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Aereo and FilmOn: Technology's Latest Copyright War and Why Aereo Should Survive

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I. Introduction

TV as we know it is changing, but the courts and Congress again face the issue of how copyright law should adapt.[1] As cable providers and broadcast networks battle over retransmission fees and the cost of cable TV increases, Internet TV becomes more

1. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676 (2d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3393 (U.S. Jan. 10, 2014) (No. 13-461) (deciding whether Aereo's service retransmitting broadcast TV over the Internet infringes broadcasters' copyrights). S*ee generally* WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009) [hereinafter PATRY, MORAL PANICS] (discussing various copyright wars in recent history).

popular.[2] Cable providers try to compete in the Internet TV market by offering live and on-demand programming accessible over the Internet but struggle to compete with the variety of online video delivery.[3] Some companies, such as Sony, Google, and Amazon, considered plans for Internet TV that would be similar to cable TV.[4] However, two companies, Aereo and FilmOn, began offering broadcast TV over the Internet in 2012.[5] As viewers abandon cable TV for Internet programming, broadcast companies must fight to find profits through existing copyright law.[6] Broadcasters won a monumental battle against Aereo in *American Broadcasting Cos. v. Aereo, Inc.*,[7] which forced the company to suspend its service.[8] The U.S. District Court for the Southern District of New York found FilmOn in contempt of

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2. *See, e.g.*, Michael Calabrese, *The CBS-Time Warner Cable Blackout Battle: Time for Congress to Rescue the Hostages*, SLATE (Aug. 9, 2013, 4:58 PM), http://www.slate.com/blogs/future_tense/2013/08/09/cbs_time_warner_cable_blackout_battle_congress_should_rescue_hostages.html (last visited Oct. 31, 2014) (reporting on the battle over retransmission fees between Time Warner Cable and CBS and discussing the increase in younger people "cut[ting] the cord") (on file with the Washington and Lee Law Review).

3. *See, e.g.*, *Watch Online*, XFINITY, http://xfinitytv.comcast.net/ (last visited Oct. 31, 2014) (offering live TV and already-aired shows for viewers) (on file with the Washington and Lee Law Review); *see also* Calabrese, *supra* note 2 ("[B]roadcasters are threatened by a different type of online video delivery.").

4. *See* Amol Sharma, Shalini Ramachandran & Don Clark, *Amazon Considering Online Pay-TV Service*, WALL ST. J. (Jan. 21, 2014), http://online.wsj.com/news/articles/SB10001424052702304757004579334981130200324?mod=WSJ_hp_LEFTTopStories (last visited Oct. 31, 2014) (reporting that Amazon, Sony, Google, and Intel are working on technology for a pay-TV service) (on file with the Washington and Lee Law Review).

5. *See About Aereo*, AEREO, http://aereo.com/about (last visited Mar. 30, 2014) (explaining the Internet TV service Aereo offers) (on file with the Washington and Lee Law Review); *Online Media Solutions*, FILMON, http://corp.filmon.com/#web_solutions (last visited Oct. 31, 2014) (describing the on-demand and live-TV services offered) (on file with the Washington and Lee Law Review).

6. *See* Calabrese, *supra* note 2 (arguing for congressional action to prevent the blackouts that the fee battles cause).

7. 134 S. Ct. 2498 (2014).

8. *See id.* at 2503 (finding that Aereo infringes on broadcasters' exclusive public performance rights in violation of the 1986 Copyright Act). Prior to issuing its opinion, the Supreme Court rejected FilmOn's motion to intervene, and thus the Court's decision discusses only Aereo. *See* Am. Broad. Cos. v. Aereo, Inc., 2014 WL 801080, at *1 (No. 13-461) (U.S. Mar. 3, 2014) (denying FilmOn's motion for leave to intervene).

court for attempting to offer Boston broadcasts,[9] and after a brief stint offering local channels for a fee, FilmOn ceased offering any live local broadcast channels.[10]

Aereo and FilmOn did not license shows or pay retransmission fees.[11] Aereo and FilmOn captured airwave broadcasts through antennas, copied the data, and transmitted it to customers via the Internet.[12] Broadcasters did not profit from Aereo and FilmOn's services as they do from cable companies, and as a result, broadcasters filed claims for copyright infringement in several district courts.[13] The Second Circuit is the only court of appeals that issued an opinion and ruled in favor of Aereo based on Second Circuit precedent interpreting the Copyright Act provisions at issue.[14] The Supreme Court, however, overturned the Second Circuit without even mentioning the precedent the Second Circuit relied on, finding that Aereo operated too much like a cable system.[15] Aereo and FilmOn's next approach argued that they are cable companies and thus entitled

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9. *See* CBS Broad. Inc. v. Filmon.com, Inc., No. 10 Civ. 7532(NRB), 2014 WL 3702568, at *7 (S.D.N.Y. July 24, 2014) ("[W]e find FilmOn in civil contempt of court for its violation of the Injunction.").

10. *See Live TV*, FILMON, http://www.filmon.com/group/ (last visited Oct. 31, 2014) (failing to list any local channels) (on file with the Washington and Lee Law Review); Jeff John Roberts, *FilmOn Launches "Teleport" Technology to Stream TV in 18 Cities, Improve on Aereo*, GIGAOM (June 30, 2014, 11:55 AM), http://gigaom.com/2014/06/30/filmon-launches-teleport-technology-to-stream-tv-in-18-cities-improve-on-aereo/ (last visited Oct. 31, 2014) (discussing FilmOn's new requirement of paying for local broadcast channels) (on file with the Washington and Lee Law Review).

11. *See Supreme Court Will Hear Broadcasters' Appeal Against Online TV Service Aereo*, THE GUARDIAN (Jan. 10, 2014, 5:06 PM), http://www.theguardian.com/law/2014/jan/10/aereo-supreme-court-broadcasters-appeal-online-tv (last visited Jan. 21, 2014) (reporting that Aereo and FilmOn "do not pay broadcasters") (on file with the Washington and Lee Law Review).

12. *See id.* (explaining Aereo and FilmOn's technology and service).

13. *See id.* (discussing broadcasters' claims).

14. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 696 (2d Cir. 2013) (ruling in favor of Aereo).

15. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2501 (2014) ("[T]hese behind-the-scenes technological differences do not distinguish Aereo's system from cable systems, which do perform publicly."); *see generally id.* (lacking any mention of the Second Circuit's reasoning).

to compulsory licensing under the same Act the Supreme Court found Aereo to violate.[16]

As technology changes, intellectual property law must change with it, but the law cannot grow as quickly as technology.[17] The U.S. Constitution specifically gives Congress the power to protect, "for limited times," creators' exclusive rights to their "writings and discoveries."[18] Copyright law intends to grow and spur technology and innovation.[19] As powerful industries lobby Congress,[20] the original intent of copyright law has arguably lost its meaning.[21] U.S. copyright law faced many "Copyright Wars,"[22] and this Note explores the latest Copyright War over Internet broadcast TV.

This Note examines whether a service that uses the Internet to allow users to watch live broadcast TV infringes on broadcasters' exclusive "public performance right." The Supreme Court correctly found that such technology violates broadcasters' public performance rights under the 1976 Copyright Act[23] despite Second Circuit precedent. Additionally, this Note considers

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16. *See* Keach Hagey, *Aereo's Bid for Comeback Hinges on Cable License*, WALL ST. J. (July 10, 2014, 6:50 PM), http://online.wsj.com/articles/aereos-bid-for-comeback-hinges-on-cable-license-1405032643 (last visited Oct. 31, 2014) ("If it were classified as a cable company, Aereo argues, it should be able to qualify for a 'compulsory license' . . . .") (on file with the Washington and Lee Law Review).

17. *See* Cullen Kiker, *Amazon Cloud Player: The Latest Front in the Copyright Cold War*, 17 J. TECH. L. & POL'Y 235, 288 (2012) ("[B]ut the problem . . . is that technology grows exponentially while the law grows arithmetically.").

18. U.S. CONST. art. I, § 8, cl. 8.

19. *See id.* ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); PATRY, MORAL PANICS, *supra* note 1, at 39 ("It is innovation that leads to progress and to new learning—the only goals of copyright.").

20. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 121 (Rev. ed. 2003) [hereinafter GOLDSTEIN, COPYRIGHT'S HIGHWAY] (discussing the motion picture industry's lobbying efforts after VCRs entered the market).

21. *See* PATRY, MORAL PANICS, *supra* note 1, at 39 (arguing that the Copyright Wars reflect a move away from innovation and learning as a purpose of copyright law).

22. *Id.* at xviii–xix.

23. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–805 (2012)).

whether a finding of infringement for Aereo and FilmOn aligns with the purpose of copyright law and argues that the evolution of copyright law in the United States no longer reflects the original intentions of copyright law.

Part II explains Aereo and FilmOn's technology. Part III outlines the legal background necessary for understanding the copyright issues surrounding the Aereo and FilmOn technology. Part IV explains the various cases against Aereo and FilmOn. Part V analyzes whether Aereo and FilmOn violate broadcasters' public performance rights and applies the Second Circuit's *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (*Cablevision*)[24] analysis to FilmOn to demonstrate how minute differences in technology can lead to different results in copyright law. Part V concludes that despite the 1976 Copyright Act, Aereo and FilmOn should be considered noninfringing because of the history and purpose of copyright.

II. Explaining the Technology at Issue

A. Aereo's Technology

Aereo's users received and recorded broadcast TV from a computer or mobile device via the Internet.[25] Aereo advertised itself as a TV antenna, but instead of a traditional antenna attached to one's TV, Aereo's antenna was in "the cloud."[26]

Aereo assigned one antenna per user, even if two users requested to watch the same show at the same time.[27] Physically, each antenna looked like two metal loops, about the size of a dime.[28] Eighty antennas filled one end of a circuit board, and

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24. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008).

25. *About Aereo*, *supra* note 5.

26. *Id*. The term "the cloud" describes any computing services, including networks, servers, and storage, done from a remote location. *See* Nicole D. Galli & Edward Gecovich, *Cloud Computing and the Doctrine of Joint Infringement: "Current Impact" and Future Possibilities*, 11 J. MARSHALL REV. INTELL. PROP. L. 673, 674, 676 (2012) (discussing cloud computing).

27. U.S. Patent No. 20,120,127,363 (filed May 24, 2012); s*ee also* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 682 (2d Cir. 2013) ("No two users share the same antenna at the same time . . . .").

28. Am. Broad. Cos., Inc. (*Aereo I*), 874 F. Supp. 2d 373, 379 (S.D.N.Y. 2012), *aff'd sub nom.* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir.

electronic components that process the broadcast signals occupied the rest of the circuit board.[29] To achieve a high antenna density to receive the most broadcasts, sixteen circuit boards existed within a metal housing.[30] Despite the high antenna density, Aereo claimed that the antennas functioned independently.[31]

An antenna optimization and control system received requests from users and assigned an antenna to obtain the user's desired content.[32] If there were no available antennas, the optimization and control system sent a busy signal back to the user.[33] For each antenna, a corresponding tuner captured the broadcast signal.[34] The tuner transmitted the broadcast to an encoding system that decoded the transmission into video and audio formats.[35] Then, a multiplexer put the content into an efficient format for streaming and storage.[36] Regardless of whether the user requested to watch the program immediately or in the future, the system stored the user-unique data in a broadcast file.[37] If a user chose to watch a program live, the streaming server buffered and streamed the broadcast content to the user's device with a six- or seven-second delay.[38] If the user wanted to record the program for later viewing, the system kept the copy in the user's broadcast file until the user chose to delete the copy.[39]

2013).

29. *Id.*
30. *Id.*
31. *Id.* at 381.
32. '363 Patent, *supra* note 27.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

B. The Aereo User's Experience

The background technology may be complicated, but the user's experience was simple.[40] To subscribe to Aereo's service, the user must have been a resident of a subscription area where Aereo offers service.[41] To watch broadcast TV through Aereo, the user must have been within the user's "home coverage area."[42] The channels available to the user depended on the user's home coverage area but included many public access channels, such as PBS, as well as the major broadcasting networks CBS, NBC, ABC, and FOX.[43] Aereo limited its service to cities where it had antennas.[44] Therefore, users could only view channels that they could watch via an antenna connected to their TV.[45]

When a user logged onto Aereo's website, the website displayed programs currently airing or that would air in the future, and the user could choose to watch or record.[46] When the user selected to watch a program currently airing, the user could pause and rewind the program to the time the user began watching that program.[47] If the user chose to record a program

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40. *About Aereo*, *supra* note 5.

41. *Frequently Asked Questions*, AEREO, http://aereo.com/faqs (last visited Mar. 5, 2014) (on file with the Washington and Lee Law Review). Note that Aereo bases a user's residence on that user's billing address. *Id.*

42. *Id.*; *see also* '363 Patent, *supra* note 27 (explaining that the server uses the user's Internet Protocol address to get the user's geographical location).

43. *TV Channels*, AEREO, http://aereo.com/channels (last visited May 7, 2014) (on file with the Washington and Lee Law Review).

44. *Where Can I Get Aereo?*, AEREO, http://aereo.com/coverage (last visited Mar. 29, 2014) (on file with the Washington and Lee Law Review).

45. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 680 (2d Cir. 2013) ("Aereo transmits to its subscribers broadcast television programs . . . ."); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 627 (1994) ("Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range."); Matthew Moskovciak, *TV Without Cable: How to Cut the Cord*, CBS NEWS (Apr. 28, 2011, 3:00 AM), http://www.cbsnews.com/8301-505123_162-57225739/tv-without-cable-how-to-cut-the-cord/ (last updated Apr. 28, 2011, 12:20 PM) (last visited Oct. 31, 2014) ("Many people are shocked when they find out they can receive free high definition TV from major TV networks simply by connecting a basic over-the-air antenna.") (on file with the Washington and Lee Law Review).

46. *Aereo II*, 712 F.3d at 681.

47. *Id.* at 681 & n.3.

airing in the future, Aereo recorded the program to the user's unique broadcast file for later viewing.[48]

C. Differences Between Aereo and FilmOn

FilmOn and Aereo operated in the same basic way with "minor distinctions in the sequence in which signals were processed."[49] At one point, Aereo offered its services in eleven cities including New York City, Boston, and Salt Lake City.[50] FilmOn's availability extended to fourteen cities including New York City, Washington, D.C., San Francisco, and Seattle.[51]

Although originally the services' pay schemes differed, Aereo and FilmOn mainly differed in their geographic accessibility.[52] FilmOn advertised that users could watch TV from anywhere in the world,[53] but in the terms and conditions of service, users agreed to watch only the services "in the area in which the broadcast was intended to be viewed."[54] If a New York City user, however, traveled to Los Angeles, nothing stopped the New York user from accessing New York channels while in Los Angeles.[55]

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48. *Id.* at 681.

49. Fox Television Stations, Inc. v. FilmOn X LLC (*FilmOn X*), No. 13-758, 2013 WL 4763414, at *2 n.4 (D.D.C. Sept. 5, 2013). The plaintiffs against FilmOn claimed that FilmOn's system is missing a number of elements that Aereo has, but the U.S. District Court for the Central District of California noted that it could not determine what elements were missing, and it did not affect the copyright analysis. Fox Television Stations, Inc. v. BarryDriller Content Sys. (*BarryDriller*), 915 F. Supp. 2d 1138, 1141 n.5 (C.D. Cal. 2012).

50. *TV Channels*, *supra* note 43.

51. *Support*, FILMON, http://support.111pix.com/index.php?/Knowledgebase/Article/View/38/9/in-which-us-cities-does-filmon-have-local-channels (last visited Oct. 31, 2014) (on file with the Washington and Lee Law Review). Aside from basic area channels, FilmOn also boasts over 500 live TV channels that FilmOn licenses from broadcasters, as well as 45,000 Video On Demand movies and shows. Declaration of Alkiviades David at 5–6, FilmOn X, 2013 WL 4763414 (D.D.C. Aug. 15, 2013) (No. 13-758).

52. *See Frequently Asked Questions*, *supra* note 41 (listing Aereo's cost to users as $8 per month); *Terms & Conditions*, FILMON, http://www.filmon.com/page/terms-en (last visited Oct. 31, 2014) (describing FilmOn's service as free) (on file with the Washington and Lee Law Review).

53. *What We Do*, FILMON, http://corp.filmon.com/#tv_solutions (last visited Oct. 31, 2014) (on file with the Washington and Lee Law Review).

54. *Terms & Conditions*, *supra* note 52.

55. *See* Telephone Interview with Alkiviades David, CEO, FilmOn (Jan. 21,

Aereo, on the other hand, delivered only the channels of the user's geographic location based on billing and Internet Protocol addresses.[56] Courts deemed Aereo and FilmOn as technologically the same,[57] but the accessibility distinction could have caused a different result under the Second Circuit's analysis.[58]

III. Relevant Legal Background of Copyright Law

A. 1976 Copyright Act

The 1976 Copyright Act governs the legal issues Aereo and FilmOn faced.[59] The 1976 Copyright Act outlines several exclusive rights of copyright holders.[60] For motion pictures and audiovisual works, copyright holders possess the exclusive right "to perform . . . [or] display the copyrighted work publicly."[61] The 1976 Act defines performance of a copyrighted work as "to recite, render, play, dance, or act it, either directly or by means of any devise or process."[62] The transmit clause defines "to perform publicly" as "to transmit or otherwise communicate a performance or display of the work to a [public place] or to the public, by means of any device or process."[63] Without a *public* performance or display, there is not necessarily a copyright

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2014) (saying that someone on the East Coast could watch West Coast TV) (on file with the Washington and Lee Law Review).

56. *See supra* notes 41–45 and accompanying text (describing Aereo's user requirement to be located in and a resident of the area where the user logs in to watch local channels).

57. *See* Fox Television Stations, Inc. v. FilmOn X LLC (*FilmOn X*), No. 13-758, 2013 WL 4763414, at *2 (D.D.C. Sept. 5, 2013) (deeming FilmOn's technology as "'similar . . . in every relevant way' to the technology at issue in *Aereo*" (citation omitted)).

58. *See infra* Part V.B (arguing that FilmOn and Aereo should receive different outcomes on whether they violate copyright law).

59. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 684 (2d Cir. 2013) (citing the 1976 Copyright Act's exclusive rights and exceptions); *FilmOn X*, 2013 WL 4763414, at *1 (framing the issue in terms of the law in the 1976 Copyright Act).

60. *See* 17 U.S.C. § 106(1)–(6) (2012) (outlining "exclusive rights in copyrighted works").

61. *Id.* § 106(4)–(5).

62. *Id.* § 101.

63. *Id.*

infringement.[64] Thus, violation of a copyright holder's public performance right requires two elements: (1) a performance or display and (2) a transmission to the public, including one as defined by the transmit clause.[65]

The 1976 Act also provides exceptions to the exclusive rights of copyright holders.[66] Fair use is one of the most common exceptions.[67] Historically, fair use prevented copyright holders from demanding royalties when someone, like a reviewer, quoted the work.[68] In the United States, judges employed fair use to ensure copyright law pursued its public policy purpose of promoting art and science.[69] The 1976 Act codified fair use for the first time,[70] but its codification did not alter the doctrine.[71] The statute does not explicitly define fair use, but it provides four factors to analyze in considering whether a use of work qualifies as fair use.[72] The four factors are (1) "the purpose and character of the use;" (2) "the nature of the copyrighted work;" (3) the amount of the work used; and (4) "the effect of the use upon the potential market for or value of the copyrighted work."[73]

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64. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 105–07 (discussing whether private copying is a copyright infringement).

65. *See* 17 U.S.C. § 106(4), (5) (outlining the exclusive rights for copyright holders of motion pictures); *id.* § 101 (defining public performance and transmission).

66. *See id.* §§ 107–12 (defining the limitations on exclusive rights, including fair use).

67. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 15–16 (describing fair use as one of the "safety valves" of copyright law that keep it from being an absolute monopoly like patents); 17 U.S.C. § 107 (2012) (codifying fair use).

68. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.06[B][1] (Matthew Bender ed., rev. ed. 2013) (discussing the history of fair use).

69. *See* 4 *id.* § 13.05 (discussing the defense of fair use); GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 15 (discussing the importance of fair use to ensure that copyright is not a monopoly).

70. *See* 17 U.S.C. § 107 (outlining fair use as an exclusion to the exclusive rights); NIMMER & NIMMER, *supra* note 68, § 13.05 ("The Copyright Act of 1976 for the first time accorded express statutory recognition of this judge-made rule of reason.").

71. *See id.* (noting that Congress did not intend to alter the fair use doctrine).

72. *Id.*

73. *Id.*

The 1976 Act also includes the first sale doctrine, another long-time judicially applied limit on copyright.[74] The first sale doctrine gives copyright holders the right to control the first sale or disposition of a copy, but does not permit copyright holders to restrict or control the resale or transfer of the copy.[75]

One of the major changes to the 1976 Act from its predecessor, the 1909 Act,[76] was the addition of § 111.[77] Section 111 creates a compulsory license for cable companies' retransmission of broadcast TV.[78] Cable companies can retransmit local broadcasts without permission from the broadcasters so long as cable companies pay royalties to the broadcasters.[79] While some stakeholders argue that § 111 is broad enough to encompass services like Aereo and FilmOn,[80] the Copyright Office does not agree and has opposed creating a compulsory licensing scheme for such services.[81]

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74. *See id.* § 8.12[B][1] (discussing the history of the first sale doctrine).

75. *See* 17 U.S.C. § 109(a) (2012) (outlining the limit on the exclusive distribution right after the first sale of a work).

76. Pub. L. No. 60-349, 35 Stat. 1075 (1909), *repealed and superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–805 (2012)).

77. 17 U.S.C. § 111.

78. *See id.* § 111(c), (d) (creating a compulsory licensing scheme for cable providers); NIMMER & NIMMER, *supra* note 68, § 8.18[E] (discussing Congress's decision to include a compulsory licensing scheme for cable companies who were previously free of copyright liability under the 1909 Act).

79. *See* 17 U.S.C. § 111(c), (d) (providing "statutory licensing" for cable companies as long as they abide by the royalty fees outlined in subsection d).

80. *See* U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT § 302 REPORT 45 (Aug. 29, 2011) ("One stakeholder, ivi, Inc., argued that the language of Section 111 is broad enough to permit an online video provider, like itself, to stream live broadcast signals over the internet.").

81. *See id.* at 48 ("The Office itself opposed (and continues to oppose) the formation of a statutory license for the retransmission of broadcast signals over the Internet."). A discussion of whether services like Aereo and FilmOn are subject to the § 111 compulsory licensing scheme is beyond the scope of this Note. Aereo's latest legal tactic, however, argues that under the Supreme Court's decision, it should be considered a cable company eligible for compulsory licensing. *See* Joint Letter at 2, Aereo, Inc. v. CBS Broad. Inc., No. 1:13-cv-3013-AJN (S.D.N.Y. July 9, 2014) (outlining Aereo's position that it should be considered a cable company subject to compulsory licensing). Aereo also petitioned the FCC to change the definition of "a provider of video services" to enable Aereo to resume operations. Alex Barinka, *Aereo Asks FCC to Change Definition of Video Distributor*, BLOOMBERG (Oct. 13, 2014), http://www.bloomberg.com/news/2014-10-13/aereo-asks-fcc-to-change-definition-

B. History and Precedent of the Public Performance Right Before 1976

At the heart of copyright law are "conflicting cultural, economic, and political values."[82] Copyright is supposed to cultivate art and literature, protect free markets, and promote free speech.[83] Many scholars make a utilitarian argument for the origins of copyright by asserting that without copyright protection, authors, inventors, and composers would have no incentives to create works and distribute them to the public.[84] Scholar William Patry, however, points out the limits of this argument in the context of U.S. copyright law where the law affords protections for works that do not need incentives like letters, business documents, and speeches.[85]

States enacted the original copyright law in the United States, but the Framers recognized the discrepancies among state laws and urged for national copyright law during the Constitutional Convention.[86] The issue of public performance rights arose in the context of music with an amendment to the 1870 Copyright Act.[87] When Congress wrote the 1909 Copyright Act, it included the public performance right with the caveat that the public performance be "for profit."[88]

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of-video-distributor.html (last visited Oct. 31, 2014) (on file with the Washington and Lee Law Review).

82. GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 30.

83. *See id.* (discussing the purpose of copyright).

84. *See* PATRY, MORAL PANICS, *supra* note 1, at 62 ("The utilitarian/consequentialist origin story is based on the assertion that only by providing copyright protection will there be sufficient incentives for authors to distribute their works to the public."). The House Report on the 1909 Copyright Act supported copyright law with this utilitarian argument. *See* H.R. REP. NO. 60-2222, at 10 (1909) ("[C]opyright legislation . . . is not based upon any natural right . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.").

85. *See* PATRY, MORAL PANICS, *supra* note 1, at 62 ("Among the many difficulties with this origin story is that it is not used as a practical guide to legislating.").

86. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 41 (discussing the history of U.S. copyright).

87. *See* Act of Jan. 6, 1897, 29 Stat. 481 (1897) (revising the copyright statute to protect public performances of dramatic and musical compositions).

88. *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1075

A pre-1976 copyright case, *Fortnightly Corp. v. United Artists*,[89] dealt with a somewhat similar issue as *Aereo*.[90] In areas of West Virginia, hilly terrain kept some people from receiving TV-broadcasting stations.[91] The defendant, Fortnightly, installed antennas on hills above cities, connected them to coaxial cables, strung the antennas on utility poles, and offered the service to homes that could not receive a signal otherwise.[92] The plaintiffs argued that Fortnightly's system infringed the broadcasters' exclusive public performance rights.[93] In finding for Fortnightly, the Supreme Court drew a distinction between types of performances.[94] The broadcaster is an "active performer," while the viewer is a "passive beneficiary."[95] Under this framework, the Court concluded that Fortnightly's system "falls on the viewer's side of the line"[96] because the system essentially did something that the individual could legally do himself by attaching an antenna to his TV.[97]

Six years after *Fortnightly*, but two years before the 1976 Copyright Act, the Supreme Court affirmed the *Fortnightly* decision in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[98] Similar to the defendants in *Fortnightly*, Teleprompter

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(1909) ("To perform the copyrighted work publicly for profit . . . ."), *repealed and superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–805 (2012)).

89. 392 U.S. 390 (1968).

90. *See id.* at 391–92 (explaining Fortnightly's system). *Aereo* dealt with a similar issue of using antennas not attached to users' TVs to watch broadcast TV. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680–82 (2d Cir. 2013) (explaining Aereo's antenna technology).

91. *Fortnightly*, 392 U.S. at 391–92.

92. *See id.* at 392 (explaining Fortnightly's system).

93. *See id.* at 394 (discussing the plaintiffs' argument for infringement under the 1909 Copyright Act).

94. *See id.* at 398 (discussing the differences between types of audiences for different types of performances).

95. *Id.* at 399.

96. *Id.*

97. *See id.* at 400 ("If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received . . . . The only difference . . . is that the antenna system is erected and owned not by its users but by an entrepreneur.").

98. *See* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 409–10 (1974) (applying *Fortnightly* to the facts and noting that the Court of

captured local broadcasts and transmitted them to homes.[99] Teleprompter's transmissions extended to people who would ordinarily be unable to receive the broadcasts due to the far distance between the viewer and broadcast station.[100] Thus, Teleprompter's service went beyond what Fortnightly offered.[101] Again considering the viewer–performer line, the Supreme Court found that receiving and rechanneling broadcast signals was a viewer function because Teleprompter did not change the programming, and the signals were for simultaneous viewing.[102] When broadcast companies send out electronic signals to the public, they permit any member of the public with the means to receive the signal to convert the signals into sights and sounds.[103] Thus, the combination of Telepromter's viewer function and public access of broadcast TV made the performance noninfringing.[104]

Teleprompter made an important comparison between the TV industry copyright protections and other copyrighted material, such as books.[105] The sale of books requires the seller to profit from the consumer.[106] But with TV, consumers do not directly pay the copyright holder—the broadcast companies—because advertisers pay the broadcasting companies to advertise during the broadcast programming.[107] Therefore, viewers have no "direct economic relationship with the copyright holders or their

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Appeals "misconceived the thrust of this Court's opinion in *Fortnightly*").

99. *Id.* at 399–400.

100. *Id.* at 400.

101. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 391–92 (1968) (discussing Fortnightly's technology and purpose).

102. *See Teleprompter*, 415 U.S. at 408 ("[Teleprompter] does not, for copyright purposes, alter the function it performs for its subscribers. . . . The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function . . . .").

103. *See id.* ("When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program.").

104. *See id.* at 414 (finding for Teleprompter).

105. *See id.* at 411 (comparing the TV industry to books).

106. *See id.* (noting that the profit scheme for TV is markedly different from that of other copyrighted material).

107. *See id.* ("[H]olders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material . . . .").

licensees."[108] This distinguishing factor between TV and other types of copyrightable material led the Court to conclude that "CATV systems . . . do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor."[109] A few years later, however, the 1976 Copyright Act superseded *Fortnightly* and *Teleprompter*.[110]

C. Congressional Intent of the 1976 Copyright Act

As *Fortnightly* and *Teleprompter* demonstrate, cable TV initially emerged to increase access to broadcast TV for viewers unable to receive the broadcasts.[111] Then it evolved to give viewers access to distant broadcast signals.[112] As early as 1965, Congress held hearings regarding how to deal with the issues over retransmission rights between cable providers and broadcasters,[113] but the Federal Communications Commission (FCC) quickly promulgated rules that froze cable retransmissions of broadcast TV.[114] In May 1966, the U.S. District Court for the Southern District of New York held that cable companies publicly performed broadcast TV under the 1909 Copyright Act.[115] The Supreme Court reversed the Southern District of New York's ruling in 1968,[116] but the FCC retained the freeze and forged

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108. *Id.*

109. *Id.* at 412.

110. *See* H.R. REP. NO. 94-1476, at 88–90 (1976) (discussing *Fortnightly* and *Teleprompter* and the difficult legal battles regarding cable TV and copyright law).

111. NIMMER & NIMMER, *supra* note 68, § 8.18[A].

112. *See id.* ("[The function of] cable television became that of making available in a given community signals from distant television stations which by reason of distance of the stations would not otherwise be available . . . .").

113. *See* 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:51 (2008) [hereinafter PATRY, PATRY ON COPYRIGHT] (discussing the first congressional hearings on cable in 1965).

114. *See id.* § 14:52 (discussing how the "FCC stepped into the debate in a big way").

115. *See* United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 214 (S.D.N.Y. 1966) (finding Fortnightly's CATV system infringing), *rev'd*, 392 U.S. 390 (1968).

116. *See* United Artists Television, Inc. v. Fortnightly Corp., 392 U.S. 390, 402 (1968) (reversing the lower court's decision and finding noninfringement).

ahead to create a fee and licensing scheme through regulations.[117] Then in 1976, Congress enacted the 1976 Copyright Act to resolve the public performance and cable TV issues with the compulsory licensing scheme of § 111.[118]

The 1976 Copyright Act ensured and expanded copyright owners' ability to exploit their works.[119] The Act abandoned the "for profit" requirement for a public performance right violation because Congress thought many nonprofit organizations could afford the royalty fees.[120] Abandoning the for profit requirement to capture nonprofit uses signified the congressional intent to expand the public performance right.[121] Furthermore, the House Report explained several key definitions demonstrating its intent for a broad public performance right.[122] The report expands the definitions of the words "transmit" and "perform" to mean beyond "the initial rendition or showing."[123] Transmit and perform can also be "any further act by which that rendition or showing is transmitted or communicated to the public."[124] The report's examples of performances include "a cable television system . . . when it retransmits the broadcast to its subscribers; and any individual . . . whenever he or she . . . communicates the performance by turning on a receiving set."[125]

The report explained that performances via "any device or process" could mean "any other techniques and systems not yet in use or even invented."[126] In discussing the transmit clause, the report notes that "[e]ach and every method by which the images

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117. *See* PATRY, PATRY ON COPYRIGHT, *supra* note 113, § 14:54 (discussing the FCC reaction to *Fortnightly*).

118. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC (*BarryDriller*), 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012) (discussing the congressional intent behind the 1976 Act).

119. *See* NIMMER & NIMMER, *supra* note 68, § 8.11[D][4][b] ("Congress sought to hold all activities liable that would interfere with the copyright owner's ability to exploit the work . . . .").

120. *See* H.R. REP. NO. 94-1476, at 62–63 (1976) (discussing the "performing rights and the 'for profit' limitation").

121. *See id.* (discussing the changes to the public performance right).

122. *See id.* at 63–65 (explaining several of the definitions in § 101).

123. *Id.* at 63.

124. *Id.*

125. *Id.*

126. *Id.*

or sounds comprising a performance or display are picked up and conveyed is a 'transmission.'"[127] Congress emphasized its intentions for the transmit clause to be broad and include "all conceivable forms and combinations of wired or wireless communications media."[128]

Congress also intended the definition of "public" to be expansive.[129] In the House Report, Congress gave several different scenarios of when a transmission is public, including "whenever the potential recipients of the transmission represent a limited segment of the public."[130] The legislative history of the 1976 Copyright Act shows Congress's intentions to incorporate broader meanings of the rights originally outlined in the 1909 Act and the desire to have the 1976 Act anticipate future technological changes.[131] Despite this congressional intent, public performance cases under the 1976 Act arguably continue under the *Fortnightly* and *Teleprompter* view of broadcasters' limited rights.[132]

D. Relevant Case Precedent Leading Up to Cablevision *and* Aereo

The first major public performance issue with the 1976 Act arose with the rise of home videocassette recorders (VCRs). VCRs became available in the United States just prior to the enactment of the 1976 Copyright Act.[133] In 1976, Universal City Studios and Walt Disney Productions challenged the technology for copyright infringement because VCRs could be used to record TV

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127. *Id.* at 64.

128. *Id.*

129. *See id.* at 65 (explaining the definition of public).

130. *Id.*

131. *See id.* at 63–64 (discussing Congress's explanations for the terms in the 1976 Act).

132. *See, e.g.*, Universal City Studios, Inc. v. Sony Corp. of Am., 464 U.S. 417, 426 (1984) (emphasizing user control and not discussing the revenue effect on broadcasters).

133. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 117 ("1976 might have seemed an ideal time for the motion picture companies to ask Congress to add some form of liability for home videotaping . . . [because] [h]ome videocassette recorders had been introduced into the American market only the year before.").

broadcasts.[134] The U.S. District Court for the Central District of California found no copyright infringement based on a consideration of practical implications and the principle that a copyright is not a monopoly.[135] While acknowledging the plaintiffs' concerns about new technology, the district court dismissed plaintiffs' fears by citing radio's fears that TV would destroy radio, which TV did not do.[136]

The Ninth Circuit Court of Appeals decided *Universal City Studios, Inc. v. Sony Corp. of America*[137] with "unusual speed,"[138] perhaps recognizing the time sensitivity of the case because VCR sales grew quickly.[139] The three-judge panel of the Ninth Circuit unanimously agreed that the district court read Congress's intentions of the 1976 Copyright Act incorrectly.[140] Members of Congress quickly introduced bills in the House and Senate to overturn the Ninth Circuit decision.[141] Motion picture companies intensely lobbied Congress in opposition of these bills, but lobbying on both sides slowed when the Supreme Court granted certiorari in June 1982.[142]

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134. *See* Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 435–36 (C.D. Cal. 1979) (discussing the technological capabilities of "Video Tape Recorders"), *rev'd*, 659 F.3d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

135. *See id.* at 469 ("Nor did the testimony invoke concern that denial of monopoly power over home-use recording would significantly dissuade authors and producers from creating audiovisual material for television.").

136. *See id.* ("[T]his court does not minimize plaintiffs' concerns. . . . History, however, shows that this fear may be misplaced.").

137. 659 F.2d 963 (9th Cir. 1981).

138. GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 120.

139. *See id.* ("In 1979, when Judge Ferguson issued his decision, VCR producers had sold 475,000 machines in the United States; three years later they would sell more than 2 million units a year, and four years later more than 4 million.").

140. *See* Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 966–67 (9th Cir. 1981) (discussing the legislative history of the 1971 copyright Amendment and 1976 Copyright Act), *rev'd*, 464 U.S. 417 (1984).

141. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 120 ("Two days after the Court of Appeals decision, Democrat Denis DeConcini, joined by Republican Alphonse D'Amato, introduced a senate bill to overturn the decision, and Republicans Stanford Parris and John Duncan introduced identical bills in the House.").

142. *See id.* at 121 (discussing the lobbying of Congress after the Ninth Circuit decision).

The Supreme Court initially heard argument on *Sony* in January 1983.[143] Months of debate among the Justices left no consensus, and the Court scheduled the case for reargument for the next term.[144] The Supreme Court ultimately reversed the Ninth Circuit.[145] The Court found that the recordings fell under fair use because they were noncommercial material free to the public over the airwaves and for private, in-the-home use.[146] By the time the Supreme Court decided *Sony*, the United States had over 4 million VCRs in use, and the consideration of practical implications may have played a role in the Court's decision.[147]

The issue of private copies and public performance resurfaced in *Columbia Pictures Industries v. Redd Horne*.[148] The defendant owned a video rental store that allowed people to watch movies in private viewing rooms.[149] The Third Circuit Court of Appeals found that this constituted a public performance because anyone from the public could view the movie by paying, just like at a movie theater.[150]

The Ninth Circuit revisited the public performance issue in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*[151] The defendant's hotel guests rented movies from the hotel to watch in the hotel rooms.[152] Although *Redd Horne* was not controlling precedent, the Ninth Circuit distinguished it because the nature of a hotel included the possibility of providing movies and

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143. *Id.*

144. *See id.* at 122–26 (discussing the various memos that the Justices sent each other regarding their disagreement on the case).

145. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) ("[T]he judgment of the Court of Appeals must be reversed.").

146. *See id.* at 425 (discussing the district court's conclusion).

147. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 120 (noting that by the time the Supreme Court decided the case, a large number of American homes had VCRs).

148. *See* Columbia Pictures Indus. v. Redd Horne, 749 F.2d 154, 156 (3d Cir. 1984) (stating the issue).

149. *Id.* at 157.

150. *See id.* at 159 ("[A]ny member of the public can view a motion picture by paying the appropriate fee. The services provided . . . are essentially the same as a movie theater.").

151. *See* Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 279 (9th Cir. 1989) (identifying the issue).

152. *Id.*

entertainment for guests.[153] The Ninth Circuit found that watching movies in the guests' rooms was not a public performance because guests "enjoy a substantial degree of privacy" in their hotel rooms.[154] The court found no transmit clause violation because the hotel did not send the transmission from a place different from where guests received the transmission.[155]

Shortly after *Columbia Pictures*, the U.S. District Court for the Northern District of California ruled on a factually similar case, *On Command Video Corp. v. Columbia Pictures Industries, Inc.*[156] On Command also allowed hotel guests to watch movies in their rooms.[157] Instead of the guest physically renting the cassette tapes, however, the guests requested the movie from the guestroom's TV, and a VCR in a remote location containing the movie played to the guest's room.[158] Because "a performance occurs where it is received" and the VCR played from a remote location to hotel guests—a sector of the public—the district court found a public performance violation.[159]

The Second Circuit Court of Appeals took up the transmit clause in *NFL v. PrimeTime 24 Joint Venture*.[160] PrimeTime rented satellite dish antennas to customers and made secondary transmissions of TV network programming to customers in the United States and Canada.[161] Similar to *Fortnightly*, the defendant used technological equipment to increase access to network TV.[162] In *Fortnightly*,

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153. *See id.* at 281 ("La Mancha's operation differs from those in *Aveco* and *Redd Horne* because its 'nature' is the providing of living accommodations and general hotel services, which may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms.").

154. *Id.*

155. *See id.* at 282 ("[T]he 'otherwise communicate' phrase must relate to a 'process whereby images or sounds are received beyond the place from which they are sent.'" (citing 17 U.S.C. § 101 (1977))).

156. *See* On Command Video Corp. v. Columbia Pictures Indus., Inc., 777 F. Supp. 787, 788 (N.D. Cal. 1991) (discussing the facts).

157. *Id.*

158. *Id.*

159. *Id.* at 789–90.

160. *See* NFL v. PrimeTime 24 Joint Venture, 211 F.3d 10, 11 (2d Cir. 2000) (discussing the public performance issue).

161. *Id.*

162. *See* Fortnightly Corp. v. United Artists, 392 U.S. 390, 391–92 (1968) (explaining the antenna used to connect customers to TV broadcasts they would otherwise not be able to receive); *NFL*, 211 F.3d at 11 (describing PrimeTime's

however, the 1909 Copyright Act governed,[163] and here, the Second Circuit heard *NFL* under the 1976 Copyright Act.[164] For the Second Circuit, "the most logical interpretation" required "each step in the process by which a protected work wends its way to its audience" to be a public performance.[165] Thus, the Second Circuit found that PrimeTime violated the NFL's public performance right.[166]

Congress responded to *NFL* and *On Command* by passing Satellite Television Extension and Localism Act of 2010 (STELA),[167] which allows secondary transmissions of broadcasts in certain circumstances.[168] Although STELA creates a public performance exception, it does not overrule the underlying principles of *NFL* and *On Command*.[169]

IV. Diverging Case Law Leading Up to the Supreme Court's Decision

A. Second Circuit

1. Cablevision

Aereo developed its technology around the Second Circuit's decision in *Cablevision*.[170] Thus, broadcasters' first challenge against Aereo for copyright infringement unsurprisingly failed in

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satellites).

163. *See Fortnightly*, 392 U.S. at 393 (discussing the law at issue in the 1909 Act).

164. *See NFL*, 211 F.3d at 12 (discussing the Copyright Act of 1976).

165. *Id.* at 13 (citing David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1998)) (internal quotation marks omitted).

166. *See id.* ("PrimeTime publicly displayed or performed material in which the NFL owns the copyright. . . . PrimeTime infringed the NFL's copyright.").

167. Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-3333, 124 Stat. 1218 (codified at 17 U.S.C. §§ 119, 111, 122 (2012)).

168. *See generally id*.

169. *See id.* (creating a narrow exception for hotel rooms and local markets without access to broadcasts).

170. *See* Am. Broad. Cos. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373, 395 (S.D.N.Y 2012) ("Aereo has made substantial investments of money and human capital in its system, all in reliance on the assumption that the Second Circuit meant what it said in *Cablevision* rather than what it did not say." (citing Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008))), *aff'd sub nom.* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013).

the Southern District of New York.[171] Broadcasters' appeal to the Second Circuit also proved unsuccessful because the Second Circuit based its decision on *Cablevision*.[172] Several other courts, however, disagreed with *Cablevision* and found that Aereo and FilmOn's services infringe on copyrights.[173]

In *Cablevision*, the plaintiffs challenged Cablevision's Remote Storage DVR System (RS-DVR) because it recorded cable programming and stored the recordings in a remote location.[174] The RS-DVR took the single data stream that Cablevision received from networks and split it into two streams: one stream went to customers, and the other stream went into a Broadband Media Router (BMR).[175] The BMR buffered the data stream and reformatted it for a server.[176] In the server, the data would first go to another buffer, and if a customer requested to record a program, the data would go into a third buffer.[177] In the third buffer, the data would flow onto a hard disk established for that particular customer's request and would be available to that customer when he requested it.[178]

The issue of public performance centered on the specific meaning of "transmit," "performance," and "to the public."[179] The court interpreted the transmit clause to mean "a transmission of a performance is itself a performance," and thus, "it *is* relevant . . . to discern who is 'capable of receiving'

171. *See id.* at 401 (finding for Aereo).

172. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 680 (2d Cir. 2013) ("The district court . . . conclud[ed] that the plaintiffs were unlikely to prevail on the merits in light of our prior decision in [*Cablevision*]. . . . We agree . . . .").

173. *See* Fox Television Stations, Inc. v. FilmOn X LLC (*FilmOn X*), No. 13-758, 2013 WL 4763414, at *1 (D.D.C. Sept. 5, 2013) ("This Court has carefully considered the rulings in *Cablevision* and *Aereo II*, but it is not bound by them . . . ."); Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC (*BarryDriller*), 915 F. Supp. 2d 1138, 1144–46 (C.D. Cal. 2012) (determining that *Cablevision* was contrary to Ninth Circuit precedent).

174. Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 124 (2d Cir. 2008).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See id.* at 133 (discussing the transmit clause of the 1976 Copyright Act (citing 17 U.S.C. §§ 101, 106(4) (2006))).

the performance being transmitted."[180] If one takes this language literally, every potential audience for copyrighted works is the general public, "[b]ut the transmit clause obviously contemplates the existence of non-public transmissions."[181] As such, the court concluded that only the customer who requests to make the copy could receive the transmission.[182] Therefore, when a user makes and watches a distinct copy only for that user's viewing, that transmission does not violate the transmit clause.[183] The court reasoned that one person using a distinct copy could limit the potential audience of that single transmission.[184]

In conclusion, the Second Circuit noted that its holding "does not generally permit content delivery networks to avoid all copyright liability by . . . associating one unique copy with each subscriber to the network."[185] This qualification likely comes from the court's fear of the proverbial slippery slope that could result from a decision allowing services to get around copyright laws by making inefficient systems.[186] Aereo, however, did create an inefficient system to get around copyright liability.[187]

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180. *Id*.

181. *Id.* at 136.

182. *See id.* at 137 ("[B]ecause the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission.").

183. *See id.* at 139 ("Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances 'to the public' . . . .").

184. *See id.* at 138 ("[T]he use of a unique copy may limit the potential audience of a transmission and is therefore relevant . . . .").

185. *Id.* at 139. There may be two separate issues of public performance and making copies. This Note focuses only on the potential public performance that occurs from the transmission of copyrighted work from a copy of that work.

186. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 710 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting) (arguing that Aereo took advantage of a loophole in the copyright law).

187. *See id.* (discussing *Cablevision*'s limit).

2. Aereo I—*Southern District of New York*

In March 2012, several broadcasting companies filed suit in the U.S. District Court for the Southern District of New York against Aereo for copyright infringement.[188] Broadcasters quickly moved for a preliminary injunction against Aereo under the theory that Aereo publicly performed the plaintiffs' copyrighted works.[189] The parties first disputed whether Aereo's system actually used separate antennas for each customer.[190] The court rejected the conclusions of the plaintiffs' experts and sided with Aereo that the antennas function independently to receive broadcasts.[191]

Next, the district court engaged in a thorough analysis of *Cablevision* to determine its factual similarity to Aereo's service.[192] Similar to Cablevision, Aereo's service operates on a unique copy per user basis.[193] Cablevision, however, created copies from a single stream of data, while Aereo's system created copies from separate streams of data.[194] This factual difference strengthened Aereo's argument for noninfringement based on *Cablevision*'s unique copy distinction.[195] The plaintiffs tried to distinguish *Cablevision* by arguing that Cablevision created a complete "time-shift" because Cablevision users only viewed the recorded programs later.[196] The district court rejected the

188. *See* Am. Broad. Cos., Inc. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373, 376 (S.D.N.Y. 2012) (discussing the plaintiffs' motion for preliminary injunction), *aff'd sub nom.* WNET, Thirteen v. Aereo, Inc., 710 F.3d 676 (2d Cir. 2013).

189. *See id.* ("Plaintiffs moved for a preliminary injunction, asserting that Aereo was directly liable for copyright infringement by publicly performing Plaintiffs' copyrighted works." (footnote omitted)).

190. *See id.* at 382 ("[T]his case turns on determining if the analysis in *Cablevision* is controlling . . . .").

191. *Id.* at 380–81.

192. *Id.* at 381–84.

193. *Id.* at 386.

194. *Id.*

195. *Id.*

196. *Id.* at 387–88. This time-shifting discussion comes from the "fixation requirement" for copyright infringement. For further discussion of the fixation requirement, see NIMMER & NIMMER, *supra* note 68, § 8.02[B][2].

plaintiffs' time-shifting argument because the *Cablevision* court did not discuss time-shifting as part of its holding.[197]

The plaintiffs also argued that Aereo's copies were temporary buffering copies, which courts found to infringe on copyrights.[198] This argument factually failed because Aereo saved all requested programming on individual user hard disks even if the user did not request to record the program for later.[199] Last, the *Aereo* plaintiffs argued that because anyone who pays for the service can access it, the public is the potential audience of a transmission.[200] This argument failed *Cablevision*'s interpretation that the transmit clause concerns only the individual transmission from the user's unique copy.[201]

After determining *Cablevision*'s factual similarity, the district court emphasized the importance of stare decisis, particularly because Aereo built its technology based on the *Cablevision* decision.[202] This strong affirmation of *Cablevision* may be due to broadcasters' true desire to not only stop Aereo's service, but also overturn *Cablevision*.[203]

3. Aereo II—*Second Circuit*

The plaintiffs appealed the district court's denial of a preliminary injunction, but they did not appeal the district

197. *See* Am. Broad. Cos. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373, 388 (S.D.N.Y. 2012) ("The Court cannot accept this reading of *Cablevision* . . . ."), *aff'd sub nom.* WNET, Thirteen v. Aereo, Inc. 710 F.3d 676 (2d Cir. 2013).

198. *See id.* at 392 (discussing the plaintiffs' argument about buffer copies).

199. *See id.* ("Plaintiffs cannot persuasively analogize the copies stored on Aereo's hard disk to 'buffer' copies.").

200. *See id.* at 392–93 (explaining the plaintiffs' argument and noting that this was the same argument the *Cablevision* plaintiffs offered).

201. *See id.* (describing the argument as a "non-starter").

202. *See id.* at 395 ("Aereo has made substantial investments of money and human capital in its system, all in reliance on the assumption that the Second Circuit meant what it said in *Cablevision* rather than what it did not say.").

203. *See* Mike Masnick, *Cablevision Realizes It Argued Against Its Own Interests in* Aereo *Case; Flips Sides*, TECH DIRT (Oct. 25, 2013, 12:51 PM), https://www.techdirt.com/articles/20131016/02041524891/cablevision-realizes-it-argued-against-its-own-interests-aereo-case-flips-sides.shtml (last visited Oct. 31, 2014) ("[B]roadcasters weren't just focused on Aereo—but rather were looking to use Aereo to overturn the Cablevision ruling.") (on file with the Washington and Lee Law Review).

court's factual finding that Aereo's antennas operate independently.[204] The Second Circuit began its analysis with the history of the 1976 Copyright Act, followed by a discussion of *Cablevision*.[205] The court determined that *Cablevision* "establishes four guideposts" for interpreting the transmit clause: (1) consideration of the potential audience; (2) "private transmissions . . . should not be aggregated;" (3) private transmissions can be aggregated if the transmissions come from the same work; and (4) consideration of any factor limiting the potential audience of the transmission.[206] The court analyzed the technical details of Aereo's system and found that it does not violate the copyright holders' public performance rights.[207]

The plaintiffs argued that *Cablevision* contradicted the legislative intent of the 1976 Copyright Act.[208] The Second Circuit disagreed and found that if Congress truly intended for all retransmissions to be actionable, it would not have required a performance to be public in order to be actionable.[209]

The dissent saw significant differences between Cablevision and Aereo's technologies.[210] The dissent found the technical details of Aereo irrelevant because Aereo's technology was "a sham," purposefully created to evade copyright law.[211] Judge Chin, the dissenting circuit judge in *Aereo II*, was also the district judge in *Cablevision* who granted summary judgment for the

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204. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 710 F.3d 676, 680 (2d Cir. 2013) ("The District Court resolved that . . . Aereo's antennas operate independently. The Plaintiffs do not appeal that factual finding.").

205. *See id.* at 684–89 (discussing *Cablevision*'s analysis and reasoning).

206. *Id.* at 689.

207. *See id.* at 689–94 (analyzing Aereo in light of *Cablevision*).

208. *See id.* (discussing the legislative intent behind the 1976 Copyright Act).

209. *See id.* at 694 ("Congress was careful to note that a performance 'would not be actionable as an infringement unless it were done "publicly" . . . .'"). The court also rejected the plaintiffs' argument to overturn *Cablevision* on a procedural technicality because a panel of the Second Circuit cannot overturn a prior decision unless overruled by the court en banc or the Supreme Court overrules or casts doubt on a prior decision. *Id.* at 695.

210. *See id.* at 697 (Chin, J., dissenting) ("[T]here are critical differences between *Cablevision* and this case.").

211. *See id.* ("[T]he system is a Rube Goldberg-like contrivance, over engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.").

networks, which the Second Circuit overturned.[212] Judge Wesley and Judge Chin also dissented from the court's denial of a rehearing en banc.[213] Again, they emphasized the effective lack of distinction between general capture and retransmission of TV and Aereo's system.[214]

4. WPIX, Inc. v. ivi, Inc.

Just after the Southern District of New York decided *Aereo I*, the Second Circuit ruled on *WPIX, Inc. v. ivi, Inc.*,[215] which on its face has facts strikingly similar to *Aereo*.[216] Ivi's service streamed live copyrighted programming over the Internet for profit, allowing users to record, pause, fast-forward, and rewind the programming.[217]

Ivi defended that it operated a cable system for purposes of the Copyright Act, which gives it a compulsory license to rebroadcast the programming.[218] In rebuttal, the plaintiffs argued that as a cable company, ivi must follow FCC regulations.[219] Ivi

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212. *See* Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478 F. Supp. 2d 607, 609 (S.D.N.Y. 2007) (listing then-District Judge Chin as the judge), *rev'd sub nom.* Cartoon Network LP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008). William Patry argues that Judge Chin's "vitriolic, petulant dissent . . . makes one think he is still resentful over being reversed as a district judge in *Cablevision*." PATRY, PATRY ON COPYRIGHT, *supra* note 113, § 14:28.

213. WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 722 F.3d 500, 512 (2d Cir. 2013) (Chin, J., dissenting).

214. *See id.* ("[T]he panel eviscerates the Copyright Act . . . .").

215. 691 F.3d 275 (2d Cir. 2012).

216. *See id.* at 277 (discussing ivi's service which streams TV over the Internet). Note that neither the U.S. District Court for the Southern District of New York nor the Second Circuit went into detail describing ivi's technology, and this may be because ivi's defense kept the court away from the public performance issue. *See id.* at 277–78 (discussing the proceedings below, which do not mention a public performance issue).

217. *Id.*

218. *See id.* ("[D]efendants argue that ivi fits within the statutory definition of a cable system under the Copyright Act."); 17 U.S.C. § 111(c)(1) (2012) ("[S]econdary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station . . . is permissible . . . ."). For further discussion of § 111 and the Satellite Television Extension and Localism Act of 2010, see *supra* note 167.

219. *See* WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d Cir. 2012) ("[Ivi]

responded that although it fit into the Copyright Act's definition of a cable company, it did not meet the FCC's definition of a cable company, thus negating a requirement to follow FCC regulations.[220] The Second Circuit did not find the § 111 argument persuasive and affirmed the lower court's decision that Congress did not intend to extend the compulsory license of § 111 to Internet retransmissions.[221]

B. U.S. District Court for the Central District of California

Shortly after *Aereo I*, broadcasting companies challenged a competing service of Aereo's, FilmOn.[222] FilmOn, however, did not have the same success as Aereo.[223] In *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*,[224] the U.S. District Court for the Central District of California analyzed *Cablevision*, but dismissed its reading of the transmit clause as one of several possible interpretations.[225] Furthermore, *Cablevision* "expressly disagreed" with *On Command*, a U.S. District Court for the Central District of California case.[226]

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acknowledg[ed] that ivi does not comply with the 'rules, regulations, or authorizations of the Federal Communications Commission' . . . ."). Recently, the U.S. Court of Appeals for the District of Columbia Circuit ruled that broadband Internet providers cannot be treated and regulated as common carriers. *See* Verizon v. F.C.C., No. 11-1355, 2014 WL 113946, at *1 (D.C. Cir. Jan. 14, 2014) (summarizing the court's finding). While the issue of FCC regulation of the Internet may have some implications for Aereo and FilmOn, it is beyond the scope of this Note. For further discussion of the FCC's opinion on the issue, see *supra* note 81.

220. *See* WPIX, Inc. v. ivi, Inc., No. 10 Civ. 7415, 2011 WL 1533175, at *3 (S.D.N.Y. Apr. 19, 2011) (discussing the defendant's argument), *aff'd*, 691 F.3d 275 (2d Cir. 2012).

221. *See WPIX, Inc.*, 691 F.3d at 282 ("[W]e conclude that Congress did not intend for § 111's compulsory license to extend to Internet retransmissions.").

222. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC (*BarryDriller*), 915 F. Supp. 2d 1138, 1145 (C.D. Cal. 2012) (discussing *Aereo*).

223. *See id.* (finding that FilmOn's technology violated copyright law).

224. 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

225. *See id.* at 1143–45 (discussing *Cablevision* and the transmit clause).

226. *See BarryDriller*, 915 F. Supp. 2d at 1145 ("The Second Circuit's focus is also in tension with precedent in the Ninth Circuit."); *supra* Part III.D (discussing *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (C.D. Cal. 1991), and other relevant precedent to the issue around Aereo/FilmOn technology).

The district court in *BarryDriller* saw no difference between transmitting movies to individual hotel rooms and FilmOn's retransmissions of broadcasts to users.[227] FilmOn essentially allows users to do something that users could lawfully do themselves: use an antenna to receive broadcast TV.[228] The court determined, however, that receiving broadcast TV through an antenna differs when done by a commercial provider.[229] The court reasoned that Congress enacted the 1976 Copyright Act to overturn Supreme Court precedent finding a distinction between what individuals could lawfully do and what commercial providers could lawfully do.[230] Because the court rejected *Cablevision* and *Aereo*, the Central District of California issued a preliminary injunction for the plaintiffs, enjoining FilmOn from operating within the Ninth Circuit.[231] FilmOn appealed this decision to the Ninth Circuit, which heard the case at the end of August 2013 but stayed the appeal pending the Supreme Court's decision in *Aereo*.[232] After the Supreme Court's decision, the parties in *BarryDriller* agreed to file for dismissal of the case without prejudice,[233] which the Ninth Circuit granted.[234]

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227. *See id.* (discussing the lack of differences between the technologies at issue in *On Command*, *Cablevision*, and *BarryDriller*).

228. *See id.* at 1146 (discussing the fact that FilmOn provides users with something that they could do themselves with an antenna hooked up to a user's TV).

229. *See id.* (finding no distinction between what individuals can lawfully do for themselves and what commercial providers can lawfully do for a number of individuals). Note that this "commercial provider" distinction has roots in the 1909 Act's "for profit" requirement for public performance violations. *See supra* Part III.A (discussing the 1976 Copyright Act's public performance right and how it differs from the 1909 Act).

230. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC (*BarryDriller*), 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012) (discussing the jurisprudence before the 1976 Copyright Act and Congress's intentions in enacting the Act).

231. *See id.* at 1151 (ordering a preliminary injunction for the geographic boundaries of the Ninth Circuit).

232. *See* Order Vacating Submission, No. 13-55156 (9th Cir. Jan. 27, 2014) (holding the case in abeyance until the Supreme Court's decision in *Aereo*). The Ninth Circuit cited *Cablevision* in *Fox Broadcasting Co. v. Dish Network, LLC*, 723 F.3d 1067, 1074 (9th Cir. 2013). Although *Fox Broadcasting Co.* did not concern public performance rights, it may indicate the Ninth Circuit's willingness to cite *Cablevision* for its public performance interpretation.

233. Stipulated Motion to Voluntary Dismiss Appeals Without Prejudice, Fox Television Stations, Inc. v. FilmOn X, LLC, No. 13-55156 (9th Cir. July 23,

C. U.S. District Court for the District of Columbia

Broadcasters also challenged FilmOn in the District of Columbia. The court engaged in a thorough analysis of the reasoning in each *Cablevision, Aereo*, and *BarryDriller*, but because none controlled, the U.S. District Court for the District of Columbia engaged in its own analysis of the transmit clause.[235] The transmit clause explains that a transmission can be a public performance even if the people capable of receiving the transmission are in the same place at the same time or in separate places at different times.[236] Thus, the court concluded that by making FilmOn's services available to *any* member of the public, FilmOn violated the broadcasters' public performance rights.[237]

Additionally, the court found that because the individual antennas all connect to the same server and encoder, they do not operate independently.[238] Because the antennas do not function independently, FilmOn's system differs from an individual setting up his own antenna.[239] Therefore, FilmOn's retransmissions do not differ from those of cable companies.[240] Because the emergence of cable companies encouraged Congress's enactment of the 1976 Copyright Act, FilmOn's service must

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2014).

234. Fox Television Stations, Inc. v. FilmOn X, LLC, No. 13-55156 (9th Cir. July 29, 2014).

235. *See* Fox Television Stations, Inc. v. FilmOn X LLC (*FilmOn X*), No. 13-758, 2013 WL 4763414, at *5–9 (D.D.C. Sept. 5, 2013) (discussing the reasoning of the courts in *Cablevision*, *Aereo*, and *BarryDriller*).

236. *See* 17 U.S.C. § 101 (2012) ("[T]o transmit or otherwise communicate a performance . . . . 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.").

237. *See FilmOn X*, 2013 WL 4763414, at *14 ("By making available Plaintiffs' copyrighted performances to any member of the public who accesses the FilmOn X service, FilmOn X performs the copyrighted work publicly . . . .").

238. *Id.* The U.S. District Court for the Southern District of New York made the opposite factual determination regarding Aereo. *See* Am. Broad. Cos., Inc. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373, 382 (S.D.N.Y. 2012) (finding Aereo's antennas operate independently), *aff'd sub nom.* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676 (2d Cir. 2013).

239. *FilmOn X*, 2013 WL 4763414, at *14.

240. *Id.*

infringe on broadcasters' copyrights.[241] The U.S. District Court for the District of Columbia did not just issue an injunction for the geographic area of the D.C. Circuit but issued a nationwide injunction, excluding the Second Circuit geographic area.[242]

D. U.S. District Court for the District of Massachusetts

Three months after the Second Circuit's ruling in *Aereo*, Hearst Stations filed a copyright infringement claim against Aereo in the U.S. District Court for the District of Massachusetts.[243] Yet another federal court faced the issue of whether broadcast TV received through individual antennas, saved to hard disks, and streamed to individual users over the Internet violated the transmit clause.[244] The court denied Hearst's preliminary injunction motion because it found the plaintiffs unlikely to succeed on the merits.[245]

The district court noted that the Second Circuit was the only court of appeals to date to deal with the issue.[246] Thus, the Second Circuit holding persuaded the court, but it nevertheless based its reasoning on a reading of the transmit clause as a whole.[247] The transmit clause's definition of performance indicated to the court that if one transmits the underlying work from its original creator to the ultimate consumer, there is no violation of the transmit clause.[248] The legislative history of the

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241. *See id.* (noting that cable TV was the "primary motivation for the 1976 Act's enactment").

242. *See id.* at *18 ("[T]he Court will grant Plaintiffs' request for nationwide relief except as to the Second Circuit, where *Aereo II* is the binding precedent.").

243. *See* Complaint, Hearst Stations, Inc. v. Aereo, Inc., 2013 WL 5604284 (D. Mass. Oct. 8, 2013) (No. 13-11649) (showing the filing date was July 9, 2013).

244. *See Hearst Stations, Inc.*, 2013 WL 5604284, at *4 ("The most hotly contested issue is whether Aereo infringes WCVB's exclusive right to transmit its work to the public.").

245. *Id.* at *9.

246. *See id.* at *5 ("The Second Circuit Court of Appeals is the only circuit court to address this issue to date . . . .").

247. *See id.* at *6 (discussing Aereo's argument about the transmit clause).

248. *See id.* ("Aereo's interpretation is a better reading of the statute because the 'canon against surplusage' requires this Court to give meaning to every statutory term if possible.").

Act further supported this interpretation because it "explains that the process of communicating a copyrighted work from its original creator to the ultimate consumer may involve several 'performances'" but only public ones violate the Act.[249]

E. U.S. District Court for the District of Utah

Based on the Supreme Court's grant of certiorari for *American Broadcasting Cos. v. Aereo, Inc.*, the U.S. District Court for the District of Utah stayed a case against Aereo pending the Supreme Court's decision.[250] Despite Aereo's success with other courts, the District of Utah court issued a stay with a preliminary injunction against Aereo.[251] First looking at the plain language of the 1976 Copyright Act, the court found that Aereo publicly performs copyrighted material by transmitting the TV broadcasts to Aereo's paying customers.[252] Considering the congressional intent of the 1976 Act, the court found Aereo's service to be "indistinguishable from a cable company" and thus, that it infringed broadcasters' public performance rights.[253] Last, the court rejected *Cablevision*'s interpretation of the transmit clause and factually distinguished *Cablevision* because Cablevision's data stream originated from a licensed broadcast while "no part of Aereo's system is authorized."[254] The district court's issuance of a preliminary injunction in the Tenth Circuit became the first area in the country where Aereo could not operate.[255]

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249. *Id.* (citing H.R. REP. NO. 94-1476, at 63 (1976)).

250. *See* Cmty. Television of Utah, LLC v. Aereo, Inc., No. 2:13CV910DAK, 2014 WL 642828, at *2 (D. Utah Feb. 19, 2014) (issuing Aereo's motion to stay).

251. *See id.* at *10 (granting the plaintiffs' preliminary injunction against Aereo).

252. *See id.* at *4 (applying the plain language of the Copyright Act to Aereo's service).

253. *Id.* at *5.

254. *Id.* at *7.

255. *See id.* at *10 (discussing geographic limits of the preliminary injunction).

V. The Problem with Public Performance Rights

The basic question for Aereo and FilmOn was whether capturing a broadcast signal over the airwaves, converting that signal, and transmitting it over the Internet is a public performance.[256] Based on an interpretation of the transmit clause and a consideration of the congressional intent behind the 1976 Copyright Act, Aereo and FilmOn infringe broadcasters' public performance rights. Although the Supreme Court's decision regarding Aereo came to the same conclusion, it did not discuss the Second Circuit's reasoning in its decision. Despite the Second Circuit's finding of noninfringement for Aereo, under the Second Circuit's analysis, FilmOn infringes broadcasters' public performance rights. The small distinction yet potential different outcomes for the two technologies demonstrates the fine, sometimes unreasonable lines that copyright law has evolved to dictate. The differing result for Aereo and FilmOn under the Second Circuit's framework highlights the need for courts and lawmakers to reconsider the purpose of copyright law in the United States.

A. Broadcast TV over the Internet Violates Public Performance Rights

1. Interpreting the Transmit Clause

a. Scholars' Interpretations

Professor David Nimmer, whom courts commonly cite as the copyright authority, provided the *Cablevision* interpretation of the transmit clause.[257] Nimmer argues that playing one copy repeatedly to members of the public is a public performance.[258]

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256. *See* Petition for Writ of Certiorari, Amer. Broad. Cos. v. Aereo, No. 13-461 (Oct. 11, 2013) (describing the issue), *cert. granted*, 82 U.S.L.W. 3241 (U.S. Jan. 10, 2014).

257. *See, e.g.*, WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 688 (2d Cir. 2013) (discussing Nimmer's interpretation of the transmit clause); Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 127 (2d Cir. 2008) (citing Nimmer for defining when a copy is produced).

258. *See* NIMMER & NIMMER, *supra* note 68, § 8.14[C][3] ("Upon reflection, it

Nimmer draws this conclusion based on Congress's inclusion of the phrase "at different times" in the definition of publicly.[259] Thus, according to Nimmer, the "at different times" phrase only comes into consideration for defining a public performance when different members of the public perform the same copy of a work at different times.[260]

William Patry, a major copyright treatise author and senior copyright counsel at Google,[261] argues that a performance requires a "'real time' transmission," where the viewer or listener receives the performance live.[262] To be a public performance via transmission, it must be a real-time transmission; if it is not transmitted in real-time, then it is not a public performance, and enters the realm of the exclusive-distribution right.[263] For Patry, the meaning of a public place also limits public performance.[264] A public place is one that the public has access to despite any conditions to entry, such as an admissions fee.[265] A transmission to a nonpublic place can be a public performance if transmitted to anyone desiring to receive the transmission through communications media.[266] Patry contends that the public performance right is not an open-ended right of ultimate control

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would seem that what must have been intended was that *if the same copy* (or phonorecord) of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance.").

259. *See id.* ("But the above-quoted 'at different times' phrase in the definition of what constitutes a public performance casts some doubt upon this conclusion.").

260. *See id.* ("It is only when the same copy of a given work gives rise to numerous performances by different members of the public that such performance . . . will be regarded as a public performance, because the public at large receives performances 'at different times,' all emanating from the same copy.").

261. *See* PATRY, MORAL PANICS, *supra* note 1, at xiii ("I serve as Senior Copyright Counsel to Google . . . .").

262. PATRY, PATRY ON COPYRIGHT, *supra* note 113, § 14:21.

263. *See id.* ("Where there is no such separate real time performance (as with instantaneous transmission), only the distribution right is implicated.").

264. *See id.* §§ 14:26–28 (discussing public places under the public performance right).

265. *Id.* § 14:26.

266. *See id.* § 14:28 (discussing the second prong of the "publicly" definition).

because the right allows copyright holders to control "*what* consumers listen to" but not *where* consumers listen to it.[267]

Judge Daniel Brenner argues that public performance rights on the Internet do not extend as far as for other mediums.[268] To determine whether a specific piece of work is publicly performed on the Internet, Judge Brenner suggests a "substitution" and "substantiality" test.[269] The first criterion, substitution, asks where the transmission originated from to determine if it substitutes a prior public performance.[270] If the transmission originates from a prior public performance, then presumably, the original public performance was properly licensed, and thus the Internet transmission is "a performance covered by the initial license."[271] For broadcast TV transmitted over the Internet, this substitution test would permit the transmission without additional licensing fees because the broadcast is free over the airwaves.[272] Judge Brenner admitted that the online transmission is "a separate, subsequent performance," but argued that it made little sense to require viewers or distributors to pay additional fees on top of the ones already paid.[273]

The second criterion of Judge Brenner's test asks whether the performance reaches or anticipates reaching a substantial enough audience to be considered public.[274] Judge Brenner argues

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267. *Id.*

268. *See* Daniel Brenner, *"Gently Down the Stream": When Is an Online Performance Public Under Copyright?*, 28 BERKELEY TECH. L.J. 1167, 1168 (2013) ("This Article concludes that the language of the Copyright Act supports a limited online public performance right.").

269. *See id.* at 1193–98 (explaining the two criterions for public performance under the author's interpretation of the public performance right).

270. *See id.* at 1193 ("The inquiry would be two-fold: does the transmission 'substitute' for an already likely compensated public performance, or does it originate a performance that has not yet occurred and been paid for?"). Brenner cited Nimmer for the basic idea of substitution for determining whether a transmission is a public performance under the public performance clause. *See* NIMMER & NIMMER, *supra* note 68, § 8.14[C][3].

271. Brenner, *supra* note 268, at 1193.

272. *See id.* at 1194–95 ("For the major broadcast networks whose programming is free to watch . . . over the air, making content available online allows these networks to extend their audiences . . . .").

273. *Id.* at 1194.

274. *See id.* at 1198 ("In short, public performance requires either a measurable audience or one that is predicted to be substantial.").

that the transmit clause's language requiring that "the public capable of receiving the performance . . . receive it"[275] supports his interpretation.[276] In light of the two elements for Judge Brenner's interpretation of the transmit clause, broadcast TV via the Internet does not violate the public performance right so long as the online programming substitutes the broadcast over the airwaves or cablecast version.[277] Based on Nimmer, Patry, and Judge Brenner's interpretations of the transmit clause, they would likely support a finding of no public performance right infringement for Aereo and FilmOn.[278]

b. Applying a Different Interpretation

Although one can interpret the transmit clause in several ways, a thorough analysis and application of the transmit clause demonstrates that Nimmer and Patry are not necessarily correct. The analysis begins with whether Aereo and FilmOn perform broadcast TV. When the user watches broadcast TV on Aereo or FilmOn, there is a performance because the device "shows its images in any sequence" and "make[s] the sounds accompanying it audible."[279] Under the 1976 Copyright Act's definition, it is irrelevant how the performance occurs, so long as the performance does in fact occur.[280]

The more complex and crucial question is whether the performance is public. One definition of public is a performance that occurs "at a place open to the public."[281] Aereo and FilmOn

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275. 17 U.S.C. § 101 (2012).

276. *See* Brenner, *supra* note 268, at 1198 ("This interpretation of the Transmit Clause . . . gains support by the words of that Clause used to define 'publicly.'").

277. *See id.* at 1202–03 ("Where viewing the programming online is a substitute for the linear broadcast or cablecast version, the linear performance license should cover the online viewing.").

278. *See* NIMMER & NIMMER, *supra* note 68, § 8.14[C][3] (discussing a narrow interpretation of the transmit clause); PATRY, PATRY ON COPYRIGHT, *supra* note 113, § 14:28 (discussing the limits of the transmit clause); Brenner, *supra* note 268, at 1198 (interpreting the transmit clause).

279. 17 U.S.C. § 101.

280. *See id.* ("[B]y means of any device or process . . . .").

281. *Id.*

users presumably watch the broadcasts at home or another private area because Aereo and FilmOn advertise their services for use on personal devices.[282] Another definition of public is "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[283] Because Aereo and FilmOn anticipate private use, they do not meet this second definition of public either.[284]

The next definition of "to the public" is the transmit clause.[285] The first requirement of the transmit clause is for a performance to be "transmit[ed] or otherwise communicate[d]."[286] Aereo and FilmOn communicate the performance—the broadcast programming—to users.[287] Thus, Aereo and FilmOn meet the first requirement of the transmit clause.

The second part of the transmit clause considers whether the "public" is capable of receiving the performance.[288] Both Aereo and FilmOn offer their services to a substantial number of persons.[289] Users can watch the underlying performance communicated at the same time or at different times.[290] Therefore, Aereo and FilmOn's communication of the broadcasters' performance is to "a substantial number of persons outside the normal circle of the family"—the public.[291] As such, it

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282. *See, e.g.*, *Supported Devices*, AEREO, http://aereo.com/devices (last visited Mar. 25, 2014) (listing devices one can use) (on file with the Washington and Lee Law Review).

283. 17 U.S.C. § 101 (2012).

284. *See supra* Part II.B (describing the user experience, which emphasizes private use).

285. *See id.* ("To perform or display a work 'publicly' means . . . to transmit . . . .").

286. *Id.*

287. *See supra* Part II.A (explaining what Aereo does).

288. *See* 17 U.S.C. § 101 ("[M]embers of the public capable of receiving the performance or display receive it in . . . separate places and at the same time or at different times.").

289. *See* Matthew Flamm, *Web-TV Startup Aereo Bags $34M in Funding*, CRAIN'S N.Y. BUS. (Jan. 8, 2014, 10:19 AM), http://www.crainsnewyork.com/article/20140108/TECHNOLOGY/140109903/web-tv-startup-aereo-bags-34m-in-funding (last updated Jan. 10, 2014, 7:16 PM) (last visited Oct. 31, 2014) (reporting that "Aereo does not divulge how many subscribers it has" but Aereo operates in ten markets) (on file with the Washington and Lee Law Review).

290. *See supra* Part II.B (describing how Aereo works).

291. 17 U.S.C. § 101 (2012).

fits the definition of public performance under the transmit clause. Because Aereo and FilmOn publicly perform under the transmit clause, they violate broadcasters' public performance rights.

2. The Problems with the Second Circuit's Interpretation of the Transmit Clause

The reading of the transmit clause offered here directly contradicts the Second Circuit's interpretation.[292] Although the Supreme Court's decision did not discuss the Second Circuit's reasoning in *Aereo II*, discussion of the Second Circuit's reasoning is illustrative.[293] The Second Circuit found that the transmit clause does not consider the underlying performance—the broadcast programming—but instead contemplates the individual transmissions from the copies on Aereo's hard drives.[294] The Second Circuit argued that because the transmit clause says "capable of receiving the performance," instead of "capable of receiving the transmission," it means whomever is capable of receiving the specific transmission and not the underlying work.[295] This reading of the transmit clause, however, is conclusory. The fact that the transmit clause says "capable of receiving the performance" indicates that the Act concerns the underlying performance and not the individual transmission.[296] The Second Circuit cites to *Buck v. Jewell-La Salle Realty Co.*[297] in support of its interpretation of the transmit clause, but the Supreme Court heard *Buck* under the 1909 Copyright Act.[298]

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292. *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 134 (2d Cir. 2008) (finding that the transmit clause considers who is capable of receiving the particular copy of the performance).

293. *See generally* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (failing to discuss the Second Circuit's reasoning).

294. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 695 (2d Cir. 2013) (discussing Aereo's private performances).

295. *See Cablevision*, 536 F.3d at 134 (determining the meaning of the transmit clause).

296. 17 U.S.C. § 101.

297. 283 U.S. 191 (1931).

298. *See Cablevision*, 536 F.3d at 134 (using a "cf." signal citing to *Buck*).

Thus, the Second Circuit's reading of the transmit clause is a conclusory statement supported by outdated law.[299]

Additionally, the Second Circuit focuses too heavily on the minute technical details of Aereo without considering its broad functionality.[300] Congress intended to allow broadcasters to capture the profits that cable companies received through retransmission by requiring cable and satellite companies to pay retransmission fees to broadcasters.[301] Because Congress could not predict future technologies, Congress purposely used vague terms to ensure that the Act would capture similar concerns about broadcasters losing profit streams because of free airwave broadcasting.[302] Aereo and FilmOn specifically fall into the scenario that Congress intended to prevent under the Copyright Act.[303] Thus, courts must consider how Aereo's system as a whole functions, and Aereo functions to retransmit broadcast TV, like a cable company.

Considering other similar issues in copyright law demonstrates the importance of considering functionality. Professor Jeffrey Malkan described the individual copies per customer distinction as "a classic distinction without a difference" and argued that the issue should be resolved by looking at what the technology accomplishes.[304] Malkan drew a comparison to fair use and course packets.[305] In *Princeton University Press v.*

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299. Notably, Patry thinks that the Second Circuit decided both *Cablevision* and *Aereo* correctly. PATRY, PATRY ON COPYRIGHT, *supra* note 113, § 14.28. He argues that because Aereo created its technology to comply with *Cablevision*, it should not be liable. *Id.*

300. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 694 (2d Cir. 2013) ("Perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality . . . .").

301. *See* H.R. REP. NO. 94-1476, at 63 (1976) ("[A] cable television system is performing when it retransmits the broadcast to its subscribers . . . .").

302. *See id.* at 64 ("The definition of 'transmit' . . . is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcast as we know them.").

303. *See supra* Part II.A (describing what Aereo and FilmOn do).

304. Jeffrey Malkan, *The Public Performance Problem in* Cartoon Network LP v. CSC Holdings, Inc., 89 OR. L. REV. 505, 547 (2010).

305. *See id.* at 548–49 (discussing the issues of fair use in *Princeton Univ. Press v. Mich. Document Serv., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc)).

Michigan Document Services, Inc.,[306] the Sixth Circuit found that when a copy shop photocopied books for course packets, there was no fair use defense, but if the students copied the books themselves, they would have a fair use defense.[307] Malkan made a parallel analogy to TV: individual viewers can make their own copies, but when viewers have someone else do the copying for them at a profit, copyright holders should receive a share of that profit.[308]

Like with course packet copying, Aereo and FilmOn start with an action that individual users could lawfully do themselves: capturing TV broadcasts from the airwaves and copying them.[309] Just because Aereo and FilmOn do something that individuals could lawfully do themselves, however, does not make Aereo and FilmOn lawful. This idea goes back to the for-profit distinction under the 1909 Copyright Act.[310] The legislative history of the 1976 Copyright Act indicates that Congress did not intend to eliminate the for-profit distinction.[311] Thus, one must consider the profit schemes of the retransmissions in the public performance analysis. In light of the congressional intent and the comparison to fair use, the Second Circuit's analysis incorrectly overlooked the broad functionality of Aereo.

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306. 99 F.3d 1381 (6th Cir. 1996) (en banc).

307. *See id.* at 1389 (discussing the difference between a student copying a book and a copy shop making copies and selling those copies to students).

308. *See* Malkan, *supra* note 304, at 549–50 (discussing the analogy between copying course packets and copying TV programs).

309. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC (*BarryDriller*), 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012) (discussing the fact that FilmOn provides users with something that they could do themselves with an antenna hooked up to a user's TV); *supra* Part II.A (explaining how Aereo captures broadcast airwaves).

310. *See* Pub. L. No. 60-349, 35 Stat. 1075 (1909) (requiring the public performance be "for profit" to be an infringement), *repealed and superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–805 (2012)).

311. *See* H.R. REP. NO. 94-1476, at 62 (1976) (describing the "for profit" limitation).

B. FilmOn's Differences Make It Less Likely to Be Lawful

The Supreme Court's decision on Aereo prevents FilmOn from lawfully operating as well.[312] Even, under the Second Circuit's interpretation of the transmit clause, FilmOn would not have received the same treatment as Aereo because FilmOn did not significantly limit who was capable of receiving its transmission.[313] The first three guideposts that the Second Circuit offered fell in FilmOn's favor, but weighing the importance of the fourth factor shows FilmOn's violation of the transmit clause.[314] This analysis illustrates the fact that although two technologies can broadly operate in the same way, copyright law has the potential to affect them differently.

First, the Second Circuit required considering the individual transmission.[315] Because only one user could access the broadcast file FilmOn created, FilmOn passed the first factor.[316] Second, although FilmOn transmitted thousands of individual transmissions from unique broadcast files, the transmissions had to be considered individually and not collectively because FilmOn

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312. *See* CBS Broad. Inc. v. FilmOn.com, Inc., No. 10 Civ. 7532(NRB), 2014 WL 3702568, at *7 (S.D.N.Y. July 24, 2014) (finding FilmOn in contempt of a previously issued injunction based on the Supreme Court's ruling against Aereo).

313. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 689 (2d Cir. 2013) (identifying the importance of limitations on the potential audience for considering whether the transmission is public). For further discussion of the Second Circuit's four guidelines for applying the transmit clause, see *supra* Part IV.A.3 (discussing *Aereo II*).

314. *See Aereo II*, 712 F.3d at 689 (discussing the four guideposts of *Cablevision*). The guideposts for applying the transmit clause are (1) "consider[ing] the potential audience of an individual transmission," (2) determining who is capable of receiving the transmission, (3) determining whether the transmission is generated from the same copy of work, and (4) considering anything that limits the potential audience of the transmission. *Id.*

315. *See id.* ("[I]f the potential audience of the transmission is only one subscriber, the transmission is not a public performance . . . ."). This subpart applies this factor despite Part V.A of this Note arguing that it is incorrect.

316. *See supra* Part II.A (discussing how FilmOn and Aereo work).

transmitted the programming from unique copies.[317] Thus, FilmOn met the Second Circuit's second and third guideposts.[318]

The fourth factor considered whether the technology limits the potential audience in any way.[319] In *Cablevision*, the court found the fact that only one user could access the individual copies sufficiently limited the potential audience.[320] A strict application of this factor weighed in FilmOn's favor because only one user could watch the individual copy.[321] But in the context of *place*-shifting[322] broadcast TV, there should be a greater limiting factor because broadcast TV over the airwaves limits access to those within the geographic range of the airwaves.[323] The RS-DVR in *Cablevision* did not change the place that users could receive broadcasts, only the time.[324] Thus, requiring more from place-shifting services fits within the Second Circuit's transmit clause guideposts.[325] FilmOn did not geographically limit who

317. *See Aereo II*, 712 F.3d at 689 ("[P]rivate transmissions—that is those not capable of being received by the public—should not be aggregated.").

318. *See id.* (discussing the transmit clause guideposts).

319. *See id.* ("Fourth and finally, 'any factor that limits the *potential* audience of a transmission is relevant' to the Transmit Clause analysis." (citing Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 137 (2d Cir. 2008))).

320. *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 137 (2d Cir. 2008) (finding a sufficient limit on the potential audience to be a private performance).

321. *See supra* Part II.A (explaining Aereo and FilmOn's services).

322. Ted Johnson, *Why Slingbox Is Finally Getting the Aereo Treatment*, VARIETY (Mar. 8, 2013, 4:00 AM), http://variety.com/2013/digital/opinion/the-slingbox-paradox-broadcasters-dont-object-1200005356/ (last visited Oct. 31, 2014) (on file with the Washington and Lee Law Review). Place-shifting is the idea that the technology changes only the place where the user watches the transmission. *See id.* (discussing place-shifting). This comes from *Sony*'s description of the VCR as "authorized time shifting" in that it changes the time that the user watches the transmission. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 443 (1984) (discussing "time shifting").

323. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC (*BarryDriller*), 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012) (discussing the natural limits of broadcast TV).

324. *See Cablevision*, 536 F.3d at 125 (explaining the time-shifting capabilities).

325. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 689 (2d Cir. 2013) (describing any limiting factor on the potential audience as the fourth guidepost for applying the transmit clause).

could access certain broadcast TV like Aereo does.[326] Therefore, FilmOn did not sufficiently limit the potential audience because it expanded access to those otherwise unable to receive the broadcasts.[327]

The Second Circuit did not discuss the comparative importance of each guidepost, but a sliding scale approach would be appropriate considering that the court referred to them as "guideposts."[328] The fourth factor weighs heavily against the rest because all four guideposts concern limitations on the potential audience.[329] FilmOn argued that it operated to allow users to access the free broadcast TV that users could already access, but because FilmOn actually does more, it is distinguishable from Aereo.[330] This difference affects the Second Circuit's application of the transmit clause.[331] Although the Supreme Court's *Aereo* decision equally affects FilmOn, FilmOn's lack of geographic limitations could continue to affect it in future litigation regarding whether FilmOn operates as a cable system eligible for compulsory licensing.

C. The Supreme Court's Aereo *Decision*

The Supreme Court's decision determined that Aereo infringed on the broadcasters' public performance rights based on a similar analysis of the congressional intent discussed above.[332]

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326. *See supra* Part II.C (discussing the differences between Aereo and FilmOn).

327. *See* Telephone Interview with Alkiviades David, *supra* note 55 (saying that someone on the East Coast could watch West Coast TV).

328. *Aereo II*, 712 F.3d at 689.

329. *See id.* (explaining the four guideposts).

330. *See* Amended Counterclaim at 2, Fox Television Stations, Inc. v. FilmOn X LLC (*FilmOn X*), 2013 WL 4763414 (D.D.C. June 27, 2013) (No. 13-758) ("[E]nabling consumers to create and access . . . the same free-to-air broadcast programming they would have been able to access freely with a traditional 'rabbit ears' antenna . . . .").

331. *See* WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 689 (2d Cir. 2013) (analyzing the transmit clause).

332. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2504–10 (2014) (analyzing whether Aereo's system performs under the Copyright Act); *see also supra* Part II.C (discussing the congressional intent behind the 1976 Copyright Act).

The Supreme Court's decision on Aereo broke down the public performance issue into whether Aereo performs broadcast TV, and if so, whether Aereo publicly performs broadcast TV.[333] The Supreme Court supported its finding that Aereo performs broadcast TV with three indicators of Congressional intent. First, the text of the 1976 Copyright Act defines "perform" as "to show its images in any sequence or to make the sounds accompanying it audible," which Aereo does when subscribers request to watch a broadcast program.[334] Second, Congress added the transmit clause in the 1976 Copyright Act to ensure that cable systems were considered public performers.[335] Third, Congress included a detailed compulsory licensing scheme in the Act for cable systems to pay retransmission fees to broadcasters.[336] The Court reasoned that Congress would not have constructed the statute as such if it did not intend for a service like Aereo to perform under the Act.[337]

In determining whether Aereo performs publicly, the Court decided that Aereo's performance does not differ from that of a cable system's performance of broadcast TV.[338] Based on the language of the transmit clause, the Court reasoned that because Aereo transmits the same pictures and sounds to a large number of people, it is irrelevant whether Aereo transmits the broadcast TV from the same copy or separate copies.[339] This reasoning effectively abrogates *Cablevision* without even mentioning *Cablevision*.[340]

The Court carefully limited its ruling to Aereo and systems like Aereo that effectively operate as cable systems.[341] If the receivers of a performance own the underlying work, they do not

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333. Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. at 2504.

334. *Id.* at 2504.

335. *Id.*

336. *Id.* at 2506.

337. *Id.* at 2506–07.

338. *Id.* at 2508.

339. *See id.* (citing the following language in the transmit clause: "whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times" 17 U.S.C. § 101 (2012)).

340. *See generally id*. (lacking any mention of *Cablevision*); *see also* Part IV.A.1 (discussing *Cablevision*'s holding).

341. Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2510 (2014).

infringe public performance rights.[342] Therefore, the decision's narrow focus allays concerns that cloud computing would be affected by the decision.[343]

D. The Underlying Public Policy of Copyright Requires Aereo to Survive

New technologies will always seek to capture new markets or existing markets in new ways.[344] These changes challenge copyright law to adapt to the technological innovation that it inspires.[345] Because technological changes force copyright law to constantly grow and evolve, it is imperative that copyright law stick to its fundamental prerogatives instead of stringently adhering to statutes. When TV originated, courts looked to analogies from other technological revolutions.[346] Combining the underlying theories of copyright law and a historical framework shows that Aereo should not be considered a copyright infringer despite the Supreme Court's ruling.

Professor Paul Goldstein highlights the central copyright question that issues like Aereo and FilmOn provoke: What is copyright law supposed to do?[347] On one end of the spectrum, copyright law can "expand to encompass every new dissemination of technology that emerges so that authors and publishers can

342. *Id.* at 2511.

343. *See id.* (noting that this case does not present an issue about cloud computing and thus, the case does not affect such technology). Note that the Supreme Court only decided the issue of whether Aereo performs publicly and directly violates the public performance right. *Id.* at 2503. Issues raised by the broadcasters' complaint in the District Court yet to be decided include secondary liability for public performance rights, as well as direct and secondary liability for reproduction rights. Complaint at 28–38, Am. Broad. Cos., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12CV01540).

344. *See* PATRY, MORAL PANICS, *supra* note 1, at 36–37 (discussing innovation).

345. *See id.* (discussing how innovation and copyright must work together).

346. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 161–62 (1975) (making a comparison to the public performance issues with broadcast TV and cable TV).

347. *See* 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.13 (3d ed. 2013) [hereinafter GOLDSTEIN, GOLDSTEIN ON COPYRIGHT] (discussing the "fundamental philosophical debate" that "present[s] a stark choice for lawmakers").

capture every element of their work's value in the marketplace."[348] At the other end, copyright law could permit consumers free access to copyrighted works to the extent that "authors and publishers can show that, deprived of payment, they have no incentive to create and publish new works."[349]

Copyrights do not create a monopoly for the protected work.[350] Even the exclusive rights of copyright holders have exceptions to avoid rigid application of rules that would go against fundamental copyright principles.[351] Copyright should encourage innovation and "the widest possible production and dissemination of literary and artistic works."[352] The public and the creators have two competing interests.[353] The public should have broad availability of works, and the creator needs a financial motivation to create and share the work.[354] Broadcasters' copyright interests slightly differ from traditional artists, like authors, because broadcasters do not profit directly from consumers.[355] Although today broadcasters receive more revenue from cable companies in retransmission fees, the bulk of broadcasters' revenue still comes from advertising.[356] Therefore,

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348. *Id.*

349. *Id.*

350. *See* NIMMER & NIMMER, *supra* note 68, § 8.01 ("[C]opyright does not confer an absolute monopoly in the patent sense."); Sony Corp. v. Universal City Studios, Inc. 464 U.S. 417, 432 (1984) ("[P]rotection has never accorded the copyright owner complete control over all possible uses of his work.").

351. *See* notes 66–75 and accompanying text (discussing fair use and first sale doctrines).

352. GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, *supra* note 347, § 1.14.

353. *See id.* (discussing congressional considerations when amending copyright law).

354. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and other arts.").

355. *See* Teleprompter Corp. v. Columbia Broad. Sys., 415 U.S. 394, 411 (1974) (comparing copyright of TV and books); *supra* notes 106–10 and accompanying text (discussing *Teleprompter*'s analysis of differences in copyright law for TV and books).

356. *See* Brian Stelter, *Broadcasters Battling for Cable Fees*, N.Y. TIMES (Dec. 28, 2009), http://www.nytimes.com/2009/12/29/business/media/29cable.html?pagewanted=all&module=Search&mabReward=relbias%3Aw&_r=0 (last visited Oct. 31, 2014) (reporting that broadcasters only receive five percent of their revenue from cable retransmission fees) (on file with the Washington and

broadcast TV that reaches more people would be able to draw in more advertising revenue, so technologies like Aereo and FilmOn that increase the audience of broadcast TV should actually help broadcasters receive more advertising revenue. Copyright law in the United States has evolved to benefit creators too much, and thus, one must consider who has the greater policy stance in determining public performance rights.[357]

Beyond considering the purpose of copyright law, courts have a history of considering public performance issues. Radio and public performance issues collided in two ways. First, when radio broadcasters began broadcasting prerecorded songs instead of live music, and second, when public business played radios in their establishments.[358] Enforcing public performance rights cost too much for individual authors and composers to enforce, so several came together to form the American Society of Composers, Authors, and Publishers (ASCAP).[359] ASCAP tried to operate as a monopoly to ensure it received the maximum royalties.[360] In this endeavor, it fought radio broadcasters to have radio broadcasts of songs deemed public performances.[361] When ASCAP tried to increase fees however, the radio broadcasters started buying their own music licenses and refused to play ASCAP's licensed music.[362] This resulted in no one using ASCAP's licenses, and ASCAP had to return to the negotiating table with broadcasters at lower prices.[363]

In *Twentieth Century Music Corp. v. Aiken*,[364] the Court compared cable TV and radio.[365] The defendant, Aiken, owned a fast food restaurant and played the radio in his restaurant on

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Lee Law Review).

357. *See* PATRY, MORAL PANICS, *supra* note 1, at xv (discussing the "unjustified expansion of our copyright laws").

358. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 57–59 (discussing the battles of radio and public performance rights).

359. *Id.* at 54–55.

360. *Id.* at 57.

361. *Id.* at 57–58.

362. *Id.* at 59.

363. *Id.* at 59–60.

364. 422 U.S. 151 (1975).

365. *Id.* at 161.

four ceiling-mounted speakers.[366] The Court considered the practical implications of its ruling because so many business establishments openly played the radio.[367] Thus, the Court's analysis construed the 1909 Act in accordance with "[t]he limited scope of the copyright holder's statutory monopoly" to find no copyright infringement.[368]

Radio continued to struggle with royalty fees under the 1995 Digital Performance Right in Sound Recordings Act (DPRA).[369] Radio broadcasters finally won their struggle gaining an exemption to public performance when "Congress agreed that radio performance of sound recordings acted as a valuable form of free advertising."[370] Radio broadcasters pay royalties to composers but the Recording Industry Association of America (RIAA) still tries to claim that radio broadcasters should be paying record companies royalties as well.[371]

Radio exemplifies finding a copyright exception to further both the public and private interests. The actual artists and composers creating the music benefit from the exposure radio provides.[372] Radio stations gain by not having to pay exorbitant fees that they could not afford.[373] The public gains by being able to hear free music over the radio airwaves.[374] If broadcasters, Aereo, and FilmOn could find compromise now, they would be able to avoid the decades of legal battles that radio saw. An unfavorable Supreme Court challenge for broadcasters could open the door to compromise similar to how broadcasters were more willing to work with DVR companies after *Cablevision*.[375]

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366. *Id.* at 152.

367. *Id.* at 162.

368. *Id.* at 156.

369. 17 U.S.C. § 114(d)(1)(A) (2012); *see also* PATRY, PATRY ON COPYRIGHT, *supra* note 212, § 14:87 (discussing radio retransmissions).

370. *See id.* (discussing the 1995 DPRA).

371. *See* PATRY, MORAL PANICS, *supra* note 1, at 95–96 (discussing how RIAA uses "piracy" to describe radio broadcasters).

372. *See id.* at 96 ("[R]adio play is a valuable promotional tool.").

373. *See* GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20, at 57 (discussing the fee battles between ASCAP and radio broadcasters).

374. *See* PATRY, MORAL PANICS, *supra* note 1, at 96 (discussing the most recent radio battle).

375. Sharma, Ramachandran & Clark, *supra* note 4.

History and precedent demonstrate the importance of considering the practical implications of technology when determining copyright infringement. Aereo and FilmOn increase access to the broadcasters' viewership.[376] People who might not otherwise tune in on an antenna, cable, or satellite may watch the broadcast TV offered through Aereo and FilmOn. Broadcasters argue that although Aereo and FilmOn may be increasing viewership, it does not actually benefit broadcasters because viewership on Aereo and FilmOn is not incorporated into the numbers that advertisers use.[377] But Aereo and FilmOn could easily track viewership for advertisers to consider.[378] When new technology emerges, other technologies and processes must adapt.

Senator John McCain introduced a bill in Congress that would provide a framework for technologies such as Aereo to operate, and Congress should seriously consider such a bill.[379] Passing a bill like the proposed Television Consumer Freedom Act would allow for a return to the fundamentals of copyright law and support the public interest in TV programming.

VI. Conclusion

Congress and courts have expanded copyright law to an extent that it no longer truly captures the essence of copyright.[380] Based on a hard reading of the 1976 Copyright Act, Aereo and

376. *See supra* Part II (discussing Aereo's technology, which allows users to receive broadcast TV even if they would normally be unable to receive the broadcast TV with "rabbit ears").

377. *See* Petition for Writ of Certiorari, Am. Broad. Cos. v. Aereo, No. 13-461 (Oct. 11, 2013), *cert. granted*, 82 U.S.L.W. 3241 (U.S. Jan. 10, 2014).

378. *See Tracking & Statistics*, FILMON, http://corp.filmon.com/#tracking_statistics (last visited Oct. 31, 2014) (offering tracking for its partners) (on file with the Washington and Lee Law Review).

379. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013) (proposing a legal framework "allow[ing] multichannel video programming distributors to provide video programming to subscribers on an a la carte basis").

380. *See* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 840 (2010) ("The goal [of the Copyright Clause] was the enhancement of the quantity and quality of literary and artistic works. . . . [T]his incentive was merely the means to the end of enriching the intellectual, cultural and artistic wealth of society.").

FilmOn infringe on broadcasters' exclusive public performance rights, but Aereo and FilmOn simply tried to be innovative based on what they believed the law to be. This technological innovation is exactly what copyright law should encourage, not prohibit. To stay true to copyright principles, Aereo should not be considered a copyright infringer because it likely could benefit, not hurt broadcasters and it encourages innovation. Technology will continue to evolve and after the Supreme Court's ruling on Aereo, other companies quickly filled Aereo's space in the market.[381] As Aereo continues to fight its legal battle in the courts, other technologies will quickly move to capture the market it leaves behind, and broadcasters may move to squash other new technologies that encroach on the market broadcasters have come to expect from the law.

381. *See* Michael Rogeau, *New York Broadcaster Picks Up Where Aereo Left Off with New Tablet TV Service*, TECHRADAR (Aug. 31, 2014), http://www.techradar.com/news/television/new-york-broadcaster-picks-up-where-aereo-left-off-with-new-tablet-tv-service-1263384 (last visited Oct. 31, 2014) (describing a company that rents antennas to customers, which then broadcasts live TV to tablets within one-hundred feet) (on file with the Washington and Lee Law Review); Sonali Basak & Alex Barinka, *TiVo Offers DVR to Cable-Free Viewers After Aereo Ruling*, BLOOMBERG (Aug. 25, 2014, 4:12 PM), http://www.bloomberg.com/news/2014-08-25/tivo-offers-dvr-device-to-viewers-without-cable-satellite-tv.html (last visited Oct. 31, 2014) (describing TiVo's new device that can record over-the-air content from broadcast networks by capturing them through an antenna in the device) (on file with the Washington and Lee Law Review).