

1 IN THE SUPREME COURT OF THE UNITED STATES

3 AMERICAN BROADCASTING :

5 Petitioners : No. 13-461

7 AEREO, INC., FKA BAMBOOM :

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11 Tuesday, April 22, 2014

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:26 a.m.

17 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf
18 of Petitioners.

20 Department of Justice, Washington, D.C.; on behalf of
21 the United States, as amicus curiae, supporting
22 Petitioners.

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1 P R O C E E D I N G S

2 (11:26 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 13-461, American Broadcasting Companies v.
5 Aereo.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 Aereo's business model is to enable
12 thousands of paying strangers to watch live TV online.
13 Aereo's legal argument is that it can make all of that
14 happen without publicly performing. But Congress passed
15 a statute that squarely forecloses that rather
16 counterintuitive submission. Because although the
17 Internet and the thousands of mini antennas are new, the
18 basic service that Aereo is providing is not materially
19 different from the service provided by the cable company
20 before this Court in 1969.

21 JUSTICE SOTOMAYOR: Why aren't they cable
22 companies?

23 MR. CLEMENT: They're not --

24 JUSTICE SOTOMAYOR: I'm looking at the --
25 everybody's been arguing this case as if for sure

1 they're not. But I look at the definition of a cable
2 company, and it seems to fit. A facility located in any
3 State. They've got a -- whatever they have -- a
4 warehouse or a building in Brooklyn, the -- that
5 receives signal transmissions or programs broadcast by
6 television broadcast stations. They're taking the
7 signals off of the --

8 MR. CLEMENT: They're taking the signals,
9 right.

10 JUSTICE SOTOMAYOR: I'm sorry, they are.
11 Makes secondary transmissions by wires, cables, or other
12 communication channels. It seems to me that a little
13 antenna with a dime fits that definition. To
14 subscribing members of the public who pay for such
15 service. I mean, I read it and I say, why aren't they a
16 cable company?

17 MR. CLEMENT: Well, Justice Sotomayor, a
18 couple of things. First of all, I mean, I think if
19 you're -- if you're already at that point, you've
20 probably understood that just like a cable company,
21 they're public -- they're publicly performing and maybe
22 they qualify as a cable company and maybe they could
23 qualify for the compulsory license that's available
24 to cable companies under Section 111 of the statute.

25 JUSTICE SOTOMAYOR: But this gets it

1 mixed up. Do we have to go to all of those other
2 questions if we find that they're a cable company? We
3 say they're a capable company, they get the compulsory
4 license.

5 MR. CLEMENT: Well, no. There's lots of
6 conditions on the compulsory license. And I think the
7 first place -- the reason that we haven't been debating
8 about whether they're a cable company is because they
9 don't want to be a cable company. They have a footnote
10 in the red brief that makes it clear. They are not a
11 cable company in their view. They don't want to be a
12 cable company. And I think that's because coming with a
13 cable company, it might potentially get you into the
14 compulsory license, but it brings with it a lot of
15 obligations to come with being a cable company --

16 JUSTICE BREYER: Yes. But that's why they
17 don't want it.

18 MR. CLEMENT: Exactly.

19 JUSTICE BREYER: That isn't the question.

20 MR. CLEMENT: Well, here's the other thing
21 is I think --

22 JUSTICE SOTOMAYOR: The question is are
23 they?

24 MR. CLEMENT: I don't think they are.
25 That's really ultimately a question under the Federal

1 Communications Act. But here's why, if I could -- I
2 think -- and Mr. Frederick will certainly speak to this if --
3 if you want him to. But I think the reason they don't
4 want to be a cable company is because I think their
5 basic business model would not allow them to qualify
6 with compulsory license anyways.

7 JUSTICE BREYER: But I'd still like to know
8 the answer to the question, in your opinion. And, of
9 course, if you want a reason, I'll give you my reason.

10 If we take the public performance, maybe we run
11 into what Professor Nimmer saw as a problem. Why isn't
12 what used to be called a phonograph record store that
13 sells phonograph records to 10,000 customers giving a public
14 performance? It seems to fall within that definition.
15 But if it is, there's no -- no first sale doctrine and
16 it's a big problem. So we could avoid that problem.

17 Now, that's why I'm very interested in the
18 answer, not just what they want.

19 MR. CLEMENT: Well, I don't think they are
20 ultimately a cable company, and we could debate that
21 question, but it's not the question before you. So
22 maybe I could give you some comfort about why you don't
23 need to decide that question.

24 JUSTICE BREYER: Well, perhaps we should
25 remand it, because my reason for wanting to decide it is

1 what I said. And what you've read in their briefs is
2 they, in their supporting amici, have thrown up a series
3 of serious problems not involving them, like the cloud,
4 which the government tells us to ignore, and many
5 others, which make me nervous about taking your
6 preferred route. So that's why I was interested in this
7 question.

8 MR. CLEMENT: But, Justice Breyer, I think
9 it's very important to -- to understand that even if
10 they're a cable company, it doesn't make all these
11 problems go away. Because they would be a cable company
12 that by very virtue of what they want to point to, which
13 is their user specific copies, I don't think they would
14 qualify for the compulsory license.

15 I also think the better way to avoid your
16 concerns is to maybe take them on directly. The reason
17 that the record company is not involved in a public
18 performance is it's not involved in any performance at
19 all, but that's different, of course, from an online
20 music store, which not only provides a download of
21 something, but actually performs it and streams it and
22 allows it live. And that is a basic distinction that's
23 not only recognized by the Second Circuit in the ASCAP
24 case, but it's also recognized in the real world by the
25 way these -- these different services are structured.

1 If you provide downloads of music, you get a
2 distribution license or a reproduction license. If you
3 provide streaming of music where you also have a
4 contemporaneous live performance, then you also get a
5 public performance license.

6 JUSTICE SOTOMAYOR: Is your definition -- I
7 mean, Justice Breyer has already asked you -- said he's
8 troubled about the phonograph store, and -- and the
9 Dropbox and the iCloud. I'm also worried about how to
10 define or -- public performance or the performance of a
11 work publicly, which I guess is the better way to do it,
12 according to you. How do I define that so that someone
13 who sells coaxial cable to a resident of a building is
14 not swept up as a participant in this? Or someone
15 who -- the sort of passive storage advisors that -- this
16 is really hard for me.

17 MR. CLEMENT: Okay. But let me --

18 JUSTICE SOTOMAYOR: How do I -- what do I do
19 to avoid -- what do we do, not me, but what does the
20 Court do to avoid a definition or an acceptance of a
21 definition that might make those people liable?

22 MR. CLEMENT: Okay. Well, let me try to
23 take -- those are actually two different examples, and I
24 think the answer to both of them is somewhat different.
25 I think the provider of coaxial cable is -- if it's just

1 a simple sale of the cable -- is not performing at all.
2 And so I think if you're somebody and all you do is take
3 a piece of hardware and you sell it once and for all to
4 a user, then the user may be performing with the
5 equipment, but you're out of the picture. And that's
6 different from an ongoing service, like a cable company
7 or like Aereo, who still owns all these facilities and
8 they're providing, through wire transmissions, these
9 performances on an ongoing basis.

10 JUSTICE SOTOMAYOR: What if you get it
11 through Dropbox?

12 JUSTICE KAGAN: Well, that's something else
13 before you get to Justice Sotomayor's second half of the
14 question, but something more along the lines of
15 providing hardware. Suppose a company just gave the
16 antenna and a hard drive, that's what they sold to the
17 user, and the user was able to use the antenna and the
18 hard drive in her own house or apartment in order to get
19 all these broadcast programs. What would the -- would
20 that be a performance?

21 MR. CLEMENT: I think the end user would be
22 doing a performance, but it would be a purely private
23 performance, and I don't think the person that sold them
24 the hardware or really anybody else, if I understand
25 your hypo, would be involved in a performance. And the

1 answer to these hypos -- I mean, this isn't something
2 that I'm making up on the fly. I mean, it's right there
3 in the text of the statute.

4 JUSTICE KAGAN: But then it really does
5 depend on, like, where the -- where the hardware is. In
6 other words, if -- if Aereo has the hardware in its
7 warehouse as opposed to Aereo selling the hardware to
8 the particular end user, that is going to make all the
9 difference in the world as to whether we have a public
10 performance or not a public performance.

11 MR. CLEMENT: Well -- and, again, I think
12 that goes to what I was about to say, which is let's
13 just not because, you know, we like one better than the
14 other. It's because of the text of the statute Congress
15 wrote. One of the ways that you can public perform. I
16 mean, they start with the classic public performance.
17 Right? A singer in a concert hall. They've sold tickets.
18 But then they say, wait, it's also a public performance
19 if you take the singer's performance and you transmit
20 it, and they're thinking over the airways and all sorts
21 of other ways, if you transmit it to the public. And
22 the definition of transmission, then, is to communicate
23 it from one place to another.

24 So there is a geographical aspect, if you
25 will, built right into the statute so that if you sell

1 somebody hardware and all they're doing is transmitting
2 it to themselves at their home, there's not going to be
3 a transmission that's chargeable to the person who sold
4 you the hardware. But if you provide an ongoing service
5 from a remote --

6 JUSTICE KAGAN: So you think that in my
7 hypo, there's a performance, but it's a private
8 performance and then you move the hardware and it
9 becomes a public performance. Is that it?

10 MR. CLEMENT: It -- it becomes a public
11 performance on behalf of the sender, but it still would
12 be a private performance on behalf of the receiver. And
13 that's one thing that's really important to get in mind,
14 is that in this statute as to the public performance
15 right, there's nothing particularly anomalous about a
16 single transmission that from the sender's perspective
17 is a public performance, but from the recipient's
18 perspective only allows for a private performance.

19 If you think about the classic cable
20 context, which is what Congress was trying to address in
21 1976 with the Transmit Clause, you have the cable
22 company and they're taking a performance off of the
23 airways and they're transmitting it to all the
24 end-users.

25 Now, the cable company is clearly performing

1 to the public, but that same transmission is allowing
2 each end-user to turn on their television set and to
3 make a performance proper, which is a private
4 performance.

5 JUSTICE SOTOMAYOR: So Roku is -- Roku is
6 paying a license for no reason.

7 MR. CLEMENT: I'm sorry?

8 JUSTICE SOTOMAYOR: Roku is paying a license
9 for no reason? They sold me a piece of equipment.

10 MR. CLEMENT: I don't know all the details
11 of that particular piece of equipment. I'm not sure
12 whether they're -- they're paying a license or not. But
13 if there was really a transfer and there's nobody else
14 providing a transmission, I don't think that just
15 operating the hardware in the privacy of your own home
16 is going to result in anything but a private
17 performance.

18 JUSTICE SOTOMAYOR: Go to the iDrop and the
19 cloud.

20 MR. CLEMENT: Sure. Now, there's, I think,
21 it's a slightly different situation. Here, I think the
22 ultimate statutory text that allows you to differentiate
23 a cloud locker storage from something like what Aereo
24 does is a language to the public. And I do think that
25 in all sorts of places, including the real world,

1 there's a fundamental difference between a service that
2 allows -- that provides new content to all sorts of
3 end-users, essentially any paying stranger, and a
4 service that provides a locker, a storage service. And
5 I think if you want a real world analogy off of the
6 Internet, I think it's the basic decision -- the
7 difference between a car dealer and a valet parking
8 service. I mean, if you looked at it from 30,000 feet,
9 you might think, hey, both of these things provide cars
10 to the public. But if you looked at it more closely,
11 you'd understand, well, if I show up at the car
12 dealership without a car, I'm going to be able to get a
13 car. If I show up at the valet parking service and I
14 don't own a car, it's not going to end well for me. And
15 so --

16 JUSTICE ALITO: What is the difference --
17 (Laughter.)

18 JUSTICE ALITO: I didn't mean to interrupt
19 your --

20 MR. CLEMENT: Well, I was just going to --
21 so I think there is a very real way in which you would
22 say, you know, at the end of the day, the car dealer's
23 providing cars to the public, the valet parking service
24 is not. It's providing a parking service.

25 CHIEF JUSTICE ROBERTS: Why isn't -- and I

1 don't want to stretch you too far -- why isn't it like a
2 public garage in your own garage? I mean, you know, if
3 you -- you can park your car in your own garage or you
4 can park it in a public garage. You can go to Radio
5 Shack and buy an antenna and a DVR or you can rent those
6 facilities somewhere else from Aereo. They've --
7 they've got an antenna. They'll let you use it when you
8 need it and they can, you know, record the stuff as well
9 and let you pick it up when you need it.

10 MR. CLEMENT: Mr. Chief Justice, that's not
11 an implausible way to look at this. That's exactly the
12 way that this Court looked at it in Fortnightly
13 decision. But Congress in 1976 decided it was going to
14 look at it differently, and it said that if you are
15 providing a service, even if you are providing a service
16 that one could reconceptualize as just renting out
17 antennas that somebody could put on their own house, the
18 person that provides that service on an ongoing basis
19 and in the process exploits the copyrighted works of
20 others is engaged in a public performance. That is
21 clearly what they were trying to do in the 1976 Act by
22 adding the Transmit Clause.

23 JUSTICE ALITO: Well, the Second Circuit
24 analogized this to its CableVision decision. So maybe
25 you could explain to me what is the difference, in your

1 view, between what Aereo does and a remote storage DVR
2 system. Is the difference -- does the difference have
3 to do with the way in which the cable company that has
4 the remote storage DVR system versus Aereo acquires the
5 program in the first place? Does it have to do with the
6 number of people who view this program that's been
7 recorded? What is the difference?

8 MR. CLEMENT: I think the potential
9 difference, and it's both the CloudLocker storage and
10 this example, I don't think this Court has to decide it
11 today. I think it can just be confident they are
12 different. Here is the --

13 JUSTICE ALITO: Well, I don't find that very
14 satisfying because I really -- I need to know how far
15 the rationale that you want us to accept will go, and I
16 need to understand, I think, what effect it will have on
17 these other technologies.

18 JUSTICE KENNEDY: I had the same question.
19 Just assume that CableVision is our precedent. I know
20 that it isn't, but let's just assume that it is. How
21 would you distinguish the CableVision from your case and
22 how is it applicable here? Assume that it's binding
23 precedent. Just that's a hypothetical.

24 MR. CLEMENT: Okay. But, Justice Kennedy, I
25 would like to answer both your questions by assuming

1 that the result in CableVision is right, but I don't
2 have to necessarily buy the reasoning, because I think
3 the reasoning of CableVision is profoundly wrong, so let
4 me circle back to that.

5 But the reason there's a fundamental
6 difference between the RS DVR at issue in CableVision
7 and what Aereo provides is, as Justice Alito alluded to,
8 the fact that there's a license in the CableVision
9 context to get the initial performance to the public.
10 And so then I think appropriately the focus in the
11 CableVision context becomes just the playback feature
12 and just the time-shifting that's enabled by that. And
13 in that context, if you focus only on that, then the RS
14 DVR looks a lot like a locker service where you have to
15 come in with the content before you can get content out
16 and you only get back the same content.

17 And here is what really I think Aereo is
18 like. Aereo is like if CableVision, having won in the
19 Second Circuit, decides: Whew, we won, so guess what?
20 Going forward, we're going to dispense with all these
21 licenses, and we are just going to try to tell people we
22 are just an RS DVR, that's all we are, and never mind
23 that we don't have any licensed ability to get the
24 broadcast in the first instance, and we're going to
25 provide it to individual users, and it's all going to be

1 because they push buttons and not because we push
2 buttons. If that were the hypothetical, I don't know
3 how that wouldn't be the clearest violation of the 1976
4 Act.

5 JUSTICE BREYER: Alright, assume that it isn't our problem.
6 I'm hearing everybody having the same problem, and I
7 will be absolutely prepared, at least for argument's
8 sake, to assume with you that if there were ever
9 anything that should be held to fall within the public
10 performance, this should be. All right? I will assume
11 that. I'm not saying it is.

12 But then the problem is in the words that do
13 that, because we have to write words, are we somehow
14 catching other things that really will change life and
15 shouldn't, such as the cloud? And you said, well, as
16 the government says, don't worry, because that isn't a
17 public performance. And then I read the definition and
18 I don't see how to get out of it.

19 MR. CLEMENT: Here is the way to get out of
20 it, Justice Breyer. Ultimately the words you're going
21 to have to interpret are "to the public." Now I think --

22 JUSTICE BREYER: To the public? You see,
23 separate, at the same time, or at different times?
24 Separate or together? So a thousand people store in the
25 cloud the same thing, as can easily happen, and call it

1 back at varying times of the day.

2 MR. CLEMENT: And if all they can do is, just
3 like the valet car parking service, is get back what
4 they put up there, I think you could easily say that
5 that is not to the public. And that is not just me
6 coming up with a clever distinction. That's the
7 distinction that's really been drawn in the real world,
8 because not all cloud computing is created equal, and
9 there are some cloud computing services that use cloud
10 computing technology to get new content to people that
11 don't have it, and they get licenses. And there is
12 other cloud computing that just has locker services and
13 they don't think they need a license, and so I'm not
14 saying that you have to bless what the market has done,
15 but I think it's a profound indication --

16 JUSTICE KAGAN: But what if, Mr. Clement,
17 it's not so simple as a company that just allows you
18 yourself to put something up there? What if -- how
19 about there are lots of companies where many, many
20 thousands or millions of people put things up there, and
21 then they share them, and the company in some ways
22 aggregates and sorts all that content. Does that count?

23 MR. CLEMENT: That, Justice Kagan, is
24 precisely why I'm asking you not to decide the cloud
25 computing question once and for all today, because not

1 all cloud computing is created equal. The details of it
2 might matter. If I can just take my valet parking service
3 one more time. If the valet parking service starts
4 renting them out and sort of has a little Zipcar service
5 on the side and says, hey, while we have your car, if
6 somebody else needs a car, we're going to rent it out to
7 them, I think that's different from the pure valet
8 parking service.

9 If I could reserve the rest of my time for
10 rebuttal. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Stewart.

13 ORAL ARGUMENT OF MALCOLM L. STEWART
14 ON BEHALF OF THE UNITED STATES, AS
15 AMICUS CURIAE, SUPPORTING PETITIONERS

16 MR. STEWART: Mr. Chief Justice, and may it
17 please the Court:

18 I would like to begin by reinforcing two of
19 the points that Mr. Clement made. The first is that
20 what Aereo is doing is really the functional equivalent
21 of what Congress in the 1976 Act wanted to define as a
22 public performance. As the Chief Justice said, one
23 potential way of looking at this is that Aereo and
24 companies like it are not providing services, they are
25 simply providing equipment that does, in a more

1 sophisticated way, what the viewer himself can do. It's
2 a plausible way of looking at the world. That's what
3 the Court in Fortnightly and Teleprompter said, but
4 Congress acted to override that and to make clear that
5 cable services, services that used one big antenna to
6 pull broadcast signals out of the sky and reroute it to
7 their subscribers, those people were engaged in public
8 performances and they ought to be paying royalties.

9 The second thing that I would like to
10 reinforce in Mr. Clement's presentation is that there is
11 no reason that a decision in this case should imperil
12 cloud locker services generally, but, as Mr. Clement was
13 pointing out, that the term "cloud computing" --

14 JUSTICE SOTOMAYOR: How about Simple.TV or
15 NimbleTV, which is not quite a hybrid?

16 MR. STEWART: I guess I'm not familiar
17 enough with the precise details of the operation, but
18 just let me say in general terms there are obviously
19 services that provide television programming over the
20 Internet. Some of them are licensed because they
21 recognize that they are publicly performing. If a
22 particular company, for instance, recorded television
23 programs and offered to stream them to anyone who paid
24 the fee or offered to stream them for free and made its
25 money off advertising, that would be a public

1 performance because those companies would be providing
2 content to people who didn't have it.

3 I think the basic distinction, the one that
4 at least defines the extremes, is the distinction
5 between the company, whether it be Internet-based or a
6 cable transmitter, that provides content in the first
7 instance and the company that provides consumers with
8 access to content that they already have. If you have a
9 cloud locker service, somebody has bought a digital copy
10 of a song or a movie from some other source, stores it
11 in a locker and asks that it be streamed back, the cloud
12 locker and storage service is not providing the content.
13 It's providing a mechanism for watching it.

14 JUSTICE KAGAN: Can I ask my same question
15 to you that I asked to Mr. Clement? How about if
16 there's a company that allows sharing and that
17 aggregates all the content that different individual
18 users put up and that in some sense sort of sorts and
19 classifies the content in different ways? How about
20 that?

21 MR. STEWART: I think you would have to --
22 you would have to know both the details of the service
23 and you would have to be making a harder call there
24 about how to draw the line, because I don't pretend that
25 there is a bright line between providing a service and

1 providing access to equipment. If you look, for
2 instance, at the extremes of a person putting a rooftop
3 antenna at his own home, everybody agrees that the
4 rooftop antenna manufacturer is not performing at all
5 and the individual is engaged in a solely private
6 performance.

7 The other extreme is the cable company, one
8 big antenna, makes transmissions to a lot of people;
9 Congress clearly intended to define that as a private
10 performance. Somewhere in the -- you could come up with
11 lots of hypotheticals that look more or less like one of
12 the other extremes, they are somewhere in the middle.
13 It's an authentically hard call as to where to draw the
14 line. So I don't have a good answer for you.

15 JUSTICE BREYER: How do we get out of
16 the Nimmer example? I mean, how do we get out -- what words do
17 I write to get out of this, throwing into this clause a
18 music store that distributes via Federal Express, a
19 device, or the U.S. Postal Service or even someone over
20 the counter, distributes to 10,000 people a copy of a
21 record which they then will take and play it? They
22 have, to the same degree, transmitted something that
23 will electronically make a performance of the music. So
24 are they when they sell the record violating the display
25 clause?

1 MR. STEWART: No, they're not --

2 JUSTICE BREYER: Because? Because?

3 MR. STEWART: Because the definition of "to
4 transmit" goes on: "To transmit a performance or
5 display is to communicate it by any device or process
6 whereby images or sounds are received beyond the place
7 from which they are sent."

8 JUSTICE BREYER: Of course they are. The
9 sounds are received beyond the place. It requires the
10 person to take the record, put it on a machine, and then
11 play it.

12 MR. STEWART: Well, there is a separate
13 exclusive right in the Copyright Act.

14 JUSTICE BREYER: Of course there is. And
15 that separate exclusive right has such things as first
16 sale doctrine attached. But if they also flow here,
17 if they -- if this covers them, which is why Nimmer wrote
18 the paragraph that was quoted, if this covers it, there
19 is no first sale doctrine, and that has a lot of
20 consequences. I think so. Anyway, if you don't know
21 and you haven't got something right there and you
22 haven't thought about it, you're not going to think
23 about it in two minutes, nor will I.

24 MR. STEWART: No. No. I have thought about
25 it. And I think the answer is that the word "transmit"

1 is being used in a particular sense. You are correct
2 that there are some contexts in which we would say that
3 a person who sends CDs or vital albums over the mails is
4 transmitting those. That's not the sense in which the
5 term "transmit" is used here. It's talking about
6 transmitting in a way that causes the sights and sounds
7 to be received, transmission through radio waves,
8 through cable, et cetera. And if there were any doubt
9 about the word "transmit," remember that it's part of
10 the definition of the word "perform." And ambiguities
11 in the definition should be construed in light of the
12 defined term. And nobody would say, in ordinary
13 parlance, that a person who transferred a copy of a
14 record was performing it.

15 JUSTICE GINSBURG: Mr. Stewart, before you
16 finish, Mr. Clement in his brief made the point that we
17 would -- if we took the position that Petitioner urges,
18 there would be an incompatibility with our international
19 obligations; that is, Aereo's view of the public
20 performance right is incompatible with our obligations
21 under the Berne Convention and under -- what is it,
22 WYCO? On pages 44 to 45 of his brief, he says that
23 "Aereo's view of what the public performance right is
24 runs straight up against our international obligations,"
25 and he cites a case from the European Court of Justice

1 and I think another case.

2 MR. STEWART: We haven't made that argument.
3 We -- we believe that existing U.S. copyright law
4 properly construed is fully sufficient to comply with
5 our international obligations. But that -- that doesn't
6 mean that we think that whenever a court misconstrues
7 the statute, we will automatically be thrown into
8 breach. It's certainly possible. But if this case were
9 decided in Aereo's favor that some of our international
10 trading partners might object, but -- but I'm not going
11 to take the position that we would concede those
12 objections had merit, so we're not making that argument.

13 The other thing I would make -- say to -- to
14 reinforce the point that Mr. Clement was making about
15 the phrase "to the public," using his example of the
16 valet parking, using a comparable example of a coat
17 checkroom, there are situations all the time in which
18 people place property momentarily at the disposal --
19 disposal of another and then retrieve it later. And
20 it's distributed to them at that later date, not in
21 their capacities as members of the public, but as the
22 true owners of the property. And I think some kind of
23 distinction along those lines is essential in much more
24 mundane applications of the Copyright Act. For example,
25 if I invite 10 friends over to watch the Super Bowl,

1 that's a private performance. It's not a public
2 performance. That's -- that's not because my friends
3 are not members of the public. They are. And in some
4 other capacities, it would be important to regard them
5 as such.

6 If the theater down the street had a
7 screening of Casablanca and it happened that those 10
8 people were the only 10 people who attended, it would be
9 a public performance, because they would be in there in
10 their capacities as members of the public. So I think
11 for -- in a wide range of situations dealing with public
12 performance, distribution to the public, it's essential
13 to ask not only are these individuals members of the
14 public in some sense, but are they acting in their
15 capacities as such. And if you have the pure cloud
16 locker service, the service that doesn't provide
17 content, it simply stores content and then plays it back
18 at the user's request, that -- that service would be
19 providing content to its true owner.

20 JUSTICE KENNEDY: How do you want us to deal
21 with CableVision -- the CableVision case in the Second
22 Circuit? Again assume it's a binding precedent. Just
23 assume that.

24 MR. STEWART: My answer would be the same as
25 Mr. Clement's, that the reasoning of CableVision, if you

1 really adhere to the idea that the only trans -- the
2 only performance that counts is the individual
3 transmission, and ask does that go to more than one
4 person, then it's hard to see how you could rule in
5 favor of our position here. But as far as the bottom
6 line outcome of CableVision is concerned, you could
7 accept the government's position and still say
8 CableVision was decided the correct way because --
9 precisely because CableVision had a license to perform
10 in real time, to broadcast the program to its
11 subscribers. The only thing that was at issue was the
12 supplemental RSDVR service. And the court in
13 CableVision appropriately, we think, held that the
14 recording of those programs by the subscribers who were
15 already entitled to view them in real time was fair use
16 under Sony and the playback can reasonably be
17 characterized as a private performance of their own
18 content. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Stewart.

21 Mr. Frederick.

22 ORAL ARGUMENT BY MR. DAVID C. FREDERICK

23 ON BEHALF OF THE RESPONDENT

24 MR. FREDERICK: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 I want to address the cable question, but
2 before I do that, can I just say the three points I
3 wanted to make are the text is very clear for Aereo, the
4 interpretations of the text that they offer absolutely
5 threaten cloud computing, and third, this case is really
6 a reproduction right case masquerading as a public
7 performance case.

8 Now, we are not a cable service. The reason
9 we're not a cable service is because cable takes all
10 signals and pushes them down. There's a head in. It's
11 defined by statute. There's a very particularized
12 regulatory structure that deals with taking a lot of
13 content and pushing it down to consumers. Aereo is an
14 equipment provider. Nothing happens on Aereo's
15 equipment until a user initiates the system. The user
16 initiates the system by logging on and pressing this is
17 the program that I want to watch. That then tunes the
18 antenna, activates the recording that will be made, and
19 then the user is then able to play back that recording.

20 JUSTICE SOTOMAYOR: I always thought, and
21 I'm -- try to be careful about it, but not often enough,
22 probably breach it like every other member of the
23 public, that if I take a phonograph of a record and
24 duplicate it a million times the way you're doing it,
25 and I then go out and sell each of those copies to the

1 public, then I am violating the Act. So why is it that
2 you are not?

3 MR. FREDERICK: Well --

4 JUSTICE SOTOMAYOR: It's not logical to
5 me --

6 MR. FREDERICK: Sure.

7 JUSTICE SOTOMAYOR: -- that you can make
8 these millions of copies and give -- sell -- essentially
9 sell them to the public, because you're telling the
10 public when they want to buy it, they can call it up and
11 hear it. So why aren't you trans --

12 MR. FREDERICK: Well, your hypothetical,
13 Justice Sotomayor, implicates the reproduction right.
14 That is the exclusive right of the copyright holder to
15 restrict the number of copies that is made. That is not
16 a public performance right question.

17 They abandoned their challenge in the
18 preliminary injunction proceeding to the reproduction
19 right issue because it runs right into the Sony
20 decision. In Sony, this Court held that consumers have
21 a fair use right to take local over-the-air broadcasts
22 and make a copy of it. All Aereo is doing is providing
23 antennas and DVRs that enable consumers to do exactly
24 what this Court in Sony recognized they can do when
25 they're in home and they're moving the equipment, the

1 antennas and the DVRs --

2 JUSTICE GINSBURG: Mr. Frederick --

3 MR. FREDERICK: -- to the Internet.

4 JUSTICE GINSBURG: -- was Judge Chin right
5 when he said that there was no technically sound reason to
6 use these multiple antennas? That the only reason for
7 that was to avoid the reach of the Copyright Act. Was
8 there a technical reason, instead of having a one big
9 antenna, to have all of these what, dime-size antennas?

10 MR. FREDERICK: Let me -- this is a very
11 complex question, Justice Ginsburg, and let me answer it
12 at multiple levels. There are technical reasons why the
13 individual antennas provide the same utility at lower
14 costs and functionality than one big antenna. But there
15 are very practical concerns, too.

16 As a startup business, Aereo is attempting
17 to entice consumers to replicate on the cloud what they
18 can do at home at lower cap costs and more efficiency.
19 As a practical matter, and Judge Chin had no basis in
20 which to make this statement at all in his dissent
21 because these are facts not on the record and efficiency
22 is not a consideration under the Copyright Act, you
23 can't do multiple channels over the Internet anyway.
24 You can only do a single video stream at a time. So
25 whether you have one big antenna or whether you have

1 lots of little antennas, you still have to compress the
2 signal and only one can go over the Internet at a time.

3 However, Justice Ginsburg, as a startup
4 business, there is a very real consideration for why
5 multiple antennas make sense. If you're in New York
6 City, you want to put an antenna on top of the building,
7 you've got to get a building permit. If you want to
8 construct it, you've got to get a construction permit.
9 If you want to put it up there with a crane, you have to
10 get a subway permit before you can do all of the things
11 to put a big antenna on a building in New York City to
12 get broadcast signals.

13 CHIEF JUSTICE ROBERTS: But is there any
14 reason you need 10,000 of them? Can't you put just --
15 if your model is correct, can't you just put your
16 antenna up and then do it? I mean, there's no
17 technological reason for you to have 10,000 dime-sized
18 antenna, other than to get around the copyright laws.

19 MR. FREDERICK: Well, the point of the
20 copyright laws, though, Your Honor, shouldn't turn on
21 the number of antennas. It turns on whether the person
22 who is receiving the signal that comes through the
23 Internet is privately performing by initiating the
24 action of that antenna getting a data stream, having
25 that signal compressed so that it can be streamed over

1 the Internet through a user-specific, user-initiated
2 copy.

3 JUSTICE SCALIA: That may well be, but it
4 doesn't contradict the Chief Justice's question. I
5 mean, you're just saying that by doing it this way you
6 don't violate the copyright laws. But his question is,
7 is there any reason you did it other than not to violate
8 the copyright laws?

9 MR. FREDERICK: We understood -- yes, there
10 is a reason, Justice Scalia. We wanted to tell
11 consumers, you can replicate the experience at very
12 small cost. You know you have a right to put an antenna
13 on your roof and put a DVR in your living room. We can
14 provide exactly the same antenna and DVR for a fraction
15 of cost by putting it over the cloud.

16 CHIEF JUSTICE ROBERTS: Yeah, but it's
17 not -- it's not. You give them space that's available
18 when they call in. They don't have -- this is my little
19 dime thing, and this is my copy that's going to be here.
20 They're there, and when they want something, you provide
21 the service of giving them that. They don't have a
22 dedicated antenna in Brooklyn.

23 MR. FREDERICK: Well, some of the consumers
24 do. The record is clear that some are statically
25 assigned to particular users. But Mr. Chief Justice,

1 that doesn't answer the question, the statutory
2 interpretation question, which is, as in CableVision, as
3 Justice Kennedy noted, there is a user-specific,
4 user-initiated copy that when viewed by the user is a
5 private performance.

6 That operation of the system works exactly
7 the same way. And the fact that CableVision is able to
8 compress its signals to make them Internet-accessible
9 through a single antenna and Aereo chooses to do it
10 through multiple antennas to avoid all the hassles that
11 go with having a big antenna should not matter for the
12 copyright laws.

13 We're still talking about renting equipment,
14 that consumers have a right to get over-the-air signals
15 that are free to the public, using public spectrum that
16 the -- that the government has allocated so that
17 broadcasters --

18 JUSTICE KENNEDY: Suppose -- suppose Aereo
19 offered a service so that the viewer at home could press
20 three different buttons, but it takes only 45 seconds,
21 and he could get the broadcast without advertising? And
22 Aereo would have some way to screen out the advertising
23 so you could watch the entire baseball game or football
24 game without the ad -- without the ads.

25 MR. FREDERICK: That would probably violate

1 the reproduction right, Justice Kennedy. It would not
2 violate the public performance rights.

3 JUSTICE KENNEDY: Would Aereo be a performer
4 then?

5 MR. FREDERICK: Aereo would not be a
6 performer. The question would be -- and this does go
7 into the technical details. And here, the position
8 between the parties is quite stark. They say the facts
9 don't matter. We have a well-developed factual record.
10 There, Justice Kennedy, the fact that would matter in
11 your hypothetical would be whether or not the initiation
12 of the advertiser-free had been somehow done by the
13 consumer or whether it had been done by the cloud
14 provider.

15 JUSTICE KENNEDY: No, the consumer makes the
16 choice. You can have it with the ads or without the
17 ads. Push button one or button two.

18 MR. FREDERICK: Right. I understand --

19 JUSTICE KENNEDY: I don't understand why he
20 is the performer in one case and not in the other case.

21 MR. FREDERICK: Because the -- the action of
22 who is a performer turns under the statute on who is
23 making -- who is acting to make the sequence of sounds
24 and images perceivable. Where you're talking about
25 taking out advertising, what you're doing is you're

1 altering the copy, and you are abridging, infringing,
2 the reproduction right. That is not something that you
3 can do in the Aereo technology. I have no brief to
4 defend that. That would be a very difficult
5 reproduction right question. But it doesn't matter in
6 terms of who is exercising a private performance,
7 because that is being done in the home with a
8 user-initiated, user-specific copy.

9 JUSTICE SCALIA: Mr. Frederick, your -- your
10 client is -- is just using this for local signals --

11 MR. FREDERICK: Yes.

12 JUSTICE SCALIA: -- right now. But if we
13 approve that, is there any reason it couldn't be used
14 for distant signals as well?

15 MR. FREDERICK: Possibly.

16 JUSTICE SCALIA: Possibly what? There is
17 possibly a reason, or it could possibly be used?

18 MR. FREDERICK: It can't be used for
19 distance, but it implicates --

20 JUSTICE SCALIA: What would the difference
21 be. I mean, you could take HBO, right? You could --
22 you could carry that without -- without performing.

23 MR. FREDERICK: No, because HBO is not done
24 over the airwaves. It's done through a private service.

25 But Justice Scalia, let me answer your

1 distant signal hypothetical this way. That would
2 implicate again the reproduction right. It does not
3 implicate the private performance and public performance
4 distinction, because, even if you were to take distant
5 signals and make them available in the home, it's still
6 through a user-initiated, user-specific copy of distant
7 programming.

8 The question then becomes, is there a fair
9 use right to be able to do that. What Sony said,
10 because Sony was dealing with local over-the-air
11 broadcasts and making a copy of local over-the-air
12 broadcasts, it said that consumers have a fair use right
13 to make a copy of that.

14 Sony did not address the distant signal, and
15 the question then would become in balancing the various fair use
16 factors whether it was appropriate for a consumer to be
17 able to get access to that programming without being
18 able to otherwise implicate the free public spectrum.

19 Now, the way Congress has addressed that,
20 Congress has addressed that by saying that when there
21 are distance signals that then get pushed through a
22 cable system, there is a copyright royalty that gets
23 paid.

24 But I want to make absolutely clear.
25 Satellite, cable, do not pay copyright royalties for

1 local over-the-air broadcasts. Why? Because the local
2 over-the-air broadcast channels wanted it that way.
3 They didn't want to be in a situation of having to
4 figure out how to divvy up all the copyright royalties
5 to the various holders. So when they talk about how
6 Congress supposedly overruled Fortnightly, what they
7 ignore is that in Section 11(d) and in Section 122(c) of
8 the Copyright Act, Congress said the retransmission of
9 local over-the-air broadcasts through satellite and
10 cable shall be exempt from the copyright regime.

11 And so when they talk about the
12 retransmission issue, they're really trying to conflate
13 a totally different regulatory system --

14 JUSTICE GINSBURG: Mr. Frederick, would you
15 clarify? If every other transmitter does pay a royalty
16 -- maybe it's under compulsory license -- and you are
17 the only player so far that doesn't pay any royalties at
18 any stage --

19 MR. FREDERICK: Well, Justice Ginsburg, the
20 person who sells an antenna to me at the local Radio
21 Shack doesn't pay copyright royalties either. And a --
22 and a company that provides a rental service for me to
23 put an antenna in my home and install it, they don't pay
24 copyright royalties either.

25 And the question that it really boils down

1 in this case is how significant should it be how long
2 the cord is between the antenna and the DVR being --

3 JUSTICE BREYER: The answer is very
4 significant. And the reason it's very significant is
5 because what the local antenna person doesn't do but you
6 apparently could do, even if you don't, is with the same
7 kind of device pick up every television signal in the
8 world and send it, almost, and send it into a person's
9 computer. And that sounds so much like what a CATV
10 system does or what a satellite system does that it
11 looks as if somehow you are escaping a constraint that's
12 imposed upon them. That's what disturbs everyone.

13 And then what disturbs me on the other side
14 is I don't understand what the decision for you or
15 against you when I write it is going to do to all kinds
16 of other technologies. I've read the briefs fairly
17 carefully, and I'm still uncertain that I understand it
18 well enough. That isn't your problem, but it might turn
19 out to be.

20 (Laughter.)

21 MR. FREDERICK: Well, let me address -- I
22 think I -- let me try to make it their problem.

23 (Laughter.)

24 MR. FREDERICK: I think I've addressed the
25 distant signal, and I think you can reserve that case to

1 say that might raise a different issue, but on the facts
2 here would not entitle the company to an injunction
3 enjoining Aereo from providing the service.

4 Now, with respect to the second aspect of
5 this, the reason why their interpretation of the
6 Transmit Clause causes so much problem, so many problems
7 for the cloud computing industry, is that -- is twofold.
8 Number one, they are conflating performance with work in
9 the Transmit Clause. What they are saying is that, so
10 long as the work is always perceived in some fashion
11 through a performance that is privately done through the
12 playback of a recording, that that -- because the
13 initial work was disseminated to the public, that
14 implicates the public performance right.

15 What that does is it means that every time
16 somebody stores something in the cloud, whether it's a
17 song, a video image or -- or the like, if it happens to
18 be something that somebody else has stored in the cloud,
19 the act of one person initiating it and perceiving it is
20 going to implicate the public performance right. And
21 that's why the cloud computing industry is freaked out
22 about this case because they've invested tens of
23 billions of dollars on the notion that an user-specific,
24 user-initiated copy when perceived by that person is a
25 private performance and not a public performance.

1 The second thing that they do that's wrong
2 with the statute is they aggregate performances.
3 Instead of where the statute says "transmit a
4 performance," they say "transmit performances." Because
5 they acknowledge that the way the technology works for
6 Aereo is that it is an individual, user-specific,
7 user-initiated copy. But they say no matter if you add
8 enough of them together, you can aggregate that to
9 become a public performance.

10 CHIEF JUSTICE ROBERTS: Just to make sure
11 I've got -- there's no reason it's a user-specific copy,
12 is it? They're making 10,000 copies. It'd be much
13 easier for you if you'd just have to make one copy and
14 everybody could get a copy.

15 MR. FREDERICK: Well, that's where the issue
16 about replicating what happens in the home matters,
17 Mr. Chief Justice, because if I'm in my home and I start
18 the program two minutes in, using Aereo's technology, I
19 missed the first two minutes, I never get to watch it.
20 It happens to be when I push the button to initiate the
21 copy, just like if I'm at home watching on a DVR, the
22 same principle. And so that copy will always be
23 different because I have control over it versus --

24 CHIEF JUSTICE ROBERTS: Surely, you can make
25 a program where you have just one copy and starting it

1 at different times. You don't need every viewer to have
2 his own copy.

3 MR. FREDERICK: But that is -- that is the
4 key distinction between video on demand and the service
5 that Aereo provides, the kinds of equipment and
6 technology that Aereo provides. We don't have a brief
7 to defend the master copy because in the master copy
8 situation, that is indisputably public because there is
9 no right to exclude anyone else. With Aereo's
10 technology, if I'm making a copy using Aereo's system,
11 no one else can look at it. Even if you happen to have
12 watched the same program, you can't watch my copy, I
13 can't download it --

14 CHIEF JUSTICE ROBERTS: That's just saying
15 your copy is different from my copy.

16 MR. FREDERICK: Correct.

17 CHIEF JUSTICE ROBERTS: But that's the
18 reason we call them copies, because they're the same.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: All I'm trying to
21 get at, and I'm not saying it's outcome determinative or
22 necessarily bad, I'm just saying your technological
23 model is based solely on circumventing legal
24 prohibitions that you don't want to comply with, which
25 is fine. I mean, that's -- you know, lawyers do that.

1 But I'm just wondering why --

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: -- whether you can
4 give me any technological reason, apart from compliance
5 with a particular legal regime, for your technological
6 mind.

7 MR. FREDERICK: It is much simpler if you're
8 a start-up to add components, to add modules when you're
9 starting up, ramping up. And what we're talking about
10 in any cloud computing industry is you're starting with
11 one group of servers and then you add them, almost like
12 Lego pieces, as you are adding the number of people that
13 you're using. That is a technological reason why the
14 cloud works the way it does, Mr. Chief Justice.

15 So with Aereo's antennas and its DVRs, we
16 can, with about the length of the size of this counsel
17 table here, service tens of thousands of people in the
18 New York area. We can provide the antennas and we can
19 provide the DVRs and it's a very compact, small space.
20 And then if we expand and we're able to continue to be
21 in business and we get more subscribers in Brooklyn, we
22 might add another row that would be the size of -- of
23 the counsel tables behind me.

24 That aspect of the technology goes to the
25 modules that are used for cloud computing where you

1 basically can add additional servers, add additional
2 hard disk space and then when new consumers activate --
3 and let me just be clear about this, when they sign up,
4 their system is completely empty. There's no content
5 being provided. There's equipment that's being
6 provided. So when they activate the system and they
7 say, I want to watch the news at 6 o'clock, they then
8 start the process that then fills their individually
9 assigned storage with the 6 o'clock news. But until
10 that happens, there's no content being provided. So the
11 notion that they have in their reply brief over and over
12 that we're somehow a content provider would mean that
13 everybody who provides an antenna or a DVR is somehow a
14 content provider. And if that's true, then the
15 implications for the equipment industry are obviously
16 quite massive and you can understand why that would
17 frighten the cloud computing industry because that turns
18 them into public performers whenever they are handling
19 content. Now, the government says --

20 JUSTICE GINSBURG: They give the subscriber
21 a menu, and it says you can get any of these things.
22 It's not as though the -- the subscriber initiates it.
23 You have these choices and they're providing you these
24 choices and those choices are content.

25 MR. FREDERICK: It's no different,

1 Justice Ginsburg, than if I'm at home and I have an
2 antenna or rabbit ears on my TV and I know what channels
3 I can get.

4 JUSTICE KAGAN: But, Mr. Frederick, it's
5 also -- it's also no different from -- from a user's
6 perspective, it's exactly the same as if I'm watching
7 cable. Right? You just have a different content
8 selection, but it looks the same to you. Somebody else
9 is providing you with a menu, and then you pick off that
10 menu.

11 MR. FREDERICK: Right. But the menu,
12 Justice Kagan and Justice Ginsburg, is simply what is
13 technologically available. There are broadcast signals
14 that are available in a local area, and they are limited
15 because that's what the broadcasters make available.
16 And simply providing a user guide that says you can tune
17 to this channel or you can tune to that channel, if you
18 want to pick up one program or another, can't be the
19 difference between a content provider and merely --
20 merely facilitating the use of your equipment.

21 JUSTICE BREYER: Would you -- would you
22 explain in a sentence or two, which will sound as if I'm
23 favoring with you, but I want them to have a chance to
24 reply, the thing that frightened me somewhat in your
25 brief was, I think, of the cloud storing everybody's

1 music. Vast amounts of music. And now they then send
2 it down, perhaps to a million people at a time, who
3 want to all hear the same song.

4 Now, what you said was, if I understood it,
5 but explain it if it is, that there is a provision of
6 the copyright law that says when that happens, it's
7 subject to a compulsory license. And if it's subject to
8 a compulsory license, then, of course, people can get it
9 and it's paid for by somebody. But if we decide with
10 them, there'd be a different provision that would come
11 into play, namely, the performance, and it wouldn't be
12 subject to the compulsory license. There's no point
13 telling me I'm right if I'm wrong. What I want to know
14 is am I -- have I got your argument correctly? And if
15 not, what is it?

16 MR. FREDERICK: I think that your argument,
17 Justice Breyer --

18 JUSTICE BREYER: It's not my argument. It's
19 a parody perhaps, or an incorrect version of your argument.

20 MR. FREDERICK: Let me -- okay. Let me try
21 to correct this. There is no compulsory license with
22 respect to music or video. There are different
23 compulsory licenses with respect to satellite and cable
24 that capture all signals and push them down to everyone.

25 JUSTICE BREYER: All right. So that would

1 be the same then, it isn't going to be a problem.

2 MR. FREDERICK: No. Where it's going to be
3 a problem with the cloud is if you say -- if I'm
4 watching a particular program and you're watching a
5 particular program and Justice Sotomayor is watching the
6 same program, we are engaging -- and the company that
7 has allowed us to make a copy of that is engaging in
8 public performance. Where you have to deal with
9 infringement is the concept of -- of volition and the
10 idea of who is doing the act. If I'm simply making
11 equipment available, then --

12 JUSTICE BREYER: But it should work out in a
13 parallel way. That is, when I look at the program, I am
14 making a copy of the program and, therefore, I'm
15 violating the nonexclusive right -- the exclusive right
16 to copy. Now, if that's fair use and therefore, I can
17 do it, it should also be fair use if exactly the same
18 thing happens but it comes from a cloud.

19 MR. FREDERICK: But let me -- let me -- let
20 me further answer your question about music, because I
21 omitted a key distinction, which is that for local radio
22 broadcasts, there is a music distribution license. It's
23 under Section 115 of the Copyright Act.

24 JUSTICE BREYER: 115(c)(3).

25 MR. FREDERICK: Right. But that's the

1 whole -- that is exactly the same way satellite and
2 cable work, as well. So that if you're broadcasting in
3 the local area, it is for free. It is like a
4 copyright-free zone. And the reason for that in the
5 music world is because they want local radio
6 broadcasters to play songs because that drives sales of
7 the records. That's a totally different business model,
8 of course, than in the television world.

9 But the reason why this matters for your
10 perspective is that what the court -- the Second Circuit
11 in CableVision did was it said user-specific,
12 user-initiated copies are private performances. They
13 are not public performances. And the only way --

14 JUSTICE SOTOMAYOR: But now you're saying
15 that AT&T system, Netflix, Hulu, all of those systems
16 get their content and they don't push it down to you.
17 They do exactly what you do. They let you choose what
18 you want to see.

19 MR. FREDERICK: Yeah. The difference is
20 that they do not exclude anyone. And the difference --
21 the public-private distinction from property law
22 is whether or not there's a right to exclude. If I have
23 private property, I exclude others. If I have public
24 property, I'm not excluding others. Netflix, Hulu,
25 those other services, they're not excluding anyone. As

1 a user of those services, I have no right to exclude
2 anyone else. And so they are making their product,
3 their content available to all without exclusion other
4 than the subscription that you pay. What we're doing is
5 providing the equipment that enables people to access
6 it.

7 JUSTICE GINSBURG: But you are seeking
8 subscribers, legions of subscribers. So I don't
9 understand that. You say they have to -- are you
10 selective, in that some people who want to use your
11 service are going to be turned down? You're not. You
12 will take anybody who can pay, right.

13 MR. FREDERICK: Sure. And if we went around
14 to a 1,000 or 10,000 homes in Brooklyn and we put up
15 antennas, installed their DVRs for them, and we sent
16 them a monthly bill every month to pay us because we had
17 performed that service and provided that equipment, it
18 would be the exact same position, Justice Ginsburg. And
19 that can't be a copyright violation.

20 Now, the only distinction the government has
21 offered for why CableVision decision in the Second
22 Circuit, and this goes to your question,
23 Justice Kennedy, somehow should be different here, is in
24 the supposed lawfulness of the first instance in which
25 that content is received. That distinction can't work

1 and would imperil the cloud. Here is why. When a
2 person is accessing local over-the-air broadcast
3 television, it is doing so because that is free public
4 spectrum. And Sony says we have a fair use right in
5 order to make a copy of that free use. The government
6 in the Fortnightly case argued that there is an
7 implied-in-law license when a person accesses local
8 over-the-air telecasts in that way. So it can't be the
9 distinction between our situation and CableVision that
10 there is somehow some difference. Because if I'm
11 watching local over-the-air broadcast TV in my home, I
12 don't have to pay a royalty for it. And that's exactly
13 the analogy that would be appropriate there.

14 Now, how would that affect the cloud? Well,
15 if you turn every type of performance that an individual
16 makes from some content that gets downloaded or
17 transferred from the cloud, the cloud provider can't
18 tell what is legal or what is not legal. Some stuff
19 could be up there pirated. Some stuff could be up there
20 perfectly licensed. And what the position of the other
21 side in this case is, those people are liable for direct
22 infringement of the public performance right. And
23 that's why the cloud industry is very concerned that if
24 you have too expansive an interpretation of what is the
25 public performance right, you are consigning them to

1 potentially ruinous liability.

2 JUSTICE KAGAN: Mr. Frederick, why isn't it
3 sufficient to create a line such as the one Mr. Clement
4 said, which said, you know, do you on the one hand
5 supply or provide the content, that puts you in one box;
6 on the other hand, if you are not supplying or providing
7 the content, if the user is supplying and providing the
8 content, and you are just providing the space, a kind of
9 platform for them to do that and for them potentially to
10 share the content, that puts you in another box?

11 MR. FREDERICK: Well, Justice Kagan, I note
12 that my friend did not reference the words of the
13 Transmit Clause at all when he offered that distinction.
14 And that's actually quite important, because in order to
15 get there, you have to make up words to put them in the
16 Transmit Clause. But even if you were to think that
17 that was good for a policy reason, you would still have
18 to explain why the hundreds of thousands of people that
19 are subscribers to Aereo's service don't have exactly
20 the same fair use right to get over-the-air broadcast
21 content that all of those people who are not Aereo
22 subscribers but they happen to have a home antenna and a
23 DVR. Those people have every bit as right to get that
24 access. And the fact that they are doing it doesn't
25 make their antenna or their antenna provider a content

1 provider. As I said --

2 JUSTICE GINSBURG: Alright so why do people pay for the
3 Aereo service if they can do the same thing all by
4 themselves?

5 MR. FREDERICK: Because if you don't have to
6 buy a TV, a DVR and an antenna and a sling box, which
7 might cost you thousands of dollars, you might pay \$100
8 to rent it, or if you want to just look at programming
9 selectively, you pay \$8 a month, it's a rental service,
10 Justice Ginsburg. That can't change the copyright
11 analysis. And just because you rent equipment does not
12 transform the person that is providing that equipment
13 into a public performer, particularly when you are the
14 one who initiates every set of signals that activates
15 the programming and the content.

16 If there are no further questions, we'll
17 submit.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

19 Mr. Clement, you have three minutes
20 remaining.

21 REBUTTAL ARGUMENT BY PAUL D. CLEMENT

22 ON BEHALF OF PETITIONERS

23 MR. CLEMENT: Thank you, Mr. Chief Justice.

24 Just a few points in rebuttal:

25 First, I just have to correct a fundamental

1 difference. Mr. Frederick says, as he did in his red
2 brief, that if you only -- if you are a cable company
3 and you only retransmit locally, you don't have to pay a
4 royalty. That is just wrong, as we point out in the
5 reply brief. There is a minimum royalty that every
6 cable company pays whether or not they transmit distance
7 signals. So that is just wrong.

8 Second, this is not a case, as Mr. Frederick
9 would like to say, where the user pushes a button, and
10 then after that point, Aereo is just a hapless
11 bystander. And if you want insight into what actually
12 happens behind the scenes, to use the phrase the
13 District Court used, look at pages 64A to 67A of the
14 petition appendix. Because Judge Nathan explains all of
15 the things that Aereo does after the consumer presses
16 the button and before it comes back to them on their
17 home screen. They are not just a passive bystander.

18 Also, this whole notion of what is
19 volitional. Maybe in the reproduction concept, in
20 context, just pushing a button and there is only one
21 person who reproduces, but the concept of what is the
22 requisite volitional conduct is answered by the Transmit
23 Clause. Congress specifically looked at this and said
24 there are going to be lots of situations where the
25 sender, usually the cable company or Aereo, sends a

1 transmission to the user, and the sender of that
2 transmission, if it allows a contemporaneous
3 performance, unlike the record company, they are a
4 transmitter.

5 JUSTICE SOTOMAYOR: Mr. Waxman, tell me the
6 consequences of our decision today.

7 MR. CLEMENT: Your consequences --

8 JUSTICE SOTOMAYOR: Do you put them out of
9 business, or do they have to go and negotiate a license
10 with every copyright holder? The -- you are, in fact,
11 telling me they are not a cable company, they are not a
12 satellite company, so they can't go into those systems
13 of payment. What happens then?

14 MR. CLEMENT: The consequences really gets
15 back to the Chief Justice's question, which is, if they
16 actually provide something that is a net benefit
17 technologically, there's no reason people won't license
18 them content. But on the other hand, if all they have
19 is a gimmick, then they probably will go out of business
20 and nobody should cry a tear over that.

21 JUSTICE BREYER: Once you take them out of
22 the compulsory licensing system, they're going to have
23 to find copyright owners, who owns James Agee's
24 pictures? Who owns something that was written by --
25 like a French silent film in 1915? I mean, the problem

1 is that they might want to have perfectly good things
2 that people want to watch and they can't find out how to
3 get permission. That is a problem that worries me and
4 it worries me again once you kick them out of the other
5 systems.

6 MR. CLEMENT: It's not a problem that should
7 worry you because, first of all, if they need a
8 compulsory license, maybe Congress can revisit it as it
9 has in technologically specific ways for cable and
10 satellite, but there is other ways to get content. They
11 can approach HBO --

12 JUSTICE SOTOMAYOR: But the Second
13 Circuit --

14 JUSTICE SCALIA: Do you have some other
15 rebuttal points?

16 MR. CLEMENT: I did, Your Honor, and one of
17 them really gets to this HBO point, which is they want
18 to say that this whole case is about reproduction and
19 there's no public performance going on at all. And to
20 understand how crazy that is, with all due respect, if
21 they approach HBO and say, we would like to carry your
22 content and provide it as a premium service, they would
23 be telling HBO, by the way, we don't need a public
24 performance license. All we need is a reproduction
25 license because we don't involve ourselves in any public

1 performance at all, and that's why at the end of the day
 2 their argument simply blinks reality. They provide
 3 thousands of paying strangers with public performances
 4 over the TV, but they don't publicly perform at all.
 5 It's like magic.

6 Thank you, Your Honors.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
 8 Counsel.

9 The case is submitted.

10 (Whereupon, at 12:25 p.m., the case in the
 11 above-entitled matter was submitted.)

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