

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-7051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPANSKI ENTERPRISES, INC.,

Plaintiff-Appellee,

v.

TELEWIZJA POLSKA, S.A.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF APPELLEE**

SARANG VIJAY DAMLE
*General Counsel and Associate
Register of Copyrights*

REGAN A. SMITH
Deputy General Counsel

EMMA RAVIV
*Barbara A. Ringer Fellow
United States Copyright Office
Washington, D.C. 20530*

CHAD A. READLER
Acting Assistant Attorney General

MARK R. FREEMAN
MEGAN BARBERO
*Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4631*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-Appellee is Spanski Enterprises, Inc. and Defendant-Appellant is Telewizja Polska, S.A. The United States appears in this Court as *amicus curiae*.

B. Rulings Under Review

Defendant-Appellant seeks review of the district court's July 9, 2015 order denying summary judgment, December 12, 2016 memorandum opinion setting forth findings of fact and conclusions of law, February 14, 2017 memorandum opinion on damages, and February 14, 2017 order entering judgment for Plaintiff-Appellee. References and citations to these rulings appear in Defendant-Appellant's brief.

C. Related Cases

This case has not previously been before this Court or any other Court, and undersigned counsel is unaware of any other related cases within the meaning of this Court's rules.

s/ Megan Barbero

MEGAN BARBERO
Counsel for the United States

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GLOSSARY

Act	Copyright Act of 1976
FSIA	Foreign Sovereign Immunities Act
ISP	Internet Service Provider
SEI	Spanski Enterprises, Inc. (Plaintiff-Appellee)
TVP	Telewizja Polska, S.A. (Defendant-Appellant)

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

This case concerns whether the public-performance right under the Copyright Act of 1976, 17 U.S.C. § 106(4), is implicated when copyrighted audiovisual works are streamed over the Internet to the American public from computer servers located abroad. This is an issue of first impression in the courts of appeals. The question directly implicates the interests of the United States Copyright Office, which is responsible for administering the federal copyright laws. *See* 17 U.S.C. § 701. This question is also of significant interest to the United States Department of Justice, which prosecutes criminal violations of the Copyright Act, including criminal violations of the public-performance right by entities located abroad that engage in large-scale streaming of copyrighted works to viewers in the United States. *See* 17 U.S.C. § 506(a). The United States respectfully submits this amicus brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

It is undisputed that the unauthorized digital streaming of a copyrighted work to the public over the Internet can violate the copyright owner's exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). The Supreme Court held in *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), that a domestic company committed copyright infringement by streaming television shows to members of the public without a license. The United States urges the Court to hold that a copyright owner's exclusive right to control the public performance of the work in the United States is infringed just as clearly when the transmission comprising the

unauthorized performance originates overseas. The exclusive right of public performance under the Copyright Act is the right to perform the work *to the public in the United States*. When a copyrighted work is streamed over the Internet to the public in the United States, it is “perform[ed] ... publicly” in the United States: that is where the audience receives and enjoys the performance of the copyrighted work. *See* 17 U.S.C. § 101 (defining “[t]o perform ... ‘publicly’”). Because the primary focus of the statute is on performances to the American public, imposing liability for a performance transmitted to the American public constitutes a domestic application of the Copyright Act, even if other relevant conduct occurred abroad. *See* *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010).

The district court thus correctly held that Telewizja Polska, S.A. (TVP) infringed Spanksi Enterprises, Inc.’s (SEI) exclusive right under the Copyright Act to “perform ... publicly” the television shows at issue in this case. TVP infringed that right when it performed copyrighted works—showing their images and making their audio heard—by transmitting the copyrighted programs from servers located in Poland to an audience that received the programs in the United States. TVP’s arguments to the contrary misunderstand the nature of the public-performance right and disregard the Supreme Court’s reasoning in *Aereo*.

The United States further urges the Court to clarify that copyright infringement is a strict liability offense. The district court’s opinion repeatedly states that TVP

infringed because it engaged in “volitional and intentional” conduct. Proof of intent, however, is not required to establish copyright infringement, including infringement of the public-performance right. To the extent the Copyright Act requires proof that the defendant engaged in volitional conduct beyond “perform[ing]” the copyrighted work “publicly,” that requirement is satisfied here because TVP transmitted copyrighted material from its servers to viewers in the United States.¹

STATEMENT OF THE CASE

A. Statutory and Legal Background

The Copyright Act, 17 U.S.C. § 101 *et seq.*, confers on the owner of a copyright a set of exclusive rights in the copyrighted work. *See generally* 17 U.S.C. § 106. One of those exclusive rights is the right “to perform the copyrighted work publicly.” *Id.* § 106(4). To “perform” an “audiovisual work” is “to show its images in any sequence or to make the sounds accompanying it audible.” *Id.* § 101. The Copyright Act defines “[t]o perform ... a work ‘publicly’” as

(1) to perform ... it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance ... of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.

¹ The government expresses no view on the district court’s finding of willfulness or on the damages award.

*Id.*² Finally, “[t]o ‘transmit’ a performance ... is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.*

Under these provisions, a cable television provider publicly performs copyrighted programs when it transmits them to its individual subscribers—even if the provider is merely capturing and retransmitting broadcast signals, and even if the individual subscribers choose the shows they wish to watch. *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505-06 (2014). Likewise, an entity publicly performs copyrighted programs if it streams them to subscribers over the Internet instead of transmitting them over a dedicated system of cables. *Id.* at 2507-10; *see* A1141 (noting parties’ agreement that “unauthorized streaming of copyrighted content can constitute a violation of the public performance right”); 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[B][3] (rev. ed. 2017) (2 *Nimmer on Copyright*) (“The act of streaming constitutes a public performance[.]”). A stream “transmission, like a television or radio broadcast, is a performance because there is a playing of the

² There is no requirement that the infringer transmit a performance directly to the public. *See Agee v. Paramount Commc’ns, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (noting that public-performance right may be infringed where cable networks transmit “to local cable companies who in turn transmit to individual cable subscribers” (quotation marks omitted)).

[copyrighted work] that is perceived simultaneously with the transmission.” *United States v. American Soc’y of Composers, Authors, Publishers*, 627 F.3d 64, 74 (2d Cir. 2010).³

In *Aereo*, the Supreme Court held that Aereo, a streaming company, infringed section 106(4)’s public-performance right by streaming copies of copyrighted shows from its equipment to subscribers over the Internet. The Supreme Court explained that “[w]hen an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby ‘communicate[s]’ to the subscriber, by means of a ‘device or process,’ the work’s images and sounds. § 101. And those images and sounds are contemporaneously visible and audible on the subscriber’s computer (or other Internet-connected device).” 134 S. Ct. at 2508. Because Aereo made the copyrighted works available to a public audience—*i.e.*, to “a large number of people who are unrelated and unknown to each other,” *id.* at 2509—the stream transmissions performed the work “publicly.” *Id.* at 2507-09 (explaining that “an entity performs a work publicly when it ‘transmit[s] ... a performance ... of the work ... to the public’” and concluding that “when Aereo streams the same television program to multiple subscribers, it ‘transmit[s] ... a performance’ to all of them” (quoting 17 U.S.C. § 101)).

³ The Second Circuit distinguished downloads, where there is no “contemporaneously perceptible event,” from “stream transmissions,” which “render[] the musical work audible as it is received by the client-computer’s temporary memory.” *American Soc’y of Composers, Authors, Publishers*, 627 F.3d at 73-74.

It is well established that the Copyright Act—including the public-performance right—generally “ha[s] no application to extraterritorial infringement.” *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (en banc); *see also, e.g., The Robert Stigwood Grp. Ltd. v. O’Reilly*, 530 F.2d 1096, 1101 (2d Cir. 1976).

B. Factual Background

TVP is Poland’s national public television broadcasting company and is owned by the Polish treasury. A1123.⁴ TVP owns and operates various Polish-language television channels, including the channel TVP Polonia, which it distributes through its website www.tvp.pl. *Id.*

Through the parties’ 1994 agreement and a 1999 addendum, TVP granted SEI, a Canadian corporation, the exclusive right to distribute copyrighted TVP Polonia content in North and South America for twenty-five years. A1123-24; A1266. The parties’ 2009 settlement agreement confirmed that SEI is the exclusive licensee of

⁴ TVP has not asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). It appears that TVP has likely waived its immunity in this case. *See* 28 U.S.C. § 1605(a)(1) (providing that a foreign state may “waive[] its immunity either explicitly or by implication”). The parties’ agreement contains a choice-of-law provision (A1273) that likely operates to waive any claim of sovereign immunity. *See Eckert Int’l, Inc. v. Government of Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 80 (4th Cir. 1994). TVP also made a “conscious decision to take part in the litigation” without “assert[ing] its immunity under the FSIA either before or in its responsive pleading.” *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000). Although the parties cite 28 U.S.C. § 1338(a) as a basis for the district court’s subject-matter jurisdiction (TVP Br. 1; SEI Br. 1), the FSIA is “the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017).

TVP Polonia in North and South America, which includes the exclusive right to distribute copyrighted TVP Polonia content over the Internet in the United States. *See* A1124. As part of the settlement, TVP agreed to use Internet geo-blocking technologies to prevent users in the United States from viewing programs through TVP’s website. *See* A1344.

In 2012, as part of its process for registering TVP Polonia episodes with the U.S. Copyright Office (*see* A1124-25; *see also* A1417-67), SEI’s lawyers discovered that they could stream TVP programs to their offices in New York—apparently because TVP had intentionally disabled its geo-blocking technology (*see* A1130-38).

C. Prior Proceedings

In 2012, SEI filed a complaint for copyright infringement against TVP, claiming that TVP had infringed SEI’s exclusive right to distribute and publicly perform the copyrighted episodes within the United States. A25-35.

In denying summary judgment, the district court rejected TVP’s argument that its conduct was extraterritorial and not subject to the Copyright Act, reasoning “that copyright infringement that commenced abroad but was complete[d] in the United States was not wholly extraterritorial, and thus the Copyright Act covered the defendant’s conduct.” A114 (citing *Automattic v. Steiner*, 82 F. Supp. 3d 1011, 1028 (N.D. Cal. 2015)). The district court explained that, while TVP’s “acts or omissions may have occurred in Poland, at least some part of the alleged infringement occurred in the United States as [SEI] captured and recorded at least some of the episodes from

TVP’s website on a computer in the United States.” *Id.* The court expressed concern that “[t]o find otherwise would leave a substantial loophole in the copyright laws.” *Id.* (quotation marks omitted). “Broadcasters could deliberately transmit potentially infringing material from locations across the United States’ borders for display in the United States without regard to the rights of copyright owners set forth in the U.S. Copyright Act.” *Id.* (quotation marks omitted).

Following a bench trial, the district court found that SEI had satisfied its burden of proving copyright infringement. A1130-33; A1138-41. The district court found that SEI held valid copyrights for 51 TVP Polonia episodes. A1124-25; A1130; A1138-40. The court further found that SEI’s lawyers were able to view those episodes in the United States. A1130-31; A1133. The court determined that “TVP acted volitionally in infringing SEI’s copyright” by removing geo-blocking restrictions (A1134), and that TVP acted “willfully and intentionally” (A1134-38). The district court held that TVP’s public performance of the copyrighted works was covered by the Copyright Act because “copyright infringement that commenced abroad but was completed in the United States was not wholly extraterritorial.” A1141 n.3 (quotation marks omitted).

The district court issued a separate opinion on statutory damages, finding that TVP’s infringement was willful and ordering TVP to pay a total of \$3,060,000 in damages. A1253; *see* 17 U.S.C. § 504(c)(2) (providing for increased statutory damages where the court finds that “infringement was committed willfully”). The court issued

its final judgment in favor of SEI on February 14, 2017. A1257. This appeal followed.

ARGUMENT

I. TVP INFRINGED SEI'S PUBLIC-PERFORMANCE RIGHT BY STREAMING COPYRIGHTED TELEVISION PROGRAMS OVER THE INTERNET FROM ABROAD TO THE AMERICAN PUBLIC

This case presents an issue of first impression in the courts of appeals: whether the unauthorized Internet streaming of copyrighted works to the American public is beyond the reach of the Copyright Act merely because the streaming transmission originates abroad. That question affects the private interests of copyright owners, such as SEI here, in protecting their exclusive right to perform their works to the American public. But it also implicates the ability of the Department of Justice to prosecute large-scale criminal piracy of copyrighted works by entities located abroad that stream copyrighted works over the Internet to viewers in the United States. Civil infringement liability is the predicate for criminal enforcement of the copyright laws: the Copyright Act imposes criminal penalties for the willful infringement of a copyright, including through unauthorized public performances, for commercial advantage or private financial gain. 17 U.S.C. § 506(a)(1)(A). This Court's resolution of the question presented may therefore affect the ability of the United States to prosecute large-scale criminal piracy on the Internet.

There is no dispute that unauthorized Internet streaming of copyrighted works to a public audience can infringe the public-performance right. If TVP had streamed

SEI's copyrighted works from servers within the United States to the American public, it would be liable for infringement. The question in this case is whether TVP's performances to the American public are beyond the reach of the Copyright Act because they originated from foreign servers instead.

The Court should answer that question in the negative: under the framework for analyzing extraterritoriality that the Supreme Court has set forth in recent decisions, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010), imposing liability on TVP does not involve an extraterritorial application of the public-performance right. The primary "focus" of the statute, *RJR Nabisco*, 136 S. Ct. at 2101, is on performing the copyrighted work "publicly," 17 U.S.C. § 106(4), and on protecting the copyright holder's interest in controlling the performance of the work to the public in the United States. In this case, the public audience for TVP's Internet transmission of copyrighted works included members of the American public, who received and viewed the performances, and it is those performances to the American public that are the subject of SEI's infringement complaint.⁵

Because the events relevant to the statute's focus occurred within the United States, imposing liability on TVP in these circumstances for unauthorized

⁵ The parties dispute whether SEI adequately proved that TVP performed some or all of the copyrighted works to the "public" in the United States. We express no view on that question and assume, for purposes of this brief, that the district court's determination on that issue is sustained.

performances to the American public represents a domestic application of the Copyright Act, even if TVP initiated the performances abroad. To hold otherwise would provide a roadmap for criminal enterprises to evade liability under United States law merely by ensuring that the servers they use to stream pirated works to the American public are stationed across the border.

A. TVP Infringed By Performing Copyrighted Works To The American Public

In *RJR Nabisco*, the Supreme Court articulated “a two-step framework for analyzing extraterritoriality issues.” 136 S. Ct. at 2101 (citing *Morrison*, 561 U.S. at 262-66, 267 n.9, and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013)). “At the first step,” the court “ask[s] whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.” *Id.* Here, the relevant provisions of the Copyright Act contain no such indication. *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (en banc). This case thus turns on the second step, which seeks to “determine whether the case involves a domestic application of the statute,” and which does so “by looking to the statute’s ‘focus.’” *RJR Nabisco*, 136 S. Ct. at 2101. “If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad.” *Id.* At this second step, a court ascertains the “focus” of a particular statutory provision by identifying the acts that the provision “seeks to ‘regulate’” and

the parties or interests that it “seeks to ‘protec[t].” *Morrison*, 561 U.S. at 267 (alteration in original); see *RJR Nabisco*, 136 S. Ct. at 2100-01.

Under that framework, it is a domestic application of the Copyright Act’s public-performance provisions to impose liability on TVP for streaming copyrighted content from servers located abroad to the American public. Section 106(4) does not protect against every unauthorized performance of a copyrighted work; it protects the copyright owner only against the unauthorized performance of the work “publicly.” 17 U.S.C. § 106(4). As relevant here, the Copyright Act defines a public performance to include “transmit[ing] or otherwise communicat[ing] a performance ... to the public.” 17 U.S.C. § 101. A copyright holder thus has no claim for infringement unless there is not only a performance, but a performance to the public. *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014) (“This case requires us to answer two questions: First, in operating in the manner described above, does Aereo ‘perform’ at all? And second, if so, does Aereo do so ‘publicly?’”). Particularly in light of extraterritoriality principles, the most natural reading of the Copyright Act’s public-performance provisions is that the relevant “public” is the public in the United States. See *RJR Nabisco, Inc.*, 136 S. Ct. at 2100 (“Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.”). In enacting the public-performance right, Congress was concerned about protecting copyright holder’s exclusive right to perform copyrighted

works to the public in the United States and prohibiting the unauthorized performance of such works to the American public.

Congress's focus on the public nature of the performance makes sense: "It would, of course, be unthinkable for an infringement to arise every time someone, for his own amusement or that of his friends, were to read a book aloud or sing a song." 2 *Nimmer on Copyright* § 8.14[c]. There is thus no doubt that singing a copyrighted song in the privacy of one's own home does not infringe the public-performance right. But if the same singer performed to a stadium full of people in New York, the copyright would be infringed because the copyrighted work would have been performed to the public. The result changes because the audience changes: only in the second example is the singer performing "publicly." 17 U.S.C. § 106(4).

Nothing in the Copyright Act, furthermore, turns on the particular technological mechanism by which the performance to the public is effected. If the same singer visited a studio in Canada and transmitted his performance of the copyrighted song live to the stadium in New York, the public audience that received and enjoyed the show would not change. The singer in the Canadian studio would "transmit" his performance to the public within the meaning of the relevant provisions when he "communicate[d] it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101. And the song would be "received" and enjoyed by the audience in New York, even though communicated electronically from the studio in Canada. The result would be

the same because Congress was explicit that the mode of transmission does not change the analysis—it can be “*any* device or process.” *Id.* (emphasis added). What matters under the Copyright Act is that a performance is transmitted to the public in the United States.

Framed in terms of the Supreme Court’s decisions in *RJR Nabisco* and *Morrison*, performances of a copyrighted work to the American public, who receive and view the performances, are the primary “focus” of the relevant provisions. The text of sections 106(4) and 101 makes clear that the public-performance right “seeks to ‘regulate’” transmissions to the American public and “to ‘protec[t]’” the copyright holder’s exclusive right to perform the work to that public. *Morrison*, 561 U.S. at 267 (alteration in original) (quoting *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10, 12 (1971)). To the extent TVP made unauthorized performances to the American public, therefore, imposing liability on TVP is a permissible domestic application of the Act.

This reading of the Copyright Act is reinforced by the fact that TVP’s contrary interpretation would create a significant gap in the public-performance right. It would mean, for example, that large-scale criminal copyright pirates could avoid United States copyright liability simply by locating their servers outside the United States. Similarly, television stations in San Diego and El Paso could eliminate the need to obtain U.S. copyright licenses simply by moving their broadcast antennae to Tijuana

and Ciudad Juarez. Congress could not have intended the public-performance right to be susceptible to such ready evasion.

B. TVP's Argument That Its Conduct Was Entirely Extraterritorial Is Unavailing

TVP nevertheless contends that its conduct was entirely extraterritorial and outside the scope of the Copyright Act because (1) its performances occurred entirely in Poland, and (2) any unauthorized performances in the United States were performances by its website users, not by TVP. Neither contention is correct.

1. TVP contends (Br. 36) that its performance occurred “entirely in Poland,” where it “upload[ed] non-geo-blocked programs to its [streaming] system.” This argument is misplaced for two reasons. First, it misunderstands the relevant statutory provisions, which focus primarily on the public audience that receives (or is capable of receiving) the transmission. And in any event, as the Supreme Court has explained, the existence of some foreign conduct in a statute’s application does not mean that the provision is being applied extraterritorially. *See RJR Nabisco*, 136 S. Ct. at 2101.

First, TVP is wrong to contend that the infringement analysis begins and ends at the point of initial transmission. As discussed, the relevant statutory provisions protect the right to perform a copyrighted work “publicly,” meaning that the copyright holder has the exclusive right to perform the copyrighted work to the public. 17 U.S.C. §§ 101, 106(4). That right includes the right to transmit the performance to the public, “whether the members of the public capable of receiving

the performance ... receive it in the same place or in separate places and at the same time or at different times.” *Id.* § 101. The transmission may occur “by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.* The Copyright Act thus defines a public performance based on who receives or is capable of receiving it. A transmission to the public or to a public place is covered, but a private transmission is not—even if it otherwise involves exactly the same conduct by the defendant.

Even if one focuses on the “perform[ance]” component of the public-performance right, as TVP urges (*see* Br. 39), it is plain that TVP’s performance was not complete in Poland. To “perform” a television program or other audiovisual work means “to *show* its images in any sequence or to make the sounds accompanying it *audible*.” 17 U.S.C. § 101 (emphasis added). For the performances at issue, the copyrighted programs were “show[n]” and “audible” in the United States when they were received by viewers on devices located here. TVP’s performances are therefore within the domestic focus, and thus the reach, of the statute.⁶

⁶ The domestic component of TVP’s performance is particularly apparent here because the district court found that TVP altered its geo-blocking technology to stream copyrighted content to the public in the United States. A1134-38. TVP’s system thus directed the transmission of data comprising the copyrighted works to the unique Internet Protocol addresses of devices located in the United States. *See generally* U.S. Gov’t Accountability Office (GAO), GAO-15-642, *Internet Management: Structured Evaluation Could Help Assess Proposed Transition of Key Domain Name and Other Technical Functions* 5 (Aug. 2015), <https://www.gao.gov/assets/680/672055.pdf>; American Registry for Internet Numbers (ARIN), *Number Resource Policy Manual* (Aug. 2017), <https://www.arin.net/policy/nrpm.html>.

Second, and in any event, the Supreme Court’s decision in *Morrison* makes clear that the location of the defendant’s conduct is not necessarily dispositive of the extraterritoriality inquiry. In that case, the Court held that the “focus” of section 10(b) of the Securities Exchange Act of 1934 was “not upon the place where the deception originated, but upon purchases and sales of securities in the United States.” 561 U.S. at 266. The Court stressed that “Section 10(b) does not punish deceptive conduct, but only deceptive conduct ‘in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.’” *Id.* (quoting 15 U.S.C. § 78j(b)). The Court therefore held that even though the defendants in *Morrison* “engaged in the deceptive conduct” and “made misleading public statements” in the United States, the case involved an impermissible extraterritorial application of the statute because the relevant securities transactions occurred abroad. *Id.* The Court stressed that the question was not whether there was “*some* domestic activity,” but whether the domestic activity “was the ‘focus’ of congressional concern.” *Id.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991)). The Court’s reasoning in *Morrison* thus strongly implies that, if the domestic conduct that was the focus of the statute (the purchase and sale of domestic securities) had occurred within the United States, section 10(b) could have reached the alleged fraud, even if the defendant’s deceptive conduct occurred abroad. *See also* *RJR Nabisco*, 136 S. Ct. at 2101 (“If the conduct relevant to the statute’s focus occurred in

the United States, then the case involves a permissible domestic application even if other conduct occurred abroad[.]”).

Applying the Supreme Court’s reasoning to this case, even if all of TVP’s conduct in transmitting the copyrighted works occurred in Poland, section 106(4) still prohibits TVP’s conduct: the primary focus of the Copyright Act’s public-performance provisions is on performances to the American public, and the public audience that received the unauthorized performances at issue in this case was in the United States.

2. TVP relies (Br. 34-36) on the Supreme Court’s decision in *Aereo* to argue that the only performance in the United States in this case was not by TVP, but by users of its website—*i.e.*, the individuals who selected the content to view from the TVP website, directed TVP’s servers to stream the content to their devices, and received the content. This argument fundamentally misunderstands *Aereo*.

In *Aereo*, the streaming company mounted a similar defense: it contended that only its users “performed” the works within the meaning of the Copyright Act, and that those performances were permissible private performances. The Supreme Court rejected that argument. It held that “*both* the broadcaster *and* the viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds.” *Aereo*, 134 S. Ct. at 2506 (citing 17 U.S.C. § 101). The Court recognized that “Aereo’s system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the

subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program." *Id.* at 2507. But the Court rejected the dissent's argument that this feature made Aereo like "a copy shop that provides its patrons with a library card" and that "is not directly liable whenever a patron uses the shop's machines to 'reproduce' copyrighted materials found in that library." *Id.* (quotation marks omitted). The majority concluded that Aereo was instead like a traditional cable company that publicly performs the programs it retransmits, notwithstanding the "single difference" that the subscriber "click[s] on a website" to "activate[] machinery that intercepts and reroutes" signals to the subscribers over the Internet—a difference that "means nothing" to the subscriber or the broadcaster. *Id.*

Under the reasoning of *Aereo*, TVP performed the copyrighted material when its servers transmitted the work via the Internet to viewers in the United States. It may be the case, as TVP argues, that its users also performed the copyrighted episodes, but that does not relieve TVP of liability for infringement any more than it did so for Aereo.

II. COPYRIGHT INFRINGEMENT IS A STRICT LIABILITY OFFENSE THAT DOES NOT REQUIRE PROOF OF WRONGFUL INTENT

A. Culpable Intent Is Not Required For Copyright Infringement

The district court found that "TVP's infringement was volitional and intentional" (A1123), and stressed throughout its opinion that TVP acted "intentionally." *See* A1127 (TVP "actively engaged in changing video formats" in

order “to intentionally make the programming available in the U.S.”); A1134 (“TVP acted willfully and intentionally to infringe SEI’s copyright.”); A1135 (“[t]he infringement was intentional and willful” and “TVP employees acted intentionally”); A1136 (“[t]he evidence also shows intentional manipulation of workflow logs”); A1141 (“TVP volitionally and intentionally infringed”). While these findings may bear, for example, on the appropriate remedy for TVP’s conduct, the court’s emphasis on TVP’s intent may suggest that the court erroneously believed that a finding of culpable intent was necessary to establish liability for infringement.

It is well established that “[c]opyright infringement is a strict liability offense in the sense that a plaintiff is not required to prove unlawful intent or culpability.” *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.08[B][1] (rev. ed. 2017) (4 *Nimmer on Copyright*) (“[T]he innocent intent of the defendant constitutes no defense to liability. A bit of reflection suffices to realize that such innocence should no more constitute a defense in an infringement action than it would to a charge of conversion of tangible personalty. In each instance, the injury is worthy of redress, regardless of defendant’s innocence.”). Indeed, the Copyright Act specifically provides for a reduction in the applicable statutory damages where the “infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). The district court erred to the extent it suggested that intent is necessary predicate to infringement liability.

B. TVP’s “Volitional Conduct” Argument Is Foreclosed By *Aereo*

TVP also argues (Br. 24) that it should not be held liable because its conduct was not “volitional.” In TVP’s view, it merely provided a website, and only its users engaged in the “volitional conduct” that led to infringement because they visited the website and viewed TVP’s programs from the United States. This argument cannot be squared with the Supreme Court’s *Aereo* decision, which rejected a similar volitional-conduct argument raised by the streaming service in that case.

All agree that to infringe the public-performance right, a defendant must engage in specific conduct: it must “perform” the copyrighted material “publicly.” 17 U.S.C. § 106(4). TVP’s “volitional conduct” argument concerns whether the statute requires something more—for example, whether the defendant must engage in conduct that is in some manner “*directed to* the plaintiff’s copyrighted material.” *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting) (emphasis added). While several courts of appeals have adopted a “volitional conduct” requirement,⁷ they have tended to equate the existence of the necessary “volitional conduct” with the existence of proximate causation. On this understanding, the “volitional conduct” requirement simply means

⁷ See, e.g., *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir. 2017) (“In direct-infringement cases, courts have trended toward requiring volitional conduct.”); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666-67 (9th Cir. 2017); *EMI Christian Music Grp., Inc.*, 844 F.3d at 96; *Leonard v. Stemtech Int’l, Inc.*, 834 F.3d 376, 387 (3d Cir. 2016); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549-50 (4th Cir. 2004).

that a defendant is not liable for acts of copyright infringement for which it is not the proximate legal cause. The Ninth Circuit, for example, recently explained that “direct infringement requires the plaintiff to show causation (also referred to as ‘volitional conduct’) by the defendant.” *Perfect 10, Inc.*, 847 F.3d at 666 (observing that “volition” in copyright infringement “simply stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts” (quotation marks omitted)); 4 *Nimmer on Copyright* § 13.08[C][1]-[3].

This Court has not addressed whether there is a separate “volitional conduct” requirement in the Copyright Act. There is no need to resolve that question in this case, however, because TVP’s particular “volitional conduct” argument is foreclosed by the Supreme Court’s decision in *Aereo*. TVP, like *Aereo*, streamed copyrighted content from its servers to the American public, which received and viewed the copyrighted programs. *Aereo*, too, contended that it was not responsible for the infringement because only its subscribers engaged in the necessary volitional conduct. As already discussed, the Supreme Court squarely rejected that argument. 134 S. Ct. at 2506 (holding that “*both* the broadcaster and the viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds”). Under the Court’s reasoning in *Aereo*, TVP is liable for direct infringement of SEI’s public-performance right: any volitional conduct requirement under the Copyright Act is satisfied here because TVP transmitted copyrighted material from its servers to viewers in the United States.

Indeed, the facts of this case make the imposition of copyright infringement liability unremarkable. TVP is a sophisticated actor, and its programs apparently have a sufficient public audience outside of Poland to make it worthwhile for TVP to license the relevant North and South American copyright interests exclusively to SEI. TVP thus had ample reason to expect that members of the public in the United States would seek to view the copyrighted programs in violation of SEI's exclusive rights. Furthermore, the district court found that TVP intentionally disabled its geo-blocking technology in attempt to reach audiences in those territories, including in the United States. In effect, TVP targeted the U.S. public. Imposing liability on TVP in these circumstances readily satisfies any notion of proximate cause.⁸

TVP's contrary argument tracks the reasoning of Justice Scalia's dissenting opinion in *Aereo*. Justice Scalia would have adopted a type of volitional-conduct requirement; as he opined, "the Act's text, which defines 'perform' in active, affirmative terms" and "makes it unlawful to copy or perform copyrighted works, not to copy or perform in general," requires conduct by the defendant that is "directed to the plaintiff's copyrighted material." 134 S. Ct. at 2512 (Scalia, J., dissenting). Justice

⁸ This case accordingly does not require the Court to decide whether the Copyright Act would reach foreign conduct on the Internet less directly and foreseeably related to infringement in the United States, such as a video posted by a foreign user on a personal blog or private website. TVP is therefore wrong to suggest that holding it liable for infringement on these facts would impose U.S. copyright liability "on the rest of the world" unless individuals and entities "geo-block Internet access requests from the U.S." TVP Br. 36-37.

Scalia would have held that Aereo was like a copy shop that was not liable for direct infringement because, unlike video-on-demand services such as Netflix, it did “not ‘perform’ for the sole and simple reason that it does not make the choice of content” for its subscribers to view. *Id.* at 2514; *id.* at 2513 (“When a user signs in to Netflix, for example, ‘thousands of ... movies [and] TV episodes’ carefully curated by Netflix are ‘available to watch instantly.’ ... That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.” (first and second alterations in original)).

The majority in *Aereo* did not endorse Justice Scalia’s analysis, and the majority’s reasoning squarely forecloses TVP’s argument here. It is doubtful, however, that TVP would prevail even under Justice Scalia’s approach to volitional conduct. TVP, like Netflix, selects the content to upload onto its website and arranges that content for viewers to select and stream programs. Under Justice Scalia’s reasoning, TVP’s “selection and arrangement” of the programs on its website, and the subsequent streaming of those programs to viewers in the United States, “serves as a basis for direct liability” because it is “directed to the plaintiff’s copyrighted material.” 134 S. Ct. at 2513 (Scalia, J., dissenting).

TVP also falsely equates its video-on-demand system, which is populated by TVP with the content of TVP’s choice and then streamed by TVP to viewers in the United States, with hosting services offered by Internet service providers (ISPs) that enable users to post content of their own choosing. *See* TVP Br. 24-25 (citing *CoStar*

Grp., Inc., 373 F.3d at 550, 555). Hosting services of that kind, such as electronic bulletin board services, are generally not liable for copyright infringement by users who upload unauthorized content, at least where (among other things) they act promptly to remove infringing content of which they have notice. *See, e.g., CoStar*, 373 F.3d at 550.⁹ Unlike an ISP that passively hosts third-party content, TVP selects and posts its own content to its website and then streams that content to viewers on demand. Video-on-demand services of that kind are engaged in the public performance of copyrighted works, as *Aereo* makes clear. When TVP performed the copyrighted works in this case to members of the American public, it infringed SEI’s exclusive public-performance right under section 106(4).

⁹ In the Digital Millennium Copyright Act of 1998, Congress provided a safe harbor against infringement liability for Internet service providers who comply with takedown notices after a third party has posted copyrighted material on its website or servers, and satisfy other requirements. 17 U.S.C. § 512(c). Congress designed the ISP safe harbor to “clarif[y] the liability faced by service providers who transmit potentially infringing material over their networks,” S. Rep. No. 105-190, at 2 (1998), while “ensur[ing] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.” *Id.*; *see Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 82 (2d Cir. 2016). TVP disclaims any reliance on the safe harbor provisions for ISPs. *See* TVP Br. 39.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

SARANG VIJAY DAMLE
*General Counsel and Associate
Register of Copyrights*

REGAN A. SMITH
Deputy General Counsel

EMMA RAVIV
*Barbara A. Ringer Fellow
United States Copyright Office
Washington, D.C. 20530*

CHAD A. READLER
Acting Assistant Attorney General

MARK R. FREEMAN
MEGAN BARBERO
*Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4631*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,500 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Megan Barbero

MEGAN BARBERO

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Megan Barbero

MEGAN BARBERO

ADDENDUM

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17 U.S.C. § 101 (excerpts)

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

....

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

....

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

17 U.S.C. § 106

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 506(a)

(a) Criminal infringement.—

(1) In general.—Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

(2) Evidence.—For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

(3) Definition.—In this subsection, the term “work being prepared for commercial distribution” means—

(A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution—

(i) the copyright owner has a reasonable expectation of commercial distribution; and

(ii) the copies or phonorecords of the work have not been commercially distributed; or

(B) a motion picture, if, at the time of unauthorized distribution, the motion picture—

(i) has been made available for viewing in a motion picture exhibition facility; and

(ii) has not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.