
Copyright Act of 1976 — Transmit Clause —
ABC, Inc. v. Aereo, Inc.

In the late 1940s and early 1950s, a new industry of community antenna television (CATV) exploded.¹ By placing an antenna on top of a hill above a community and transmitting signals to subscribers' houses via coaxial cables, CATV companies provided television to areas where hilly terrain made receiving traditional broadcast signals difficult.² After the Supreme Court held that such systems did not violate copyright holders' exclusive rights to public performance,³ Congress revised the copyright law in 1976 and, among other things, enacted the Transmit Clause to supersede those decisions and make such transmissions an infringement of copyright. Last Term, in *ABC, Inc. v. Aereo, Inc.*,⁴ the Supreme Court held that a company that transmitted broadcast television to users via the Internet violated the Transmit Clause, even though the user selected what content to watch, and even though each user had a dedicated antenna that produced a "personal" copy of the broadcast.⁵ The Court employed a functionalist approach, relying on analogical reasoning rather than analyzing the underlying technical operations of the system — the method that Justice Scalia adopted in his dissent. In doing so, the majority introduced unpredictability into the law by leaving important doctrinal questions unanswered and adopting an approach that lacks clear boundaries.

Prior to the Copyright Act of 1976,⁶ the Court read the public performance right narrowly. In 1968, in *Fortnightly Corp. v. United Artists Television, Inc.*,⁷ the Court held that a CATV operator is more analogous to a "viewer" than a "performer," and thus cannot face liability under the Copyright Act.⁸ The Court affirmed *Fortnightly* in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,⁹ and called

¹ In 1948, the first commercial CATV system in the country had 727 customers. By 1955, about 150,000 homes subscribed to one of 400 such systems. Thomas R. Eisenmann, *Cable TV: From Community Antennas to Wired Cities*, HARV. BUS. SCH.: WORKING KNOWLEDGE (July 10, 2000), <http://hbswk.hbs.edu/item/1591.html> [<http://perma.cc/8Z3Y-E9MC>].

² See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391–92 (1968).

³ See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 405 (1974); *Fortnightly*, 392 U.S. at 402.

⁴ 134 S. Ct. 2498 (2014).

⁵ *Id.* at 2503.

⁶ 17 U.S.C. §§ 101–805 (2012).

⁷ 392 U.S. 390.

⁸ *Id.* at 400–01 ("Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.")

⁹ 415 U.S. 394 (1974).

on Congress to revise the copyright law if it wished to cover such activity.¹⁰ In 1976, Congress enacted a sweeping reform of copyright law, which included adding the Transmit Clause to broaden the definition of what it meant to “publicly perform” a work.¹¹ According to the Transmit Clause, a work is performed publicly when the performance is transmitted 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.”¹²

In order to avoid implicating the Transmit Clause, Aereo, a company that allowed users to watch live and recorded broadcast television on a computer or other digital device, employed arrays of tiny television antennas and assigned each antenna to only one user at a time — rather than broadcasting to a multifarious “public.”¹³ Aereo announced its public launch in February 2012 in New York.¹⁴ Subsequently, a group of broadcasters including ABC and WNET filed suit in the Southern District of New York and moved for a preliminary injunction on the ground of copyright infringement by public performance.¹⁵ Judge Nathan denied the preliminary injunction,¹⁶ relying on a Second Circuit case, *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*,¹⁷ which held that remote storage digital video recorders (RS-DVRs) do not violate the Transmit Clause.¹⁸ Finding that Aereo’s technology was structured similarly to the RS-DVRs and rejecting the plaintiffs’ attempts to distinguish *Cablevision*,¹⁹ Judge Nathan held that the plaintiffs were not likely to prevail on the merits.²⁰

The Second Circuit affirmed. Writing for the majority, Judge Droney²¹ reaffirmed *Cablevision*’s doctrinal interpretation and found that Aereo’s technology, under *Cablevision*’s approach, was noninfringing and that the plaintiffs were therefore unlikely to prevail on

¹⁰ *Id.* at 414 & n.16.

¹¹ See Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2541-44 (codified as amended at 17 U.S.C. § 101); see also H.R. REP. NO. 94-1476, at 86-87 (1976).

¹² 17 U.S.C. § 101.

¹³ ABC, Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 377-79 (S.D.N.Y. 2012). Aereo also offered a recording feature, but the plaintiffs challenged only the live-broadcasting component. *Id.* at 376.

¹⁴ *Id.* at 401.

¹⁵ *Id.* at 375-76.

¹⁶ *Id.* at 405.

¹⁷ 536 F.3d 121 (2d Cir. 2008).

¹⁸ *Id.* at 139-40.

¹⁹ See *Aereo*, 874 F. Supp. 2d at 386-96.

²⁰ *Id.* at 405; see also *id.* at 375 (“But for *Cablevision*’s express holding regarding the meaning of [the Transmit Clause] . . . Plaintiffs would likely prevail . . .”).

²¹ Judge Droney was joined by District Judge Gleeson of the Eastern District of New York, sitting by designation.

the merits.²² In *Cablevision*, the Second Circuit had stated that “transmission of a performance is itself a performance,”²³ and that the inquiry under the Transmit Clause is who is capable of receiving “a *particular* transmission of a performance.”²⁴ Further, a court should not aggregate multiple discrete transmissions of the same underlying work: if each transmission is to an audience of one, the transmission is not “public.”²⁵ Since Cablevision’s system had created a unique copy of a broadcast for each requesting user, which was then transmitted only to that single subscriber, it had not infringed the public performance right.²⁶ Rejecting, as did the court below, attempts made by the plaintiffs to distinguish *Cablevision*,²⁷ Judge Droney agreed with the district court that the plaintiffs were unlikely to succeed on the merits.²⁸

Judge Chin dissented, calling Aereo’s technology a “sham” and “a Rube Goldberg–like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act.”²⁹ Rather than defining the “public” in terms of the number of individuals capable of receiving the transmission, Judge Chin defined it in terms of the type of intended audience: a public transmission is a transmission to “anyone other than oneself or an intimate relation,” even a single individual.³⁰ Judge Chin further argued that Congress in 1976 would have intended for Aereo’s system to fall within the definition of public performance.³¹ Finally, Judge Chin distinguished *Cablevision* on two points: First, Cablevision transmitted only content it had a license to transmit in the first place, whereas Aereo lacked such a license.³² Second, since Cablevision had a license to transmit such broadcasts, the only technology at issue in *Cablevision* was essentially that of a VCR or DVR — technology very different from Aereo’s.³³

²² WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 696 (2d Cir. 2013).

²³ *Cablevision*, 536 F.3d at 134.

²⁴ *Id.* at 135 (emphasis added).

²⁵ *Id.* at 135–37.

²⁶ *Id.* at 139.

²⁷ The plaintiffs had argued, among other things, that Aereo acts like a cable television provider and should be treated as such. *Aereo*, 712 F.3d at 693. However, Judge Droney stated that “technical architecture matters,” not just “functionality.” *Id.* at 694.

²⁸ *Id.* at 696.

²⁹ *Id.* at 697 (Chin, J., dissenting).

³⁰ *Id.* at 698.

³¹ *Id.* at 701.

³² *Id.* at 702. Judge Droney rejected this distinction as having “no bearing” on the question of whether the performance was “public,” since “having a license to publicly perform a work in a particular instance, such as to broadcast a television program live, does not give the licensee the right to perform the work again.” *Id.* at 690 (majority opinion).

³³ *Id.* at 702–03 (Chin, J., dissenting). Judge Droney, responding to this argument, noted that *Cablevision* did not rest on the fact that it was analogous to VCRs, and that the case had been

The Supreme Court reversed and remanded. Writing for the Court, Justice Breyer³⁴ held that Aereo did publicly perform the copyrighted work in violation of the copyright statute.³⁵ First recounting the history of *Fortnightly*, *Teleprompter*, and the 1976 Copyright Act, the Court concluded that the Act's goal was "to bring the activities of cable systems within the scope of the Copyright Act."³⁶

Turning to the question of whether Aereo "performs," the Court noted that "Aereo's activities are substantially similar to those of the CATV companies" that Congress had in mind in 1976.³⁷ Just like those companies, Aereo was therefore "performing" the work as conceived by the Transmit Clause.³⁸ Next, the Court responded to the distinction drawn by Justice Scalia's dissent: that CATV systems retransmit constantly, whereas Aereo acts only upon a user's request.³⁹ The Court rejected "this sole technological difference" by analogizing to a CATV subscriber who powered on a television set and "turned the knob" to select a channel.⁴⁰ This "invisible" technological difference "means nothing to the subscriber . . . [or] the broadcaster," and does not excuse copyright infringement.⁴¹

Turning to the requirement that the performance must be "public," Justice Breyer began by accepting, *arguendo*, the Second Circuit's conception of transmission as a new performance rather than as merely a retransmission of the underlying performance, but still found that Aereo transmitted to the public.⁴² The Court stated that "behind-the-scenes" "technological differences" do not distinguish Aereo from cable television, which does transmit publicly, given "Congress' regulatory objectives."⁴³ Aereo's "commercial objective" is the same as that of a cable company, and the user's "viewing experience" is not "significantly alter[ed]."⁴⁴ Accordingly, "Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as

applied in the context of Internet music downloads. *Id.* at 691 (majority opinion) (citing *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 73–76 (2d Cir. 2010)).

³⁴ Justice Breyer was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

³⁵ *Aereo*, 134 S. Ct. at 2503.

³⁶ *Id.* at 2506.

³⁷ *Id.*

³⁸ *Id.* at 2506–07. Aereo argued that it was merely an equipment provider, an argument quickly rejected by the Court. *Id.*

³⁹ *Id.* at 2507; *see id.* at 2513–15 (Scalia, J., dissenting); *see also* cases cited *infra* note 55.

⁴⁰ *Aereo*, 134 S. Ct. at 2507 (majority opinion).

⁴¹ *Id.*

⁴² *Id.* at 2508 (citing *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 73 (2d Cir. 2010)).

⁴³ *Id.*

⁴⁴ *Id.*

from those of cable companies.”⁴⁵ The Court implicitly rejected *Cablevision*’s “no-aggregation” rule, stating that the text of the Transmit Clause suggested that “one can ‘transmit’ . . . through a *set* of actions.”⁴⁶ And the facts that the transmissions are sent to subscribers rather than a “normal circle of a family and its social acquaintances,” and that Aereo’s subscribers have no prior relationship to the underlying work, both further indicated that the transmissions were public.⁴⁷

Finally, the Court responded to the argument that ruling against Aereo would have negative ramifications for other emerging technologies such as cloud computing.⁴⁸ The Court stated that its “limited holding”⁴⁹ applies only to cable television–like systems, and does not apply when the user owns the work or is paying for a service “other than the transmission of copyrighted works, such as the remote storage of content.”⁵⁰ With respect to Aereo’s service, however, Congress’s intent was clear.⁵¹

Justice Scalia dissented.⁵² He argued that the Court’s argument “fails at the very outset because Aereo does not ‘perform’ at all,” and accused the Court of adopting “an improvised standard (‘looks-like-cable-TV’) that will sow confusion for years to come.”⁵³ Justice Scalia began by describing the distinction between direct and secondary infringement, emphasizing the key question of “*who* does the performing.”⁵⁴ The statute, as recognized by the Supreme Court and every Circuit that has considered the issue, includes a “volitional-conduct requirement” for direct copyright infringement,⁵⁵ which is determined by “who select[ed] the copyrighted content: the defendant or its customers.”⁵⁶ Unlike video-on-demand services like Netflix,

⁴⁵ *Id.* at 2509.

⁴⁶ *Id.* Justice Breyer relied on the Transmit Clause language that covers transmissions of “a performance to the public ‘whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times.’” *Id.* (alterations in original) (quoting 17 U.S.C. § 101 (2012)).

⁴⁷ *Id.* at 2509–10 (quoting 17 U.S.C. § 101).

⁴⁸ See, e.g., Brief *Amici Curiae* of Center for Democracy & Technology et al. in Support of Neither Party, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2014 WL 880968.

⁴⁹ *Aereo*, 134 S. Ct. at 2510.

⁵⁰ *Id.* at 2511 (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 31, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2014 WL 828079 (distinguishing cloud-based storage services)).

⁵¹ *Id.*

⁵² Justice Scalia was joined by Justices Thomas and Alito.

⁵³ *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.* at 2512–13 (citing *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–35, 437 (1984); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066–68 (9th Cir. 2014); *Cablevision*, 536 F.3d 121, 130–31 (2d Cir. 2008); *Parker v. Google, Inc.*, 242 F. App’x 833, 836–37 (3d Cir. 2007) (per curiam); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549–50 (4th Cir. 2004)).

⁵⁶ *Id.* at 2513.

Aereo does not choose its own content. Instead, like a “copy shop that provides its patrons with a library card” and offers copy machines for public use, Aereo “offers access to an automated system . . . [that] lies dormant until a subscriber activates it.”⁵⁷ Since Aereo does not volitionally “perform” the copyrighted work, it cannot face liability for direct infringement.

Next, Justice Scalia took issue with what he described as the Court’s “guilt-by-resemblance” approach.⁵⁸ He argued that the Court’s opinion was “built on the shakiest of foundations,” treating “snippets” of a House Report as “authoritative evidence” of the Transmit Clause’s meaning.⁵⁹ Justice Scalia objected to the Court’s “blithe[]” rejection of the multiple technological differences between Aereo and cable systems.⁶⁰ Even if the 1976 amendments intended to overrule the CATV cases, “what they were meant to do and how they did it are two different questions — and it is the latter that governs.”⁶¹ Justice Scalia found no grounding in the statute for the Court’s test and accused the majority of articulating “no criteria for determining when its cable-TV-lookalike rule applies.”⁶²

Justice Scalia shared “the Court’s evident feeling that what Aereo is doing (or enabling to be done) . . . ought not to be allowed,” but he was not willing to “distort the Copyright Act to forbid it.”⁶³ The “proper course” was “to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade.”⁶⁴

While Justices Breyer and Scalia are each outspoken advocates in the purposivism versus textualism debate,⁶⁵ this case was about a related but different methodological disagreement: what this comment will call formalism versus functionalism. Justice Breyer was concerned with the function of the technology, examining factors such as user experience and commercial objective. Justice Scalia, in contrast, was concerned with the underlying technical operation of the system.

⁵⁷ *Id.* at 2514.

⁵⁸ *Id.* at 2517.

⁵⁹ *Id.* at 2515.

⁶⁰ *Id.*; see also *id.* n.5. The CATV systems, according to Justice Scalia, were “more akin to video-on-demand services than copy shops,” especially as the technology evolved by the 1970s, when CATV systems were “deliberately selecting and importing distant signals, originating programs, [and] selling commercials.” *Id.* at 2515–16 (alteration in original) (quoting Brief for Petitioners at 20, *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (No. 72-1633)) (internal quotation mark omitted).

⁶¹ *Id.* at 2516.

⁶² *Id.*

⁶³ *Id.* at 2517.

⁶⁴ *Id.* at 2518.

⁶⁵ See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., 1997); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

In *Aereo*, Justice Breyer’s functionalist approach was useful in limiting the Court’s holding to systems that are analogous to cable television, but introduced unpredictability into the law by ignoring doctrinal distinctions and adopting an approach that lacks a clear focus and scope. The Court could have achieved the same result without resorting to this reasoning by analogy or could have reached the opposite outcome and let Congress correct the result if it had meant to bar *Aereo*’s existence — either of which would have provided clearer guidance for future courts and innovators.

While many commentators see *Aereo* as a clash between purposivism and textualism,⁶⁶ the key methodological divide between Justices Breyer and Scalia in *Aereo* was on functionalist-formalist grounds. The terms functionalist and formalist are here used to refer to a spectrum of approaches to statutory application that emphasizes or deemphasizes the details of the technological system in question. Functionalism concentrates on what the technology does, not how it works, often focusing on the pragmatic, real-world effects rather than getting caught up in minutiae.⁶⁷ Formalism, in contrast, focuses on understanding the intricacies of the technology and its precise contours and technical details rather than analogizing to older technology,⁶⁸ even if critics consider the analytical lines drawn by formalists to be specious.

The Court frequently engages in both functionalist and formalist methods, which the 2012 case *United States v. Jones*⁶⁹ well exemplifies.

⁶⁶ See, e.g., Andrew Tutt, Essay, *Textualism and the Equity of the Copyright Act: Reflections Inspired by American Broadcasting Companies, Inc. v. Aereo, Inc.*, 89 N.Y.U. L. REV. ONLINE 1 (2014); Michael Dorf, *Technology and Methodology in Aereo and Riley*, DORF ON LAW (June 26, 2014, 7:00 AM), <http://www.dorfonlaw.org/2014/06/technology-and-methodology-in-aereo-and-riley/> [<http://perma.cc/BA7H-TLT8>] (“[T]he lineup in *Aereo* is best understood as reflecting purposivist versus textualist sympathies on the Court.”); Nilay Patel, *Will the Supreme Court Ever Figure Out Technology?*, VOX (June 26, 2014, 11:32 AM), <http://www.vox.com/2014/6/26/5842876/can-the-supreme-court-ever-get-technology-decisions-right> [<http://perma.cc/6MNZ-NA7W>].

⁶⁷ See I. Glenn Cohen, Essay, *Make it Work!: Breyer on Patents in the Life Sciences*, 128 HARV. L. REV. 418, 428 (2014) (defining the “‘Breyer-ly’ virtues” as “practicality [and] a deep interest in and understanding of how things work in the real world”).

⁶⁸ See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2742 (2011) (Alito, J., concurring in the judgment) (“In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.”); cf. *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2120 (2013) (Scalia, J., concurring in part and concurring in the judgment) (refusing to affirm details of molecular biology in the majority opinion that he did not believe he adequately understood).

⁶⁹ 132 S. Ct. 945 (2012). *Jones* addressed whether the placement of a GPS tracking device on the undercarriage of an individual’s car and subsequent use of that tracking data constituted a search or seizure within the Fourth Amendment. *Id.* at 948.

Justice Scalia wrote the majority opinion, finding that the type of GPS surveillance used in that case formally violated longstanding physical trespass doctrine.⁷⁰ Justice Alito, concurring in the judgment and joined by three other Justices, critiqued Justice Scalia's strict adherence to this formalist approach, calling it "highly artificial" and "strain[ed]," and instead suggesting that the Court look at the practical impact of its privacy holding.⁷¹

In *Aereo*, Justice Breyer adopted this type of common law pragmatism to evaluate new technology under old laws, brushing aside the differences between the old technology and the new. Justice Breyer's functionalist approach implicitly relied upon at least three discrete criteria, each of which was analyzed across the "performance" and "public" sections of the opinion, to determine whether *Aereo* functioned sufficiently similarly to cable television systems to justify evaluating *Aereo* like a cable company under the Copyright Act. First, Justice Breyer looked to the commercial objective of the two systems, and whether *Aereo* sought to fill the same commercial need as cable companies.⁷² Second, Justice Breyer looked to the viewing experience and whether customers would care about the technological differences.⁷³ Third, Justice Breyer briefly mentioned whether the copyright holders (here, the broadcasters) considered the systems identical.⁷⁴ Throughout the majority opinion, Justice Breyer was very clear that none of the formal technological differentiations between *Aereo* and cable networks affect this analysis: "Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter?"⁷⁵

One justification given by Justice Breyer for the Court's functionalist approach is the resulting "limited holding."⁷⁶ Rather than engage with the merits of copyright doctrine in a way that could have repercussions

⁷⁰ *Id.* at 949–51.

⁷¹ *Id.* at 958 (Alito, J., concurring in the judgment).

⁷² Regarding "performance": "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach." *Aereo*, 134 S. Ct. at 2506. Regarding "publicly": "[The technological differences between Aereo and cable companies] do not render Aereo's commercial objective any different from that of cable companies." *Id.* at 2508.

⁷³ Regarding "performance": "But this difference means nothing to the subscriber." *Id.* at 2507. Regarding "publicly": "Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made?" *Id.* at 2508–09.

⁷⁴ Regarding "performance": "It means nothing to the broadcaster." *Id.* at 2507. Regarding "publicly": "[W]hy, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old?" *Id.* at 2509.

⁷⁵ *Id.* at 2508.

⁷⁶ *Id.* at 2510.

for other technologies, the Court limited its decision to “cable companies and their equivalents”⁷⁷ — sparing unforeseen collateral consequences.

However, in avoiding one problematic consequence by adopting this functionalist approach, the Court paved the way for another: unpredictability in the law.⁷⁸ First, this approach ignores key doctrinal concerns.⁷⁹ Justice Breyer ignored, rather than addressed, the Second Circuit’s dispute over whether “the public” is determined by the number of recipients or the type of recipient.⁸⁰ Justice Breyer’s analogy to CATV systems, including comparing turning a television knob to an Aereo subscriber’s engaging the system,⁸¹ also ignored the volitional-action requirement for direct infringement, as Justice Scalia made clear in his dissent.⁸²

Second, the Court provided little guidance on how other courts might apply this reason-by-analogy approach. Under the functionalist approach, two technologies could do the same thing in fundamentally different ways, but be treated identically. The Court did not articulate what level of similarity is sufficient. Certainly, the Court has long treated cable television and broadcast television differently simply because of the underlying technological differences,⁸³ even though they are at least as functionally similar as Aereo is to cable television. Under a guilt-by-resemblance approach, a court may treat VCRs, DVRs, and RS-DVRs identically, regardless of technical distinctions.⁸⁴ A court could decide that Aereo’s DVR-like features are more like a VCR than cable television, reaching the nonsensical result that live television transmitting infringes copyright but transmission following short

⁷⁷ *Id.*

⁷⁸ See, e.g., Elizabeth Bahr & Josh Blackman, *Youngstown’s Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 560 (2010) (“Two notable pitfalls of functionalism are: (1) it at times requires judges to consider unreliable extrinsic evidence; and (2) it fails to establish predictable rules.”).

⁷⁹ See Mitch Stoltz, *Symposium: Aereo Decision Injects Uncertainty into Copyright*, SCOTUSBLOG (June 27, 2014, 2:18 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-decision-injects-uncertainty-into-copyright> [<http://perma.cc/CA49-U43J>] (“Justice Breyer’s majority opinion . . . was driven by legislative history and first principles, with analysis of the statutory text an afterthought. That approach turned a pure question of statutory interpretation into something more like common law adjudication.”).

⁸⁰ *Aereo*, 134 S. Ct. at 2510. (“The Act thereby suggests that ‘the public’ consists of a large group of people outside of a family and friends.”).

⁸¹ *Id.* at 2507.

⁸² *Id.* at 2515 n.5 (Scalia, J., dissenting); see cases cited *supra* note 55.

⁸³ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637–38 (1994) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–89, 396–99 (1969)) (justifying distinct regulations for broadcasters based on the “unique physical limitations of the broadcast medium,” *id.* at 637).

⁸⁴ See Mark P. McKenna, *The Limits of the Supreme Court’s Technological Analogies*, SLATE (June 26, 2014, 12:07 PM), http://www.slate.com/articles/technology/future_tense/2014/06/abc_v_aereo_ruling_the_supreme_court_s_terrible_technological_analogies.single.html [<http://perma.cc/UZ3Y-VW5B>].

delay does not. Is Dropbox, which can receive and transmit multiple copies of the same video files to different users, distinguishable *enough* from cable television that it can avoid liability under this functionalist approach?⁸⁵ As one commentator noted: “Defining the bounds of ‘similarity’ to a cable system will require much litigation, and cases comparing cloud storage systems and other new technologies against cable systems will be complex and expensive.”⁸⁶

This unpredictability is particularly dangerous in the technology sphere, in which predictability breeds innovation.⁸⁷ As one commentator described: “[I]t’s not just lawyers looking for loopholes, it’s the entire tech industry. Loopholes are the building blocks of our current age of disruptive technology An entire class of startups are building massive businesses around loopholes in the law”⁸⁸ Aereo itself is an example: relying on *Cablevision*, Aereo built a company with over 75,000 subscribers⁸⁹ and about eighty employees.⁹⁰ Reliable rules with clearly delineated lines enable innovators to know where the law ends and where there is room to disrupt the status quo.⁹¹

While the holding itself was narrow, the case’s methodological implications could be broad. Rather than engage in a functionalist approach that increases unpredictability in the law, the Court should have engaged directly with the differences in technology between 1976 cable television and 2014 online streaming television. The Court had two better options than the one it ultimately chose: First, it could have come to the same result through existing doctrinal means, as Judge Chin did in his dissent in the Second Circuit case. Or, second, like the Court in *Fortnightly* and *Teleprompter*, the Court could have reached the opposite result and deferred to Congress to revise the statute if it wished, rather than trying to effectuate what Congress might have meant to enact, but did not actually enact.

⁸⁵ *See id.*

⁸⁶ Stoltz, *supra* note 79.

⁸⁷ *See generally* Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 730–31 (2002) (“[C]larity is essential to promote progress [in the patent context], because it enables efficient investment in innovation.”); Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (“Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.”).

⁸⁸ Patel, *supra* note 66.

⁸⁹ Peter Kafka, *Here’s How Many Subscribers Aereo Had Last Year*, RE/CODE (July 21, 2014, 2:28 PM), <http://recode.net/2014/07/21/heres-how-many-subscribers-aereo-had-last-year> [<http://perma.cc/K96K-VDG9>].

⁹⁰ Kyle Alspach, *Broadcasters May Seek a Payout from Aereo After Supreme Court Ruling*, BETABOSTON (June 26, 2014), <http://betaboston.com/news/2014/06/26/broadcasters-may-seek-a-payout-from-aereo-after-supreme-court-ruling> [<http://perma.cc/ZE9J-5JT8>].

⁹¹ *Cf.* Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).