly stated in Sony Computer Entertainment, Inc. v. Connectix Corp., copyrights do not give copyright owners the right to control the machines that are used to play their content. Thus, before resorting to the language of the statute and the applications of the specific legal provisions, there intuitively seems to be no reason to conclude that Cablevision has done anything wrong by introducing its RS-DVR system.

The copyright owners sued Cablevision, arguing that Cablevision should be directly liable both for reproducing copies of their copyrighted programming on its servers without permission and for transmitting that content, without authority, to the public in violation of their public performance rights. Regarding the reproductions, the court determined that the customers actually made the copies because only they had the appropriate “volitional conduct,” a concept that was first articulated in Religious Technology Center v. Netcom On-Line Communications. According to Netcom, the mere fact that someone owns or operates a machine that makes copies of content at the initiation of a third party does not necessarily make that person directly liable for the reproductions made by that machine. The Netcom court compared those operating servers on the Internet to businesses that make photocopy machines available to the public, entities that have never been accused of direct liability. Based on this analogy, the Netcom court determined that there must

60. Sony Computer Entm’t, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000).
61. In Connectix, Sony sued the developer of software that enabled Sony games to play on different consoles. The Ninth Circuit ruled that copyright does confer copyright holders control over the market for devices that play games. See id. at 607.
64. See Netcom, 907 F. Supp. at 1369.
65. See id.
be “some element of volition or causation” to pin liability on the owner of the machine.\textsuperscript{66}

Following the same logic, the Second Circuit believed that Cablevision did not engage in the necessary volitional conduct to hold it liable for direct infringement, since the copies were made at the behest of customers. In reaching this conclusion, several issues were important to the court. First, Cablevision provided a system that mechanically made reproductions of television programs without involving its own personnel in the process of creating the copies.\textsuperscript{67} In addition, Cablevision did not select the programs that customers were able to copy. Rather, the programs were provided via the channels that the copyright owners authorized Cablevision to transmit to customers. These conditions are in stark contrast to attributes underlying the Zediva service, for one, in which humans actually selected and loaded the videos into the video recorders.\textsuperscript{68}

It is worth noting several additional points about volitional conduct here because the dissent in Aereo overlooked their importance in its analysis. In a case subsequent to Netcom, the Fourth Circuit made the following observations about volitional conduct:

\begin{quote}
To establish direct liability . . . something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.\textsuperscript{69}
\end{quote}

According to this statement, an owner of a mechanical process acts with volition when the owner is such a knowing and active participant in the third party’s infringement that it is fair to consider it an accomplice to the direct infringement.\textsuperscript{70} Thus, when a third party uses a mechanical system to copy or deliver content that it independently acquired from other unrelated sources, there is no way to connect the operator’s conduct to the third party’s illegal activity.

\textsuperscript{66} Id. at 1370.

\textsuperscript{67} In contrast to a copy shop that provides machines for customers to operate, businesses with employees who make copies at the request of customers, such as Kinko’s, are liable for direct infringement when they reproduce copyrighted material without permission, unless their actions fall within a limitation on a copyright owner’s exclusive rights, such as fair use. See, e.g., Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

\textsuperscript{68} Humans were also involved with selecting content and loading machines in On Command and Redd Horne.

\textsuperscript{69} CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004).

\textsuperscript{70} According to the Second Circuit, “the purpose of any causation-based liability doctrine is to identify the actor (or actors) whose ‘conduct has been so significant and important a cause that [he or she] should be legally responsible.’” Cartoon Network, 536 F.3d at 132 (quoting W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 42, at 273 (5th ed. 1984)).
However, this does not mean that all designers or operators of mechanical systems can wipe their hands from potential culpability for direct infringement. For instance, if the owner of the machine or system unlawfully provides the content to the third party without the authority of the copyright owner, while knowing that the third party intends to use its machine to violate the copyrights in that content, then there may be a sufficient nexus to the third party’s infringing activity to conclude that the machine owner directly trespassed on the exclusive domain of the copyright owner. Or, as another example, suppose a proprietor of a bookstore that solely contains copyrighted books provides a copy machine that is only capable of making complete reproductions of entire works. In this instance, one could easily conclude that the machine owner acts with sufficient “volition” to hold it directly liable for its customers’ illegal activities, since the only possible result of its conduct is infringement.

Neither of these scenarios, of course, applies to Cablevision’s RS-DVR system, since Cablevision originally provided its customers legal access to the copyrighted content, and many customers lawfully make copies for time-shifting. For these reasons, the Second Circuit held “that on the facts of this case, copies produced by the RS-DVR system are ‘made’ by the RS-DVR customer, and Cablevision’s contribution to this reproduction by providing the system does not warrant the imposition of direct liability.”

In addition to concluding that Cablevision was not directly liable for any infringing reproductions made with the RS-DVR system,


72. See, e.g., Elektra Records, Co. v. Gem Electronic Distribs., Inc., 360 F. Supp. 821, 823 (E.D.N.Y. 1973) (finding direct infringement by business proprietor when customers used coin operated “Make-a-Tape” system to create 8-track copies of sound recordings provided at the store). The Supreme Court warned in Sony that “the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn.” Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 n.17 (1984). One might be tempted to argue that even the hypothesized scenario involves contributory liability, since the machine owner does not actually push the button that starts the reproduction process. Nonetheless, when there are absolutely no or very few potential non-infringing uses of the machine, the distinction is phantom, and of course, the result is exactly the same in each instance, given that the machine owner is conclusively liable under each framework of analysis. This is because the seller or operator of a machine is liable for contributory liability if: (1) there are not any “substantial noninfringing uses” of that machine, see Sony, 464 U.S. at 442; (2) the operator knows about the infringing conduct and has an opportunity to stop it, see A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019–22 (9th Cir. 2000); Religious Tech. Ctr. v. Netcom On-line Commc’ns, 907 F. Supp. 1361, 1373–75 (N.D. Cal. 1995); or (3) the seller or operator induces the infringing conduct, see Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005).

73. Cartoon Network, 536 F.3d at 133.
the Second Circuit also determined that the company did not make public performances by enabling the system to transmit reproduced content to subscribers. Cablevision offered two grounds to support this conclusion. First, under the same rationale that convinced the court that the customers used the RS-DVR system to make the reproductions, the company argued that customers, and not Cablevision, made the transmissions. Cablevision also argued that, in any event, the transmissions were not “to the public” and thus did not violate the copyright owners’ public performance rights no matter who transmitted them. The court ultimately agreed that the transmissions were not made to the public and, hence, determined that it did not have to address the question of who was responsible for making those transmissions. Therefore, it solely considered whether the operation of the system resulted in transmissions to the public.

The district court had determined that Cablevision’s RS-DVR system made transmissions to the public because it transmitted the same content to different customers at different times. In its view, these conditions meant that the operation fell squarely within the statutory language of a public performance. The Court of Appeals, though, disagreed with the lower court’s analysis. According to the Second Circuit, the most sensible interpretation of the transmit clause is that the relevant asynchronous transmissions must be from the same copy of the copyrighted content. This is why the transmissions in Redd Horne and On Command were deemed public performances. In contrast, each of Cablevision’s transmissions derives from a unique and encrypted copy created by the customer and sent exclusively to that customer’s cable box. According to the Second Circuit, the use of a unique copy limits the potential audience of a transmission and thus is relevant in determining whether a transmission is to the public. The court held, “[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances ‘to the public’ and therefore do not infringe any

74. Id. at 134.
75. Id.
76. See id.
77. See id. at 135 (citing Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478 F. Supp. 2d 607, 623 (S.D.N.Y. 2007)).
79. Cartoon Network, 536 F.3d at 138.
80. See id.
exclusive right of public performance." The court thus granted summary judgment in favor of Cablevision.

IV. AEREO PERFORMS POORLY IN THE WAKE OF THE CABLEVISION DECISION

Using the Second Circuit’s reasoning in Cartoon Network as a springboard, Aereo devised a system—enabling it to store and stream live over-the-air broadcasts at the request of customers—that it believed was so analogous to Cablevision’s RS-DVR that it would not infringe on copyright owners’ exclusive rights to publicly perform their works. In very general terms, Aereo allocated to each customer a unique antenna on its property that received live, over-the-air television programming. The system then gave the customers complete control to select programming that they wanted to have transmitted over the Internet from the antenna to a personal electronic viewing device located in an area within the range of the original live over-the-air signal.

To be more specific, Aereo’s system consisted of thousands of small dime-sized antennas housed in a facility suitably located to receive over-the-air television signals. When an Aereo customer wanted to watch a live television broadcast, he or she would select the program from a list of current local programming on Aereo’s website. Aereo’s server would then dedicate a particular antenna to that customer for the duration of the show and tune it to the selected

81. Id. at 139. But see Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138 (S.D. Cal. 2012) (involving a company that retransmitted over-the-air signals from independent small antennas with technology similar to Aereo’s, although the content was transmitted to regions not reached by the original over-the-air signals). In affirming a preliminary injunction, the court disagreed with the analysis in Cartoon Network, claiming that its “focus on the uniqueness of the individual copy from which [the] transmission is made is not commanded by the statute.” Id. at 1144–45. The court concluded that the “[d]efendants’ unique-copy transmission argument based on Cablevision . . . is not binding in the Ninth Circuit.” Id. at 1146.

82. See Cartoon Network, 536 F.3d at 139.

83. The Second Circuit agreed with Aereo that the company did not publicly perform copyrighted works based on the reasoning of Cartoon Network because the system made a unique copy of the program from a user-specific antenna and transmitted the performance to only one Aereo customer. See WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 689–94 (2d Cir. 2013), rev’d sub nom. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

program.\textsuperscript{85} Notably, when the customer finished accessing the show, the antenna would be reallocated to another individual subscriber, who could then use it to receive its desired program. After selecting a particular program, a customer was given a choice. He or she could either request that the program be immediately streamed over the Internet to a personal device or instruct the system to save the program in a storage space dedicated to that customer so that it could be streamed at a later time. The parties did not ask the court to address whether the saved programs satisfied the conditions of fair use,\textsuperscript{86} but, under Cartoon Network's logic, the answer presumably would depend on the legality of the transmissions themselves.\textsuperscript{87}

The debate in the litigation essentially came down to one's conceptualization of the operation of the system. In Aereo's view, customers used uniquely allocated personal antennas located at Aereo's facility to retrieve publicly available, over-the-air television signals and then transmitted the programs to their own personal devices, typically so that they could watch them in private settings.\textsuperscript{88} Aereo's contribution to this process was entirely mechanical; it merely established a system and left it to the customers to operate it, just as Netcom did.\textsuperscript{89} Moreover, although customers could use the system unlawfully, such as by transmitting the programs to a public forum, Aereo's purpose was to facilitate private performances, and certainly a

\textsuperscript{85} The program was temporarily saved in a buffer file and transmitted to the customer a few seconds after the live broadcast to the viewer. If two or more customers requested to view the same show, Aereo would create separate buffer files for each customer and transmit the shows to the customers from their unique files. This distinguishes the circumstances from previous systems, such as Zediva's, in which transmissions were made from the same copy of the copyrighted work. The Supreme Court did not address whether the temporary copies that were made for the purpose of the transmissions satisfied the fair use criteria, presumably because it found the purpose of making the copies to be infringing.

\textsuperscript{86} See \textit{Aereo}, 134 S. Ct. at 2503.

\textsuperscript{87} If the customers have a legitimate right to access the broadcasts for live viewing, then they should be able to instruct Aereo's system to save them in a personal storage file for time-shifting. In \textit{Cartoon Network}, the court determined that Cablevision could mechanically make unique personal copies at the customers' direction of programming that the customers had legal rights to receive. The situation with Aereo logically is no different if the customers have legal rights to access and transmit the programs. On the other hand, if Aereo's customers do not have such access rights, then Aereo would be making the copies for a commercial objective that would harm the market value of the copyrighted works. Thus, making the reproductions would not satisfy the criteria of fair use. \textit{Cf.} UMG Recordings, Inc. v. MP3.com, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (MP3.com's act of copying CDs for transmission to established CD owners not a fair use because of commercial purpose and negative market effects).


\textsuperscript{89} See \textit{Aereo}, 134 S. Ct. at 2504; Brief for Respondent, \textit{supra} note 88, at 28.
substantial number of customers used it in that way.\textsuperscript{90} Thus, Aereo could not be liable for direct infringement of the public performance right.\textsuperscript{91} On the other hand, from the copyright owners’ perspective, Aereo, and not the customer, captured specific over-the-air television signals on its property and then retransmitted those signals to numerous unrelated people at many different locations over the Internet.\textsuperscript{92} In this way, Aereo’s actions fell squarely within the statutory definition of a public performance.

Despite Aereo developing a complex system that appeared to be under the complete control of customers, who used personal antennas to receive over-the-air broadcasts and then instructed the system to retransmit those broadcasts, the Supreme Court determined that Aereo’s behind-the-scenes technological devices nonetheless failed to make it any different than a traditional cable provider.\textsuperscript{93} The Court reached this conclusion after evaluating both the history of the public performance definition under the Copyright Act and the reasons that Congress amended that definition in 1976.

Prior to 1976, the Copyright Act gave copyright owners the exclusive right to perform dramatic works publicly and to perform nondramatic and musical compositions publicly for profit.\textsuperscript{94} Based on these provisions, in 1968, the Supreme Court held that community antenna television (CATV) systems did not perform copyrighted works by retransmitting over-the-air copyrighted broadcasts to customers within a local geographical area.\textsuperscript{95} The Court reasoned that since the CATV customers could legally use amplifying equipment to access the over-the-air signals, the CATV company did nothing wrong by, in

\textsuperscript{90} See WNET, 712 F.3d at 690 (stating that the potential audience of each Aereo transmission is the single user who requested the program); Brief for Respondent, supra note 88, at 28, (stating that Aereo believes that no actor that uses its system directly infringes).

\textsuperscript{91} See WNET, 712 F.3d at 696 (“Aereo’s transmissions of unique copies of broadcast television programs created at its users’ requests and transmitted while the programs are still airing on broadcast television are not ‘public performances’ of the Plaintiffs’ copyrighted works.”).


\textsuperscript{93} In reaching this conclusion, some of the Justices at oral arguments seemed to philosophically agree with a dissenter’s view from the Court of Appeals decision, who called Aereo’s approach a “Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.” WNET, 712 F.3d at 697 (Chin, J., dissenting); see, e.g., Katy Bachman, Supreme Court Weighs Whether Aereo Is Simply Circumventing Copyright Law, AdWEEK (Apr. 22, 2014), http://www.adweek.com/news/technology/supreme-court-weighs-whether-aereo-simply-circumventing-copyright-law-157181.

\textsuperscript{94} 17 U.S.C. § 1(c)–(e) (1964) (repealed 1976).

\textsuperscript{95} See Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400–01 (1968). The Supreme Court, in Aereo, called CATV systems the precursors of modern cable systems. See Aereo, 134 S. Ct. at 2504.
essence, providing that equipment for the benefit of those customers.\textsuperscript{96} In 1974, the Court reached the same conclusion for CATV providers servicing customers that lived hundreds of miles away.\textsuperscript{97} This time, the Court held that the CATV provider did not perform the works because it only chose the broadcast stations, and not the actual copyrighted works, that it provided to customers.\textsuperscript{98} Thus, the rulings established that once a broadcaster puts a signal into the public airwaves, anyone was free to facilitate viewing by members of the public.\textsuperscript{99}

According to the Court in \textit{Aereo}, Congress overruled these decisions in 1976 by amending the Copyright Act with the language that is still in effect today.\textsuperscript{100} The Court determined that under the new public performance clause, entities that act like CATV systems, including modern cable systems, publicly perform copyrighted works, even when they simply enhance viewers' ability to receive broadcast television stations.\textsuperscript{101} In the Court's view, this is exactly what Aereo was doing, although in a new technological way; therefore, it held that the public performance clause covered its operation. Without saying so directly, the Court clearly believed that Aereo was engaged in a clever trick and warned that, if it got away with it, all cable companies would quickly adopt the new delivery method to avoid paying copyright royalties, thereby thwarting Congress's intent when it passed the legislation.\textsuperscript{102} In response, the dissenters criticized the majority for condemning Aereo simply through "guilt by resemblance," with reasoning based on the shakiest of foundations.\textsuperscript{103}

The Court majority reached the right conclusion but, as the dissent noted, never directly established a coherent theoretical conceptualization to back it up even though some of its reasoning alludes to a proper framework. As mentioned, before 1976, the governing model of an over-the-air transmission was that it was one bulk public signal—a grand performance made to the public, so to speak—that anyone was free to view or assist others to view. The 1976 amendments, however, changed the scenario from a public model to a private \textit{geographic control} approach that treats an over-the-air transmission as conceptually divided into multiple signals that arrive separately and uniquely at each location that they touch and are

\begin{itemize}
\item \textsuperscript{96} See \textit{Fortnightly Corp.}, 392 U.S. at 399–400.
\item \textsuperscript{97} See \textit{Teleprompter Corp. v. Columbia Broad. Sys., Inc.}, 415 U.S. 394, 400, 412 (1974).
\item \textsuperscript{98} See \textit{id.} at 407–10.
\item \textsuperscript{99} See \textit{id.} at 408.
\item \textsuperscript{100} See \textit{Aereo}, 134 S. Ct. at 2505.
\item \textsuperscript{101} See \textit{id.} at 2506.
\item \textsuperscript{102} See \textit{id.} at 2509.
\item \textsuperscript{103} See \textit{id.} at 2515 (Scalia, J., dissenting). 
\end{itemize}
exclusively acquired by the owner or controlling occupant of that property (hereinafter called “the authorized recipient”).\(^{104}\) This means that if an authorized recipient of a broadcast signal on property A retransmits the signal to property B, then the transmission to property B is a performance even if the occupant of property B could have received the same original broadcast via an antenna on his roof. Also, if the authorized recipient on property A retransmits its signal to one or more locations so that the content can be viewed by unrelated members of the public, then that person publicly performs the underlying work.\(^{105}\) Taken together, this explains why cable companies, for instance, need permission from copyright owners to carry programming that is also aired on local broadcast television stations.\(^{106}\)

However, once the copyright owner authorizes the retransmission of the signal from property A to another particular geographic location, the authorized recipient at that other location obtains legitimate access to the copyrighted content encoded in the signal.\(^{107}\) That authorized recipient then performs, or displays, the work by showing the content on his property or retransmitting the signal to another location where individuals view the material.\(^{108}\) Assuming only family and friends watch the program on the property, then the performance is private, but if a larger audience views it, then it becomes public.\(^{109}\) And if the authorized recipient retransmits the signal to other locations, or lets others transmit that signal, then he or

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\(^{104}\) A controlling occupant of property would be someone who the property owner has authorized to access and exercise substantial control over the property. For instance, one who rents an apartment or automobile under typical terms would be controlling occupants.

\(^{105}\) If the authorized recipient allows an unauthorized recipient to access and retransmit the signal from its property, then the transmission will be treated as if the authorized recipient sent it. This is effectively what Aereo did when it allocated antennas on its property to its subscribers. See infra notes 123–27 and accompanying text.

\(^{106}\) Cable systems and satellite carriers may obtain permission to retransmit copyrighted content through private negotiations or through a compulsory license. See 17 U.S.C. §§ 111(a)(4), (c), 119 (2012).

\(^{107}\) Cf. Brief of Dish Network L.L.C. & Echostar Technologies L.L.C. as Amici Curiae in Support of Respondents at 42–46, Aereo, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1348475 (stating that once a transmission crosses the physical boundary of the subscriber’s door or the legal boundary established by the licensing framework, the particular public performance comes to an end). With a cable system, the authorized recipient is the subscriber at the location that houses the cable box.

\(^{108}\) See 17 U.S.C. § 101 (2012); Aereo, 134 S. Ct. at 2506 (stating that under the new copyright language, both the broadcaster and the viewer of a television program perform).

\(^{109}\) See § 101 (defining a public performance as one made at a place open to the public or where a substantial number of persons outside of a normal circle of a family and its special acquaintances is gathered).
she may be making public performances, depending on the set of people who view the content.\textsuperscript{110}

The geographic control approach clearly distinguishes the circumstances in \textit{Cartoon Network} from those in \textit{Aereo}. In \textit{Cartoon Network}, the copyright holders authorized Cablevision to transmit performances to customers in exchange for royalties. At that point, the customers gained legitimate access to the performances, and so, under \textit{Netcom}'s principles, Cablevision could provide equipment that mechanically followed the directions of those customers to make personal copies of those performances and transmit them without incurring direct liability. In contrast, the copyright holders never authorized Aereo to transmit performances from its facility to customers; therefore, Aereo was the only party that had legal access to those performances. The fact that Aereo designated temporary antennas to individual customers did not make the customers authorized recipients of the performance signals. For that to be the case, Aereo, at a minimum, would have had to allocate specific antennas to each subscriber through rental agreements that provided them rights to exercise substantial physical control over their particular assets.

The actual situation in \textit{Aereo}, of course, was drastically different. In fact, Aereo not only failed to provide its customers any kind of physical control over the company’s antenna assets but also did not even exclusively allocate particular antennas to individual customers. Rather, it simply allowed customers to use antennas on its property that were available for the duration of the shows that they wanted to watch.\textsuperscript{111} Thus, in reality, Aereo simply received the broadcast signals that the copyright owners sent to its property and then made those signals available to the public through an integrated web of antennas.\textsuperscript{112}

\begin{itemize}
\item[\textsuperscript{110}.] A public performance would result, for instance, if the transmission is (1) sent to a public facility where it is viewed by occupants, (2) sent to a place where it is viewed by a larger set of people than a normal circle of family and friends, or (3) sent to several locations that include people other than a normal circle of family and friends. See \textit{id}. The Copyright Act provides certain specific circumstances in which a public performance does not infringe copyrights. See § 111. For instance, one exception allows the management of a hotel, apartment, or similar facility to retransmit over-the-air signals to guests or residents at no charge. See § 111(a)(1).
\item[\textsuperscript{111}.] This process of increasing efficiency by transferring limited antenna resources to different customers based on current needs is reminiscent of the system used by Zediva. With Zediva, different members of the public shared the same DVD, while with Aereo, different members of the public shared the same antenna. See \textit{Warner Bros. Entm’t, Inc. v. WTV Sys., Inc.}, 824 F. Supp. 2d 1003, 1007 (C.D. Cal. 2011) (“[Zediva] customers do not have access to or control over a specific DVD or DVD player.”).
\item[\textsuperscript{112}.] Even if Aereo provided each subscriber the exclusive use of one particular antenna, it still would make public performances by allowing several unrelated customers access to the
A majority of the Court clearly agreed with the geographic control model but did not directly identify it in their opinion. For instance, the majority determined that the customers were not making personal transmissions from Aereo to their devices because, “neither the record nor Aereo suggests that Aereo’s subscribers receive performances in their capacities as owners or possessors of the underlying works.”\footnote{Aereo, 134 S. Ct. at 2510.} The Court continued that “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.”\footnote{Id.} Thus, the Court majority did recognize that Aereo’s customers did not gain legitimate access to broadcast signals acquired on Aereo’s property via temporary personal antennas.

Aereo could have appropriately followed the Cablevision model if it had designed the system to use the subscribers’ own antennas, located on the subscribers’ premises to receive the signals. The customers then could have instructed Aereo’s system to transmit those signals back to Aereo and save the signals in personal storage space dedicated to that customer or retransmit those signals to a customer’s personal viewing device over the Internet. Of course, with this setup, the customers might not enjoy the same quality of reception as they could get via the antennas located on Aereo’s well-situated property, but, as noted in the discussion of the On Command hotel video system, copyrights are intended to provide certain incentives related to convenience.\footnote{For discussion of On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991), see supra notes 38–40 and accompanying text.} Still, with this system, they could save their lawfully accessed programs on a remote DVR and watch them on a personal viewing device other than the television.

The three dissenting judges in \textit{Aereo}, unfortunately, fell for the smokescreen raised by Aereo and its amicus curiae supporters, who clouded the analysis with faulty arguments about volitional programs, or the signals containing the programs, from its property. This would be no different than a public facility that shows the same program on multiple screens, which are each hooked up to its own separate antenna. The facility performs or displays the works publicly, even if the customers are given complete control to select the channels that they wish to watch on the facility’s individual sets, since the performances are made available “at a place open to the public.” § 101. Indeed, based on the logic of \textit{Aveco}, the facility would perform the works publicly even if each television was housed in a private room that could only be occupied by a few friends or family members. \textit{See} Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62–63 (3d Cir. 1986); \textit{infra} notes 128–30 and accompanying text.
The dissent believed that Aereo simply provided a mechanical system and made it available to customers, who then could use it for legal or illegal ends. According to the dissent, the broadcasters, not Aereo, chose the content that was available on its system. Thus, the operation lacked the kinds of human interactions and decisions required by video-on-demand services, such as Netflix. The dissent also noted that Aereo did not choose the content that was transmitted from its facility to customers, since the customers made these selections themselves. For this reason, Aereo did not have the necessary volitional conduct to hold it directly responsible for the transmissions. Rather, the customers were the impetus behind them and, accordingly, only the customers should be held accountable for direct infringements, such as when they transmit the programs to public settings. Aereo, on the other hand, could only be liable as a contributory infringer, which depends on other factors, such as its knowledge about specific public performances and an ability to prevent them.

The dissent supported its conclusion by relying on the traditional analogies to operators of copy machines that rent them on

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117. See Aereo, 134 S. Ct. at 2514 (Scalia, J., dissenting).

118. See id.

119. See id. at 2513 (“[S]election and arrangement [of content by video-on-demand services] constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.”).

120. See id. at 2514 (stating that with Aereo’s system, “subscribers call all the shots”).

121. See id. at 2513 (“Most of the time that issue [of direct infringement] will come down to who selects the copyrighted content: the defendant or its customers.”).

122. See id. at 2514, 2517. Contributory infringement is established where the defendant, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. See, e.g., Gershwin Pub’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2nd Cir. 1971). In Netcom, the court indicated that an ISP could be liable for contributory infringement if it had knowledge that specific customers were using its system to infringe copyrights and it had the ability to prevent them. See Religious Tech. Ctr. v. Netcom On-line Commc’ns, 907 F. Supp. 1361, 1373–75 (N.D. Cal. 1995). One also can be held responsible for contributory infringement by providing the tools used for infringement and encouraging customers to use them for those illegal ends. See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005).
a per-use basis to customers. Specifically, it claimed that Aereo was akin to a copy shop that provides its patrons a library card (the antenna), which enabled them to obtain freely available broadcasted content. The customers use the card to choose the content and then instruct the system to take the potentially infringing action. In either case, the operator is passive and, so, does not have the requisite volitional conduct to be held directly accountable.

Although this sounds coherent and consistent, the dissent’s reliance on the copy shop analogy is completely misplaced. First of all, Aereo’s customers did not come to Aereo with their own independently acquired materials, whether they were obtained from a public library or elsewhere. Rather, Aereo gave them access to copyrighted materials on its property that Aereo, as the property owner, had no right to show or transmit to the public. In effect, Aereo gave the copyrighted content to individuals and had them do what the company would not have been allowed to do itself. Hence, in reality, the customers acted more like agents of Aereo who collectively participated in a scheme that resulted in public performances of the copyrighted materials under the umbrella of the company. The volitional conduct, therefore, occurred when Aereo chose to give subscribers access to content that it had no right to offer.

Even allowing for the dissent’s copy shop analogy, the library card concept is clearly not the right model. Rather, Aereo was more like a CD rental shop that makes CD burners available within the shop. Since it is unlawful for commercial businesses to rent CDs to customers due to the likelihood that they will make infringing reproductions, it follows that the CD shop should also be directly responsible when the customers use its machines to accomplish that illegal end. Sure, the customers select the content and work the machines, but the copy shop was not allowed to give them the content for the reproduction in the first place. This certainly is much closer to what Aereo did than hypothetically providing its customers a library card to access publicly available content.

123. See Aereo, 134 S. Ct. at 2513.
124. See id. at 2514.
125. See id.
127. As discussed earlier, direct liability arises when the machine owner engages in illegal conduct with a sufficient nexus to the copying that it is appropriate to conclude that the machine owner trespassed on the domain of the copyright owner. See supra notes 69–71 and accompanying text.
In truth, though, the copy shop analogy does not depict the appropriate counterpart in the physical world. Rather, it is more accurate to compare Aereo to a facility that receives all the over-the-air television signals on its property and then links numerous televisions to separate antennas on the roof. As part of its service, Aereo provides its customers telescopic viewing tubes that allow them to zero-in and view designated screens at Aereo’s facility, which they can tune to the channels they want to watch from their homes. As with Aereo’s technical system, the broadcasters make the programs available and the customers select the content. Yet, it should be obvious that Aereo has done nothing more than create a public viewing facility very much like the one in Aveco, which the court determined was a direct infringer.128 One could also analogize to a very large sports bar where all the patrons are watching their favorite teams on numerous individual televisions in private rooms within the facility.129 No one would question that the bar is making public performances, and the same conclusion obviously applies to Aereo.130

The dissent laments that the Court majority “provides no criteria for determining when its cable-TV-lookalike rule applies.”131 It then questions whether Aereo might legally offer other arrangements that are not like cable TV, such as a customer-controlled delayed transmission service, because cable TV only provides live television.132 If the Court had definitively made its decision in terms of geographic control attributes, then the dissent would not have had the opportunity to sarcastically wonder what the outcome to its hypothetical worry would be, since the service would certainly be illegal.133 Using this straightforward approach also cleanly disarms one of the latest copyright salvos that Fox Communications has dropped on Dish Network’s new array of services, which it incorrectly claims is supported by the Supreme Court’s decision in Aereo.134

129. As made clear in Aveco, On Command, and Redd Horne, it does not matter if the patrons in the sports bar watch the programming within one large open room or in individual private viewing areas, as long as the overall facility is open to the public.
130. Some public facilities, including sports bars, may be subject to an exception that allows them to show live television programs, depending on their physical size, the number and size of the televisions, whether they serve food or drink, and as long as they do not charge customers to watch the programs. See 17 U.S.C. § 110(5) (2012).
132. See id. at 2516–17.
133. Since the customers would not have lawful access to the signals received on Aereo’s property, Aereo would be responsible for making reproductions on DVRs or performing the works publicly when the signals are transmitted to viewers.
134. See Avery, supra note 6.
V. FOX MAY BEAT DISH SOMEWHERE BUT NOT DISH ANYWHERE

Recently, Dish Network has introduced many new technological innovations that allow its subscribers to watch programs carried by Dish in more convenient ways. In response, Fox Broadcasting has taken aim at several of these, asking federal courts in California to enjoin the services on the grounds that they infringe its copyrights and violate contractual provisions. In particular, Fox is upset with: (1) *Prime Time Anytime*, which allows subscribers to automatically save all prime time programming aired by four networks on a home DVR; (2) *AutoHop*, which allows subscribers to easily skip commercials from the *Prime Time Anytime* programs; (3) *Dish Anywhere*, which allows subscribers to watch Dish Channels live on personal devices; and (4) *Hopper Transfers*, which allows subscribers to copy Dish programming on personal devices as long as they remain customers of Dish. To Fox’s dismay, the California district court refused to issue a preliminary injunction for any of these services, and the Ninth Circuit affirmed those orders. Thereafter, in January 2015, the district court granted Dish’s motions for summary judgment on the copyright claims. Thus, Fox faces an uphill battle if it is to get relief from the courts. As we shall see, some of the services may indeed raise difficult copyright issues that could be tough for the courts to ultimately tackle. However, despite Fox’s attempt to tar it with the same brush as Aereo, *Dish Anywhere* is the application that is easiest to defend in light of the Supreme Court’s ruling.

135. See, e.g., Holman W. Jenkins, Jr., *Dish Takes Aim at the Cable Bundle*, WALL ST. J., Jan. 17, 2015, at A13. In addition to the services discussed in this section, Dish also recently unveiled Sling TV, an Internet streaming service that delivers content with the authority of participating networks, such as ESPN, CNN, TNT, and TBS, among others, to Internet devices for twenty dollars per month. For more information on the service, see Sling TV, https://www.sling.com/ (last visited Apr. 11, 2015).

136. See Fox Broad. Co., Inc. v. Dish Network, LLC, No. CV 12-04529 DMG(SHx), 2013 U.S. Dist. LEXIS 187499, at *2 (C.D. Cal. Sept. 23, 2013); Fox Broad. Co. v. Dish Network, LLC, 905 F. Supp. 2d 1088, 1092 (C.D. Cal. 2012), aff’d 747 F.3d 1060 (9th Cir. 2014). Fox owns the copyrights to several of the shows that it airs, such as *The Simpsons* and *Family Guy*. The contract claims are not discussed in this article.

137. See Fox, 2013 U.S. Dist. LEXIS 187499 at *2–8; Fox, 905 F. Supp. 2d at 1092–96.


139. There is significant speculation that the parties will now settle the litigation. See, e.g., Eric Gardner, *Fox, Dish Agree to Pause Litigation over Ad-Skipping DVR*, HOLLYWOOD REP. (Jan. 16, 2015), http://www.hollywoodreporter.com/thr-esq/fox-dish-agree-pause-litigation-764331.
A. Prime Time Anytime

With *Prime Time Anytime*, customers can push a button that, by default, records all prime time programming on all of the four major networks and saves those programs for eight days on the at-home DVR system provided by Dish.\(^{140}\) After activating the button, the subscribers are provided a menu through which they can disable recordings of particular networks on specified days of the week and can reduce the time that programs are saved.\(^{141}\) Subscribers also have the option to save a broadcasted program for a longer period of time by instructing the system to copy the show from the DVR disk space allocated for *Prime Time Anytime* programming to the DVR disk folder otherwise used to save content. With *Prime Time Anytime*, Dish made certain predetermined automatic choices, such as fully recording shows that were at least half completed by the end of the prime time window and altering the prime time window during special events, such as the Olympics.

Fox argues that by preselecting certain options, Dish is engaged in volitional conduct and should be directly liable as a commercial establishment for making unauthorized reproductions of its copyrighted content.\(^{142}\) As with so many new technological innovations, including Aereo, the notion of volitional conduct rears its ugly head and becomes the determining factor between legal and illegal conduct. If Dish does not have volition, then it is only subject to contributory liability, which in this instance insulates it from wrongdoing.\(^{143}\) Unlike with Aereo, though, Dish’s customers actually

\(^{140}\) The networks are NBC, ABC, CBS, and Fox. Prime time programming typically is 8:00–11:00 PM Eastern Standard Time and Pacific Standard Time, and 7:00–10:00 PM Mountain Standard Time and Central Standard Time.

\(^{141}\) The customer has the option to save shows for two to eight days.

\(^{142}\) *Fox*, 905 F. Supp. 2d at 1099–102. If Dish is found directly liable, it is very unlikely that it could benefit from a fair use defense, even assuming that most customers time-shift the recorded programs, because it has a commercial purpose and does not transform the copyrighted content. For a similar scenario, see UMG Recordings, Inc. v. MP3.com, 92 F. Supp. 2d 349, 352–53 (S.D.N.Y. 2000) (finding MP3.com did not have a fair use for reproducing music, even though customers used the service to listen to music that they had already purchased on CDs).

\(^{143}\) Since the system is devised to save programs for fewer than eight days, then customers will make a substantial number of recordings for time-shifting, which is a fair use. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–55 (1984). The provider of technology typically is not liable for contributory infringement when there are substantial current or potential noninfringing uses of the technology and the provider has no ability to prevent illegal uses by customers. *See id.* at 442; *Religious Tech. Ctr. v. Netcom On-line Commc’ns*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995). This is qualified when the provider’s purpose is clearly to facilitate infringement, see Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005), but that does not apply to Dish because it actively limits the recording times to a period typically associated with personal time-shifting, which is a lawful fair use.
have lawful access to the copyrighted content; therefore, the arguments raised in the Aereo dissent provide legal cover to Dish’s operations. Dish has provided a totally automated user-controlled system for which the customers choose the content.144 In contrast with On Command, where the hotel selected and loaded videotapes into its own machines and simply transmitted the movies to guests without giving them any control over the playback functions, Dish is doing nothing more than facilitating actions, at its customers’ discretion, that the customers already could choose to do with content that the copyright owners had previously authorized them to view.

In addition, the dissent’s appeal to the copy shop analogy provides especially useful insights, since the accusation involves reproduction and not performance.145 Indeed, the wrongdoing that Fox accuses Dish of committing is like identifying a copy shop owner who preselects certain parameters of the machine, such as paper size and orientation, which can be changed by users via a menu of choices. Clearly, predetermining these options for the convenience of consumers does not give rise to volitional conduct, and the same can be said for how Dish set up Prime Time Anytime. This is why the district court and Ninth Circuit both concluded that Fox had not established a likelihood of success on the merits in the infringement suit and, consequently, refused to issue a preliminary injunction.146 It also explains why the district court then granted Dish’s motion for summary judgment.147 Even based on the evaluation of volitional conduct by the dissenting Supreme Court justices in Aereo, this conclusion is unquestionably correct.

B. AutoHop

The debate over the AutoHop feature, which allows viewers to effectively skip over commercials, raises more difficult issues that cannot be resolved by reference to the Aereo decision.148 To create AutoHop capabilities, Dish employees watch Prime Time Anytime programming the night they are aired and create a file that marks the

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144. According to the dissent in Aereo, the most important factor in addressing volitional conduct is “who selects the copyrighted content.” Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2513 (2014) (Scalia, J., dissenting).

145. See id.

146. See Fox, 905 F. Supp. 2d at 1102, 1111, aff’d 747 F.3d at 1068, 1073.


148. Although the controversy over AutoHop is outside the direct scope of this Article, it is important to acknowledge the parameters of the debate to give context to the breadth of the disputes that separate the parties.
beginning and end of commercials. This file is transmitted to customer DVR boxes the next morning and allows subscribers to “hop over” commercials from the Prime Time Anytime programming that they reproduced on their DVRs the night before. The original copies of the entire programs remain unaffected and users can watch the commercials if they wish. AutoHop simply instructs the DVR where to stop and restart the content.

Since Dish does not make the reproductions of the copyrighted programming, Dish can only be liable for distributing the commercial-skipping files if the company acts as a contributory infringer. The Supreme Court determined in Sony that individuals are able to legally make temporary copies of television programming for the purposes of time-shifting because the reproductions are a fair use. Thus, if you look at the glass one way, AutoHop is simply a tool that customers can apply to prevent them from viewing portions of legally reproduced content. In this way, it does not implicate any copyright privileges, just as providing eyeshades would not. In fact, Congress has demonstrated that it approves of technologies that automatically skip preselected content with the passage of the Family Movie Act, which sanctions the distribution of filters that edit content during the playback of movies.

On the other hand, when customers are provided with AutoHop’s capabilities, then they may be motivated to make copies on their DVRs with Prime Time Anytime not simply for time-shifting, but also, or even primarily, so that they can watch their favorite prime time shows without commercials. This, in turn, may result in far more damaging market effects on the copyright owners than the consequences from mere time-shifting, thereby decreasing the potential applicability of fair use protection.

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149. The California district court provides a complete explanation of AutoHop’s operation. See Fox, 905 F. Supp. 2d at 1094–96.

150. Dish also makes copies of the copyrighted broadcasts to test the accuracy of the AutoHop file markers. The district court determined that these “quality assurance” copies are not protected as fair use, but did not issue a preliminary injunction because Fox did not sufficiently demonstrate a likelihood of irreparable harm. See id. at 1102–06, 1109–11. The Court of Appeals affirmed the denial of the preliminary injunction. See Fox Broad. Co. v. Dish Network LLC, 747 F.3d 1060, 1072–73 (9th Cir. 2014).

151. The Supreme Court’s decision only evaluated copies of free over-the-air programming, but copyright owners have not challenged copies of content distributed by cable or satellite for the purpose of time-shifting. For instance, the copyright owners did not sue Cablevision for contributory infringement. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 124 (2d Cir. 2008).

At the preliminary injunction stage, the Ninth Circuit ruled that Fox did not own the copyrights to the commercials and therefore had no copyright interests in the material skipped by customers. Later, the district court found that Fox did, indeed, own the copyrights to some of the commercials, but nonetheless ruled that AutoHop was legal, since ad-skipping does not involve unauthorized copying or distribution. As just noted, one might take issue with this conclusion because the customer’s initial copy may not be a fair use when made for the purpose of skipping advertisements. Also, even if Fox does not own the copyright to the advertisements, it still might have copyright interests in compilations, which include the union of its copyrighted programs with the advertising content. If this were the case, then reproductions made for the purpose of removing portions of that content, even if developed by others, might then diminish the economic value of Fox’s entire copyrighted compilation.

C. Dish Anywhere

Dish Anywhere provides subscribers with significant flexibility to remotely watch live or recorded programs anywhere in the world using technology called a “Sling” that streams content from audiovisual equipment via the Internet. Along with its DVR

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153. See Fox, 747 F.3d at 1068–69. According to the court, “commercial-skipping does not implicate Fox’s copyright interest because Fox owns the copyrights to the television programs, not to the ads aired in the commercial breaks. If recording an entire copyrighted program is a fair use, the fact that viewers do not watch the ads not copyrighted by Fox cannot transform the recording into a copyright violation.” Id.


155. For Fox to have rights to the compilation, it must exercise creativity in the selection and arrangement of its copyrighted work and the commercials that are aired with it. See, e.g., Feist Publ’ns, Inc. v. Rural Telephone Serv., 499 U.S. 340, 348 (1991); U.S. COPYRIGHT OFFICE, CIRCULAR 14, COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (stating that compilations of preexisting works may be copyrightable if the materials are selected, coordinated, or arranged in ways that demonstrate originality).

156. Cf. In re Aimster Copyright Litig., 334 F.3d 643, 647 (7th Cir. 2003) (stating that making copies for the purpose of fast-forwarding through commercials amounts to creating an unauthorized derivative work).

157. Sling Media owns federal trademark registrations to the word “Sling” as applied to a variety of hardware, software, and services associated with the streaming of audio and video content to network devices. SLING, Registration No. 3,719,986; SLING, Registration No. 3,851,688. Sling Media became well known for introducing the Slingbox, which is used to stream live television to remote devices via the Internet. EchoStar, the satellite company that also operated Dish Network, acquired Sling Media in 2007. See Laura Holson, EchoStar to Acquire Sling Media, N.Y. TIMES (Sept. 26, 2007). Soon thereafter, EchoStar spun off Sling Media and its other set-top box businesses to a new company called EchoStar Holding Corporation. The parent company, which then primarily consisted of the satellite TV broadcasting business, changed its name to Dish Network Corporation. See Erica Org, EchoStar Now Called Dish Network Spins Off
cap
abilities, Dish’s home configurations include several separate
tuners as well as a Sling.158 Since Dish provides more than one tuner,
individuals within the house can use a home network to watch
different programs on separate televisions, while someone else can use
the Sling to watch a live broadcast from another location using a
personal viewer with Internet access, such as an iPad, smart phone, or
laptop.159 The Sling also allows an individual to stream any program
that was previously saved on the DVR to a remote personal device via
an Internet connection.

In September 2013, the district court, without addressing the
likelihood of success on the copyright claim, refused to issue a
preliminary injunction because Fox had not demonstrated irreparable
harm.160 In its appeal to the Ninth Circuit, Fox reportedly asked the
court to reconsider this ruling in light of the Supreme Court’s Aereo
decision, claiming in its brief that Dish “engages in virtually identical
conduct when it streams Fox’s programming to Dish subscribers over
the Internet . . . .”161 The Ninth Circuit, though, affirmed the ruling of
the district court on the irreparable harm issue in July 2014.162
Subsequently, the district court granted Dish’s motion for summary
judgment.

Although Fox may have legitimate contract claims regarding
Dish Anywhere, it will undoubtedly fail with its allegations that the
service violates public performance rights, despite its recent victory in
Aereo.164 Drawing from the Aereo decision, Fox undoubtedly believes

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158. The main set-top box includes three separate tuners, but customers can add more
tuners for use with home networking systems using devices called “Super Joeys.”

159. The home network may be supported by Super Joeys, which include additional
tuners that allow individuals within the home to simultaneously watch even more channels and
record them to the DVR.

160. See Fox Broad. Co., Inc. v. Dish Network, LLC, No. CV 12-04529 DMG(SHx), 2013

161. Avery, supra note 6; see Fox Broad. Co. v. Dish Network, LLC, No. CV 12-04529
that the Supreme Court’s recent decision in American Broadcasting Companies, Inc. v. Aereo,
Inc. is a game-changer that governs the outcome of it copyright claims in this case.”); Cyrus
Farivar, Dish Anywhere Streaming Stays Alive, Despite Fox’s Win Over Aereo, ARS TECHNICA


164. Fox claims that Dish violates the Retransmission Consent Agreement, which among
other things, contains a prohibition on authorizing others to retransmit Fox broadcasts. Fox
Broad. Co. v. Dish Network LLC, 747 F.3d 1060, 1070 (9th Cir. 2014); Fox, 2013 U.S. Dist.
LEXIS 187499, at *8–11. In 2015, the district court denied both parties’ motions for summary
judgment. See Fox, 2015 U.S. Dist. LEXIS 23496, at *55.
that Dish is behaving like a cable company by transmitting the same programming to multiple individuals without paying additional license fees. Specifically, Fox wants the courts to recognize that, even though Dish Anywhere appears to give customers autonomy over the content, Dish is making public performances through its rented machinery that simultaneously transmits the same programs from set-top boxes to viewers around the world. Unfortunately, the Supreme Court invited this meritless argument by failing to articulate the geographic control foundation in the Aereo ruling.

In reality, the differences between Aereo and Dish Anywhere are striking, when considering geographic control attributes. Aereo provided its customers public access to copyrighted content on its property without having authority to do so. Dish, on the other hand, delivers content to set-top boxes controlled by its subscribers with authority from copyright holders, including Fox. Thus, unlike Aereo, Dish’s role with its automated system is comparable to the operators in Netcom and Cartoon Network, which mechanically followed instructions to accomplish tasks on copyrighted materials that customers already possessed or legally controlled.\(^{165}\) For this reason, the notion of volitional conduct becomes much more relevant. In fact, Dish’s customers use Slings to transmit copyrighted content to devices in other locations totally at their own bidding and without any active involvement by Dish or its personnel. Thus, Dish can be directly liable only if there are few noninfringing ways that customers can use the Slings to transmit copyrighted content or if Dish’s purpose is to encourage customers to publicly perform copyrighted works.\(^{166}\)

In this instance, each individual customer takes actions with the separate signals that Dish transmits exclusively to the set-top box under his control. Thus, the subscribers are not sharing signals and

\(^{165}\) In Netcom, customers used the system to copy and transmit materials that they already possessed. Religious Tech. Ctr. v. Netcom On-line Commc’ns, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (“Netcom did not take any affirmative action that directly resulted in copying plaintiffs’ works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers . . . ”). In Cartoon Network, the customers had legal access to and the right to control the copyrighted works. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 132 (2d Cir. 2008). Accordingly, the court determined that Cablevision’s RS-DVR system was sufficiently close to the operation of an ISP or copy shop—where all copied content is supplied by the customers themselves—that the customers were the people who made the copies when determining liability. See id.

\(^{166}\) Dish may violate its contracts with Fox by providing tools that enable customers to transmit content to personal devices. This has no bearing on the determination about copyright infringement, however. For instance, suppose a copy shop owner promised a book author that he would stop customers from copying any portions of the book. If a customer copied a small portion for research in a way that satisfied fair use, the copy shop owner would not become a copyright infringer due to violation of the contract. Rather, the wrong would be totally within the realm of contract principles.
retransmitting content to different people from the same source. For this reason, *Dish Anywhere* cannot be likened to Zediva or the On Command hotel movie service. Rather, with *Dish Anywhere*, each customer is transmitting independent content from a personal set-top box or personal DVR to a device in another location. As long as that transmission is not to a public facility or otherwise to the public, then by the express terms of the Copyright Act, the transmission does not violate a copyright owner’s exclusive right to perform publicly. Furthermore, if subscribers use Slings to retransmit live programming to their own personal devices while they are away from home, then the transmissions are private and noninfringing. Since this is certainly a major, noninfringing way that subscribers use Slings, and Dish markets the service for just this kind of convenience, Dish is not subject to contributory liability just because some customers may use their Slings in ways that amount to public performances.

Although Dish does not directly infringe public performance rights through *Dish Anywhere*, some of the ways that customers might use Slings could raise some interesting copyright issues. For instance, suppose a Dish customer gives his *Dish Anywhere* password to a friend who has not contracted with a cable or satellite company for television services. Typically, an individual with only one set-top box who uses a Sling to share live content with a friend must watch the same program at home as the one transmitted to the associate. This, at least, partially limits the freedom that the friend may have when the paying subscriber is also watching TV. However, since the Dish set-top box has three tuners, the friend can watch anything available through the subscription even while the subscriber is watching another program. Also, the friend can watch programs that the subscriber previously saved on the DVR while the subscriber watches live TV. Thus, the friend can essentially avoid paying fees to cable and satellite companies and instead watch copyrighted content for free, even when

167. Although a customer that streams content from the DVR to a personal device does not infringe public performance rights, it is possible that the initial reproduction would not be considered a fair use if it were made for the purpose of watching the programming in another location. The Supreme Court in *Sony* only addressed reproductions that were made for the purpose of watching content at a later time at home. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 425 (1984) (stating that the case concerned the private, home use of video tape recorders). The Court determined that the activity was a fair use largely because the copyright owners could not demonstrate any concrete financial harm. See id. at 450–54. Copyright owners might be able to demonstrate greater market effects when customers make copies at home for the purpose of watching the content at a different place via the Internet using a Sling.


169. *See Fox, 2013 U.S. LEXIS 187499, at 3.*
the acquaintance is not within the location that is controlled by the subscriber and houses the set-top box.

This, perhaps, is not what Congress anticipated when it revised the definition of a public performance in 1976. The legality, though, comes down to a statutory interpretation of the phrase “to the public.” As previously noted, the Supreme Court already concluded in Aereo that the phrase is controlled by the definition of a “public place,” noting that “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.” 170

This may seem like the wrong result; it may even feel like stealing. Nevertheless, due to the Supreme Court’s interpretation, the legality of the practice is now firmly cemented, unless Congress acts to change it. For instance, as mentioned earlier, the notion of “to the public” could be more specifically defined to cover all transmissions outside of the property to anyone other than the subscriber or legal possessor of the copyrighted content. 171 Although such an approach would prohibit the suspect transmissions, it nevertheless may be more limiting than appropriate. Instead, relying on geographic control attributes, a better solution might be to reword the phrase “to the public” so that it only applies to those who do not reside at the location where the set-top box is situated. This typically would allow children, spouses, or co-renters to access content that they otherwise could view at home, but prevent other members of the public from seeing those programs for free.

D. Hopper Transfers

The final point of contention involves Hopper Transfers, which is a service that allows customers to copy recordings made on their DVRs to mobile devices, such as an iPad, via a home wireless network. By using this service, Dish subscribers can watch recorded programs even when they do not have access to the Internet, such as when travelling on a plane. Although at first glance one might think that Hopper Transfers should be treated the same as Dish Anywhere, this may not be the case. The Copyright Act specifically provides that copyright owners do not have the right to prevent private transmissions of displays or performances to other locations, which protects many users of Dish Anywhere. 172 Hopper Transfers, though,

171. See supra note 18 and accompanying text.
172. The Copyright Act only provides copyright owners exclusive rights to perform or display works publicly. See 17 U.S.C. §§ 106(4)–(5) (2012). Thus, subscribers who use Dish
require reproductions of copyrighted material and, so, are infringing unless they fall within an exception, which in this case must be fair use.\textsuperscript{173} This, of course, raises the persistent question whether copying for personal space-shifting is a fair use. Although the appellate courts have never directly addressed the issue,\textsuperscript{174} the Ninth Circuit once indicated in dicta that the practice “is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.”\textsuperscript{175} On the other hand, the Copyright Office has made it clear in several rulemaking actions that it does not accept that this conclusion is necessarily correct, especially with regard to motion pictures.\textsuperscript{176} As with the Supreme Court’s decision in \textit{Sony} regarding time-shifting, the key factor in the analysis will be whether Fox can demonstrate that \textit{Hopper Transfers} will diminish economic opportunities for it to earn revenue, such as through digital download services.\textsuperscript{177} If Fox and

\textit{Anywhere} to retransmit live transmissions so that they can personally watch them in other locations definitely do not infringe performance rights. Of course, if the retransmissions are made to public facilities, then the customer has made an infringing use. See 17 U.S.C. § 101 (2012) (definition of performing a work publicly). Also, it may not be legal for subscribers to make reproductions on the DVR for the purpose of watching the content in another location. See \textit{supra} note 167 and accompanying text.

\textsuperscript{173} See 17 U.S.C. § 107 (2012) (“Notwithstanding the exclusive rights provided in section 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”). The Copyright Act provides several other more specific limitations on copyright owners’ exclusive rights, see 17 U.S.C. §§ 108–22 (2012), but they do not apply to individuals making reproductions to facilitate the viewing of copyrighted materials on other devices or in other locations.

\textsuperscript{174} The plaintiffs in the Cablevision litigation did not challenge whether it was legal for Cablevision’s customers to make unique remote copies for the purpose of time-shifting content so that they could watch programming later at the original locations housing the cable boxes. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008) (“[If the customers make the copies,] Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by plaintiffs.”). The court noted that its holding does not generally permit content delivery networks to avoid all copyright liability by giving their subscribers the capacity to make their own individual copies of copyrighted content, and that it did not address the potential for liability as a contributory infringement under these circumstances. See id. at 139–40.

\textsuperscript{175} Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999). The Ninth Circuit was specifically discussing the Audio Home Recording Act, which amended the Copyright Act to further protect digital musical recordings, so the statement may only be relevant to space-shifting of music. See id. However, the court did also refer to \textit{Sony}, which addressed time-shifting of movies, as a point of comparison when it made the statement. See id.


\textsuperscript{177} In \textit{Sony}, the Supreme Court stated, “[a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.” Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). This means that although the defendant raises fair use as an affirmative defense, the burden nevertheless shifts to the plaintiff to prove economic harm.
Dish do not settle their differences, this litigation may finally give the courts the opportunity to conclusively rule on the legality of reproductions for personal space-shifting, a practice so many people now take for granted.\textsuperscript{178}

VI. CONCLUSION

The Supreme Court reached the correct decision in \textit{Aereo}, but it so greatly feared how its ruling might affect other technologies that it failed to provide almost any meaningful guidance at all.\textsuperscript{179} Although the Court noted with understated subtlety that those making personal transmissions must be possessors of the copyrighted works, it never fashioned the argument within a meaningful framework and instead rested on the notion that Aereo simply looked like cable. This Article demonstrated that the Supreme Court could have provided more substance to its decision by evaluating public performance rights through the lens of geographic control attributes. Had the Court done so, it would have been better able to address the dissent’s confusion over volitional conduct. It also would have given much needed guidance to companies developing convenient new technologies, such as those recently introduced by Dish, and to district courts that must analyze these complex questions.

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