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Copyright Cowboys: Bringing Online Television to the Digital Frontier

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INTRODUCTION

A computer monitor eclipsing the classic scene of an American family basking in a television screen's warm glow was once

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inconceivable.[1] The inverse is now true as people are breaking free from their remote control shackles and turning to mobile devices to receive programming on their own terms.[2] Watching television is still America's favorite pastime and people are tuning in at an average of 2.8 hours a day.[3] However, traditional television viewers are steadily decreasing as younger demographics shift towards alternative media outlets.[4] While online services are growing significantly, online content constraint is producing a glaring niche in the market for streaming broadcast channels.

Two companies emerged as the frontrunners in the rush to close the market gap and created a highly polemical copyright battle in their wake.[5] Aereo, started by media entrepreneur Barry Diller, is a subscription-based system that allows users to watch live television coupled with DVR capability online and on mobile devices via a series of dime-sized antennae situated at the company's headquarters.[6] Alkiviades David launched Aereo's competitor FilmOn—formerly known as Aereokiller—to offer the same type of service as Aereo.[7] Remarkably, both systems operate independent of cable companies.[8] Initially in litigation against each other, the companies reconciled and now stand united against

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1 *See* Baoding Hsieh Fan, *When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting*, 52 FED. COMM. L.J. 619, 633 (2000).

2 *See American Time Use Survey*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (June 20, 2013, 10:00 AM EDT), http://www.bls.gov/news.release/atus.nr0.htm.

3 Brian Stelter, *Youth Are Watching but Less Often on TV*, N.Y. TIMES, Feb. 8, 2012, http://www.nytimes.com/2012/02/09/business/media/young-people-are-watching-but-less-often-on-tv.html?pagewanted=all&_r=0.

4 *See generally* Graeme McMillan, *Viewers Are Flocking to Streaming Video Content – And so Are Advertisers*, WIRED, Mar. 1, 2013, http://www.wired.com/underwire/2013/03/streaming-video-advertising.

5 *See* Joe Mullin, *As FilmOn is Shut Down by Courts, All Eyes Are on Aereo*, ARS TECHNICA (Sept. 10, 2013, 12:07 AM), http://arstechnica.com/tech-policy/2013/09/as-filmon-is-shut-down-by-courts-all-eyes-are-on-aereo.

6 *See generally* AEREO, http://www.aereo.com (last visited Oct. 17, 2013).

7 *See* Fox Television Stations, Inc. v. Barrydriller Content Systems, PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

8 *See* Emily Steel, *FilmOn Launches New Remote TV Service*, FINANCIAL TIMES, Feb. 10, 2014, http://www.ft.com/cms/s/0/af323520-9265-11e3-9e43-00144feab7de.html#axzz2uA43G8me.

a rapid onslaught of broadcaster-brought copyright infringement claims.[9]

Broadcasters were not initially threatened by Aereo or FilmOn and expected easy legal victories against them. However, they were blockaded by the Second Circuit's *Cartoon Network v. CSC Holdings* ("Cablevision") public-performance decision.[10] Cablevision, a major cable operator, created a "remote storage DVR system" ("RS-DVR") through which users could record their favorite shows, which were stored in a remote location available for retrieval to viewers' televisions through their remote controls.[11] Responding to broadcaster fury, the Second Circuit ultimately deemed unique single-subscriber systems as private performances not equating to copyright infringement.[12] Although merely one decision, *Cablevision*'s influence is potentially far-reaching.[13] It has already been credited with creating legal cover for cloud computing processes, which enable services such as SoundCloud and Apple iCloud to exist without first acquiring authorization from copyright holders.[14] This development has elicited scathing reviews from some copyright scholars and support from others.[15]

Aereo and FilmOn were undeniably influenced by the Second Circuit's decision, albeit not favorably. As District Court Judge Nathan stated in *WNET v. Aereo*, *stare decisis* prevented the court from assessing *Aereo* with a clean slate and, therefore, the system was deemed judicially permissible upon passing *Cablevision*'s

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[9] *See* Ross Todd, *Aereo Makes Peace with FilmOn Founder Amid Network Challenges*, AM. LAW. LITIG. DAILY (Oct. 18, 2013, 10:48 AM), http://www.americanlawyer.com/litigationdaily.

[10] *See generally* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

[11] *See id.* at 124.

[12] *See id.* at 139.

[13] *See* Lee Gesmer, *Aereo, Antenna Farms and Copyright Law: Creative Destruction Comes To Broadcast TV*, 18 No. 7 CYBERSPACE LAW. 16 (Thomson/LegalWorks, New York, N.Y.) (2013).

[14] *See* Daniel Schnapp, *Legal Implications of Cloud-Based Distribution and Consumption of Entertainment Content*, *in* UNDERSTANDING DEVELOPMENTS IN CYBERSPACE LAW, 2013 EDITION: LEADING LAWYERS ON ANALYZING RECENT TRENDS, CASE LAW, AND LEGAL STRATEGIES AFFECTING THE INTERNET LANDSCAPE (Aspatore 2013).

[15] *See* Gesmer, *supra* note 13.

doctrinal test.[16] However, the California district court in *Fox v. Barrydriller* was not persuaded—or bound—by the Second Circuit's decision, and used a different public performance test to find in favor of broadcasters.[17] Additionally, the D.C. Circuit in *Fox v. FilmOn* issued a nationwide (with the exception of the Second Circuit) injunction against FilmOn, leaving Aereo poised to change the fundamentals of the television industry.[18] Aereo CEO, Chet Kanojia, remains confident his system will prevail and is busily expanding the service.[19]

Resolution of the public-performance conundrum now lies in the hands of the Supreme Court, which recently granted certiorari to determine which public-performance approach is correct and whether Aereo and similar systems streaming unlicensed online broadcast television violate copyright law.[20] The present judicial tension with respect to online streaming of broadcast television is yet another chapter in a long and familiar tale of the judiciary attempting to fit new technology into an outdated copyright framework. As the story goes, while new innovation creates new benefits and possibilities, it also creates unprecedented legal issues.

This Note will argue that the Supreme Court is ill-equipped under the current copyright regime to solve the public-performance conundrum in a manner that will protect copyright authors, reward tireless technology pioneers, and provide for the public interest. Part I will illuminate the theoretical underpinnings of copyright law and public-performance jurisprudence, the cable industry's evolution, and previous online television efforts. Part II will discuss the two conflicting public-performance approaches. Part III proposes two remedies: (1) a legislative remedy calling for a newly drafted Copyright Act including an online television

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16 *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 686 (2d. Cir. 2013).

17 *See* Gesmer, *supra* note 13.

18 *See* Fox Television Stations, Inc. v. FilmOn X LLC, No. 13-CV-758 (RMC), 2013 WL 4852300, at *4 (D.D.C. Sept. 12, 2013).

19 *See* Emma Wollacot, *An Android App Plus a Court Win: It's Aereo's Busy Day*, FORBES, Oct. 10, 2013, http://www.forbes.com/sites/emmawoollacott/2013/10/10/an-android-app-plus-a-court-win-its-aeros-busy-day.

20 *See* Adam Liptak & Bill Carter, *Justices Take Case on Free TV Streaming,* N.Y. TIMES, Jan. 10, 2014, http://www.nytimes.com/2014/01/11/business/media/supreme-court-to-hear-case-on-retransmission-of-tv-signals-by-aereo.html?_r=0.

compulsory license and (2) a judicial remedy endorsing a copyright principle-focused public-performance framework. Part IV provides concluding thoughts on the interests at stake.

I. THE GOOD, THE BAD, AND THE UGLY: COPYRIGHT AND CABLE

Copyright claims influence the public experience in a multitude of ways from the ability to use an iPod to the joy of catching a late night rerun of a favorite *Seinfeld* episode. Historically, such claims have been brought not only by authors struggling to maintain their limited monopolies on works, but also by interest groups seeking to control new technological innovations.[21] The influence of Hollywood and the media and telecommunications industry on copyright legislation and policy remains strong.[22] In recent years, however, the rise of the Internet has broadened the scope of influence on copyright law and policy to new interest groups outside the industry.[23]

A. Copyright

Copyright law is the result of early American efforts to accord formal legal protection to the fruits of intellectual labor. The Founders granted Congress the power to "promote Progress of Science and useful Arts by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" in recognition of the human mind's far reaching capabilities.[24]

At an early point, the judiciary recognized that authors and innovators equally benefit society.[25] This judicial acknowledgement, however, only made balancing the competing interests of authors and innovators more difficult. Drawing the line for protecting author rights has proven to be especially

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[21] *See* Brian D. Johnston, *Rethinking Copyright's Treatment of New Technology: Strategic Obsolescence as a Catalyst for Interest Group Compromise*, 64 N.Y.U ANN. SURV. AM. L. 165 (2008).

[22] *See* PETER DECHERNEY, HOLLYWOOD'S COPYRIGHT WARS: FROM EDISON TO THE INTERNET 237 (Columbia Univ. Press 2012).

[23] *See id*. at 236.

[24] U.S. CONST. art. I, § 8, cl. 8.

[25] *See* Wheaton v. Peters, 33 U.S. 591, 621 (1834).

difficult. Although the authors' statutorily granted exclusive rights are entitled to copyright protection, offering authors the strictest level of such protection does the public a disservice in chilling innovation.[26] On the other side of the coin, according innovators too much deference damages authors' incentive to create. Although new technology is targeted as the stressor upon copyright, it is the foundation of copyright law.[27] If it had not been for the invention of the printing press, there would be no new works to speak of or protect. Yet innovators are often in precarious positions when it comes to copyright litigation and may be hesitant to claim their rights because they do not possess the resources for litigation.[28]

In protecting the results of the "sweat of the brow," early copyright jurisprudence esteemed the individual effort expended in a work's creation.[29] Copyright's overarching goal, however, has always been to enhance the public good.[30] Indeed, while authors provide the vehicle through which rights are delivered, the system as a whole is designed to benefit the public at large.[31] The greater the public's access to a diversity of information, the closer copyright law is to serving its purpose. As described by the Electronic Frontier Foundation in its amicus brief defending Aereo, that litigation was not about Aereo but rather the public's choice in broadcast television.[32]

The Copyright Act of 1976 is the current codification of American copyright law.[33] The Act protects "original works of authorship in tangible forms of expression from which can be perceived, reproduced or otherwise communicated either directly

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[26] *See* Christopher Leslie, *Antitrust and Patent Law as Component Parts of Innovation Policy*, 34 U.C. IRVINE J. CORP. L. 1259 (2009).

[27] *See id.* at 1261.

[28] *See id.* at 1272.

[29] *See generally* Int'l New Serv. v. Associated Press, 248 U.S. 215 (1918) (holding the Associated Press had a quasi-property right entitled to protection in the work put into fact gathering although the facts themselves were not subject to copyright).

[30] *See* WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 22:64 (2014).

[31] *See id.*

[32] *See* Brief for WNET v. Aereo as Amici Curiae Supporting Respondents, Electronic Frontier Foundation, 712 F.3d 676, 680 (2d Cir. 2013).

[33] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976).

or with the aid of a machine or device."[34] Authors are granted several—but not exclusive—rights, including the right to reproduce copyrighted work in copies or phonorecords, prepare derivative works, distribute works by sale or transfer of ownership, to display the work publicly, and to perform the work publicly.[35]

Although clarity is espoused as a copyright virtue, the judicial definition of public performance has become increasingly murky.[36] Section 106 of the Copyright Act codifies copyright authors' exclusive right to perform their works publicly.[37] The public performance right contains two prongs: the Public Place Clause and the Transmit Clause. The Public Place Clause straightforwardly defines a public performance as a performance that "takes place at a place that is open to the public or at any place where a substantial number of persons outside a normal circle of family and social acquaintances is gathered."[38] Congress has clarified that semipublic places such as hotels, clubs, and schools are considered public for copyright purposes.[39]

The Transmit Clause is at the heart of the present public performance conflict. It provides that a public performance is 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.[40]

The legislative history emphasizes that "device or process" encompasses all conceivable forms or combinations of wired and wireless communication, and that each and every method of

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34 *See* 17 U.S.C. § 106 (2012).

35 *See id.*

36 *See* Fogarty v. Fantasy, Inc., 114 S. Ct. 1023, 1030 (1994) (stating that because copyright enriches the public good by increasing access to public goods, copyright lines must be demarcated as clearly as possible).

37 17 U.S.C. § 106.

38 *Id.* § 101.

39 *See* H.R. REP. NO. 94-1476, at 64 (1976).

40 17 U.S.C. § 101.

transmitting an image comprising a performance or display comes under the scope of the Copyright Act.[41]

One of the judiciary's first struggles with the public-performance right concerned the transmission of content viewed privately within a public commercial space, an issue addressed by the Third Circuit in *Columbia Pictures Industry, Inc. v. Redd Horne, Inc*.[42] In *Redd Horne*, the defendants owned and operated two video rental stores offering patrons the option to rent videos for either home viewing or in-store viewing in private rooms.[43] The in-store option allowed customers to watch a film of their choice alone or with a small group of friends in a room with personal VCR service for a small fee.[44] Plaintiffs did not contest the rental service but claimed that the unauthorized exhibition of the films within the private rooms infringed upon their exclusive public performance rights.[45] The panel did not reach the Transmit Clause issue because the video store sufficiently fulfilled the meaning of public space within the first clause.[46] Similarly to *Redd Horne*, in *Columbia Industries Inc. v. Aveco Inc.*, defendants owned a video store featuring private viewing booths.[47] The court found that their case was not distinguishable because customers controlled the VCRs in the booths whereas, in *Redd Horne*, store employees controlled the VCRs from outside the rooms.[48] The court also held that the service was a violation of owners' public-performance rights.[49]

The judiciary first addressed Transmit Clause technicalities in *On Command Video Corporation v. Columbia Pictures Industries*.[50] In *On Command*, a hotel wired each room to a specific video player ("VCP") enabling guests to choose videos to

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41 *See* H.R. REP. NO. 94-1476, at 64 (1976).
42 749 F.2d 154 (3d Cir. 1984).
43 *Id.* at 156.
44 *Id.* at 157.
45 *See id.*
46 *See id.* at 159.
47 Columbia Indus. Inc. v. Aveco Inc., 800 F.2d 59, 61 (3d Cir. 1986).
48 *See id.* at 62.
49 *See id.* at 64.
50 777 F. Supp. 787 (N.D. Cal. 1991).

watch through a centralized switchboard system.[51] Columbia Pictures claimed that the system was infringing upon its exclusive right to publicly perform its work.[52] The court rejected defendants' argument that the placement of wires throughout the hotels sufficiently fulfilled the requirements of the Public Place clause.[53] Moreover, the court proffered a definition of "perform"—the first such definition provided by any court. The court stated that because a "performance" is statutorily defined as "the showing of images in any sequence to make the sounds accompanying it audible[,]" a performance occurs where a transmission is received but not where it is passing through.[54] Establishing that the performances only occurred within the private hotel rooms, which were not relevant for the purposes of the Public Place Clause, the court engaged in a Transmit Clause analysis.[55] The court held that the system at issue constituted public-performance infringement, because the works were still available to the public at large, which included potential hotel guests.[56]

Warner Brothers Entertainment Inc. v. WTV Systems, Inc. brought the *Redd Horne*/*Aveco* discussion into the Internet Age.[57] The service at issue, Zediva, allowed subscribers to stream unlicensed copyrighted works on demand at extremely discounted rates via an individualized DVD player housed in a data center.[58] When a viewer would choose a film to watch, a specified DVD player, similar to the VCP systems in *On Command*, played the request.[59] The private nature of viewers receiving programming at home was not enough to negate the public availability of the content and was also insufficient to overcome public-performance claims.[60]

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51 *See id.* at 788.
52 *See id.* at 789.
53 *See id.*
54 *Id.*
55 *See id.*
56 *See id.* at 790.
57 824 F. Supp. 2d 1003 (C.D. Cal. 2011).
58 *See id.*at 1007.
59 *See id.* at 1009–11.
60 *See id.* at 1010.

Cablevision forever changed the copyright landscape of the Second Circuit by introducing a new, transmission-centric public-performance test. The controlling question for the *Cablevision* court was whether the Cablevision design performed the work to the public, and the court ultimately held that it did not because the system design constrained receipt of the transmission to single individuals.[61] The *Cablevision* court relied upon exhaustive statutory interpretation to establish the scope of the public-performance right because it found neither "performance" or "to the public" to be expressly defined.[62] Because the statutory language provides that parties must be "capable of receiving the performance in order to be public" as opposed to "capable of receiving the transmission," the court held that a transmission in itself is meant to be interpreted as a performance.[63]

B. Cable: Past and Present

A true appreciation of the interests at stake in the Aereo and FilmOn litigations requires an understanding of cable systems and their history. A cable system is formally defined as a facility that, in whole or in part, receives signals transmitted or programs broadcast by one or more television broadcast stations, and makes secondary transmissions of these signals by wires or other communication systems to subscription-paying customers.[64] Cable companies, satellite companies, and other content providers are also called multichannel video programming distributors ("MVPDs").[65]

Ironically, much like Aereo and FilmOn, the cable industry began as a pesky new innovation that sought to compete with broadcast television.[66] Broadcasters delivered signals over radio licensed by the Federal Communications Commission ("FCC")

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61 *See* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 134, 139 (2d Cir. 2008).

62 *See id*.

63 *Id.* at 134.

64 *See* 17 U.S.C. § 111 (2012).

65 *See* Marvin Ammori, *Copyright's Latest Communication Policy: Content Lock out and Compulsory Licensing for Internet Television,* 18 COMMLAW CONSPECTUS 375, 376 (2010).

66 *See* United States v. Southwestern Cable Co., 392 U.S. 157, 165 (1968).

before the first commercial cable system installation in 1950.[67] The poor reception, especially in rural areas, proved to be a less than ideal content delivery method.[68] Community access television ("CATV") systems provided a novel solution by using wirelines to deliver video signals.[69] Initially perceived to be a local auxiliary to supplement broadcasting services, the rapid expansion of this system demonstrated its potential to become a national communications system.[70]

Despite broadcaster claims, the Supreme Court did not find CATV systems liable for copyright infringement. CATV systems secured two landmark victories, *Fortnightly v. United Artists Television* and *Teleprompter Corp v. Columbia Broadcasting System*, both of which were subsequently overturned by the Copyright Act of 1976, but nevertheless gave rise to the industry by allowing CATV systems to develop without judicial impediment.[71]

Fortnightly presented the first major copyright battle for content and set the precedent for judicial treatment of cable systems.[72] Broadcasters claimed that CATV signal retransmissions via a series of antennas on hills for a flat monthly fee violated their public-performance rights, yet the CATV system owners contended that mere retransmission did not constitute performance.[73] Adhering to the Copyright Act of 1909, which lacked a statutory definition of a cable system, the Court recognized the dubiousness of relying upon a statute lagging 60 years behind technological innovation.[74] Finding no support in the conventional performance definition, the Court looked to tests beyond the ordinary scope of the Act to adjudicate properly.[75] It

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67 Michael Zarkin, *Cable TV Deregulation Considered: An Exploration of Three Theses*, 17 COMM. L. & POL'Y 1, 8–9 (2012).

68 *See id.*

69 *See Southwestern Cable Co.*, 392 U.S. at 161.

70 *See id.* at 163.

71 *See* Teleprompter Corp. v. Columbia Broad. Sys. Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968).

72 *See Fortnightly*, 392 U.S. at 395.

73 *See id*.

74 *See id.* at 401–02.

75 *See id*. at 398–99.

rejected the appellate test measuring petitioner efforts enabling the viewing and hearing of the copyrighted work, because a quantitative measurement could potentially expose general public actions to copyright liability, such as shopkeepers selling televisions.[76] Constraining copyright liability to industry players, the Court attempted to place CATV systems within the existing broadcasting process to determine the appropriate treatment.[77] This framework illustrated a fundamental difference between broadcasters and viewers.[78] The Court observed that the broadcaster merely supplied electronic signals whereas the viewer provided the video/audio conversion equipment.[79] Because the CATV systems provided equipment in the same manner as the audience and merely made the signals more widely available, the thin similarity to broadcasters was insufficient to constitute public performance infringement.[80]

The subsequent *Teleprompter* decision briefly cemented the precedent that CATV systems did not infringe broadcasters' public performance rights.[81] Seminal changes to the CATV system since *Fortnightly,* including selling commercials and original programming, created newly significant overlap with broadcasters.[82] Petitioners argued the CATV evolution warranted fresh judicial review under the *Fortnightly* comprehensive functionality test for public performance infringement.[83] The Court did not find the changes determinative despite the CATV systems' ability to effectively compete with broadcasters, because such systems did not impact the baseline of signal retransmission.[84] As the nature of the retransmission itself remained the same, the changes did not possess a sufficient nexus to equate the systems to a public performance infringement.[85]

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76 *See id*. at 397.
77 *See id*. at 399.
78 *See id*. at 400.
79 *See id*. at 399.
80 *See id*. at 400–01.
81 *See* Teleprompter Corp. v. Columbia Broad. Sys. Inc., 415 U.S. 394, 412 (1947).
82 *See id.* at 404.
83 *See id.* at 403.
84 *See id.* at 405.
85 *See id.*

The FCC noted that the threat of adverse effects upon broadcasters was too substantial to leave unaddressed, and asserted jurisdiction by slowly implementing regulations in 1968.[86] FCC authority was unclear because the system's novelty did not place it in the clear-cut categories of a common carrier or broadcaster. The Court ultimately affirmed that cable systems were subject to FCC regulation.[87] Specifically, the Court held the Communications Act granted FCC authority to regulate and make available a rapid nationwide and worldwide wire and radio communications service applicable to interstate and foreign communication by wire or radio, placing cable systems directly in its purview.[88]

The FCC embraced the new judicial grant to regulate and implemented a set of cable industry rules in the 1970s.[89] Most regulations were short-lived as they were either repealed or substantially revised shortly between 1974 and 1980.[90] There is no singularly accepted explanation for why the FCC imposed and revoked regulations so quickly. Some theorize interest groups and other industry officials petitioned the FCC and pushed the "cable fable," painting the cable industry as a revolutionary technology that could resolve social problems.[91]

Serious concerns with the existing cable regulations reflected the legislative fear of creating effective competition between cable and broadcasters, yet such concern refused to account for the unique contours of cable technology, thereby limiting cable's ability to evolve by subjecting it to ill-fitting broadcast rules.[92] The technological difference proved to be too great to be ignored by FCC policy, leading to legislative reform in the 1984 Cable Act. The Act was created with the purpose of establishing a national cable policy and established franchise procedures that would assure growth, distribute power among competing governing

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86 *See* Zarkin, *supra* note 67, at 3.

87 *See* United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

88 *See id.* at 167.

89 *See* Zarkin, *supra* note 67, at 4.

90 *See id*. at 5.

91 *See supra* note 41.

92 John F. Gibbs & Todd G. Hartman. *The Regulation of Convergence Technologies: An Argument for Technologically Sensitive Regulation*, 27 WM. MITCHELL L. REV. 2193, 2201 (2001).

entities, promote competition and create wider information diversity.[93] The cable industry's exponential growth after the passage of the Act and the increase in subscriptions created a host of market-power issues targeted in the redrafted Cable Act of 1992, and such problems continue to plague the industry today.[94]

Vertical integration was an issue of particular concern then and remains so today.[95] Cable systems started as distribution platforms for broadcast channels yet now own programmers.[96] They use this heft against smaller programmers to engage in integration by requiring them to sell company equity to obtain carriage.[97] This also creates a stronger incentive to favor affiliated programmers, thus creating severe roadblocks for smaller, non-cable affiliated programmers.[98]

The cable industry's undue market power likewise affects broadcasters. Traditionally, broadcast signals were free but the Copyright Act of 1976 requires cable companies to pay broadcasters for retransmission rights of their work.[99] Retransmission fees result in seven-digit revenues for broadcasters and broadcasters believe that such fees allow them to compete with pay television channels, thus placing them at the foundation of their business model.[100] As a result, retransmission fees are often the cause of heated negotiations, which sometimes can end in channel blackouts much to the frustration of viewers.[101]

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93 *See* 47 U.S.C. § 52(1) (2012).

94 *See* Pub. L. No. 102-385, 106 Stat. 1460.

95 *See* David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511, 519–20 (1995).

96 *See* James B. Speta, *The Vertical Dimension of Cable Open Access*, 71 U. COLO. L. REV. 975, 1006 (2000).

97 *See* Patry, *supra* note 30, at 385.

98 *See id*.

99 *See* 17 U.S.C. § 111 (2012).

100 *See* Will Richmond, *Aereo's Court Victory Places Retransmission Consent Fees in Spotlight*, VIDEONUZE (Apr. 2, 2013), http://www.videonuze.com/article/aereo-s-court-victory-puts-retransmission-consent-fees-into-spotlight.

101 *See* Susanna Kim, *Time Warner Cable Sued by Customers Fed Up with CBS Blackout*, ABC NEWS (Aug. 16, 2013), http://abcnews.go.com/Business/time-warner-cable-customers-hope-build-class-action/story?id=19970548.

Bundling is another vastly unpopular yet lucrative cable industry practice.[102] Bundling consists of cable companies packaging channels together, thereby leaving the consumer no choice but to purchase a vast selection of unwanted programming for the sake of accessing a handful of channels.[103] Although cable companies are heavily criticized, network owners possess significant leverage by holding popular programming hostage until cable companies acquiesce and adopt lesser-known channels.[104] Networks seem unlikely to give up this practice as it has been estimated that only twenty channels would survive in an unbundled world.[105]

Public frustrations with MVPDs and their internal quarreling is an ongoing conversation from the popular cartoon *South Park*[106] to the floor of the House of Representatives.[107] This expanding disconnect between the cable industry and the public has prompted new legislative stirrings. Americans' turning in droves to the Internet has been a reflection of their frustration with the cable industry.[108] Americans need and want leaner package options that contain content they actually want to view and serves their needs.[109] House Representative John D. Rockefeller is spearheading a bill calling for online services to receive the same access to programming as cable and satellite companies to undercut cable using market power anti-competitively in order to limit online video distributors response to consumer demand.[110] Additionally, Senator John McCain is advocating the "Television

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[102] *See* Dan Bobkoff, *The History – and Future – of Cable's Bundling*, NPR (Aug. 7, 2013), http://www.npr.org/2013/08/07/209820647/the-history-and-future-of-cables-bundling.

[103] *See id.*

[104] *See id.*

[105] *See id.*

[106] *See South Park*: *Informative Murder Porn* (Comedy Central television broadcast Oct. 2, 2013).

[107] *Television Viewers, Retransmission Consent, and the Public Interest: Hearing Before the Subcomm. on Commc'n., Technology, and the Internet*, 111th Cong. 3 (2010).

[108] *See id.* at 4.

[109] *See id.* at 5.

[110] *See* Bryce Baschuk, *Rockefeller Unveils Aereo Friendly Online Video Legislation for Expanded Choice,* BLOOMBERG BNA (Nov. 13, 2013), http://www.bna.com/rockefeller-unveils-aereo-n17179880063.

Consumer Freedom Act," which would allow Americans to purchase preferred television channels "à la carte" and thereby drastically lower their cable bills.[111] A newly successful Canadian initiative creating government requirements for à la carte television may lend support to the à la carte television movement in the United States.[112]

While lawmakers attempt to repair the relationships between cable moguls, networks, and audiences, new technologies unconstrained by old business practices and industry standards have successfully responded to consumer demands. Aereo is merely one battlefront in a war that is in full swing as television migrates to the Internet.[113] On-demand viewing services such as Netflix and Hulu have become increasingly competitive and have molded the new industry standard. Netflix currently boasts 30 million subscribers, which is ten million more than the nation's largest cable company, Comcast.[114] The amount of viewers watching solely streaming content has become so significant that Nielsen now accounts for online viewers in its television ratings system.[115] Nielsen also launched "Nielsen Twitter TV Ratings" to paint a more comprehensive picture of modern audience engagement by measuring the quantity and influence of tweets about television shows.[116] Such developments underscore how new technology has impacted the relationship between viewers and content providers. The technology industry and free market have created an audience-centric model, creating different viewer

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111 *See Senator John McCain Introduces Television Consumer Freedom Act*, JOHN MCCAIN (May 9. 2013), http://www.mccain.senate.gov/public/index.cfm/2013/5/video-a72c9d95-97f3-41ac-a17d-e751fda2ae12.

112 *See* Joshua Brustein, *Cable TV Companies Forced to Unbundle in Canada*, BLOOMBERG BUSINESSWEEK, Oct. 14, 2013, http://www.businessweek.com/articles/2013-10-14/cable-tv-companies-forced-to-unbundle-in-canada.

113 *See* Todd, *supra* note 9.

114 *See* Brian Stelter, *Netflix, as Easy as Changing the Channel*, N.Y. TIMES, Oct. 14, 2013, http://www.nytimes.com/2013/10/15/business/media/netflix-as-easy-as-changing-the-channel.html.

115 *See* Heather Kelly*, Nielsen Adds Web Viewers to Its TV Ratings*, CNN (Oct. 28, 2013), http://www.cnn.com/2013/10/28/tech/web/nielsen-tv-ratings-online.

116 *See* Brian Stelter, *Nielsen to Measure Twitter Chatter About TV Shows*, N.Y. TIMES, Oct. 6, 2013, http://www.nytimes.com/2013/10/07/business/media/nielsen-to-measure-twitter-chatter-about-tv.html.

expectations and affording them more control, choice, and engagement.

Cable industry officials are now in a bind to accommodate these new viewer demands while maintaining sizable profits. Aereo's judicial stamp of approval has finally realized their deep-seated fear of a formidable Internet opponent and will only lead industry officials to attempt to draw in a younger audience who finds them increasingly irrelevant.[117] The television industry has long been trying to rebel against this challenge to the status quo and its stronghold on the industry by staving off "cord cutting" and exclusively online television consumption.[118]

Cable companies' primary tool to contractually fend off Internet forces is content lockout.[119] Cable companies put heavy pressure on networks, preventing them from placing all of their content online.[120] As a result, while the network is allowed limited online content to maintain relevance, its most popular shows will still lock in viewers to watch on television.[121] Another effective strategy in ensuring cable necessity is requiring proof of a cable subscription in order to access content online, such as the popular HBO GO online feature from premium network Home Box Office ("HBO").[122]

Online services have weakened the content barrier by acquiring their own programming as opposed to relying on existing networks. While some, such as Amazon, have their own studios, platforms such as Hulu and Netflix have entered bidding wars alongside networks to publish production companies' shows online first.[123] Netflix flexed its new market power in overcoming such networks as AMC and HBO to acquire *House of Cards*.[124] This

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117 *See* Matt Twomey, *As TV Migrates Online, Cable Is Under Pressure to Change*, CNBC (May 19, 2013), http://www.cnbc.com/id/100739314.

118 *See* Ammori, *supra* note 65, at 393.

119 *See id.* at 403.

120 *See id*. at 405.

121 *See id.* at 379.

122 *See id.* at 408.

123 *See* Atul Patel, *Original Programming: Who's Really in Charge*?, MEDIAPOST BLOGS (Aug. 14, 2013, 9:20 AM,) http://www.mediapost.com/publications/article/206749/original-programming-whos-really-in-charge.html.

124 *See id.*

acquisition proved to be a worthwhile investment as Netflix recently made history as the first company to enjoy Emmy success for an online-only show when its original program, *House of Cards*, took home three trophies after fourteen nominations.[125] Star of the show, Kevin Spacey, credited the wins and ultimate success to Netflix's nontraditional distribution model and its built-in understanding of consumer desire.[126] Indeed, consumers do not want to wait week-in and week-out for the traditional serial release of a show, but want the ability to sit with a story and binge-watch at their own convenience.[127]

Cable operators have been unable to rely on the judiciary for legal support when it has challenged major forms of revenue such as advertising.[128] In a recent ruling, cable broadcasters forcefully litigated over Dish Network's "Dishhopper" system.[129] Dishhopper allows subscribers to record multiple shows and skip through commercials using the "Autohop" function.[130] While watching television without commercials is a viewer's dream, Fox cited it as severely damaging to its revenue flow.[131] The court ultimately held in favor of Dish Network, stating the process underlying "Autohop" was permissible under the fair-use doctrine.[132] The allowance of commercial skipping was a particularly hard blow to broadcasters and it may have permanently changed the nature of television. This new ability to skip ads will likely result in the number of ad placements and advertising revenue to plummet, thereby placing the industry in a precarious position.[133]

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125 *See* T.C. Sottek, *Netflix Challenges the TV Establishment with Emmy Wins for 'House of Cards*,*'* VERGE (Sept. 22, 2013), http://www.theverge.com/2013/9/22/4759754/netflix-challenges-the-tv-establishment-with-emmy-wins-for-house-of.

126 *See id.*

127 *See id.*

128 *See* Ammori, *supra* note 65, at 386.

129 *See generally* Fox Broad. Co., v. Dish Networks L.L.C., 723 F.3D 1067 (9th Cir. 2013).

130 *See id.* at 1072.

131 *See id.* at 1079.

132 *See id.*

133 *See* Gina Hall, *Dish Decision May Help Broadcasters Without Aereo*, L.A. BIZ (July 19, 2013), http://www.bizjournals.com/losangeles/news/2013/07/29/dish-decision-may-help-aereo-in-battle.html?page=all.

C. Online MVPDS: ivi

Aereo and FilmOn are not the first attempts at online television. As previously discussed, prior companies have attempted to compete with the incumbent MVPD-dominated market and have failed due to the myriad tactics employed by MVPD to maintain its grip on the market. One service, ivi, attempted a different strategy by claiming to be a cable company instead of building a copyright defense.[134] Its failure may be why Aereo and FilmOn do not refer to themselves as online cable providers despite the resemblance. The now-defunct ivi was a Seattle startup that retransmitted live broadcasts from several networks, including CBS, ABC, and Fox, to viewers nationwide on a downloadable player for a low fee of $4.99 a month.[135] Broadcasters quickly brought a claim for copyright infringement.[136] The issue of public performance was not argued. In fact, ivi did not deny that it was retransmitting broadcaster signals, but proposed that it should be entitled to a compulsory license because its operation as a cable system qualified it despite not fitting the traditional statutory definition of a cable system.[137]

Section 111 of the Copyright Act codifies compulsory licenses allowing cable providers to access broadcaster content.[138] This section was enacted with the intention of creating a public market for the cable industry that would nurture its growth in a manner impossible to achieve in a completely free market while simultaneously offering compensation to copyright authors.[139] However, there is no explicit mention of Internet cable service providers, and the provision was clearly intended to address a traditional MVPD system. The court acknowledged prior congressional direction to construct section 111 as narrowly as possible, thus making it inappropriate to allow the Internet, an

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134 Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 323 n.52 (2013).

135 *See* WPIX, Inc. v. IVI Inc., 765 F. Supp. 2d 594 (S.D.N.Y. 2011).

136 *See id.* at 589.

137 *See id.* at 590.

138 17 U.S.C. § 111 (2012).

139 *See WPIX, Inc.*, 765 F. Supp. 2d at 604.

unprecedented technology lacking FCC regulation, to benefit from compulsory licensing.[140]

II. THE SEARCHERS: TO PERFORM OR TRANSMIT?

Public-performance jurisprudence provides for two approaches that lead to drastically different outcomes. The first approach defines public performance by examining the totality of circumstances surrounding the performance itself and, in so doing, emphasizes the overall outcome. The second approach considers a transmission to be a performance in itself and is therefore "transmission-centric" in focusing purely on the nature of the transmission to determine whether it is a public performance. While the totality of circumstances approach governed the FilmOn decision, the transmission-centric approach first articulated in *Cablevision* governed *Aereo*.

A. Totality: Redd Horne, Aveco, On Command, WTV, Barrydriller, FilmOn

Redd Horne first presented the totality of circumstances approach, the analysis of which centers on the work in question rather than the recipients of a particular transmission, given that it is doubtful that Congress intended to hinge copyright protection upon the technicalities of delivering a work.[141] This approach considers elements such as the location of the viewing, the nature of the viewing, the nature of the transmission, the overall outcome and any other seemingly relevant factors. The *Redd Horne* court reasoned that the Copyright Act's legislative history warranted a broad reading of the public performance right.[142] The statutory definition that opened the public performance right to original works and any further rendition, the court held, meant that it would be illogically inconsistent to constrain the right narrowly.[143]

While the consideration of private space, potentially including peoples' homes, complicates public performance analysis under a

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140 *See id.* at 616.
141 *See id.*
142 *See* Gesmer, *supra* note 13, at 14.
143 *See id.*

totality approach, it is not outcome determinative. The *WTV* court followed *On Command*'s reasoning and stated that despite viewing works on personal computers, works being available to viewers, as the public at large, are determinative in deeming a performance public.[144] The *Redd Horne* court emphasized legislative history in reiterating that the purpose of the revised public-performance clause is to capture works being made accessible to a significant number of people.[145] Therefore, the private nature of the viewership was not a mitigating factor because the works were available to the public at large.[146] The *On Command* court opined that the location of the performance does not equate a private performance if the relationship between the transmitter and the audience can be deemed commercial or public.[147] That decision also supports aggregating transmissions in providing that transmissions occurring in a hotel were not to be treated independently.[148]

The nature of the transmission is a matter of consideration under the totality approach, but the *Barrydriller* court plainly rejected treating a transmission as a performance.[149] Although the statute does not expressly define "to the public" or "performance," that court found that the definition of "public performance of a work" was sufficient and rejected an understanding of a transmission as a performance.[150] Furthermore, the *Barrydriller* court found that Congress placed emphasis in the work itself rather than the "performance of a performance."[151] The *Aveco* court also considered the nature of the transmission. While acknowledging the minor adjustment in the source of the transmission, the court

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144 *See* Warner Bros. Entm't v. WTV Sys., 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011).

145 *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 158 (3rd Cir. 1984).

146 *See id.*

147 *See* On Command Video v. Columbia Pictures, 777 F. Supp. 787, 790 (N.D. Cal. 1991).

148 *See id*. at 789–90.

149 *See generally* Fox Television Stations, Inc. v. Barrydriller Content Systems, PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

150 *See id.* at 1142.

151 *See id.* at 1144.

did not consider the control detail dispositive.[152] Indeed, *Aveco* reiterates that the overall functionality and outcome of the transmission creates public performance infringement.[153]

The totality approach rejects single-subscriber systems falling outside the scope of public performance. *On Command* cites that Congress meant to target single viewer systems such as the one in contention by providing that a public performance occurs when members of the public receive a work in the same place or in separate places regardless of time.[154] The *Barrydriller* court also disagreed with the shield created by a unique copy of a work and deemed it judicial invention because the statute never refers to a single copy of the work as a factor to be considered in making a determination of whether a public performance.[155] Rather, the language refers to the copyright work itself.

B. Transmission-centric: Cablevision *and* Aereo

Treating a transmission as a performance requires analyzing the nature of the transmission itself and its potential audience to determine whether it is a public or private performance. The *Cablevision* court supported its reading of the text in the legislative history by reasoning that it reflected Congressional hesitance to create an overly broad right.[156] The court rejected using the work as a public performance analysis baseline along the lines of prior public performance jurisprudence because doing so would render the text "to the public" surplusage.[157] The court further reasoned that holding that the public at large could always be a potential audience would misalign with Transmit Clause intentions, which obviously contemplate the existence of non-public transmissions.[158]

Cablevision established four public performance infringement goalpost rules that work carefully in tandem to make this

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152 *See id.*
153 *See id*.
154 *See id.*
155 *See id.* at 1145.
156 *See id*. at 1145–46.
157 *See id.* at 1144–45.
158 *See id.* at 1144.

determination. The first and most important factor is an analysis of the potential audience capable of receiving the transmission.[159] If there is a single-subscriber system, meaning that only one party is on the receiving end of a particular transmission, then it is a private performance, thus falling out of the public-performance purview.[160] Second, if there is a single-subscriber system, then the transmissions should not be aggregated.[161] Third, if the public transmissions stem from the same work and not a unique copy, then they should be aggregated and deemed a public performance.[162] These factors find support in *Redd Horne* because the holding relied on a video store showing the same copy of a work to customers.[163] Although *Redd Horne* did not explicitly describe the significance of the same copy being used, *Cablevision* considered that analysis in "filling the gap" left by *Redd Horne* and holding that a unique copy can function to constrain the potential audience.[164] The *Cablevision* court held that a true single subscriber system allowed by the transmission of unique copies of works in a one-to-one transmission sufficiently constrains the potential audience of a work thus bypassing public performance consideration.[165] Lastly, any factor limiting the potential audience must be considered if engaging in a Transmit Clause analysis.[166]

The *Aereo* analysis follows *Cablevision*'s distilled rule: if the public is capable of receiving a transmission, it is a public performance, but if the potential audience of the transmission is only one subscriber, the transmission is not a public performance.[167] The court observed that the primary Cablevision features creating the single audience member for the transmission were the unique copy of the work and the transmission of the

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159 *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 689 (2d. Cir. 2013), *cert. granted sub nom*., Am. Broad. Cos., Inc., v. Aereo, Inc., 134 S. Ct. 896 (2014).

160 *See id*.

161 *See id.*

162 *See id*.

163 *See id.* at 694 (citing Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984)).

164 *See* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 138 (2d Cir. 2008).

165 *Id.* at 137.

166 *See id.*

167 *See WNET, Thirteen*, 712 F.3d at 689.

unique work to a particular individual.[168] The *Aereo* court found that the Aereo system possessed the same two features and that during the entire chain of a transmission, from the time a signal is first received by Aereo to the time it generates an image, the potential audience is of only one Aereo customer, and therefore does not constitute a public performance.[169] Although the plaintiffs argued that *Cablevision* established that an aggregation of transmissions disturbs the potential audience, the *Aereo* court disagreed.[170] Rather, that court opined that the aggregation of transmissions would distort the focus back to the work, and not the transmission itself.[171] Furthermore, agreeing with the plaintiff's analysis, the *Aereo* court found, would require the aggregation of all of Cablevision's transmissions because a distinguishing point had not been established, and the court was not willing to do so.[172]

The Massachusetts District Court sided with the Second Circuit in *Hearst Stations v. Aereo*.[173] The *Hearst* court found the *Aereo* explanation of the public performance clause to be more plausible and endorsed the Second Circuit in its transmission-centric interpretation.[174] It also found support from the rule against surplusage, requiring judicial interpretation to give meaning to every statutory term if possible.[175] The legislative language stating that the process of communicating a work from its author to the ultimate consumer contains several performances further supported the idea that a transmission may be considered a performance in itself.[176]

The Supreme Court adopted a totality of circumstances approach during the *Aereo* oral arguments. The Court was openly troubled by the resemblance between the Aereo system and cable or satellite systems rather than the technicality of the

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168 See *id.* at 688–89.
169 *See id.* at 690.
170 *See id.* at 691.
171 *See id.*
172 *See id.*
173 *See generally* Hearst Stations Inc. v. Aereo, No. 13-CV-11649 (NMG), 2013 WL 5604284 (D. Mass. Oct. 8, 2013).
174 *See id.* at *5–6.
175 *See id.* at *6.
176 *See id.*

transmission.[177] However, the Court was most concerned with the current and distant abilities of the Aereo system, lack of royalty payments, and the public-performance question's impact on cloud computing and equipment providers.[178] The petitioners responded to equipment-provider liability, stating that equipment providers do not perform a work by selling equipment but rather a private performance is later initiated upon use.[179] They further argued that Congress addressed this in 1976 and said that if a service was being provided even if it could be reduced to equipment rental, the person providing the service on an ongoing basis and in the process exploits the copyrighted works of others is engaged in a public performance.[180] The petitioners also presented that cloud computing and the Cablevision remote storage DVR are distinguishable and permitted because of content ownership.[181] They analogized the systems to a car dealership and valet parking.[182] A car dealership provides cars to any paying stranger similarly to a service that provides new content to paying strangers.[183] However, a valet service holds and manages your existing property just as cloud storage lockers hold user-owned content.[184] Because users already own the content through the underlying licensing or purchase, they may lawfully retrieve content from cloud storage or DVR systems without violating public-performance rights.[185] Aereo argued that public performance should not be the contested issue because the case presented a question of the reproduction right.[186] It relied on a landmark Supreme Court copyright case, *Sony Pictures v. Universal Studios, Inc.* ("Betamax"), asserting that the Court recognized consumers' fair-use right to make copies of local over-

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177 Transcript of Oral Argument at 4, American Broad. Cos. Inc., v. Aereo, Inc., _U.S. _ (2014) (No. 13-461) [hereinafter *Aereo* Oral Argument].
178 *See id.*
179 *See id.* at 9.
180 *See id.* at 14.
181 *See id.* at 16.
182 *See id* at 13.
183 *See id* at 14.
184 *See id.*
185 *See id.*
186 *See id.* at 28.

the-air broadcasts.[187] Aereo further argued that it does not provide content because a user's assigned storage does not contain programming until the user selects a program by clicking a button.[188] Equipment providers such as Radio Shack selling antennas do not pay copyright royalties, and thus Aereo is not required to pay.[189] Therefore, as a self-purported equipment provider, Aereo stated it merely creates an avenue for consumers to use their statutorily granted and judicially recognized fair-use right.[190]

III. HOW THE WORLD WIDE WEST CAN BE WON: SOLVING PERFORMANCE ANXIETY

The Copyright Act of 1976 is at the eye of the public-performance storm because it does not provide firm statutory ground for the judiciary. Between the courts' adoption of "the Transmit Clause is not a model of clarity" as a mantra and the statute severely lagging behind the times, there is a distinct need for Congressional action. In *Betamax*, Justice Stevens emphasized that an existing gap in the law should not be filled by anyone other than Congress.[191] Congress has the constitutional authority and the institutional ability to accommodate varied permutations of competing interests implicated in new technology.[192] The challenge of filling the gap between new technology and old copyright law without congressional guidance has left the judiciary grappling with complicated public-performance issues beyond the scope of its expertise, resulting in the *Aereo*'s incorrect and damaging outcome.

Copyright law must support wider content availability in order to appropriately and effectively address the interests of authors as well as the innovators and the public. In the meantime, the

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187 *See id.* at 29.
188 *See id.* at 43.
189 *See id.* at 37.
190 *See id.* at 46.
191 *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
192 *See id.* at 430.

judiciary must adhere to copyright jurisprudence to ensure its integrity and maintain logical consistency.

A. Legislative Remedy

As Justice Fortas stated in his *Fortnightly* dissent, "[a]pplying the normal jurisprudential tools—the words of the Act, the legislative history, and precedent—to the facts of this case is like trying to repair a television with a mallet."[193] Similarly to *Teleprompter*[194] and *Fortnightly*,[195] the courts have treated *Aereo*[196] and *FilmOn*[197] under the regime of an outdated Copyright Act.[198] Despite legislative efforts, it is impossible to design laws sufficiently predictive to capture every type of allegedly foreseeable situation. Just as Congress noted in the 1976 Copyright Act, technical advances have generated new industries and methods for the reproduction and dissemination methods of copyrighted works.[199] This newly evolved business relationship between authors and users makes it particularly difficult to enforce existing copyright law.[200]

The explicit and widely acknowledged judicial frustration with the statutory text is troubling. An overwhelming amount of copyright holdings are consistently grounded in statutory interpretation rather than theory.[201] While it is not always the place of the judiciary to ground opinions in theory, its reliance on statutory interpretation has been further hindered by the scant support given by Congress beyond the language of the Act, impeding the judiciary's ability to shape consistent copyright principles.[202] The Court is often in a precarious position, forced

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193 Fortnightly Corp. v. United Artists Television, 392 U.S. 390, 403 (1968).

194 *See generally* Teleprompter Corp. v. Columbia Broad. Sys. Inc., 415 U.S. 394 (1974).

195 *See generally Fortnightly Corp.*, 392 U.S. 390.

196 *See generally* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d. Cir. 2013).

197 *See generally* Fox Television Stations, Inc. v. FilmOn X L.L.C., 13-CV-758 (RMC), 2013 WL 4852300 (D.D.C. Sept. 12, 2013).

199 *See* H.R. REP. NO. 94-1476, at 51 (1976).

200 *See id.* at 64.

201 Marci A. Hamilton, *Copyright at the Supreme Court*, 47 J. COPYRIGHT SOC'Y 317, 321 (2000).

202 *See id.* at 320–21.

between either seeking legislative clarity or picking up where Congress has left off to fill in the gaps as a result despite Congress' more valuable role of reviewing and addressing larger policies, themes, and developments.[203] Justice Breyer openly stated that he was not confident in his understanding of what a decision for or against Aereo could mean for other useful technologies.[204] This is precisely the type of question that requires Congressional wisdom and legislative deliberation.

The judiciary's inability to handle these cases is becoming more apparent and decisions reached may undermine copyright law rather than uphold it.[205] Authors have predominantly felt the effects because of court hesitance to expand the scope of copyright without explicit legislative authorization.[206] The *Betamax* Court's emphasis on constitutional text tasks Congress with defining the scope of copyright, not the judiciary.[207] Early in the Court's history, it was inclined to deny authors the power to control or benefit from new technology through copyright law and *Betamax* interprets the language to mean that the Clause places the public interest ahead of all others.[208] Lauding new technology benefits above all neglects other relevant liberties present in a copyright claim. Authors are not a counterweight to the public interest but, rather, are at the very center of the equation.[209]

Notably, the Supreme Court has limited the scope of intellectual property law more frequently than it expanded it, particularly within the past fifteen years.[210] This is a particularly treacherous time for limiting intellectual property rights, because the increased amount of stakeholders creates a wider net of impact than ever before.[211] The outcome looks bleak; moving forward, it

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[203] *See id*. at 321.
[204] *See Aereo* Oral Argument, *supra* note 177, at 38.
[205] *See* Pallante, *supra* note 134, at 322.
[206] *See* Sony Corp. of Am. v. Universal City Studios Inc., 464 U.S. 417, 431 (1984).
[207] *See id.* at 429.
[208] *See id.* at 432.
[209] *See* Pallante, *supra* note 134*,* at 340.
[210] *See* Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1833 (2006).
[211] *See* DECHERNEY, *supra* note 22.

is likely new technology will comprise most of the intellectual property litigation.

It is time for the drafting of a new Copyright Act instead of permitting the judiciary to continue in its attempts to fit the square pegs of technological innovation into the round holes of the current Copyright Act. The Internet must be the focus of a new Copyright Act because it is the most impactful societal force since the Industrial Revolution.[212] The twenty-first century Copyright Act requires twenty-first century enforcement strategies that "respect the technical integrity and expressive capabilities of the Internet as well as the law."[213]

The breadth of issues Congress would need to examine and revise is beyond the scope of this Note. However, even if an entirely new act is not drafted, Congress should still specifically address public performance. Despite the increasing significance of public performance, especially within film and television, it has gone unaddressed in the most recent copyright legislation.[214]

A renewed online television license discussion is essential for two reasons: author protection and marketplace failure.[215] Former concern that retransmissions would occur without the ability of copyright authors to privately negotiate is now a present reality with no license, thus leaving authors powerless and profitless.[216] The anti-competitive business tactics within the cable industry and industry players' attempts to maintain benefits for themselves while underserving the consumer indicate massive marketplace failure.[217] The cable operator ownership of the MVPD market nurtures a misalignment of interest and incentives. The governmentally-granted monopoly power has shifted focus internally and, accordingly, industry leaders are seeking ways to

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212 *See id.*

213 *See* Pallante, *supra* note 134, at 326.

214 *See Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act, and Illegal Streaming Before the H. Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary,* 112th Cong. 1 (2011) (statement of Maria A. Pallante, Register of Copyrights).

215 *See id*.

216 *See id.*

217 *See generally* Ammori, *supra* note 65, at 405 (discussing Time Warner Cable's attempts to stop content providers from putting television shows online).

maximize their power and profits instead of outwardly seeking consumer approval.[218]

A legislative remedy permitting online television viewing while compensating broadcasters would serve the public interest by restructuring the market and allowing broadcasters to maintain a revenue feed that would not compel them to move to a pay channel service. Lower barriers to entry for new distributors would allow them to become legitimate competitors and create an entirely new component of the entertainment and media industry. Consumers would finally receive content from smaller networks currently unable to overcome the bundling scheme.[219]

The Copyright Office ("the Office") previously explored licensing broadcast video over the Internet in a 2008 report on satellite technology.[220] The Office stated that it was not opposed to delivering programming over the Internet but that it was inappropriate for online companies to sidestep private negotiations or operate without the Communications Act and FCC limitations imposed on traditional cable operators.[221] The former Copyright Register, Mary Beth Peters, cited several protests to the idea. Among those concerns were non-paying subscribers receiving content, broadcasts no longer being restricted to local retransmissions, and the lack of opportunities for copyright owners to assess the risks of putting their works on the Internet and private negotiations.[222] She also recognized that unconsented retransmissions would effectively wrest control away from program producers who make significant investments in content powering the U.S. economy's creative engine.[223]

Peters did not completely discount the idea and suggested that if Congress found it appropriate, a new license should be crafted to Internet distribution instead of amending § 111 of the Copyright

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218 *See id.* at 405–06.

219 *See id.* at 419–20.

220 *See* MARY BETH PETERS, REGISTER OF THE COPYRIGHTS, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 187–88 (2008).

221 *See id.* at 188.

222 *See id.* at 193–94.

223 *See id.*

Act.[224] This solution would be the most successful. Attempting to stretch § 111 to fit the needs of the Internet would fall back into the bad habit of stretching old laws to meet new technology despite the contours of the law not suiting its unique qualities. As previously discussed, this was largely unsuccessful with early FCC regulations of cable television.[225] Licenses must be specified to the Internet's unique qualities to guard growth instead of inhibiting future innovation or progress as well as feature low entry costs to ensure that smaller programmers can be assured carriage.[226] A compulsory license ensured to compensate copyright authors as well as prevent content lock-out strategies so innovators can truly embrace and build the online MVPD structure would reward all parties involved as well as finally grant the public the freedom of choice long craved for entertainment consumption.[227]

B. Judicial Resolution

In testimony before the Subcommittee on Intellectual Property, Competition, and the Internet Committee on the Judiciary, the current Copyright Register, Maria Pallante, stated that the unauthorized streaming of copyrighted content would only increase in severity if technology outpaces legal reforms.[228] While the operative word in her statement is "if," she should have said "when." To rely solely on legislative solutions is both ill advised and unrealistic. In a tortoise and hare race between the law and technology, slow and steady does not emerge victorious. Technology has gone beyond the realm of outpacing legal reforms from the advent of the CATV systems to Aereo slipping through a judicially created copyright loophole.[229] Assuming that Congress will act promptly, comprehensively, and retroactively is hazardous, so the judiciary must be better equipped to address public-performance conflicts.

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224 *See id.*
225 *See* discussion *supra* Part I.B.
226 *See* Ammori, *supra* note 65, at 415.
227 *See id.* at 414.
228 *See* Pallante, *supra* note 214.
229 *See supra* discussion Part II.B.

The ambiguities of copyright law have long created Sphinx-like riddles blocking the courts' path to appropriate adjudication. Such a death of Congressional guidance is emphatically more problematic when dealing with new technology.[230] As Justice Stevens advises, where Congress has plainly not marked a course, the judiciary must proceed with caution to construe the scope of rights enacted by a legislature that did not contemplate the involved calculus of interests.[231] It is established that Congress did not contemplate the present calculus of interests in drafting the current Copyright Act.[232] The Act was drafted when cable was a fledgling industry and had not yet been addressed by a national policy.[233] Although Congress predicted its growth and significance, the same cannot be said for its current market power or the other offshoot industries and interests at play.[234] Therefore, because technological change has rendered statutory text ambiguous, the Copyright Act must be construed in light of its basic purpose of encouraging authors and motivating private innovators for the benefit of the public.[235] In his *Fortnightly* dissent, Justice Fortas also cautioned the Court to inflict minimal damage to traditional copyright principles and business relationships until Congress had legislated on the issue.[236]

Public-performance jurisprudence has proven that new technologies, such as the streaming services like Aereo and FilmOn, highlight ambiguities in the Copyright Act's statutory terms. As the *Aereo* court stated, discerning between a public and private transmission in the technological landscape of 1976 was

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230 *See supra* discussion Part III.

231 *See* Sony Corp. of Am. v. Universal City Studios Inc., 464 U.S. 417, 432 (1984) (Stevens, J., dissenting).

232 *See Sony Corp.*, 464 U.S. at 431.

233 *See* Vivian I. Kim, *The Public Performance in the Digital Age: Cartoon Network LP v. CSC Holdings,* 24 BERKELEY TECH. L.J. 263, 269 (2009).

234 *See* Dan Schnapp and Matthew Syrkin, *United States: Copyright Disruption in the Cloud: U.S. Courts Divided Over Rights Required for Streaming Entertainment from the Cloud – Could A U.S. Supreme Court Showdown be Looming?*, MONDAQ (Feb. 20, 2013), http://www.mondaq.com/unitedstates/x/222642/Copyright/Copyright+Disruption.

235 *See Sony Corp.*, 464 U.S. at 428–32 (Stevens, J., dissenting).

236 *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 404 (1968) (Fortas, J., dissenting).

much simpler than it is today.[237] The Court's trepidation during the *Aereo* oral arguments emphasizes the liability danger the present ambiguities pose to current and future beneficial technologies.[238] Keeping in line with Justice Stevens and Justice Fortas, the terms and outcomes of copyright decisions must be construed so as to uphold the theoretical underpinnings of copyright law to preserve and vitalize technology for the public good.

Cablevision correctly points out that neither "public" nor "performance" is expressly defined in the Copyright Act, which gave rise to the notion that a transmission in itself is a performance.[239] The question here is whether examining the potential recipient of a specific transmission rather than examining the totality of the circumstances comports with copyright principles. If the former approach is followed and elevates form over substance, technology will as a result be developed with the creation of truly individualized transmissions in mind. This was already apparent with the Aereo system. The *Aereo* court responded that this practice is not unusual and that even Cablevision created its design for the same purpose.[240] In his *Aereo* dissent, Judge Chin disagreed with the creation of a judicial blueprint to sidestep copyright infringement.[241] Chief Justice Roberts agrees with Judge Chin and readily dismissed Aereo's argument that its design is a necessarily efficient and cost effective strategy for a startup company.[242] While the Chief Justice does not find it outcome determinative, it is difficult to reconcile this notion with copyright law's purpose.[243] Although copyright law wants to encourage private motivation using existing author works for the benefit of the public, it cannot be said that Aereo and similar services should be rewarded for designing in pure avoidance of the law. Allowing technological copyright law circumvention runs counter to copyright law's purpose by implicitly approving the

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237 *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 694 (2d Cir. 2013).
238 *See Aereo* Oral Argument, *supra* note 177, at 15.
239 *See* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 134 (2d Cir. 2008).
240 *See Aereo*, *Inc.*, 712 F.3d at 694.
241 *See id.* at 705 (Chin, J., dissenting).
242 *See Aereo* Oral Argument, *supra* note 177, at 41.
243 *See id.*

misdirection of innovation energy which should be directed towards the public benefit and not avoiding the law.

The seemingly nebulous line-drawing process in determining when the potential audience is the public is also offered as justification for a single subscriber exemption. *Cablevision* rejects the "public at large" approach because the public could potentially always be the audience for a performance and legislative history points to a narrower reading to ensure "public" possesses a tangible meaning.[244] Examining this notion's soundness requires looking at what copyright goals are accomplished by constraining public performance more narrowly and permitting single-subscriber systems. The lack of authorization removes a weighty obstacle for the innovator, thus enabling a wider audience to receive content and promoting diversity of information. However, the harm here largely outweighs the public benefit figuratively and eventually literally. The potential broadcaster harm from the Aereo system and other copycat services could be irreparable.[245] Affected broadcasters have been explicit about efforts to maintain their business even if it means moving to pay cable.[246]

A narrow reading of the legislative history is also not supported by the text or copyright aims. *Cablevision* stated that Congress feared an overly broad treatment of public performance as evidenced by drawing the line for infringement at private, thus cabining the right.[247] This acknowledgement highlights that Congress did already draw the line between public and private for the courts. The definition of private within the legislative history is family and social acquaintances.[248] Although this is a small carve-out, the remainder is also the ordinary meaning of public, i.e., the community at large. This line-drawing also comports with copyright aims. Maintaining relationships between large groups of people and maximizing benefits for the masses necessitates a far-

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244 *See Cartoon Network*, 536 F.3d at 134–35.

245 *See Aereo*, 712 F.3d at 697 (Chin, J., dissenting).

246 *See Exec Threatens to Make Fox Pay-TV-Only Channel If Aereo Goes on*, FOX NEWS (Apr. 9, 2013), http://www.foxnews.com/entertainment/2013/04/09/exec-threatens-to-make-fox-pay-tv-only-channel-if-aereo-goes-on.

247 *See Cartoon Network*, 536 F.3d at 136.

248 *See* H.R. REP. NO. 94-1476, at 64 (1976).

reaching doctrine.[249] If the public-performance right can be constrained by the lack of aggregation, this could potentially mean works falling under the scope of copyright would be unprotected. Furthermore, drawing the line such that private individuals do not have to obtain a license every time they wish to sing a song or make use of a copyright work would broaden the scope of copyright. Exposing individuals to copyright liability would not only be inefficient but chill public desire to enjoy the arts and other copyrighted works, which is the antithesis of copyright's goal.

The Transmit Clause also supports a broad application by reiterating that a public performance occurs even when the recipients are not gathered in a single place or at the same time.[250] The inclusion of potential recipients of "semipublic" places such as hotel room occupants and schools is also reflective of the broad nature of the clause.[251] If Congress intended a constrained interpretation, it would likely be reflected in the Copyright Act's definitions section. For example, Congress may have implemented an additional time element or required the recipients be gathered in the same location. Congress acknowledges that closed-circuit television and computers may one day be influential and although they may not have known the specific outcomes, it seems apparent that they included that language to ensure that the public did not become tied to physicality.[252] It had already become evident from CATV system technology had the ability via wires to build communities over long distances sufficiently determined to be "the public."[253]

The *Aereo* court openly acknowledges that application of the Transmit Clause analysis should focus less on the technical details and more on the overall functionality.[254] However, the two concepts are not necessarily exclusive. Previously discussed public performance cases did not put technical details of systems to the side to focus instead on pure functionality; rather, both can be

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249 *Id.* at 63.
250 *See id.* at 64–65.
251 *See id*. at 65.
252 *See id.* at 80.
253 *Id.*
254 *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 693–94 (2d Cir. 2013).

considered simultaneously.[255] It is unlikely that Congress intended for the results to differ based solely on the technicality of a system as opposed to the actual results it produces.[256] A technically focused interpretation implies that the harm the Copyright Act was targeting was the manner in which material was being disseminated rather than potential recipients.

Upholding the approach grounded in technical architecture over that which considers the totality of circumstances leads to logically inconsistent results. If *Redd Horne* and *Aveco* determined the private viewing booths in their requisite video stores to be private performances, the court could have created the precedent of small video store chains acting as movie theaters without the appropriate license. Currently, the Aereo system is allowed to operate as an online cable provider without any license or regulation.[257] The Second Circuit explicitly prohibited the operation of such a system in *ivi*.[258] As Judge Chin acknowledged, while public performance was not one of the issues to be adjudicated, the outcome was the same.[259] The *Aereo* court is correct in responding that the inclusion of private transmissions within a system that resembles a cable system creates complications and the court is also obligated to uphold Congress' other expressed concerns in the Act.[260] However, this approach essentially disregards copyright law's overarching purpose. It is nonsensical for the Second Circuit to address the severe harm to broadcasters in ivi yet condone Aereo despite both services essentially creating the same outcome. This not only hurts copyright law, but also damages the congruity of the judiciary. The Court was apparently wary of inconsistent results when trying to justify Aereo's nonpayment of royalties despite its similarity to a CATV system. While Aereo attempted to distinguish its

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255 *See supra* Part II.

256 *See* Fox Television Stations, Inc. v. FilmOn X LLC, No.13-758 (RMC), 2013 WL 4852300, at *7 (D.D.C. Sept. 12, 2013).

257 *See* discussion *supra* Part I.C.

258 *See* WPIX, Inc., v. ivi, Inc., 691 F.3d 275, 279, 282 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013).

259 *See, e.g.*, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 696–97 (2d Cir. 2013) (Chin, J., dissenting).

260 *See id.*

company from a cable system stating that cable systems "push signals down" to users while they are an equipment provider allowing users to choose programming, it did not manage to distinguish itself from services such as Netflix and Hulu.[261] Aereo's weak argument that unlike Netflix and Hulu, its system is different because it excludes people was quickly shot down by Justice Ginsburg who points out that making services available to paying subscribers is not exclusionary.[262] This further speaks to its content being available to the public at large because *Redd Horne* established that requirement of payment is insufficient to make a performance private.[263]

Economic harm has not been addressed in either the *Cablevision* and *Aereo* court's treatment of public performance.[264] *Cablevision* dismisses *On Command*'s inclusion of commerciality in its analysis.[265] Congress did not define public performances as being public commercial performances, yet it did explicitly state that it had drafted the public performance right broadly without mention of commercial business and created non-profit exemptions because it is difficult to predict the profit schemes the future will bring.[266] Commercial considerations are therefore important to the public-performance right, but they are purposefully not named in the statutory definition of public performance in an effort to intelligently draft a long lasting law.

The *Aereo* court also dismisses Aereo's lack of a license to transmit broadcaster works deeming it irrelevant for public performance right considerations. However, Judge Chin observed the *Cablevision* court explicitly stated their holding does not generally permit content delivery networks to avoid all copyright

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261 *See Aereo* Oral Argument, *supra* note 177, at 45.

262 *See id.* at 47–48.

263 *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984).

264 *See id.* at 695–96 (discussing harm as part of "[t]he [o]ther [p]reliminary [i]njunction [f]actors"); Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 126 (2d Cir. 2008) (addressing the legal infringement elements of the underlying grant of summary judgment).

265 *See* 536 F.3d at 139.

266 *See* H.R. Rep. No. 94-1476, at 62–63.

liability by creating unique copies for individual subscribers.[267] In an amicus brief, Cablevision also stated that the Aereo case should have turned out differently because Aereo was unlicensed.[268] Admittedly, Cablevision most likely is trying to protect the copyright shield created for their system. There is also ambiguity in the *Cablevision* court's statement that their holding should not apply generally to all content-delivery networks with a unique copy subscription model because it may be referring to single-subscriber systems being prey to violating other copyright laws despite not infringing public performance.[269] However, embracing a totality approach would erase this concern regarding licenses. By not accounting for a multitude of relevant factors underlying the totality approach, the courts are vulnerable to falling back into the pattern of *Teleprompter* and *Fortnightly*. The Court clung to the *Teleprompter* transmission-focused rule despite the CATV system evolution resulting in entirely different circumstances in *Fortnightly*.[270] Here, there is a very real distinction between the Cablevision systems and Aereo that warrants serious consideration instead of applying the same rule to each.

IV. DISQUIET ON THE WESTERN FRONT: CLOSING THOUGHTS

The motivating concern of this Note was not to prevent damage to the broadcast industry for the sake of fending off Darwinian industry mandates but to assess the impact such mandates will have on Americans. The current conundrum centers on how best to defend the public interest currently under a dual threat. The havoc wrought on broadcasting will primarily result in constrained, lower quality content if the courts condone the unauthorized streaming of broadcast television and pave the way for *Cablevision*-centric designed systems to operate.[271] However, the

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[267] *See Aereo, Inc.*, 712 F.3d at 703 (quoting Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008)).

[268] *See* Greg Sandoval, *Cablevision to Aereo: Don't Compare Your Case to Ours*, CNET (Sept. 25, 2012, 11:01 AM), http://news.cnet.com/8301-1023_3-57519928-93/cablevision-to-aereo-dont-compare-your-case-to-ours.

[269] *See* 536 F.3d t 139–40.

[270] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398–99 (1968).

[271] *See Aereo, Inc.*, 712 F.3d at 704.

cable industry will not be given the appropriate incentive to develop a more consumer-conscious business if the public does not have the option of legally approved streaming broadcast television.[272]

The public interest in widely accessible and diverse information is built into the architecture of broadcast television, thus significantly increasing the potential harm if the broadcast industry suffers economic damage.[273] By possessing a broadcast license, companies are aware that the basis of their operation is an obligation to serve the community.[274] Historically, this community obligation has naturally placed a great amount of trust in, reliance upon—and afforded power to—broadcasters.[275]

A public service-oriented business does not translate into a business with a loss-sustaining model for the sole sake of preserving the integrity of its mission.[276] Broadcasters have been left with a twofold concern: they must reimagine their services and content-delivery schemes quickly to stay afloat in a highly competitive field and also take on lost revenue from decreased retransmission fees.[277] The more cost-effective Aereo service may induce users to employ its services and leave their traditional cable companies, thereby resulting in a smaller consumer base and a decrease in revenue.[278] In fact, the projected loss for broadcasters if Aereo and other copycat services are given the green light is over $2 billion a year, and could grow to up $6 billion per year by 2018.[279]

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[272] *See Television Viewers, Retransmission Consent, and the Public Interest: Hearing Before the Subcomm. On Commc'n, Tech., & the Internet of the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 4 (2010) (statement of Sen. John D. Rockefeller IV).

[273] *See id.* at 30–31 (statement of Mr. Joseph Uva, CEO and Pres., Univision Commc'n Inc.).

[274] *See id.* at 41 (statements of Thomas Rutledge, COO, Cablevisions Sys. Corp. and Chase Carey, Deputy Chairman, Pres., & COO, The News Corp.).

[275] *See id.* at 31 (statement of Thomas Rutledge, COO, Cablevisions Sys. Corp.).

[276] *See id.* at 41.

[277] *See* Sandoval, *supra* note 268; ERNST & YOUNG, SUSTAINING DIGITAL LEADERSHIP! AGILE TECHNOLOGY STRATEGIES FOR GROWTH, BUSINESS MODELS AND CUSTOMER ENGAGEMENT 33 (2014), *available at* http://www.ey.com/Publication/vwLUAssets/EY-Sustaining-digital-leadership/$FILE/EY-Sustaining-digital-leadership.pdf.

[278] *See* Gesmer, *supra* note 13.

[279] *See id.*

Justice Breyer is appropriately sensitive to preventing the public from receiving good content simply because a new technology service cannot find the appropriate permissions from copyright holders yet does not fit into the statutory copyright scheme.[280] Although many Americans may benefit from enjoying the convenience of online cable, the increased information flow on the Internet would not provide a balance for roughly 30 million Americans who rely exclusively on over the air television without access to cable or satellite.[281] The public relies on television not only for their daily dosages of escapism, but for local news, community building through sports, enlightenment through cultural programming, and critical information during emergencies.[282] A return to grounding copyright law coming from the legislature and the courts is the only way to balance out the involved rights for a judicious outcome and to truly ensure diversity of information for the masses.

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[280] *See Aereo* Oral Argument, *supra* note 177, at 53.

[281] *See Television Viewers*, *supra* note 272, at 17 (statement of Chase Carey, Deputy Chairman, Pres., & COO, The News Corp.).

[282] *See id.* at 6 (statement of Sen. Frank R. Lautenberg).