

Insert at page 420 of the Casebook, after *Cartoon Network v. CSC Holdings*.

**WNET v. Aereo, Inc.,**

712 F.3d 676 (2d Cir 2013), *cert granted* \_\_ US \_\_ (2014)  
[Edited]

DRONEY, CIRCUIT JUDGE:

Aereo, Inc. ("Aereo") enables its subscribers to watch broadcast television programs over the internet for a monthly fee. Two groups of plaintiffs, holders of copyrights in programs broadcast on network television, filed copyright infringement actions against Aereo in the United States District Court for the Southern District of New York. They moved for a preliminary injunction barring Aereo from transmitting programs to its subscribers while the programs are still airing, claiming that those transmissions infringe their exclusive right to publicly perform their works. The district court (Nathan, *J.*) denied the motion, concluding that the plaintiffs were unlikely to prevail on the merits in light of our prior decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir.2008) ("*Cablevision*"). We agree and affirm the order of the district court denying the motion for a preliminary injunction.

**BACKGROUND**

....[T]he following facts are undisputed.

**I. Aereo's System**

Aereo transmits to its subscribers broadcast television programs over the internet for a monthly subscription fee. Aereo is currently limited to subscribers living in New York City and offers only New York area channels. It does not have any license from copyright holders to record or transmit their programs.

The details of Aereo's system are best explained from two perspectives. From its subscribers' perspective, Aereo functions much like a television with a remote Digital Video Recorder ("DVR") and Slingbox.<sup>2</sup> Behind the scenes, Aereo's system uses antennas and a remote hard drive to create individual copies of the programs Aereo users wish to watch while they are being broadcast or at a later time. These copies are used to transmit the programs to the Aereo subscriber.

***A. The Subscriber's Perspective***

Aereo subscribers begin by logging on to their account on Aereo's website using a computer or other internet-connected device. They are then presented with a programming guide listing broadcast television programs now airing or that will air in the future. If a user

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<sup>2</sup> A Slingbox is a device that connects the user's cable or satellite set-top box or DVR to the internet, allowing the user to watch live or recorded programs on an internet-connected mobile device, such as a laptop or tablet.

selects a program that is currently airing, he is presented with two options: "Watch" and "Record." If the user selects "Watch," the program he selected begins playing, but the transmission is briefly delayed relative to the live television broadcast.<sup>3</sup> Thus the user can watch the program nearly live, that is, almost contemporaneously with the over-the-air broadcast. While the user is watching the program with the "Watch" function, he can pause or rewind it as far back as the point when the user first began watching the program.<sup>4</sup> This may result in the user watching the program with the "Watch" feature after the over-the-air broadcast has ended. At any point while watching the program with the "Watch" feature, the user can select the "Record" button, which will cause Aereo's system to save a copy of the program for later viewing. The recorded copy of the program will begin from the point when the user first began watching the program, not from the time when the user first pressed the "Record" button.<sup>5</sup> If a user in "Watch" mode does not press "Record" before the conclusion of the program, the user is not able to watch that program again later.

An Aereo user can also select a program that is currently airing and press the "Record" button. In that case, a copy of the program will be saved for later viewing. However, the "Record" function can also be used to watch a program nearly live, because the user can begin playback of the program being recorded while the recording is being made. Thus the difference between selecting the "Watch" and the "Record" features for a program currently airing is that the "Watch" feature begins playback and a copy of the program is not retained for later viewing, while the "Record" feature saves a copy for later viewing but does not begin playback without further action by the user.

If an Aereo user selects a program that will air in the future, the user's only option is the "Record" function. When the user selects that function, Aereo's system will record the program when it airs, saving a copy for the user to watch later. An Aereo user cannot, however, choose either to "Record" or "Watch" a program that has already finished airing if he did not previously elect to record the program.

The final notable feature of Aereo's system is that users can watch Aereo programming on a variety of devices. Aereo's primary means of transmitting a program to a user is via an internet browser, which users can access on their computers. Aereo users can also watch programs on mobile devices such as tablets or smart phones using mobile applications. Finally, Aereo subscribers can watch Aereo on an internet-connected TV or use a stand-alone device to connect their non-internet TVs to Aereo.

Aereo's system thus provides the functionality of three devices: a standard TV antenna, a DVR, and a Slingbox-like device. These devices allow one to watch live television with the antenna; pause and record live television and watch recorded programming using the DVR; and use

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3.The technical operation of Aereo's system, discussed below, results in a slight delay in transmitting the program, which means that an Aereo subscriber using the "Watch" feature sees the program delayed by approximately ten seconds.

4.Thus if an Aereo user starts watching a program five minutes after it first began airing, he can rewind back to the five-minute mark, but not earlier.

5.Thus if an Aereo user starts watching a program five minutes after it first began airing and presses the "Record" button at the twenty-minute mark, the recorded copy will begin from the five-minute mark.

the Slingbox to watch both live and recorded programs on internet-connected mobile devices.

### ***B. The Technical Aspects of Aereo's System***

Aereo has large antenna boards at its facility in Brooklyn, New York. Each of these boards contains approximately eighty antennas, which consist of two metal loops roughly the size of a dime. These boards are installed parallel to each other in a large metal housing such that the antennas extend out of the housing and can receive broadcast TV signals. Aereo's facility thus uses thousands of individual antennas to receive broadcast television channels.

When an Aereo user selects a program to watch or record, a signal is sent to Aereo's antenna server. The antenna server assigns one of the individual antennas and a transcoder to the user. The antenna server tunes that antenna to the broadcast frequency of the channel showing the program the user wishes to watch or record. The server transcodes the data received by this antenna, buffers it, and sends it to another Aereo server, where a copy of the program is saved to a large hard drive in a directory reserved for that Aereo user. If the user has chosen to "Record" the program, the Aereo system will create a complete copy of the program for that user to watch later. When the user chooses to view that program, Aereo's servers will stream the program to the user from the copy of the program saved in the user's directory on the Aereo server. If the user instead has chosen to "Watch" the program, the same operations occur, except that once six or seven seconds of programming have been saved in the hard drive copy of the program in the user's directory on the Aereo server, the Aereo system begins streaming the program to the user from this copy. Thus even when an Aereo user is watching a program using the "Watch" feature, he is not watching the feed directly or immediately from the antenna assigned to him. Rather the feed from that antenna is used to create a copy of the program on the Aereo server, and that copy is then transmitted to the user. If at any point before the program ends, the user in "Watch" mode selects "Record," the copy of the program is retained for later viewing. If the user does not press "Record" before the program ends, the copy of the program created for and used to transmit the program to the user is automatically deleted when it has finished playing.

Three technical details of Aereo's system merit further elaboration. First, Aereo assigns an individual antenna to each user. No two users share the same antenna at the same time, even if they are watching or recording the same program.<sup>7</sup> Second, the signal received by each antenna is used to create an individual copy of the program in the user's personal directory. Even when two users are watching or recording the same program, a separate copy of the program is created for each. Finally, when a user watches a program, whether nearly live or previously recorded, he sees his individual copy on his TV, computer, or mobile-device screen. Each copy of a program is only accessible to the user who requested that the copy be made, whether that copy is used to watch the program nearly live or hours after it has finished airing; no other Aereo user can ever view that particular copy.

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7. Aereo's system usually assigns these antennas dynamically. Aereo users "share" antennas in the sense that one user is using a particular antenna now, and another may use the same antenna when the first is no longer using it. But at any given time, the feed from each antenna is used to create only one user's copy of the program being watched or recorded. Thus if 10,000 Aereo users are watching or recording the Super Bowl, Aereo has 10,000 antennas tuned to the channel broadcasting it.

## II. The Present Suits

Two groups of plaintiffs (the "Plaintiffs") filed separate copyright infringement actions against Aereo in the Southern District of New York. They asserted multiple theories, including infringement of the public performance right, infringement of the right of reproduction, and contributory infringement. ABC and its co-plaintiffs moved for a preliminary injunction barring Aereo from transmitting television programs to its subscribers while the programs were still being broadcast. The two sets of plaintiffs agreed to proceed before the district court in tandem, and the motion for preliminary injunction was pursued in both actions simultaneously.

Following expedited briefing and discovery and an evidentiary hearing, the district court denied the Plaintiffs' motion. The district court began its analysis with the first factor relevant to granting a preliminary injunction: whether the Plaintiffs have demonstrated a likelihood of success on the merits. The district court found that this factor was determined by our prior decision in *Cablevision*. After a lengthy discussion of the facts and analysis of that decision, the district court concluded that Aereo's system was not materially distinguishable from Cablevision's Remote Storage Digital Video Recorder system, which we held did not infringe copyright holders' public performance right. The district court found unpersuasive each of the Plaintiffs' arguments attempting to distinguish Cablevision. Thus the court concluded that the Plaintiffs were unlikely to prevail on the merits.

The district court then considered the other three preliminary injunction factors. First, the court concluded that the Plaintiffs had demonstrated a likelihood that they would suffer irreparable harm in the absence of a preliminary injunction. But second, the district court found that an injunction would severely harm Aereo, likely ending its business. As such, the balance of hardships did not tip "decidedly" in favor of the Plaintiffs. Finally, the district court concluded that an injunction "would not disserve the public interest." Because the Plaintiffs had not demonstrated a likelihood of success on the merits or a balance of hardship tipping decidedly in their favor, the district court denied their motion for a preliminary injunction. The Plaintiffs promptly filed an interlocutory appeal, and this case was briefed on an expedited schedule.

### DISCUSSION

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The outcome of this appeal turns on whether Aereo's service infringes the Plaintiffs' public performance right under the Copyright Act. ....

#### I. The Public Performance Right

The 1976 Copyright Act (the "Act") gives copyright owners several exclusive rights and then carves out a number of exceptions. The fourth of these rights, at issue in this appeal, is the copyright owner's exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. § 106(4). The Act defines "perform" as "to recite, render, play, dance, or act [a work], either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. The Act also states:

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.

This appeal turns on the second clause of this definition (the "Transmit Clause" or "Clause").

The relevant history of the Transmit Clause begins with two decisions of the Supreme Court, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). These decisions held that under the then-current 1909 Copyright Act, which lacked any analog to the Transmit Clause, a cable television system that received broadcast television signals via antenna and retransmitted these signals to its subscribers via coaxial cable did not "perform" the copyrighted works and therefore did not infringe copyright holders' public performance right. Even before these cases were decided, Congress had begun drafting a new copyright act to respond to changes in technology, most notably, cable television.

These efforts resulted in the 1976 Copyright Act. The Act responded to the emergence of cable television systems in two ways. First, it added the Transmit Clause. The legislative history shows that the Transmit Clause was intended in part to abrogate *Fortnightly* and *Teleprompter* and bring a cable television system's retransmission of broadcast television programming within the scope of the public performance right. Second, Congress recognized that requiring cable television systems to obtain a negotiated license from individual copyright holders may deter further investment in cable systems, so it created a compulsory license for retransmissions by cable systems.<sup>8</sup>

Plaintiffs claim that Aereo's transmissions of broadcast television programs while the programs are airing on broadcast television fall within the plain language of the Transmit Clause and are analogous to the retransmissions of network programming made by cable systems, which the drafters of the 1976 Copyright Act viewed as public performances. They therefore believe that Aereo is publicly performing their copyrighted works without a license. In evaluating their claims, we do not work from a blank slate. Rather, this Court in *Cablevision* closely analyzed and construed the Transmit Clause in a similar factual context. Thus the question of whether Aereo's transmissions are public performances under the Transmit Clause must begin with a discussion of *Cablevision*.

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8. Put briefly, the statute allows cable systems to retransmit copyrighted works from broadcast television stations in exchange for paying a compulsory license to the U.S. Copyright Office calculated according to a defined formula. The fees paid by cable systems are then distributed to copyright holders. ...

## II. *Cablevision's* Interpretation of the Transmit Clause

In *Cablevision*, we considered whether Cablevision's Remote Storage Digital Video Recorder ("RS-DVR") infringed copyright holders' reproduction and public performance rights. . . .

[The court summarized its reasoning in *Cablevision*]

. . . .

[T]he *Cablevision* court concluded that Cablevision's transmission of a recorded program to an individual subscriber was not a public performance. Each transmission of a program could be received by only one Cablevision customer, namely the customer who requested that the copy be created. No other Cablevision customer could receive a transmission generated from that particular copy. The "universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." The transmission was therefore not made "to the public" within the meaning of the Transmit Clause and did not infringe the plaintiffs' public performance right.

We discuss *Cablevision's* interpretation of the Transmit Clause in such detail because that decision establishes four guideposts that determine the outcome of this appeal. First and most important, the Transmit Clause directs courts to consider the potential audience of the individual transmission. If that transmission is "capable of being received by the public" the transmission is a public performance; if the potential audience of the transmission is only one subscriber, the transmission is not a public performance, except as discussed below. Second and following from the first, private transmissions—that is those not capable of being received by the public—should not be aggregated. It is therefore irrelevant to the Transmit Clause analysis whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions. Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work. In such cases, these private transmissions *should* be aggregated, and if these aggregated transmissions from a single copy enable the public to view that copy, the transmissions are public performances. Fourth and finally, "any factor that limits the *potential* audience of a transmission is relevant" to the Transmit Clause analysis.

## III. *Cablevision's* Application to Aereo's System

As discussed above, Cablevision's holding that Cablevision's transmissions of programs recorded with its RS-DVR system were not public performances rested on two essential facts. First, the RS-DVR system created unique copies of every program a Cablevision customer wished to record. Second, the RS-DVR's transmission of the recorded program to a particular customer was generated from that unique copy; no other customer could view a transmission created by that copy. Given these two features, the potential audience of every RS-DVR transmission was only a single Cablevision subscriber, namely the subscriber who created the copy. And because the potential audience of the transmission was only one Cablevision subscriber, the transmission was not made "to the public."

The same two features are present in Aereo's system. When an Aereo customer elects to watch or record a program using either the "Watch" or "Record" features, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And

when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy. Thus, just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.

Plaintiffs offer various arguments attempting to distinguish *Cablevision* from the Aereo system. First, they argue that *Cablevision* is distinguishable because *Cablevision* had a license to transmit programming in the first instance, namely when it first aired the programs; thus the question was whether *Cablevision* needed an additional license to retransmit the programs recorded by its RS-DVR system. Aereo, by contrast, has no license. This argument fails, as the question is whether Aereo's transmissions are public performances of the Plaintiffs' copyrighted works. If so, Aereo needs a license to make such public performances; if they are not public performances, it needs no such license. Thus whether Aereo has a license is not relevant to whether its transmissions are public and therefore must be licensed. This argument by the Plaintiffs also finds no support in the *Cablevision* opinion. *Cablevision* did not hold that *Cablevision*'s RS-DVR transmissions were *licensed* public performances; rather it held they were not public performances. . . .

....

Plaintiffs also argue that the Copyright Act requires that all of Aereo's discrete transmissions "be aggregated and viewed collectively as constituting a public performance." ]. This is not contrary to *Cablevision*, they argue, because *Cablevision* only held that transmissions of the same performance or work made by different entities should not be aggregated. On their view, discrete transmissions of the same performance or work made by the same entity should be aggregated to determine whether a public performance has occurred. This argument is also foreclosed by *Cablevision*. First, *Cablevision* made clear that the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted. But the only reason to aggregate Aereo's discrete transmissions along the lines suggested by Plaintiffs is that they are discrete transmissions *of the same performance or work*. Thus Plaintiffs are asking us to adopt a reading of the Transmit Clause that is contrary to that adopted by *Cablevision* because it focuses on the potential audience of the performance or work being transmitted, not the potential audience of the particular transmission. Second, Plaintiffs provide no reason why Aereo's multiple, audience-of-one transmissions of unique copies of the same underlying program should be aggregated but not *Cablevision*'s multiple, audience-of-one transmissions of unique copies of the same underlying program. Both Aereo and *Cablevision* are making multiple private transmissions of the same work, so adopting the Plaintiffs' approach and aggregating all transmissions made by the same entity would require us to find that both are public performances. ....

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Plaintiffs' argument fails to account for Aereo's user-specific antennas. Each user-associated copy of a program created by Aereo's system is generated from a unique antenna assigned only to the user who requested that the copy be made. The feed from that antenna is not used to generate multiple copies of each program for different Aereo users but rather only one copy: the copy that can be watched by the user to whom that antenna is assigned. Thus even if we

were to disregard Aereo's copies, it would still be true that the potential audience of each of Aereo's transmissions was the single user to whom each antenna was assigned. It is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna, ensuring that the potential audience of that transmission is only one person. Plaintiffs have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet: it remains the case that only one person can receive that antenna's transmissions. Thus even without the creation of user-associated copies, which under *Cablevision* means that Aereo's transmissions are not public, there is significant reason to believe that Aereo's system would not be creating public performances, since the entire chain of transmission from the time a signal is first received by Aereo to the time it generates an image the Aereo user sees has a potential audience of only one Aereo customer.

Finally, Plaintiffs argue that holding that Aereo's transmissions are not public performances exalts form over substance, because the Aereo system is functionally equivalent to a cable television provider. Plaintiffs also make much of the undisputed fact that Aereo's system was designed around the *Cablevision* holding, because it creates essentially identical copies of the same program for every user who wishes to watch it in order to avoid copyright liability, instead of using a perhaps more efficient design employing shared copies. However, that Aereo was able to design a system based on *Cablevision's* holding to provide its users with nearly live television over the internet is an argument that *Cablevision* was wrongly decided; it does not provide a basis for distinguishing *Cablevision*. Moreover, Aereo is not the first to design systems to avoid copyright liability. The same is likely true of *Cablevision*, which created separate user-associated copies of each recorded program for its RS-DVR system instead of using more efficient shared copies because transmissions generated from the latter would likely be found to infringe copyright holders' public performance right under the rationale of *Redd Horne*, 749 F.2d 154. Nor is Aereo alone in designing its system around *Cablevision*, as many cloud computing services, such as internet music lockers, discussed further below, appear to have done the same. Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, but this Court's decisions in *Cablevision* and *NFL*, held that technical architecture matters.

#### **IV. The Legislative Intent Behind the 1976 Copyright Act**

Plaintiffs also contend that the legislative history of the 1976 Copyright Act shows that Aereo's transmissions should be deemed public performances of the Plaintiffs' copyrighted works. They argue that cable retransmissions are public performances under the Transmit Clause and Aereo is functionally equivalent to a cable system. However, this reading of the legislative history is simply incompatible with the conclusions of the *Cablevision* court.

This view of the legislative history also ignores a contrary strand of the history behind the 1976 Copyright Act. Congress recognized when it drafted the 1976 Act that its broad definition of "performance" could create unintended results. The House Report states that under this definition, "any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set." House Report at 63. But because Congress did not wish to require everyone to obtain a license from copyright holders before they could "perform" the copyrighted works played by their television, Congress

was careful to note that a performance "would not be actionable as an infringement unless it were done 'publicly,' as defined in section 101 . "Private" performances are exempted from copyright liability. *Id.* This limitation also applies to performances created by a "transmission," since, as the *Cablevision* court noted, if Congress intended all transmissions to be public performances, the Transmit Clause would not have contained the phrase "to the public."<sup>18</sup>

In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today. New devices such as RS-DVRs and Slingboxes complicate our analysis, as the transmissions generated by these devices can be analogized to the paradigmatic example of a "private" transmission: that from a personal roof-top antenna to a television set in a living room. As much as Aereo's service may resemble a cable system, it also generates transmissions that closely resemble the private transmissions from these devices. Thus unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private. Although Aereo may in some respects resemble a cable television system, we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act. And we certainly cannot disregard the express language Congress selected in doing so. That language and its legislative history, as interpreted by this Court in *Cablevision*, compels the conclusion that Aereo's transmissions are not public performances.

....

### CONCLUSION

We conclude that 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 under *Cablevision*. As such, Plaintiffs have not demonstrated that they are likely to prevail on the merits on this claim in their copyright infringement action. Nor have they demonstrated serious questions as to the merits and a balance of hardships that tips decidedly in their favor. We therefore affirm the order of the district court denying the Plaintiffs' motion.

CHIN, CIRCUIT JUDGE:

I respectfully dissent.

Defendant-appellee Aereo, Inc. ("Aereo") captures over-the-air broadcasts of television programs and retransmits them to subscribers by streaming them over the Internet. For a monthly fee, Aereo's customers may "Watch" the programming "live" (that is, with a seven-second delay) on their computers and other electronic devices, or they may "Record" the programs for later viewing. Aereo retransmits the programming without the authorization of the copyright holders and without paying a fee.

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18. This is particularly appropriate given that in 1976, when cable TV was still in its infancy, many Americans used rooftop antennas. Thus Congress would have certainly wished to avoid adopting language that would make millions of Americans copyright infringers because they transmitted broadcast television programs from their personal rooftop antennas to their own television sets.

The Copyright Act confers upon owners of copyrights in audiovisual works the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). This exclusive right includes the right "to transmit or otherwise communicate a performance ... to the public, by means of any device or process." In my view, by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act.

Aereo argues that it is not violating the law because its transmissions are not "public" performances; instead, the argument goes, its transmissions are "private" performances, and a "private performance is not copyright infringement." It contends that it is merely providing a "technology platform that enables consumers to use remotely-located equipment ... to create, access and view their own unique recorded copies of free over-the-air broadcast television programming."

Aereo's "technology platform" is, however, a sham. The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is 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. After capturing the broadcast signal, Aereo makes a copy of the selected program for each viewer, whether the user chooses to "Watch" now or "Record" for later. Under Aereo's theory, by using these individual antennas and copies, it may retransmit, for example, the Super Bowl "live" to 50,000 subscribers and yet, because each subscriber has an individual antenna and a "unique recorded cop[y]" of the broadcast, these are "private" performances. Of course, the argument makes no sense. These are very much *public* performances.

....

### **CONCLUSION**

Based on the plain meaning of the statute, its legislative history, and our precedent, I conclude that Aereo's transmission of live public broadcasts over the Internet to paying subscribers are unlicensed transmissions "to the public." Hence, these unlicensed transmissions should be enjoined. Cablevision does not require a different result. Accordingly, I dissent.