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2 UNITED STATES COURT OF APPEALS

3 FOR THE SECOND CIRCUIT

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5 WNET, THIRTEEN, FOX TELEVISION

STATIONS, INC., TWENTIETH CENTURY FOX

6 FILM CORPORATION, WPIX, INC., UNIVISION

TELEVISION GROUP, INC., THE UNIVISION

7 NETWORK LIMITED PARTNERSHIP, AND PUBLIC

BROADCASTING SERVICE,

8

Plaintiffs-Counter-Defendants-

9 Appellants,

10 v. 12-12786-cv

11 AEREO, INC., F/K/A BAMBOOM LABS, INC.

12 Defendant-Counter-Claimant-Appellee.

13 -----x

14 AMERICAN BROADCASTING COMPANIES, INC.,

DISNEY ENTERPRISES, INC., CBS

15 BROADCASTING INC., CBS STUDIOS INC.,

NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS,

16 LLC, UNIVERSAL NETWORK TELEVISION, LLC,

TELEMUNDO NETWORK GROUP, LLC AND

17 WNJU-TV BROADCASTING, LLC,

18 Plaintiffs-Counter-Defendants-

Appellants,

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v. 12-2807-cv

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AEREO, INC.,

21

Defendant-Counter-Claimant-Appellee.

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November 30, 2012

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500 Pearl Street

25

New York, New York

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4 B E F O R E:

5 JUDGE DENNIS CHIN

6 JUDGE CHRISTOPHER DRONEY

7 JUDGE JOHN GLEESON

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10 ERIC J. FINZ, Hearing Reporter

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14

15 P A R T I E S:

16 PAUL M. SMITH, ESQ.

17 BRUCE P. KELLER, ESQ.

18 R. DAVID HOSP, ESQ.

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10:03:08 2 JUDGE CHIN: We have sitting

10:03:08 3 with us again today Judge Gleeson

10:03:12 4 from the Eastern District of New

10:03:13 5 York, and we are grateful for his

10:03:16 6 assistance.

10:03:17 7 I understand that everyone is

10:03:18 8 here. Accordingly, we'll hear the

10:03:23 9 first cases in tandem.

10:03:30 10 MR. SMITH: Good morning, your

10:03:31 11 Honors, I'm Paul Smith,
10:03:33 12 representing the WNET appellants in
10:03:35 13 this case.
10:03:36 14 Congress in the 1976 Copyright
10:03:39 15 Act overruled the Supreme Court and
10:03:40 16 provided a service that retransmits
10:03:44 17 broadcast television programs to
10:03:45 18 subscribers is engaging in public
10:03:49 19 performance of those programs and
10:03:49 20 needs a license to retransmit.
10:03:51 21 Aereo is a business that
10:03:52 22 receives and retransmits broadcast

10:03:55 23 television programming over the

10:03:56 24 internet to its subscribers for a

10:03:58 25 fee. It nevertheless claims to be

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10:04:01 2 exempt from the rule barring

10:04:03 3 unlicensed retransmission services,

10:04:05 4 primarily arguing that this court

10:04:07 5 in Cablevision carved out an

10:04:08 6 exception to the rule whenever the

10:04:10 7 unlicensed retransmission service

10:04:12 8 takes the trouble to pause and make

10:04:14 9 a copy of the program, interposing

10:04:16 10 that in the screen before sending

10:04:18 11 it on to each individual

10:04:21 12 subscriber. It also seems to argue

10:04:22 13 that it's not really a

10:04:24 14 retransmission service at all and

10:04:25 15 it is instead a provider of

10:04:27 16 equipment that it leases to

10:04:29 17 subscribers who then use it

10:04:31 18 themselves.

10:04:31 19 Neither of these arguments has

10:04:32 20 my basis in the statute. Indeed,

10:04:34 21 if accepted, either of them would

10:04:36 22 effectively overrule Congress's

10:04:38 23 determination in 1976 that people

10:04:40 24 should not be able to profiteer

10:04:42 25 from broadcast television

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10:04:43 2 programming by retransmitting it

10:04:45 3 for a fee for their subscribers.

10:04:47 4 The regime that existed before the

10:04:49 5 '76 Act under Fortnightly and

10:04:53 6 Teleprompter would be restored.

10:04:55 7 Now, regarding Cablevision, I

10:04:57 8 think it's important to understand,

10:04:58 9 and focus on the fact that the

10:04:59 10 issue before the court there was

10:05:00 11 very different from the one here.

10:05:02 12 What you had there was a licensed

10:05:04 13 retransmission services, not

10:05:06 14 unlicensed retransmission services.

10:05:07 15 Cablevision was a cable company, so

10:05:09 16 it had a license to do the straight

10:05:11 17 through transmissions of all the

10:05:12 18 programs. And the only issue

10:05:14 19 before the court was whether it

10:05:15 20 needed a second license when it was

10:05:17 21 providing the DVR functionality not

10:05:20 22 at the set top, but at the server

10:05:22 23 level.

10:05:23 24 And the court came to the

10:05:24 25 conclusion that if you focus just

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10:05:26 2 on that single transmission from

10:05:27 3 the personalized copy to the

10:05:31 4 subscriber, to the individual

10:05:32 5 subscriber assigned to that copy,

10:05:34 6 that that could be viewed as a

10:05:35 7 private transmission rather than a

10:05:37 8 public transmission, or private

10:05:39 9 performance rather than a public

10:05:41 10 performance.

10:05:41 11 But that case is different

10:05:43 12 from this one because what you're

10:05:45 13 dealing with here is an entirely

10:05:47 14 unlicensed service, so everything

10:05:48 15 Aereo does is unlicensed, from the

10:05:52 16 moment it receives the programming

10:05:53 17 over its antennas, the

10:05:54 18 transmissions it makes from its

10:05:56 19 antennas to its servers, where the

10:05:58 20 programming is processed into

10:06:00 21 internet format.

10:06:03 22 JUDGE DRONEY: How does that

10:06:04 23 matter whether it's a public

10:06:05 24 performance or not?

10:06:07 25 MR. SMITH: Your Honor, once

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10:06:08 2 you start looking at the entire

10:06:10 3 service and everything it does,

10:06:11 4 including the servers that all the

10:06:13 5 subscribers share, the antennas

10:06:15 6 that are used, the wires over which

10:06:16 7 the signal goes before there is

10:06:17 8 even a copy made, then I think the

10:06:19 9 picture looks very different.

10:06:20 10 And the fact that at some

10:06:22 11 point in that process they
10:06:23 12 interpose a copy and then send it
10:06:26 13 on doesn't mean that their entire
10:06:28 14 service becomes a private
10:06:29 15 transmission.

10:06:30 16 JUDGE DRONEY: How does the
10:06:31 17 fact of a license matter?

10:06:32 18 MR. SMITH: Well, the license
10:06:33 19 was what confined the attention of
10:06:35 20 the Cablevision panel just to the
10:06:37 21 final end of the transmission.

10:06:38 22 JUDGE DRONEY: Is that the

10:06:39 23 basis for its decision?

10:06:41 24 MR. SMITH: I think it is.

10:06:42 25 That's what they were talking

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10:06:43 2 about. After all, there was no

10:06:44 3 issue about the other transmissions

10:06:45 4 that were being made by Cablevision

10:06:47 5 or their receipt of the broadcast

10:06:49 6 programming or anything else, it

10:06:50 7 was just focused on that last

10:06:51 8 transmission.

10:06:53 9 And so the effect of allowing

10:06:54 10 Cablevision to morph into a

10:06:58 11 decision that authorizes what Aereo

10:07:01 12 does of course would be to mean

10:07:02 13 that everybody can engage in

10:07:04 14 license free retransmission.

10:07:06 15 Because in current technology, it's

10:07:08 16 virtually cost free to put these

10:07:10 17 copies of the stream and therefore

10:07:14 18 there would be a whole regime of

10:07:16 19 how television is delivered to

10:07:17 20 people over cable, over satellite,

10:07:19 21 with retransmission consent, with

10:07:21 22 license fees that are paid, that

10:07:23 23 whole thing.

10:07:24 24 JUDGE CHIN: What about the

10:07:25 25 argument that Aereo is simply just

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10:07:27 2 providing the equipment that

10:07:33 3 arguably as a technological matter

10:07:35 4 you could take these little

10:07:36 5 antennas and put them on to your

10:07:39 6 home computer and accomplish the

10:07:41 7 same thing, would that make it

10:07:43 8 closer to Cablevision?

10:07:44 9 MR. SMITH: Your Honor, the

10:07:46 10 notion that you can be a service

10:07:49 11 that serves multiple people and

10:07:50 12 provide some access to distant

10:07:52 13 programming like this and still say

10:07:54 14 all you are is an equipment

10:07:55 15 provider, that argument first was

10:07:57 16 overruled by Congress. That's

10:07:59 17 essentially what the cable

10:08:00 18 companies argued in Fortnightly and

10:08:02 19 in Teleprompter, that they were

10:08:03 20 just facilitating the subscribers'

10:08:07 21 receipt of television over

10:08:08 22 antennas, and that they were not

10:08:10 23 themselves engaged in any kind of

10:08:12 24 performance.

10:08:13 25 And the Congress said no, you

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10:08:14 2 are not, you're a service that is

10:08:16 3 performing the shows, when you take

10:08:19 4 it in on your antenna and send it

10:08:21 5 on.

10:08:22 6 And the fact that there are

10:08:23 7 individual antennas can't change

10:08:25 8 that analysis. First of all, in

10:08:26 9 the Transmit Clause Congress was as

10:08:29 10 broad as it possibly could be, said

10:08:31 11 any device or process that involves

10:08:34 12 transmitting programs on to

10:08:35 13 subscribers.

10:08:36 14 JUDGE DRONEY: How about the

10:08:37 15 unique copies, isn't each recipient

10:08:41 16 of the Aereo service getting a

10:08:43 17 unique copy?

10:08:44 18 MR. SMITH: There is a copy

10:08:45 19 that's created in the stream of

10:08:46 20 transmission.

10:08:47 21 JUDGE DRONEY: For each

10:08:50 22 individual; right?

10:08:50 23 MR. SMITH: Yes, that's the

10:08:51 24 legal issue we're presented with,

10:08:51 25 whether that can change the

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10:08:53 2 analysis. As a practical matter

10:08:55 3 what that would mean if it does

10:08:56 4 change the analysis is that

10:08:58 5 Congress's determination in 1976 is

10:09:00 6 overruled; there will be no more

10:09:01 7 licensing of retransmission

10:09:02 8 services because everyone will

10:09:03 9 start doing it.

10:09:05 10 JUDGE DRONEY: Wasn't that the

10:09:06 11 basis of the Cablevision decision,

10:09:08 12 that each was a unique copy

10:09:09 13 thereto?

10:09:10 14 MR. SMITH: In that particular

10:09:12 15 context where all they were

10:09:13 16 focusing on was that one

10:09:15 17 transmission from that copy that

10:09:16 18 had been created adjunct to a

10:09:18 19 licensed service. But if you're

10:09:19 20 going to allow them to do

10:09:20 21 everything that a retransmission

10:09:22 22 service does, from taking it on

10:09:23 23 antennas, processing, it, having

10:09:26 24 the website where people order it

10:09:28 25 up and send it on, including live,

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10:09:31 2 effectively, so the copy isn't even

10:09:33 3 perceptible to the user, well,

10:09:34 4 that's a very different

10:09:35 5 proposition. It takes Cablevision

10:09:37 6 and turns it into a complete carte

10:09:40 7 blanche for people to abuse the

10:09:42 8 copyright.

10:09:43 9 JUDGE GLEESON: Are you

10:09:44 10 familiar with the device called the

10:09:46 11 Slingbox?

10:09:48 12 MR. SMITH: I am, your Honor,

10:09:49 13 yes.

10:09:50 14 JUDGE GLEESON: Now, if I were

10:09:51 15 able to afford one, it would allow

10:09:53 16 me to be able to take a broadcast

10:09:55 17 and convert it something on my

10:09:58 18 laptop.

10:09:59 19 MR. SMITH: It would allow you

10:10:00 20 to take a broadcast and send it on

10:10:02 21 to the internet to one of your

10:10:04 22 devices, yes.

10:10:05 23 JUDGE GLEESON: That wouldn't

10:10:06 24 be a public performance, my viewing

10:10:08 25 of it on my laptop would not be a

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10:10:11 2 public performance?

10:10:13 3 MR. SMITH: The use of a

10:10:14 4 Slingbox may or may not involve

10:10:16 5 some copyright infringement. It

10:10:16 6 would not be a public performance,

10:10:19 7 that's correct.

10:10:19 8 JUDGE GLEESON: The potential

10:10:20 9 audience is just me.

10:10:21 10 MR. SMITH: That's correct.

10:10:22 11 JUDGE GLEESON: Your argument

10:10:23 12 I don't think takes sufficient

10:10:24 13 account of the fact that

10:10:25 14 Cablevision is part of the

10:10:27 15 landscape. And once you take that

10:10:32 16 kind of Slingbox phenomenon and

10:10:34 17 then push it back upstream and have

10:10:36 18 it be provided, here by Aereo, in

10:10:39 19 just the same way that Cablevision

10:10:41 20 provided the DVD function, it sure

10:10:45 21 looks like you got a problem with

10:10:48 22 the Cablevision case.

10:10:49 23 MR. SMITH: But again, your

10:10:51 24 Honor, even before, before you get

10:10:52 25 to the creation of the copy and the

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10:10:53 2 sending it out over the internet,

10:10:55 3 there is a lot of things that

10:10:57 4 Aereo's already done, including

10:10:59 5 transmissions inside its own

10:11:00 6 facility to get the thing to the

10:11:02 7 server where it's converted into

10:11:04 8 internet format.

10:11:06 9 And all of those things exist

10:11:07 10 separate and apart from any copy

10:11:09 11 that is made, and are not

10:11:11 12 individualized in the same way,

10:11:13 13 there is no preceding copy.

10:11:15 14 JUDGE GLEESON: But before it

10:11:17 15 goes to one of its subscribers, is

10:11:19 16 an individualized copy made with a

10:11:22 17 separate hard drive allocable to

10:11:25 18 that subscriber?

10:11:26 19 MR. SMITH: That's correct,

10:11:26 20 yes.

10:11:27 21 And the legal question is

10:11:28 22 whether you're going to read that

10:11:29 23 in light of the statute. The

10:11:30 24 statute, after all, makes it

10:11:32 25 perfectly clear that Congress

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10:11:34 2 intended to cover this --

10:11:37 3 JUDGE GLEESON: I get your

10:11:38 4 argument.

10:11:38 5 Can we do this consistent with

10:11:40 6 Cablevision?

10:11:40 7 MR. SMITH: I think this is an

10:11:42 8 important element of how far

10:11:44 9 decisis works. If you have

10:11:45 10 statutory interpretation by a prior

10:11:47 11 panel that includes some language

10:11:49 12 that covers lots of different other

10:11:50 13 factual situations, that when you

10:11:50 14 get to those other factual

10:11:51 15 situations, and it's perfectly

10:11:56 16 evident that to apply that broad

10:11:57 17 language to those situations you

10:11:58 18 would be acting inconsistent with

10:11:59 19 the statute, then that broad

10:12:01 20 language becomes dictum to the

10:12:03 21 extent it applies to these other

10:12:05 22 fact situations.

10:12:07 23 I don't think a panel can bind

10:12:10 24 subsequent panels with respect to

10:12:11 25 factual situations entirely

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10:12:13 2 different from the one before the

10:12:14 3 court.

10:12:14 4 As the fly on the wall put it,

10:12:17 5 it's actually inadequate, the

10:12:20 6 precedent has to be viewed in light

10:12:22 7 of the facts before the panel.

10:12:23 8 Otherwise you say well, you have to

10:12:25 9 follow the law. But the law here

10:12:27 10 is a statute. And Congress could

10:12:28 11 not have been more clear that it

10:12:30 12 intended not to allow people to

10:12:32 13 engage in retransmission businesses

10:12:34 14 of this kind.

10:12:35 15 Now, they didn't anticipate

10:12:37 16 specific individual copies because

10:12:39 17 this was 1976, but they did say

10:12:42 18 whether it's live or time delayed,

10:12:44 19 it doesn't matter whether it's

10:12:46 20 individual streams, it doesn't

10:12:47 21 matter whether it goes at the same

10:12:49 22 time or different times, same

10:12:50 23 place, different places, any device

10:12:52 24 or process legislative history says

10:12:55 25 we're trying to be as absolutely

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10:12:56 2 broad as we can because of the

10:12:58 3 kinds of technological advances

10:12:59 4 that are coming, we still want

10:13:01 5 retransmission has to be something

10:13:02 6 that you need to pay for. Because

10:13:04 7 you're profiteering on somebody

10:13:06 8 else's property.

10:13:07 9 So if this panel says we are

10:13:10 10 bound by this language that was

10:13:11 11 applied to a completely different
10:13:13 12 fact situation, then what you're
10:13:14 13 doing is you're following, I would
10:13:16 14 submit, is dictum, to the extent
10:13:18 15 that that broad language is applied
10:13:20 16 here in this context, you're
10:13:22 17 feeling as if you're bound by
10:13:24 18 something that that panel did not
10:13:25 19 have the authority to bind you on,
10:13:26 20 because they did not have these
10:13:28 21 facts before them at that time.
10:13:29 22 JUDGE CHIN: You have some

10:13:31 23 rebuttal time. We'll hear from

10:13:32 24 your colleague, Mr. Keller.

10:13:38 25 MR. SMITH: I appreciate it,

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10:13:40 2 your Honor. Thank you.

10:13:42 3 MR. KELLER: May it please the

10:13:46 4 court, I'm Bruce Keller, I

10:13:47 5 represent the ABC parties in 2807.

10:13:51 6 I have three points to make

10:13:52 7 that I hope you'll find compliment

10:13:54 8 those made by Mr. Smith. The first

10:13:56 9 is about the Transmit Clause, it's

10:13:58 10 foundational in nature. The second

10:14:00 11 is about Cablevision, it's

10:14:03 12 interpretive, I think those are

10:14:04 13 some of the questions Judge Gleeson

10:14:06 14 asked. And the third is about

10:14:07 15 Aereo, and it's based on the

10:14:09 16 record.

10:14:09 17 The Transmit Clause point is

10:14:11 18 really this: When Congress enacted

10:14:13 19 the Transmit Clause it was

10:14:15 20 declaring to businesses that

10:14:16 21 publicly performed copyrighted

10:14:18 22 works are infringing, and if they

10:14:21 23 make their customers capable of

10:14:23 24 receiving transmissions or

10:14:25 25 retransmissions of copyrighted

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10:14:27 2 performances, regardless of the

10:14:29 3 technology, that business is being

10:14:32 4 outlawed.

10:14:33 5 And at the core of the

10:14:34 6 Transmit Clause are services that

10:14:38 7 retransmit over-the-air radio or

10:14:41 8 television broadcast. Every case

10:14:43 9 that has addressed a retransmission

10:14:44 10 of either a radio or television

10:14:47 11 broadcast has concluded it's a
10:14:49 12 violation of the Transmit Clause.
10:14:51 13 Legislative history is clear on
10:14:53 14 that, the Kirkwood case, the
10:14:56 15 FineTime 24 case from this circuit
10:14:58 16 is clear on that.
10:14:59 17 And to make sure that
10:15:01 18 retransmitters are swept up within
10:15:03 19 the Transmit Clause, Congress
10:15:05 20 instructed courts to reject the
10:15:08 21 1960s era defense that if all we do
10:15:11 22 is enable someone who otherwise

10:15:14 23 could receive that performance, if

10:15:15 24 we just facilitate what they do for

10:15:18 25 themselves, that's not a performance.

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10:15:18 2 Congress said it is a performance

10:15:20 3 and if you do it for all of your

10:15:21 4 paying subscribers, that's a public

10:15:22 5 performance. In other words, the

10:15:24 6 stand in the shoes of the consumer

10:15:26 7 defense was rejected through the

10:15:28 8 new Transmit Clause, that's what

10:15:30 9 Kirkwood/Infinity Broadcasting so

10:15:33 10 holds at pages 108 and 112.

10:15:36 11 The second point is that

10:15:37 12 Cablevision did not change that

10:15:40 13 Transmit Clause juris prudence.

10:15:43 14 And here's why: The Cablevision

10:15:45 15 panel concluded that the RSDVR

10:15:48 16 service before it was a storage

10:15:49 17 service, not a retransmission

10:15:52 18 service. It was not a

10:15:53 19 retransmission of performances.

10:15:55 20 And that's why the unique

10:15:57 21 copies that they found meaningful

10:16:00 22 there doesn't make a difference

10:16:01 23 here. In that remote storage DVR

10:16:07 24 case, could you not, for example,

10:16:09 25 watch the Super Bowl --

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10:16:11 2 JUDGE CHIN: There is a

10:16:12 3 storage aspect to the Aereo system?

10:16:16 4 MR. KELLER: There is a

10:16:17 5 storage aspect to the Aereo system,

10:16:19 6 it is one that they downplay to the

10:16:20 7 virtual exclusion of their

10:16:22 8 retransmission service.

10:16:23 9 And it is absolutely clear

10:16:24 10 from their own advertising and from

10:16:26 11 the record that they enable their

10:16:28 12 subscribers to watch the Super Bowl

10:16:31 13 as it is broadcast.

10:16:33 14 JUDGE GLEESON: But even in

10:16:34 15 the watch mode they can stop, they

10:16:35 16 can pause, rewind. Correct?

10:16:38 17 MR. KELLER: Yes, that is

10:16:39 18 true.

10:16:39 19 But the Transmit Clause says

10:16:40 20 it doesn't matter when a

10:16:43 21 subscriber, how a user watches a

10:16:44 22 program, we're concerned with

10:16:46 23 whether a retransmitter is

10:16:48 24 retransmitting that program.

10:16:50 25 And the difference between

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10:16:52 2 Cablevision and Aereo in this

10:16:54 3 regard is crisp. You could not

10:16:57 4 watch the Super Bowl in real-time

10:16:59 5 as a retransmission of a

10:17:00 6 copyrighted performance through the

10:17:02 7 RSDVR service.

10:17:05 8 JUDGE GLEESON: How about my

10:17:07 9 Slingbox example, they can, and

10:17:09 10 that's not a public performance,

10:17:10 11 right?

10:17:11 12 MR. KELLER: So I took your

10:17:12 13 point about the private nature of

10:17:14 14 Slingbox. I think Mr. Smith made

10:17:16 15 clear it's not been tested yet,

10:17:18 16 there is no precedent, there is no

10:17:19 17 court ruling on it.

10:17:21 18 JUDGE GLEESON: It's hard to

10:17:22 19 figure why any precedent would be

10:17:25 20 construed in such a way to render

10:17:27 21 that a public performance.

10:17:28 22 MR. KELLER: I'm not arguing

10:17:29 23 whether it is or it isn't. I think

10:17:31 24 under the Second Circuit precedent,

10:17:33 25 Kirkwood matters. Kirkwood says

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10:17:34 2 what that a consumer might be able

10:17:36 3 to do on his or her own piece of

10:17:39 4 equipment is one thing.

10:17:40 5 Cablevision basically says the same

10:17:42 6 thing when it uses the VCR analogy

10:17:45 7 as the analogy that governs the

10:17:46 8 day.

10:17:47 9 It's another thing when a

10:17:48 10 third pair commercial service

10:17:49 11 insinuates itself into the process,

10:17:51 12 they don't get to stand in the

10:17:53 13 shoes of what you do if you could

10:17:55 14 afford the Slingbox.

10:17:57 15 JUDGE CHIN: How is the Aereo

10:17:59 16 system different from the Slingbox

10:18:00 17 system as a factual matter?

10:18:03 18 MR. KELLER: I think that the

10:18:04 19 difference between the Aereo system

10:18:05 20 is that it is a full-fledged

10:18:07 21 service. There are a number of

10:18:09 22 findings in the District Court's

10:18:10 23 opinion.

10:18:11 24 JUDGE CHIN: With a Slingbox

10:18:12 25 you're getting a transmission in

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10:18:15 2 some other way, not through --

10:18:17 3 MR. KELLER: Not through the

10:18:19 4 system.

10:18:19 5 So what drove the Second

10:18:22 6 Circuit in Cablevision was this

10:18:25 7 notion that the RSDVR service was a

10:18:29 8 storage service. That led directly

10:18:32 9 to the analogy of the VCR in your

10:18:35 10 home moved upstream. And the

10:18:37 11 Second Circuit concluded that

10:18:38 12 because it was not a retransmission

10:18:40 13 service, it was not a public

10:18:42 14 performance at the point at which

10:18:45 15 you played back what you previously

10:18:47 16 had.

10:18:49 17 JUDGE DRONEY: So in the Aereo

10:18:50 18 system, if you hit pause on the

10:18:52 19 watch mode for five seconds, is it

10:18:54 20 still a public performance after

10:18:55 21 that or is that a unique copy after

10:18:57 22 do you that?

10:18:58 23 MR. KELLER: The unique copies

10:19:00 24 don't matter here when the system

10:19:01 25 enables the subscribers to watch

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10:19:04 2 it.

10:19:04 3 JUDGE DRONEY: It's a private

10:19:05 4 performance then. If you are in a

10:19:07 5 watch mode, you pause it for five

10:19:09 6 seconds and resume watching, does

10:19:11 7 that now become a private

10:19:12 8 performance?

10:19:13 9 MR. KELLER: No. Because --

10:19:15 10 and Congress, this gets to the

10:19:17 11 point earlier, Congress

10:19:18 12 contemplated technological devices

10:19:21 13 evolving over time. They said,

10:19:23 14 doesn't matter how you do it. Any

10:19:25 15 device or process that facilitates

10:19:27 16 the retransmission is going to be

10:19:30 17 swept up in the Transmit Clause.

10:19:31 18 And then went further. It

10:19:33 19 said not only that, you could

10:19:34 20 retransmit at different times, same

10:19:38 21 time, different places, same

10:19:40 22 places, all of it is embraced. The

10:19:42 23 eye is on the retransmission

10:19:44 24 service and what it does in terms

10:19:46 25 of retransmitting the initial

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10:19:49 2 copyrighted performance.

10:19:50 3 And the difference between the

10:19:52 4 Cablevision decision and this case

10:19:54 5 is the difference between storage

10:19:56 6 and retransmission. And how do we

10:19:58 7 know that, we know that from what

10:20:00 8 the Second Circuit subsequently

10:20:02 9 said in the ASCAP case. Because in

10:20:05 10 ASCAP they drew the same

10:20:06 11 distinction between a musical file

10:20:10 12 download, a stored copy of

10:20:12 13 something that was sent on but not

10:20:14 14 in any way that could possibly be

10:20:16 15 perceived, according to the ASCAP

10:20:18 16 panel, as a performance, in a

10:20:21 17 stream. Which they said could very

10:20:23 18 well be a performance.

10:20:24 19 But Cablevision went further,

10:20:25 20 and this is really crucial. Not

10:20:27 21 only did it distinguish between

10:20:29 22 storage and retransmission, it said

10:20:32 23 we are not going to lay down a rule

10:20:35 24 that all unique copies always

10:20:38 25 render something a private

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10:20:40 2 performance.

10:20:40 3 They did it at least three

10:20:42 4 places in the opinion. The first

10:20:43 5 was saying that copies may be

10:20:46 6 relevant to whether or not

10:20:47 7 something's a private performance,

10:20:50 8 based on whether they truly play an

10:20:52 9 audience limiting function.

10:20:54 10 Then they said and another

10:20:56 11 thing, not only is it just relevant

10:20:58 12 and not determinative, they

10:20:59 13 qualified that statement in the

10:21:00 14 very next paragraph when they said

10:21:02 15 and by the way, we're not analyzing

10:21:03 16 the concept of to the public for

10:21:05 17 all purposes, we are not analyzing

10:21:07 18 the contours of to the public in

10:21:09 19 any great detail. And then it went

10:21:11 20 on on the very next page to say

10:21:13 21 even more about how cabined they

10:21:17 22 were making their decision.

10:21:18 23 They said a different delivery

10:21:20 24 system design may well result in a

10:21:23 25 different analysis of whether there

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10:21:25 2 is a public performance.

10:21:27 3 So they started with the VCR

10:21:29 4 analogy because it was a storage

10:21:31 5 system. They didn't exculpate all

10:21:33 6 retransmission services because

10:21:35 7 they used unique copies, and they

10:21:36 8 warn that different designs may

10:21:38 9 matter. And here you have a very

10:21:40 10 different design.

10:21:43 11 Which takes me through the

10:21:43 12 third point about Aereo and the

10:21:44 13 record.

10:21:44 14 Aereo is at the heart of the

10:21:48 15 Transmit Clause because they admit

10:21:49 16 that they are a retransmission

10:21:51 17 service. Super Bowl comes in,

10:21:53 18 Super Bowl goes out, all within

10:21:55 19 seconds. They advertise themselves

10:21:58 20 as a service that you can use to

10:22:00 21 watch television without cable. No

10:22:02 22 cable required. Broadcast TV is

10:22:06 23 right on its home page. That's at

10:22:08 24 pages 15 -- well, page 55 of the

10:22:11 25 record, and Mr. Kanojo said it on

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10:22:14 2 the stand at pages 1570 to 71 of

10:22:17 3 the record.

10:22:18 4 And it's in its very

10:22:19 5 positioning statement. Aereo is a

10:22:21 6 retransmission statement by its own

10:22:23 7 design. And because it doesn't

10:22:26 8 break the retransmission chain,

10:22:28 9 which the Second Circuit found was

10:22:31 10 broken in Cablevision because of

10:22:32 11 the act of storage, and then the

10:22:34 12 subsequent act, private playback on

10:22:38 13 those facts, Aereo does not get the

10:22:41 14 benefit of the Cablevision

10:22:43 15 analysis.

10:22:44 16 I reserve some time.

10:22:47 17 JUDGE CHIN: Yes.

10:22:48 18 MR. KELLER: Thank you very

10:22:49 19 much.

10:22:55 20 MR. HOSP: Your Honors, David

10:23:01 21 Hosp for Aereo.

10:23:03 22 May it please the court, I

10:23:05 23 will respond to a number of the

10:23:06 24 comments that have been made by

10:23:08 25 both attorneys for plaintiffs.

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10:23:11 2 But first, I'd like to make

10:23:13 3 five basic points with respect to

10:23:15 4 this case. First, I think you

10:23:17 5 heard this from opposing counsel,

10:23:21 6 consumers have the right to make

10:23:22 7 private performances. They have

10:23:24 8 the right to use an antenna, they

10:23:26 9 have the right to use a DVR, and

10:23:29 10 they have the right to use a

10:23:31 11 Slingbox type system, an internet
10:23:33 12 connection that allows them to make
10:23:34 13 private performances.

10:23:36 14 Second, supplying the
10:23:38 15 technology to accomplish this does
10:23:40 16 not constitute a violation of the
10:23:42 17 private performance right. And
10:23:43 18 particularly it does not constitute
10:23:46 19 a direct infringement of any
10:23:49 20 copyright. And that is the only
10:23:51 21 thing that has been challenged
10:23:52 22 here, is a direct infringement --

10:23:54 23 JUDGE CHIN: Do you concede

10:23:55 24 that Aereo is transmitting?

10:24:02 25 MR. HOSP: Consumers in the

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10:24:04 2 Aereo system transmit a copy of --

10:24:06 3 JUDGE CHIN: My question is,

10:24:07 4 do you concede that Aereo is

10:24:08 5 retransmitting -- that Aereo

10:24:10 6 captures broadcasts and then

10:24:12 7 retranslates them?

10:24:15 8 MR. HOSP: No, your Honor.

10:24:16 9 Aereo transmits a copy that

10:24:18 10 has been made by the consumer.

10:24:20 11 That's what's done using the Aereo

10:24:22 12 system. And that is, it's a

10:24:24 13 significant difference.

10:24:25 14 I take your Honor back to the

10:24:26 15 ASCAP decision.

10:24:27 16 JUDGE CHIN: How does the

10:24:28 17 consumer -- are you suggesting the

10:24:30 18 consumer is making the copy on her

10:24:33 19 own, or is it doing with it with

10:24:37 20 the assistance of Aereo?

10:24:39 21 MR. HOSP: Well, your Honor,

10:24:40 22 Judge Nathan in her decision was

10:24:42 23 very clear that in fact a consumer

10:24:44 24 makes the copy. She said whether a

10:24:46 25 user watches a program through

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10:24:48 2 Aereo's service as it is being

10:24:49 3 broadcast or after the initial

10:24:51 4 broadcast ends, does not change

10:24:53 5 that the transmission is made from

10:24:55 6 a unique copy previously created by

10:24:57 7 that user, accessible and

10:25:00 8 transmitted only to that user.

10:25:02 9 JUDGE CHIN: Only the prior

10:25:03 10 creation of that copy, the consumer

10:25:06 11 got it from Aereo. True?

10:25:11 12 MR. HOSP: Yes. The consumer

10:25:12 13 accessed it through the antenna

10:25:14 14 that Aereo provided.

10:25:16 15 JUDGE CHIN: It seems to me in

10:25:18 16 Cablevision, there was an ongoing

10:25:21 17 relationship between the consumer

10:25:23 18 and Cablevision. The consumer was

10:25:26 19 receiving the broadcast through

10:25:28 20 Cablevision. Cablevision as a

10:25:32 21 cable provider had the right to do

10:25:33 22 that. And then the consumer is

10:25:36 23 making a copy. Instead of doing it

10:25:38 24 in his living room, he's doing it

10:25:41 25 through machinery at Cablevision.

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10:25:45 2 Here there is no ongoing

10:25:48 3 relationship or prior relationship

10:25:49 4 with Aereo. And it's that first

10:25:53 5 capturing of the broadcasting that

10:25:57 6 results in the consumer having it.

10:25:59 7 So why doesn't that make this

10:26:01 8 case different from Cablevision?

10:26:04 9 MR. HOSP: It doesn't because

10:26:05 10 the Cablevision court specifically

10:26:07 11 addressed that issue. In fact, it

10:26:09 12 was an issue that was raised by the

10:26:11 13 plaintiffs in that case.

10:26:12 14 What the plaintiffs said was,

10:26:14 15 in fact they argued to this court,

10:26:16 16 the transmission, where Cablevision

10:26:19 17 split the stream and directed that

10:26:22 18 stream into the RSDVR system, the

10:26:25 19 plaintiffs themselves said that's

10:26:27 20 unlicensed, that's completely out

10:26:29 21 of bounds, nothing that they do

10:26:31 22 within the RSDVR system is licensed

10:26:33 23 at all.

10:26:34 24 And this court accepted that.

10:26:35 25 It accepted them at their word, and

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10:26:37 2 they said --

10:26:37 3 JUDGE CHIN: But the

10:26:38 4 plaintiffs were unsuccessful on

10:26:39 5 that point.

10:26:41 6 But before it got to the point

10:26:45 7 where they were separating the

10:26:47 8 stream, there was a license for

10:26:50 9 that. And doesn't that make this

10:26:52 10 case different?

10:26:54 11 MR. HOSP: Your Honor, it
10:26:55 12 doesn't make this case different
10:26:56 13 because the transmission that this
10:26:58 14 court considered in Cablevision was
10:27:00 15 the transmission from the
10:27:02 16 individual copy to the individual.
10:27:04 17 And basically what Cablevision said
10:27:07 18 was, the court accepted the
10:27:09 19 plaintiffs' argument that in fact
10:27:12 20 the transmission, the splitting of
10:27:15 21 the stream that went into the RSDVR
10:27:17 22 system, was not licensed.

10:27:19 23 And what Cablevision said was,

10:27:20 24 you know what, that doesn't matter.

10:27:22 25 It doesn't matter whether or not

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10:27:23 2 that stream is licensed or not,

10:27:26 3 because ultimately the only thing

10:27:27 4 that we're looking at is the nature

10:27:29 5 of the transmission itself.

10:27:31 6 And the transmission at issue,

10:27:32 7 and this is the fundamental holding

10:27:33 8 of Cablevision, but not just

10:27:35 9 Cablevision, it's the fundamental

10:27:37 10 holding, it's one of the fund

10:27:38 11 member holdings of ASCAP too. It

10:27:41 12 is that a transmission from an

10:27:42 13 individual copy to a single

10:27:45 14 individual is not a public

10:27:48 15 performance.

10:27:49 16 JUDGE DRONEY: Let's talk

10:27:50 17 about the individualization of

10:27:52 18 this. Let's hypothetically say

10:27:55 19 Monday Night Football,

10:27:57 20 Giants/Redskins, next Monday, 5,000

10:28:00 21 Aereo customers are watching it on

10:28:02 22 their watch function. And none of

10:28:04 23 them has paused it.

10:28:06 24 Aren't those 5,000 people

10:28:07 25 seeing the exact same thing at the

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10:28:10 2 exact same time?

10:28:11 3 MR. HOSP: They are not,

10:28:13 4 actually. And this was a finding

10:28:14 5 that the court made.

10:28:15 6 In fact, what happens in the

10:28:16 7 Aereo system is a consumer logs on,

10:28:19 8 they are assigned an antenna. And

10:28:21 9 that individual antenna receives

10:28:23 10 its own individual signal. And

10:28:25 11 what was shown at the hearing was

10:28:27 12 in fact the signals that are

10:28:30 13 generated in each individual's

10:28:31 14 antenna are different. There was

10:28:34 15 actual, an actual factual

10:28:35 16 determination, there was evidence

10:28:36 17 that showed that in fact antenna A

10:28:40 18 is generating a slightly different

10:28:42 19 signal from antenna B.

10:28:45 20 JUDGE DRONEY: How is it

10:28:46 21 different?

10:28:47 22 JUDGE GLEESON: Redskins might

10:28:48 23 win in some homes but lose in

10:28:50 24 others?

10:28:50 25 MR. HOSP: They might. It

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10:28:52 2 might be broadcast differently down

10:28:53 3 in Washington.

10:28:54 4 No, what was the difference

10:28:57 5 is, again, they're not differences

10:28:58 6 that make a significant impact on

10:29:00 7 the perception and what you are

10:29:03 8 actually sort of seeing.

10:29:05 9 JUDGE DRONEY: People have

10:29:06 10 different quality TVs too. How is

10:29:08 11 what they're watching different?

10:29:09 12 If they're just on their watch

10:29:11 13 function, they haven't paused it,

10:29:12 14 aren't they seeing the same 3rd

10:29:15 15 down and 3 play at the same time as

10:29:17 16 the 4,000 other customers?

10:29:19 17 MR. HOSP: Again, they may be

10:29:20 18 viewing it at the same time.

10:29:21 19 But under Cablevision and

10:29:22 20 under ASCAP what they are viewing,

10:29:24 21 what is being transmitted to them

10:29:25 22 is different from what is being

10:29:28 23 transmitted to others.

10:29:28 24 JUDGE CHIN: You're saying

10:29:30 25 that's an individualized copy?

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10:29:32 2 MR. HOSP: Yes, exactly.

10:29:33 3 It is both an individual -- --

10:29:36 4 JUDGE CHIN: Does that make

10:29:37 5 any sense? Millions of people are

10:29:40 6 watching the football game, they

10:29:42 7 get it through Aereo, and put aside

10:29:45 8 the record function, and that's not

10:29:48 9 getting a retransmission from

10:29:50 10 Aereo? That's the position?

10:29:52 11 MR. HOSP: Under the Transmit

10:29:54 12 Clause, and under particularly --

10:29:56 13 JUDGE CHIN: But as a matter

10:29:57 14 of common sense. Is it at all

10:29:59 15 logical that, you know, the 25,000

10:30:02 16 people who are watching it

10:30:04 17 individually on their, through

10:30:07 18 their Aereo system, that they are

10:30:09 19 watching an individualized copy and

10:30:11 20 they're not watching the football

10:30:13 21 game?

10:30:14 22 MR. HOSP: It is logical based

10:30:15 23 on the system that Congress put in

10:30:17 24 place.

10:30:18 25 This all goes back to the

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10:30:19 2 Transmit Clause, and what the

10:30:20 3 Transmit Clause says is, that the

10:30:23 4 performance at issue --

10:30:24 5 JUDGE CHIN: What if you took

10:30:25 6 away the record function

10:30:27 7 completely, and this were just a

10:30:29 8 system for streaming and watching.

10:30:33 9 Like I view. Is that -- and that's

10:30:37 10 perfectly fine?

10:30:39 11 MR. HOSP: No, no. If you're
10:30:40 12 talking about a streaming service
10:30:41 13 where there is no fixed copy that's
10:30:42 14 being made, then no, that is a
10:30:45 15 public performance issue.
10:30:46 16 You could see this distinction
10:30:47 17 with respect to --
10:30:48 18 JUDGE CHIN: But if you take
10:30:49 19 away the record function, instead
10:30:51 20 of two buttons your only choice is
10:30:53 21 to watch, you're saying it still
10:30:55 22 would be consistent with the

10:30:58 23 Copyright Act because it's still a

10:31:00 24 copy. Is that the position?

10:31:02 25 MR. HOSP: Your Honor, just to

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10:31:03 2 clarify your hypothetical.

10:31:05 3 Are you saying that there is

10:31:06 4 still a fixed copy that is

10:31:08 5 cognizable?

10:31:08 6 JUDGE CHIN: Exact same

10:31:10 7 technology, except that the

10:31:12 8 consumer, the Aereo subscriber does

10:31:14 9 not have the option of hitting a

10:31:16 10 record button. All he can do is

10:31:18 11 watch.

10:31:19 12 MR. HOSP: That would be a

10:31:20 13 very, very different situation.

10:31:23 14 Because there, and again, the real

10:31:24 15 question, under Cablevision and

10:31:27 16 ASCAP is whether or not a fixed

10:31:29 17 copy is made. Which is different

10:31:31 18 from a streaming situation.

10:31:32 19 JUDGE CHIN: The exact same

10:31:34 20 technology except you're not giving

10:31:36 21 the option of letting the person

10:31:38 22 record it. Otherwise the

10:31:41 23 technology is the same, in terms of

10:31:43 24 the copying, et cetera, that's all

10:31:45 25 the say. Would that violate the

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10:31:46 2 Copyright Act?

10:31:48 3 MR. HOSP: If there was --

10:31:50 4 again, if there is a fixed copy

10:31:51 5 being made, then no, it would not.

10:31:53 6 Under Cablevision, under my

10:31:54 7 reading of Cablevision, again, you

10:31:56 8 don't need to reach that question

10:31:57 9 because that's not the question

10:31:58 10 that's presented in this case. But

10:31:59 11 under my reading of Cablevision,
10:32:03 12 what Cablevision says is where you
10:32:05 13 have a unique fixed copy, you now
10:32:06 14 have a reproduction issue. But
10:32:08 15 it's no longer a public performance
10:32:10 16 issue.
10:32:10 17 And again, coming back to
10:32:12 18 ASCAP, think about it, you're
10:32:15 19 sitting at your computer and you
10:32:16 20 want to listen to a song right now.
10:32:18 21 You've got two ways to do it. You
10:32:21 22 can stream it, and if you stream it

10:32:23 23 what's happening is you are

10:32:24 24 actually streaming it from a common

10:32:26 25 copy that other people have access

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10:32:27 2 to. And that's a public

10:32:28 3 performance issue. It's not a

10:32:30 4 reproduction issue, because there

10:32:31 5 is no fixed copy that's being made.

10:32:32 6 The other way you can listen

10:32:34 7 to music right now is to download

10:32:36 8 it. And what you do is you

10:32:37 9 download it, it takes a couple of

10:32:38 10 seconds, there is a couple of

10:32:39 11 seconds delay, and then when you

10:32:41 12 play that, again, within a couple

10:32:45 13 of seconds, what you are playing is

10:32:47 14 an individual copy.

10:32:48 15 And that's the circumstance

10:32:49 16 that ASCAP, this court examined in

10:32:52 17 ASCAP. What this court said what,

10:32:54 18 you know what, that's not a public

10:32:56 19 performance. It doesn't matter,

10:32:58 20 because now you've got a copy

10:33:00 21 issue. You've got a reproduction

10:33:01 22 right issue. These are two rights

10:33:03 23 that work in tandem with each

10:33:06 24 other.

10:33:06 25 JUDGE DRONEY: Let me ask you

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10:33:07 2 about the antennas.

10:33:08 3 Would you still be arguing

10:33:09 4 that these are not public

10:33:11 5 performances if instead of all

10:33:13 6 these antennas you just had one?

10:33:15 7 Is the system, without that

10:33:18 8 feature, still not a public

10:33:20 9 performance?

10:33:20 10 MR. HOSP: Well, again, it's a

10:33:22 11 very different case than what we
10:33:23 12 have here. And we do believe that
10:33:25 13 the antennas matter in this case.
10:33:27 14 But under the holding in
10:33:28 15 Cablevision, where you're talking
10:33:30 16 about a system like this, where
10:33:32 17 there is an individual copy that is
10:33:34 18 being made, under the ruling in
10:33:38 19 Cablevision, under the law as it
10:33:40 20 stands in the Second Circuit, that
10:33:42 21 is if that individual copy is going
10:33:44 22 directly to only one individual and

10:33:46 23 is only accessed by that

10:33:48 24 individual, what you have is a copy

10:33:49 25 issue.

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10:33:50 2 JUDGE GLEESON: But if it was

10:33:51 3 just one retransmission, you

10:33:53 4 wouldn't win; right?

10:33:55 5 MR. HOSP: If it was --

10:33:56 6 JUDGE GLEESON: If you had no

10:33:57 7 individual antennas, no

10:33:58 8 individualized copies, you'd lose?

10:34:00 9 MR. HOSP: Yes. If it was one

10:34:03 10 antenna and no copies being made,

10:34:05 11 at that point you --

10:34:06 12 JUDGE GLEESON: Does the

10:34:07 13 provider of Video-on-Demand content

10:34:11 14 create a public performance when it

10:34:14 15 provides a movie to someone in

10:34:17 16 Video-on-Demand?

10:34:18 17 MR. HOSP: Yes, absolutely.

10:34:19 18 And that's exactly the same

10:34:20 19 situation that the court, the

10:34:21 20 Cablevision court addressed when it

10:34:23 21 talked about the on command in the

10:34:25 22 Redhorn cases.

10:34:27 23 JUDGE GLEESON: Would it be

10:34:28 24 different if a provider of

10:34:30 25 Video-on-Demand created an

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10:34:33 2 individualized hard drive for each

10:34:34 3 of the subscribers, would they then

10:34:36 4 be creating a private performance

10:34:37 5 and not have to worry about paying

10:34:39 6 royalties?

10:34:40 7 MR. HOSP: That's exactly what

10:34:41 8 ASCAP is. And what ASCAP held was

10:34:44 9 in that situation where what you

10:34:46 10 have is somebody making an

10:34:47 11 individual copy, what you have is a

10:34:50 12 reproduction right issue. But it's

10:34:52 13 not a public performance right

10:34:53 14 issue.

10:34:54 15 That is exactly the issue that

10:34:56 16 was decided by this court in ASCAP

10:34:58 17 when it said you know what, these

10:34:59 18 are two rights that function in a

10:35:04 19 complementary way. And Cablevision

10:35:06 20 recognized that. Cablevision

10:35:08 21 recognized the notion that it was

10:35:09 22 okay that by creating a copy you no

10:35:13 23 longer had a public performance

10:35:14 24 issue, because you now were

10:35:16 25 creating -- you essentially were

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10:35:18 2 picking your poison. You were

10:35:20 3 creating a reproduction right

10:35:22 4 issue.

10:35:22 5 And what Cablevision says is,

10:35:24 6 that's okay because you have

10:35:25 7 another right to go under.

10:35:26 8 Now, in this particular case,

10:35:29 9 because of the Supreme Court's

10:35:30 10 decision in Sony, we believe that

10:35:34 11 the consumer making the copy is a

10:35:37 12 fair use. And therefore while it

10:35:39 13 does implicate the reproduction

10:35:41 14 right, we believe that it is not a

10:35:44 15 violation of that reproduction

10:35:45 16 right, because it's foreclosed

10:35:47 17 under Sony.

10:35:49 18 But that's an issue that's

10:35:50 19 being litigated in the District

10:35:52 20 Court.

10:35:52 21 JUDGE DRONEY: Can I get back

10:35:53 22 to my antenna question.

10:35:55 23 It sounded like you said even

10:35:56 24 with one antenna you'd still be

10:35:58 25 arguing same position under

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10:36:00 2 Cablevision that the individualized

10:36:01 3 copies here do not constitute a

10:36:03 4 public performance. That's what

10:36:04 5 you said, right?

10:36:05 6 MR. HOSP: Your Honor, if we

10:36:06 7 were presented with that, it's my

10:36:08 8 reading of Cablevision that because

10:36:10 9 there is an individual copy, that

10:36:12 10 it would foreclose a public

10:36:14 11 performance finding there.

10:36:16 12 JUDGE DRONEY: Even with just

10:36:17 13 one antenna?

10:36:18 14 MR. HOSP: Even with just one

10:36:20 15 antenna. But again, that is not

10:36:21 16 our situation.

10:36:22 17 JUDGE DRONEY: So why did you

10:36:23 18 build all these antennas?

10:36:24 19 MR. HOSP: Well, there are a

10:36:26 20 number of different reasons.

10:36:27 21 JUDGE DRONEY: Is there any

10:36:28 22 technological reason for it?

10:36:30 23 MR. HOSP: There is.

10:36:34 24 Is there a technological

10:36:35 25 reason in terms of?

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10:36:36 2 JUDGE DRONEY: Does it make

10:36:37 3 the transmissions better? Why do

10:36:39 4 you it, why do you spend all the

10:36:40 5 money on all these little antennas

10:36:42 6 when you can do it with one big

10:36:44 7 antenna?

10:36:45 8 MR. HOSP: It makes it clear

10:36:46 9 that there are in fact two bases

10:36:48 10 for this being legal under the

10:36:49 11 Copyright Act. I mean, that's what

10:36:52 12 Judge Nathan made clear, was that

10:36:55 13 the copies themselves, under the

10:36:57 14 law as it is --

10:36:58 15 JUDGE CHIN: But it seems

10:36:59 16 you're exalting form over

10:37:02 17 substance. You're going through

10:37:03 18 this fiction of using, you know, a

10:37:06 19 million itty-bitty antennas when

10:37:10 20 really you'd rather do it with one,

10:37:12 21 just to try to fit within

10:37:13 22 Cablevision.

10:37:14 23 Isn't that what's happening?

10:37:16 24 MR. HOSP: No, your Honor.

10:37:17 25 JUDGE CHIN: No? Is there any

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10:37:18 2 legitimate business reason for

10:37:20 3 having all of these little

10:37:21 4 itty-bitty antennas?

10:37:24 5 MR. HOSP: I guess I'm not --

10:37:26 6 JUDGE CHIN: Any technological

10:37:28 7 reason.

10:37:28 8 MR. HOSP: Is there any

10:37:30 9 logical reason?

10:37:30 10 JUDGE CHIN: Technological

10:37:31 11 reason.

10:37:31 12 MR. HOSP: The reason for

10:37:32 13 having the antennas is to comply I

10:37:34 14 with the Copyright Act. And we

10:37:36 15 believe that in both instances it

10:37:37 16 complies with the Copyright Act.

10:37:39 17 And again, this is something,

10:37:42 18 the argument that plaintiffs have

10:37:43 19 made that the court, the District

10:37:46 20 Court paid too much attention to

10:37:48 21 the form of --

10:37:50 22 JUDGE CHIN: Let's extend this

10:37:53 23 to books. You send an electronic

10:37:56 24 book to a consumer, you make it a

10:37:58 25 little bit different, you put the

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10:38:00 2 purchaser's name on it. Does that

10:38:02 3 now suddenly become a private

10:38:07 4 performance?

10:38:08 5 MR. HOSP: Well, again --

10:38:10 6 JUDGE CHIN: Under the logic

10:38:11 7 that you're advocating in this

10:38:14 8 case?

10:38:14 9 MR. HOSP: Again, with respect

10:38:15 10 to books, the public performance

10:38:18 11 right obviously doesn't apply.

10:38:19 12 But taking your argument for

10:38:22 13 what I think that you're asking,

10:38:25 14 the answer is yes, this, for

10:38:27 15 example, all comes back to ASCAP.

10:38:29 16 If you basically take it in the

10:38:32 17 music industry situation, yes, what

10:38:36 18 this court held was that where you

10:38:38 19 make a copy, even if you're

10:38:41 20 listening to it right away, where

10:38:42 21 you make a copy, it's not a public

10:38:44 22 performance anymore. And that's

10:38:46 23 important because do you have

10:38:47 24 another right to go under.

10:38:49 25 And in fact, when you read the

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10:38:50 2 Cablevision decision, at the end of

10:38:52 3 the Cablevision decision, the end

10:38:54 4 of the Cablevision decision makes

10:38:55 5 clear that this court understood

10:38:57 6 exactly what it was doing. This

10:38:59 7 court said, you know what, we're

10:39:02 8 not saying that there is no

10:39:03 9 copyright protection here, we're

10:39:05 10 not saying that there aren't

10:39:06 11 possibilities in many instances

10:39:07 12 where you're not going to have a

10:39:09 13 right either under indirect

10:39:10 14 infringement or potentially under

10:39:12 15 your reproduction right. And

10:39:15 16 that's okay.

10:39:15 17 And it's important to do that

10:39:17 18 because if you take the flip side,

10:39:19 19 if you turn it around and you say

10:39:20 20 okay, let's accept, for example,

10:39:22 21 these aggregation arguments. What

10:39:24 22 you're saying is every time

10:39:26 23 somebody goes up on a roof and puts

10:39:28 24 an antenna on a roof and then

10:39:30 25 transmits that signal down to their

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10:39:31 2 own television, that's now a public

10:39:34 3 performance because that has to be

10:39:36 4 aggregated with the original

10:39:37 5 broadcaster's performance.

10:39:38 6 Every single question that is

10:39:40 7 raised by the plaintiffs was

10:39:42 8 actually specifically addressed in

10:39:43 9 the Cablevision decision.

10:39:44 10 JUDGE CHIN: But that's not

10:39:45 11 what's happening here. Aereo is

10:39:46 12 providing the service so the

10:39:48 13 consumer doesn't have to go up on

10:39:49 14 the roof. And the consumer can

10:39:52 15 stay downstairs.

10:39:54 16 Why isn't that retransmission?

10:39:56 17 MR. HOSP: Because the

10:39:57 18 analysis is the same under the

10:39:59 19 Copyright Act in either instance.

10:40:01 20 What the Copyright Act held is,

10:40:02 21 what the Copyright Act says, what

10:40:04 22 Congress intended, was for the

10:40:07 23 analysis to be the transmission of

10:40:10 24 the performance, rather than the

10:40:13 25 transmission of the work.

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10:40:15 2 And again, this is really what

10:40:17 3 plaintiffs are asking you to do, is

10:40:18 4 overturn Cablevision. That's

10:40:22 5 what's at issue. And what's being

10:40:23 6 said here is that Cablevision is

10:40:24 7 wrong. We disagree with

10:40:26 8 Cablevision.

10:40:29 9 JUDGE CHIN: I think the

10:40:30 10 District Judge got it right in

10:40:31 11 Cablevision. But of course we're

10:40:36 12 bound by the Circuit decision.

10:40:38 13 MR. HOSP: And that really is

10:40:40 14 what's, you know, in this instance

10:40:42 15 it's the sort of thing where --

10:40:45 16 JUDGE GLEESON: And to put

10:40:46 17 your position as just as bluntly,

10:40:49 18 you seem to be reticent to say it

10:40:53 19 out loud, the model is built around

10:40:57 20 Cablevision?

10:40:57 21 MR. HOSP: Yes.

10:40:58 22 JUDGE GLEESON: You don't have

10:40:59 23 all these little antennas because

10:41:00 24 it makes any sense, it's kind of

10:41:02 25 like constructing your business

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10:41:04 2 affairs to avoid taxes. Right?

10:41:07 3 It's tax avoidance is different

10:41:08 4 from tax evasion.

10:41:10 5 But you built this business

10:41:12 6 and the technology with Cablevision

10:41:14 7 in mind to avoid copyright

10:41:16 8 violations; correct?

10:41:17 9 MR. HOSP: Everyone in this

10:41:18 10 case agrees that Aereo designed

10:41:20 11 this system to comply with

10:41:21 12 copyright and to follow the law as

10:41:23 13 this court laid down in

10:41:25 14 Cablevision.

10:41:25 15 Now, the plaintiffs --

10:41:26 16 JUDGE GLEESON: And the reason

10:41:27 17 you have all the little tiny

10:41:28 18 antennas is simple, it's because,

10:41:30 19 in your view, kind of a belt and

10:41:33 20 suspenders approach to avoiding the

10:41:35 21 public performance?

10:41:36 22 MR. HOSP: And it follows the

10:41:38 23 law and it follows the Copyright

10:41:40 24 Act.

10:41:40 25 Now, plaintiffs suggested

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10:41:41 2 somehow this is a bad thing that

10:41:43 3 Cablevision -- that Aereo has

10:41:45 4 decided to follow the law. It's an

10:41:46 5 argument that doesn't make sense.

10:41:48 6 The law, this court decided

10:41:49 7 what the law was. And Aereo

10:41:52 8 followed it to a T. And the law is

10:41:55 9 what it is.

10:41:55 10 This court -- let me make

10:41:57 11 clear, I believe that the Second

10:42:00 12 Circuit got it right in

10:42:01 13 Cablevision. Because it's the

10:42:03 14 balance between private performance

10:42:05 15 and public performance that

10:42:06 16 Congress indicated it wanted to

10:42:08 17 strike.

10:42:09 18 And so this is a situation --

10:42:12 19 JUDGE CHIN: Is it your view

10:42:13 20 that this case is exactly like

10:42:15 21 Cablevision?

10:42:16 22 MR. HOSP: Well, the District

10:42:17 23 Court --

10:42:18 24 JUDGE CHIN: Even though there

10:42:19 25 isn't that ongoing relationship

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10:42:21 2 between the subscriber and Aereo as

10:42:25 3 there was in Cablevision?

10:42:27 4 MR. HOSP: Well, your Honor, I

10:42:29 5 believe there is an ongoing

10:42:30 6 relationship.

10:42:31 7 But the District Court made

10:42:32 8 factual determinations that in fact

10:42:36 9 all of the facts that are relevant

10:42:39 10 to the Cablevision finding are

10:42:41 11 present here. The District Court
10:42:43 12 made those factual findings
10:42:45 13 specifically. And those factual
10:42:47 14 findings have not been challenged.

10:42:49 15 JUDGE CHIN: You don't think
10:42:50 16 you're asking us to go one step
10:42:52 17 further than Cablevision with this
10:42:54 18 case?

10:42:54 19 MR. HOSP: No, no. This
10:42:55 20 doesn't extend Cablevision at all.
10:42:58 21 Not even a little bit. This case
10:43:01 22 is on all fours with Cablevision.

10:43:03 23 The question under Cablevision

10:43:05 24 and under ASCAP, it's not just

10:43:07 25 Cablevision, it's ASCAP as well,

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10:43:09 2 and other courts have followed this

10:43:10 3 as well, it's whether or not there

10:43:11 4 is a single unique copy and who can

10:43:14 5 receive that copy. And that's what

10:43:15 6 the law says. And in fact that's

10:43:19 7 how the law stands.

10:43:20 8 This is why the court -- and

10:43:22 9 this is why the Supreme Court noted

10:43:24 10 that in instances like this where

10:43:26 11 you're dealing with new technology,

10:43:28 12 courts have to be very circumspect

10:43:30 13 about extending copyright.

10:43:32 14 We're not asking to extend

10:43:35 15 Cablevision. Plaintiffs are asking

10:43:37 16 to extend the Copyright Act.

10:43:41 17 Appellants here are asking you

10:43:42 18 fundamentally to change the law and

10:43:43 19 to overturn Cablevision. To

10:43:45 20 overturn ASCAP. And in the process

10:43:47 21 to punish Aereo for following the

10:43:50 22 law.

10:43:52 23 We're asking you not to do

10:43:53 24 this. We're asking you to uphold

10:43:56 25 Judge Nathan's exceptionally well

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10:44:00 2 written opinion.

10:44:00 3 Thank you, your Honor.

10:44:01 4 JUDGE CHIN: Thank you.

10:44:03 5 We'll hear rebuttal.

10:44:08 6 MR. SMITH: Your Honors, I

10:44:09 7 think it's telling you saw from

10:44:11 8 Mr. Hosp's argument no effort to

10:44:13 9 explain why their service and his

10:44:15 10 particular features with the little

10:44:16 11 antennas and the individual copies

10:44:18 12 should be exempt under the statute

10:44:21 13 as written by Congress.

10:44:23 14 Congress made the statute as

10:44:24 15 broad as possible. It said the

10:44:26 16 function of retransmission by any

10:44:28 17 device or process, whether it goes

10:44:29 18 to different people, different

10:44:30 19 places, same time, same place, all

10:44:32 20 of that ought to be requiring a

10:44:33 21 license.

10:44:34 22 Instead what they did is they

10:44:35 23 designed a system by taking some

10:44:37 24 straight language out of the

10:44:38 25 Cablevision decision and said we

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10:44:39 2 think we can exploit this.

10:44:41 3 But it makes no sense to think

10:44:42 4 that a decision about that one

10:44:44 5 little DVR function changed the

10:44:48 6 statute and that it binds

10:44:50 7 subsequent panels to say well, you

10:44:51 8 can do it this way when in fact, as

10:44:53 9 was brought out in the questioning,

10:44:54 10 they could have 5 million people

10:44:57 11 watching the same Monday Night

10:44:59 12 Football game live over their

10:45:01 13 internet devices without paying a

10:45:02 14 dime in license fees for it.

10:45:05 15 JUDGE GLEESON: Does this

10:45:05 16 enlarge the audience for the

10:45:07 17 content?

10:45:08 18 MR. SMITH: It might well,

10:45:09 19 your Honor. Another argument that

10:45:10 20 was made by the cable companies

10:45:12 21 before the '76 Act is we're not

10:45:15 22 harming you, we're simply getting

10:45:17 23 your broadcast to more people. And

10:45:18 24 more people seeing the commercials.

10:45:22 25 Congress disagreed with that

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10:45:22 2 determination and said if you're

10:45:23 3 making money off their broadcast

10:45:25 4 programming that they paid to

10:45:26 5 create, you owe them license fees.

10:45:29 6 What Aereo is saying is we

10:45:30 7 found a way to design around it

10:45:32 8 using stuff in a decision that is

10:45:33 9 about a different factual

10:45:35 10 situation.

10:45:35 11 The one point I want to make

10:45:37 12 is the same thing is true with

10:45:38 13 respect to the record function.

10:45:39 14 The statute is clear that a

10:45:41 15 retransmission service that delays

10:45:42 16 is also covered and also requires a

10:45:45 17 license. So if Ivy, for example,

10:45:48 18 decided to make a copy of Monday

10:45:50 19 Night Football and tell the

10:45:52 20 subscribers you can watch this copy

10:45:53 21 on demand whenever you want to for

10:45:55 22 the next 36 hours, that would also

10:45:56 23 be covered by the Transmit Clause.

10:45:58 24 It says same time or different

10:46:00 25 times.

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10:46:00 2 JUDGE DRONEY: As long as

10:46:01 3 they're watching the same copy

10:46:03 4 though, right?

10:46:04 5 MR. SMITH: That is a function

10:46:05 6 that clearly the Transmit Clause

10:46:07 7 covers in that situation.

10:46:08 8 Now, the only question then is

10:46:10 9 are you going to let Aereo, which

10:46:12 10 has provided this television to

10:46:14 11 them through the antennas and made

10:46:16 12 it available, suddenly say we're

10:46:18 13 just a VCR, we're just a DVR,

10:46:22 14 because we make individual copies

10:46:23 15 instead of doing what Ivy would be

10:46:25 16 doing, which is time delayed

10:46:27 17 retransmissions.

10:46:28 18 I think the important point is

10:46:30 19 different times is the same as

10:46:32 20 saying delayed times. Delayed

10:46:33 21 retransmission is the same as the

10:46:36 22 live retransmission.

10:46:37 23 Thank you, your Honor.

10:46:38 24 JUDGE CHIN: Thank you.

10:46:39 25 JUDGE GLEESON: Thank you.

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10:46:42 2 MR. KELLER: We are not asking

10:46:45 3 you to overturn the Second

10:46:46 4 Circuit's decision in Cablevision

10:46:48 5 notwithstanding the rulings of the

10:46:50 6 lower court in that case.

10:46:51 7 It is not the case that

10:46:54 8 Aereo --

10:46:54 9 JUDGE GLEESON: District

10:46:55 10 judges like overturning the Second

10:46:58 11 Circuit.

10:46:59 12 MR. KELLER: Mr. Hosp did not

10:47:00 13 answer the question directly, Judge

10:47:04 14 Chin, when you asked him to concede

10:47:05 15 whether Aereo is retransmitting.

10:47:08 16 But Aereo conceded it already, at

10:47:10 17 page 28 of their brief. There they

10:47:12 18 say that Aereo is transmitting our

10:47:16 19 copyrighted performances, they're

10:47:18 20 just not doing it directly. It's

10:47:20 21 right at the top of page 28.

10:47:22 22 So what? A retransmission

10:47:24 23 service by definition, indirectly

10:47:27 24 retransmits the copyrighted works

10:47:29 25 of the original broadcaster. That

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10:47:31 2 is what a cable television system

10:47:34 3 does. It receives a signal, runs

10:47:36 4 it through the cable head end,

10:47:38 5 sends it to its subscribers.

10:47:39 6 Aereo is a retransmission

10:47:40 7 service in every sense of the word.

10:47:42 8 Judge Nathan made specific findings

10:47:44 9 on that point. She repeatedly

10:47:45 10 talked about Aereo's system

10:47:47 11 transmitting our copyrighted

10:47:48 12 broadcast to Aereo's subscribers.

10:47:50 13 And Judge Droney, your point

10:47:52 14 really was the one I wanted to make

10:47:54 15 and never got to. I guarantee you

10:47:56 16 that when you watch Super Bowl XLVI

10:47:58 17 through Aereo, the Giants beat the

10:48:01 18 Patriots every time 21-17. It is

10:48:03 19 exactly the same performance.

10:48:05 20 And the notion that somehow

10:48:06 21 it's encoded differently, the name

10:48:08 22 on the book example, somehow that

10:48:10 23 makes it private, that is not

10:48:12 24 common sensical at all. It is a

10:48:14 25 retransmission service, pure and

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10:48:15 2 simple.

10:48:16 3 Now, Mr. Hosp suggested that

10:48:18 4 without a fixed copy, somehow the

10:48:21 5 result is different. No, it's not.

10:48:23 6 Either way, Congress said you use

10:48:26 7 any device or process, if the end

10:48:28 8 result is that the viewer gets the

10:48:30 9 performance, it's a retransmission

10:48:33 10 of a public performance, that

10:48:36 11 violates the Copyright Act without
10:48:37 12 a license.
10:48:38 13 Now, why is that important?
10:48:39 14 Because it's all about the
10:48:41 15 difference that clearly separates
10:48:42 16 us today on ASCAP. ASCAP came out
10:48:45 17 the way it did because at page 74
10:48:48 18 of that opinion, Judge Walker wrote
10:48:50 19 that a performance, if it's not a
10:48:53 20 performance, it can't be a public
10:48:55 21 performance. That's the holding of
10:48:57 22 ASCAP.

10:48:58 23 And in that context, the

10:49:00 24 download of a previously stored

10:49:02 25 musical file to somebody's cell

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10:49:05 2 phone was viewed, just like we

10:49:08 3 argue Cablevision's RSDVR service

10:49:11 4 is should be viewed, was viewed by

10:49:13 5 the panel, as a stored service. It

10:49:15 6 was not perceptible at the time

10:49:18 7 that the original transmission was

10:49:19 8 coming in. There was input, but no

10:49:22 9 output.

10:49:23 10 And Aereo is not that. It is

10:49:24 11 a pure input/output service.
10:49:28 12 Without a license, it violates the
10:49:30 13 public performance right that the
10:49:31 14 broadcasters have because it sells
10:49:33 15 our broadcast, our performances, to
10:49:35 16 its own subscribers.

10:49:38 17 Thank you very much.

10:49:39 18 JUDGE CHIN: Thank you.

10:49:41 19 We'll reserve decision.

10:49:43 20 (Time noted: 10:49 a.m.)

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24

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2 CERTIFICATE

3 STATE OF NEW YORK)

4 : ss.

5 COUNTY OF NEW YORK)

6 I, ERIC J. FINZ, a Shorthand

7 Reporter and Notary Public within and

8 for the State of New York, do hereby

9 certify that the foregoing proceedings

10 were taken before me on November 30,

11 2012;

12 That the within transcript is

13 a true record of said proceedings;

14 That I am not connected by

15 blood or marriage with any of the

16 parties herein nor interested directly

17 or indirectly in the matter in

18 controversy, nor am I in the employ of

19 the counsel.

20 IN WITNESS WHEREOF, I have

21 hereunto set my hand this ____ day of

22 _____, 2012.

23

24

25

ERIC J. FINZ

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