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Sean Anderson

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# FREE TO PAY A FEE FOR SOMETHING FREE: AEREO'S CHALLENGE TO THE BROADCAST TELEVISION INDUSTRY

*Sean R. Anderson**

*In 2012, Aereo, a New York City-based technology company, began offering its paying subscribers the ability to view otherwise free over-the-air broadcast television on their Internet-connected devices such as phones and tablets. Over the next two years, the service became increasingly popular and expanded to other major cities across the country. At the same time, however, broadcast companies and other copyright holders sued Aereo in multiple venues across the country. In each suit, the copyright owners claimed that Aereo had violated the Copyright Act by publicly performing the broadcasters' copyrighted material through its services. Aereo countered with a technological and legal maneuver that simultaneously perturbed and complicated the courts' understanding of its service. Aereo claimed that, because each of its customers received a unique transmission of the broadcast, it was not publicly performing the broadcasters' content but rather it was enabling thousands of simultaneous private performances. In* American Broadcasting Companies, Inc. v. Aereo, Inc*., the Supreme Court reversed a divided Second Circuit panel and ruled 7-2 in the broadcast companies' favor; the Court held that Aereo's service publicly performed the broadcasters' content despite the fact that Aereo created unique copies for each of its subscribers.*

*This Note analyzes the Court's decision in* Aereo *and argues that the Court's holding does not solve the underlying issue as to whether multiple separate performances of a copyrighted work*

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* J.D. Candidate, Brooklyn Law School, 2015; A.B., The University of Chicago, 2006. I would like to thank the entire staff of the *Journal of Law and Policy* for their immense effort and invaluable guidance throughout the editing process.

*constitute a public performance. The Court simply held that because Aereo's system is similar to that of a cable company's, it should be treated like one under the law. However, as this Note explores, that holding does not resolve many of the uncertainties brewing in the cloud computing industry and other on-demand content delivery systems. Additionally, this Note argues for an amendment to the Copyright Act to allow for third-party content delivery systems like Aereo to charge subscribers a fee to view otherwise free over-the-air broadcast television. This Note explores the technological, economic and public policy-based incentives for such an amendment.*

## INTRODUCTION

> *"[Aereo's service 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."*[1]

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[1] WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting). Rube Goldberg was an American humorist, sculptor, engineer, and inventor who rose to the height of his popularity in the 1940s and 1950s, winning the Pulitzer Prize in 1948 for his political cartooning. *Biography,* RUBE GOLDBERG, http://www.rubegoldberg.com/about (last visited Oct. 10, 2014). However, Mr. Goldberg is probably best known for his machines. *Id.* Generally described as drawings of overly complicated devices that perform simple tasks, Rube Goldberg's machines remain so popular that his estate hosts an annual competition inviting students, inventors, and humorists of all ages to build their own fanciful creations. *Machine Contest,* RUBE GOLDBERG, http://www.rubegoldberg.com/contest (last visited Oct. 10, 2014). However, outside of the warm confines of nostalgia for the man and his imagination, and the group of folks who converge annually to build their own contraptions, a reference to a Rube-Goldberg-like machine has taken on something of a negative connotation. *See, e.g.*, Rebecca Onion, *Taking Rube Goldberg Seriously: What fictional inventions say about American ingenuity*, SLATE MAGAZINE (Apr. 24, 2014, 2:48 PM), http://www.slate.com/articles/technology/history_of_innovation/2014/04/rube_goldberg_heath_robinson_and_the_history_of_fictional_inventions.html. Indeed, judges, journalists, and critics use the description to admonish a system for being unnecessarily complicated; the comparison is used to dismiss something that is wasteful in operation and divisive in motive. *See, e.g.*, Campbell v. United States, 373 U.S. 487 (1963)

> *"Aereo's convoluted technological design serves no other purpose; it does not make transmission faster, more efficient, or cheaper . . . ."*[2]
>
> *"But designing technologies to comply with the copyright laws is precisely what companies should do."*[3]

This Note discusses the novel copyright and broadcast regulation issues surrounding a challenge brought by Aereo, Inc, a small New York City-based start-up company, against major broadcast companies and copyright holders.[4] In 2012, Aereo began providing an online service that enabled its local subscribers to watch over-the-air broadcast television on a computer,[5] wireless device,[6] or standard television set[7] for a fee starting at $8 per

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(The dissenting justices characterizing the majority opinion as reminiscent of a Rube Goldberg cartoon.); *see also* Bousley v. United States, 523 U.S. 614 (1998) (Again, the dissent stating that Rube Goldberg would "envy the scheme the Court has created."). The author has counted over 150 cases that use Rube Goldberg's name in this way. Yet, this Note is unfortunately not a vindication of Rube Goldberg's name.

[2] Brief for Petitioner at 11, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461).

[3] Brief for Respondent at 3, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461).

[4] Aereo, Inc. is a private company that provided its subscribers access on their Internet-enabled devices to broadcast television for a monthly fee. *See* BLOOMBERG BUSINESS WEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=130375459 (last visited Oct. 2, 2014).

[5] Aereo supports all major desktop browser software, such as a Firefox, Chrome, Safari and Internet Explorer. *See Aero Announces Google Cast™ Ready Date,* AEREO (Apr. 10, 2014), http://blog.aereo.com/2014/04/aereo-announces-google-cast-ready-date/.

[6] Aereo supported Apple and Android products, and prior to the Court's ruling, advertised that it was planning to expand to the Kindle Fire. *See Pick a Device*, AEREO, https://aereo.com/devices, *archived at* http://web.archive.org/web/20140325040255/https://aereo.com/devices (last visited Oct. 5, 2014).

[7] *See* AEREO, *supra* note 6.

month.[8] Over a short period of time, Aereo gained thousands of subscribers, extensive media coverage and competition from several copycat services. The company followed up on this early success in New York City by rapidly expanding into other major cities nationwide.[9] Broadcast company founder and media mogul Barry Diller became an early investor in the company, funding the deep coffers supporting Aereo's rapid expansion and its concomitant legal defense fund.[10]

This allocation of ample funds for legal expenses was prescient because major broadcast companies and copyright holders promptly sued Aereo (and a nearly identical service, FilmOn X)[11] for copyright infringement in numerous courts across the country.[12] Aereo never obtained or even asked for permission from

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[8] For $8 a month, subscribers get 20 hours of DVR space to record shows. For $12 a month, subscribers can upgrade to 60 hours of DVR space and record two shows at once. *See* Chloe Albanesius & Jamie Lendino, *Aereo: Everything You Need to Know*, PC MAGAZINE (April 22, 2014), http://www.pcmag.com/article2/0,2817,2417555,00.asp.

[9] *See* Alex Barinka, *Aereo Raises $34 Million in Funding to Expand Online-TV Service*, BLOOMBERG (Jan. 8, 2014, 12:01 AM), http://www.bloomberg.com/news/2014-01-07/aereo-raises-34-million-to-help-online-television-service-grow.html

[10] *See* Dawn C. Chmielewski, *IAC Chairman Barry Diller defends Aereo Internet TV Service*, LOS ANGELES TIMES (May 29, 2013), http://articles.latimes.com/2013/may/29/entertainment/la-et-ct-barry-diller-says-aereo-isnt-about-beating-up-on-broadcasters-its-about-change-20130529.

[11] Shortly after Aereo launched its service in New York, FilmOn X, a Los Angeles-based company, also began offering a nearly identical service nationwide. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1139–41 (C.D. Cal. 2012). However, FilmOn X and Aereo differ in three potentially notable ways: first, FilmOn X provides its watch feature for free and does not require its viewers to sign-up or provide the company with any information; second, FilmOn X's website contains advertising; and third and most importantly, FilmOn X allows its users to view broadcast television outside of the designated market area ("DMA") or media market from that which the viewer is located. *See id.* In the nascent stage of this industry, where the underlying reading of the Copyright Act is the threshold legal issue, these differences have not been fully explored by the courts or commentators.

[12] Hearst Stations Inc. v. Aereo, Inc., 977 F. Supp. 2d 32 (D. Mass. 2013); Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013); WNET v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012); Fox

the broadcast companies or copyright owners (such as television and movie studios) to retransmit their signals to its paying customers.[13] These broadcasters and copyright holders alleged that Aereo violated their exclusive right to "publicly perform" their own copyrighted content.[14] On a motion for a preliminary injunction arising out of the District Court for the Southern District of New York, the broadcasters and copyright holders demanded that Aereo pay for permission or shut down.[15]

Aereo countered that its service was not publicly performing the broadcasters' copyrighted material, but merely facilitating an activity an individual is otherwise entitled to do for free and without liability: watch free over-the-air broadcast television in private.[16] Aereo claimed its transmissions were private because each of its subscribers received a unique transmission beamed from one of Aereo's thousands of dime-sized antennas.[17] Indeed, Aereo engineered its system in such a way as to ensure unique transmission despite the glaring technological and financial inefficiency of doing so.[18]

The broadcasters disagreed, contending that Aereo's transmissions were no different from the transmissions made by a cable or satellite company.[19] Cable and satellite companies

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Television Stations, Inc. v. Barrydriller Content Sys., PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); Nextstar Broad., Inc. v. Aereo, Inc., Civil No. 2:13-cv-975 (D. Utah 2013).

[13] Retransmission fees originate from Retransmission Consent, a provision from the 1992 United States Cable Television Protection and Competition Act that "requires that a television station give its consent to a cable system or other multichannel video programming distributor (MVPD) to carry its broadcast signal." *Retransmission Consent*, FEDERAL COMMUNICATIONS COMMISSION, http://www.fcc.gov/encyclopedia/
retransmission-consent (last visited Oct. 5, 2014). In turn, "television stations and cable systems...negotiate for this retransmission consent and money or other consideration is generally exchanged between the parties in these private negotiations." *Id.*

[14] *See* WNET v. Aereo, Inc., 874 F. Supp. 2d 373, 376 (S.D.N.Y. 2012).

[15] *Id.* at 375–76.

[16] *See id*. at 376–77.

[17] *See id.* at 379, 384.

[18] *Id.* at 385.

[19] *See id*. at 385–86.

publicly perform the broadcasters' content because they capture the free over-the-air broadcast transmission and bundle it with other cable and premium transmissions into a single signal before distributing it to their subscribers.[20] Aereo believed the difference between one large central antenna like those used by cable companies and its thousands of unique antennas made all the difference.

At the end of its 2014 term, the Supreme Court held in *American Broadcasting Companies, Inc. v. Aereo, Inc*,[21] that Aereo likely violated the Copyright Act because its service publicly performed the broadcasters' copyrighted content—*i.e.*, it retransmitted broadcast television like a cable company, but without paying the required retransmission fees. As a result of the Court's holding, Aereo immediately suspended its service across the country.[22]

While the Court's opinion is relatively succinct in its resolution of the long-brewing litigation surrounding Aereo, this Note argues that the characterization of a technology as a "Rube Goldberg-like contrivance"[23]—one in which the technology is necessarily inefficient because of outdated copyright and broadcast television standards—is not only a reason to change the legal grounds from which such a contrivance was borne, but also an opportunity to recalibrate the balance that copyright law endeavors to maintain.

Moreover, the Court's decision and Aereo's apparent market success prior to its legal defeat have emboldened broadcasters and copyright owners to develop their own Internet-based platforms to distribute their content.[24] While the Court's relatively

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[20] *See, e.g.*, FEDERAL COMMUNICATIONS COMMISSION, EVOLUTION OF CABLE TELEVISION, http://www.fcc.gov/encyclopedia/evolution-cable-television (last visited Oct. 4, 2014).

[21] Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014).

[22] Emily Steel, *Stung by Supreme Court, Aereo Suspends Service*, N.Y. TIMES (June 28, 2014), http://www.nytimes.com/2014/06/29/business/media/stung-by-supreme-court-aereo-suspends-service.html.

[23] *See Aereo II*, 712 F.3d at 697 (Chin, J. dissenting) (characterizing Aereo's service as Rube Goldberg contrivance).

[24] *See, e.g.*, Sonia Basak & Alex Barkina, *TiVo Offers DVR to Cable-Free Viewers After Aereo Ruling*, BLOOMBERG (Aug. 25, 2013), http://www.bloomberg.com/news/2014-08-25/tivo-offers-dvr-device-to-viewers-

straightforward interpretation of the Copyright Act's Transmit Clause resolved the immediate dispute between the parties, Congress must answer the ultimate question: whether a third-party *should* be permitted to transmit free over-the-air broadcast television to individuals already located within range of the signal without paying the retransmission fees required of cable and satellite companies.

The U.S. Constitution's Copyright Clause provides a mandate to Congress: "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."[25] It is the promotion of development that justifies Congress' grant of any property rights to useful creations in the arts and sciences.[26] In order to achieve this constitutional mandate, Congress should periodically redefine the eligible types of arts and sciences and the extent to which their inventors and creators are entitled to exclusive rights.[27]

Accordingly, this Note argues that Congress should amend existing legislation to allow third-party services to provide access

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without-cable-satellite-tv.html; Emily Steel, *After Supreme Court Ruling, Aereo's Rivals in TV Streaming Seize Opening*, N.Y. TIMES (June 29, 2014), http://www.nytimes.com/2014/06/30/business/media/after-supreme-court-ruling-aereos-rivals-in-tv-streaming-seize-opening.html.

[25] U.S. CONST. art. I, § 8, cl. 8.

[26] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 428–29 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

[27] *See* Sony Corp. of Am., 464 U.S. at 428–29. ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.").

via the Internet to broadcast television for individuals otherwise entitled to view the same content for free. Additionally, Congress must amend existing legislation in order to clarify the implications of the Court's *Aereo* decision on cloud computing.[28]

To that end, Part I of this Note explains Aereo's technology and the service that it provided before it was shuttered. Part II briefly summarizes the Court's decision in *American Broadcasting Companies, Inc. v. Aereo, Inc*. Part III surveys recent legislative and executive efforts to address the issues posed by Aereo and related services. Part IV argues in support of amendments to either the Copyright Act or the Communications Act, which would allow third-party antenna-rental services such as Aereo to provide access to otherwise free over-the-air broadcast television. Part V is a brief discussion of the Court's decision on cloud computing. Part VI is a conclusion.

## I. AEREO'S TECHNOLOGY AND SERVICE

In 2012, Aereo began providing a service that allowed its subscribers located in the New York City Designated Market Area (DMA)[29] to watch free over-the-air broadcast television on their Internet-connected devices.[30] Broadcast television refers to those channels that are transmitted over the air for free and can be

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[28] In its amicus brief in support of neither party, BSA, The Software Alliance (BSA) described cloud computing as a new approach to computing that "enables the user to access, via an Internet connection, a vast computer network—owned and maintained by a specialized information technology provider—that stores and processes data. The user may purchase the precise amount of data storage and processing power it needs at the time that it is needed." Brief for BSA, The Software Alliance as Amicus Curiae in Support of Neither Party at 2, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461) [hereinafter BSA Brief].

[29] "DMA (Designated Market Area) regions are the geographic areas in the United States in which local television viewing is measured by The Nielsen Company. The DMA data are essential for any marketer, researcher, or organization seeking to utilize standardized geographic areas within their business." *See* NIELSEN, http://www.nielsen.com/us/en/campaigns/dma-maps.html (last visited Oct. 10, 2014).

[30] Aereo I, 874 F. Supp. 2d 373, 376–77 (S.D.N.Y. 2012).

received by anyone with an antenna, a digital receiver,[31] and a television set. The most popular channels include ABC, CBS, NBC, and FOX.[32] Aereo's subscribers could either watch these broadcast channels "live,"[33] or at a later time by recording the program.[34] This recording feature functioned similarly to a home digital video recorder device (DVR)[35] or a videocassette recorder

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[31] "Congress enacted the Digital Transition and Public Safety Act on 20 October 2005." Kathy Gill, *What Is The Digital TV Transition?*, ABOUT.COM, http://uspolitics.about.com/od/electionissues/tp/digital_TV_transition.-2Bh.htm (last visited Oct. 10, 2014). The Act set the end of the analog era on February 18th, 2009. Deficit Reduction Act of 2005, Pub. L. No. 109-71, 120 Stat. 4, 21 (2006). The cutoff date was delayed until June 2009 in order to give the public time to acquire digital converter boxes. *See* Saul Hansell, *Obama's Balancing Act on Digital TV*, N.Y. TIMES (Jan. 20, 2009, 2:20 pm), http://bits.blogs.nytimes.com/2009/01/20/obamas-balancing-act-on-digital-tv/.

[32] For the week of September 22, 2014, Nielsen ranks shows from these four networks in the top ten most watched broadcast television programs. *Top 10 List For Prime Broadcast Network TV – United States*, NIELSEN, http://www.nielsen.com/us/en/top10s.html (last visited Oct. 10, 2014). ABC is the American Broadcasting Company, which is owned by the Disney Media Group. *See Disney/ABC Television Group Overview*, DISNEY/ABC TELEVISION GROUP, http://www.disneyabctv.com/division/index_facts.shtml (last visited Oct. 10, 2014). CBS is CBS Broadcasting, Inc. *See About CBS*, CBS CORPORATION, http://www.cbscorporation.com/ourcompany.php?id=11 (last visited Oct. 10, 2014). NBC is the National Broadcasting Company, which is owned by NBCUniversal, a subsidiary of Comcast Corporation. *ABOUT US*, NBC UNIVERSAL, http://www.nbcuni.com/corporate/about-us/ (last visited Oct. 10, 2014). FOX is the FOX Broadcasting Company, which is owned by 21st Century Fox. *Fox Broadcasting Company*, 21ST CENTURY FOX, http://www.21cf.com/Television/Fox_Broadcasting_Company/ (last visited Oct. 10, 2014). Other major broadcast companies include PBS, the Public Broadcasting Service; Univision, the American Spanish language broadcast network; and the CW Television Network, "a joint-venture between Warner Bros. Entertainment and CBS Corporation," *ABOUT THE* CW, THE CW, http://www.cwtv.com/thecw/about-the-cw (last visited Oct. 10, 2014).

[33] Aereo transmitted live broadcast programming delayed by seven seconds in order to record and transmit a unique copy for each viewer over the Internet. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 682 (2d Cir. 2013).

[34] *See id*.

[35] Many cable companies also offer a feature called the remote digital video recorder ("RS-DVR"). This technology was at issue in the *Cablevision* case, Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 123 (2d Cir. 2008), a case upon which Aereo and Judge Nathan of the Southern

(VCR).

By way of description, it might be helpful to contrast Aereo's service with the more familiar cable subscription. There are two major features that distinguished Aereo's service from a cable subscription. First, Aereo only provided access to over-the-air broadcast channels (such as ABC, NBC, CBS and FOX), whereas cable companies provide access to both over-the-air broadcast channels *and* cable channels (such as Nickelodeon, HBO and ESPN). And second, Aereo did not pay the broadcast companies and copyright holders for carrying their signals.[36] Pursuant to a statutory scheme, cable and satellite companies are required to pay broadcast companies billions of dollars per year in "retransmission fees" for permission to include copyrighted material in their cable bundles or packages, which they in turn offer to their subscribers.[37] Aereo, on the other hand, did not pay a cent to the broadcast companies and copyright holders for permission to offer their content over its service.[38] Unsurprisingly, both broadcast companies and cable companies (including, of course, copyright owners) vigorously contested Aereo's then very popular service.[39]

Aereo argued that it did not need permission from the broadcasters to carry their signals and therefore did not need to pay

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District of New York relied when finding the service permissible. *Aereo I*, 874 F. Supp. 2d at 375.

[36] *See Aereo I*, 874 F. Supp. 2d at 398–99.

[37] *See id.* at 376. *See generally Retransmission Consent*, FEDERAL COMMUNICATIONS COMMISSION, http://www.fcc.gov/encyclopedia/retransmission-consent (last visited Oct. 10, 2014) (detailing the statutory scheme).

[38] Retransmission fees originate from Retransmission Consent, a provision from the 1992 United States Cable Television Protection and Competition Act that "requires that a television station give its consent to a cable system or other multichannel video programming distributor (MVPD) to carry its broadcast signal." FEDERAL COMMUNICATIONS COMMISSION, *supra* note 20. In turn, "television stations and cable systems . . . negotiate for this 'retransmission consent' and money or other consideration is generally exchanged between the parties in these private negotiations." *Id.*

[39] *See* Mike Masnick, *Why the Networks Are Really Afraid of Aereo: Time Warner Cable Says it Might Offer Aereo-Like Service*, TECHDIRT (May 3, 2013, 10:46 AM), http://www.techdirt.com/articles/20130502/16064822930/why-networks-are-really-afraid-aereo-time-warner-cable-says-it-might-offer-aereo-like-service.shtml.

the otherwise statutorily mandated retransmission fees. Aereo claimed that it was not a cable or satellite company and therefore did not enter into the statutory scheme. More importantly, however, Aereo attempted to back its claim that it did not need to pay the broadcasters retransmission fees by asserting that it did not *publicly* transmit their copyrighted content.[40] Unlike a cable company, which bundles each unique transmission into a single signal that it then simultaneously beams out to all of its millions of customers, Aereo transmitted a separate signal, generated by a unique antenna, to each and every customer.[41] Again, the Copyright Act only grants copyright holders the exclusive right to *publicly* perform their work.[42] An individual is entitled to *privately* perform a copyrighted work, such as by pressing "play" on an iPod or DVD player in the privacy of one's home. Aereo argued that its service merely facilitated thousands of discrete private performances.

Technically, Aereo did provide unique copies of the broadcasters' copyrighted material to each of its users. While the Court ultimately found the difference between Aereo and a cable company one without a distinction, the details of its system are worth explaining. Unlike the nomadic smartphone-viewing customers its service attracted (and created), Aereo's technology required substantial physical space that housed a significant amount of hardware.[43] Aereo installed tens of thousands of dime-sized antennas in a large warehouse in each city in which it operated.[44] Each dime-sized antenna independently received a free-over-the-air signal from the broadcast companies just like an antenna sitting atop your television.[45] According to Aereo, because

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[40] *See Aereo I*, 874 F. Supp. 2d at 385.

[41] *See id.*

[42] 17 U.S.C. § 106(4) (2014).

[43] *See Aereo I*, 874 F. Supp. 2d at 377–81.

[44] *See id.* at 373, 379; *see also* Jeff John Roberts, *Inside Aereo: new photos of the tech that's changing how we watch TV*, GIGAOM (Feb. 6, 2013, 12:06 PM), http://gigaom.com/2013/02/06/inside-aereo-new-photos-of-the-tech-thats-changing-how-we-watch-tv/.

[45] *Aereo I*, 874 F. Supp. 2d at 377. For example, in the New York City DMA, most broadcast television signals emanate from an antenna on the top of the Empire State Building. *See* Thomas R. Haskett, *Broadcast Antennas on the*

each antenna was assigned to a single user at any given moment and each transmission was private, Aereo therefore did not infringe upon the copyright owners' rights in providing its service to thousands of people.[46] Aereo considered its service a vast improvement over what an individual could already permissibly do with a trip to a local Radio Shack and the corner store: go out and purchase a rabbit-ears antenna,[47] a bit of aluminum foil, and a television set.[48]

Accordingly, commentators have described Aereo as an antenna-rental service.[49] This is a helpful description because it not only captures the spirit of Aereo's business model but also accurately describes the technology it used.[50] Unlike an individual who keeps an antenna above her television at home, an Aereo subscriber "rented" an antenna located in an Aereo-operated warehouse[51] where each antenna would only broadcast to a single user at any given moment.[52]

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*Empire State Building*, BROADCASTING ENGINEERING MAGAZINE (Aug. 1967), *available at* http://www.lnl.com/esbantennas.htm. Accordingly, Aereo located its warehouse storing thousands of antennas for its New York City DMA customers near downtown Brooklyn. *See* Gerry Smith, *Aereo Threatens Broadcasters By Streaming Network TV Online*, HUFFINGTON POST (July 20, 2012, 4:40 PM), http://www.huffingtonpost.com/2012/07/20/aereo-broadcasters-streams-networks-tv_n_1690173.html.

[46] *See Aereo I*, 874 F. Supp. 2d at 376 n.1.

[47] I use "rabbit ears antenna" to describe the traditional set top antennas.

[48] *See Aereo I*, 874 F. Supp. 2d at 373; *see also* Staci D. Kramer, *Diller to Networks: Get Radio Shack To Pay Retrans & Aereo Will Too*, GIGAOM (Mar. 11, 2012, 3:05 PM), http://gigaom.com/2012/03/11/419-diller-to-networks-get-radio-shack-to-pay-retrans-aereo-will-too/.

[49] *See, e.g.*, Kevin Roose, *Aereo's Absurd 'Tiny Antennas' Strategy Wins in Court*, NEW YORK MAGAZINE (April 2, 2013, 3:24 PM), http://nymag.com/daily/intelligencer/2013/04/aereos-tiny-antennas-strategy-wins-in-court.html

[50] *See* Aereo II, 712 F.3d 676, 676 (2d Cir. 2013).

[51] The majority of Aereo's antennas are what the company labels as "dynamic," meaning that they are reassigned as one user signs off the system and another signs on. Aereo I, 874 F. Supp. 2d 373, 377–78 (S.D.N.Y. 2012). Some, however, are "static," in that they are assigned to one user regardless of whether that user is logged in to the system. *See id*.

[52] In its brief, Aereo stated that "[h]undreds of these miniature antennas can be stored in a single housing." Brief for Respondent at 10 n.7, Am. Broad. Cos.,

Consider Second Circuit Judge Denny Chin's Super Bowl Sunday example.[53] If, assuming Aereo were still operating, 50,000 of its New York City-based customers wished to watch the Super Bowl, each one of those 50,000 customers would log onto Aereo on their Internet-connected device and select FOX from the list of over-the-air broadcast channels available.[54] Then, in Aereo's Brooklyn warehouse, 50,000 individual dime-sized antennas, each uniquely associated with a single subscriber, would tune into FOX's New York DMA over-the-air signal. Once the miniature antennas receive the signal, Aereo's system would begin to make 50,000 digital copies of the broadcast—again, one for each viewer. Aereo's system created an approximately seven second delay in order to make a unique copy for each viewer.[55] Because the system makes unique digital copies for each subscriber, each Aereo subscriber was able to pause, rewind, or fast-forward his or her personal copy.[56] For an extra $4 per month, Aereo subscribers were able to select to record programs and store up to twenty hours of recorded programs as one would on a DVR or VCR.[57]

Imaginatively, Judge Denny Chin used the Super Bowl—consistently, the most-watched live broadcast television program each year—to exhibit the absurdity of Aereo's individual antenna and unique copy technology.[58] Indeed, Judge Chin referred to

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Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461). Aereo further noted, "In factual findings unchallenged on appeal, the district court determined that each antenna could be used only by a single user at any given time and that 'each antenna functions independently.'" *Id.*

[53] *Aereo II*, 712 F.3d at 697, 704 n.6 (Chin, J. dissenting).

[54] *Id.*

[55] *Aereo I*, 874 F. Supp. 2d at 378.

[56] *Id.* at 377–78.

[57] *See It's not magic. It's wizardry.*, AEREO, https://aereo.com/about, *archived at* http://web.archive.org/web/20140528094403/https://aereo.com/about; *see also* Chloe Albanesius & Jamie Lendino, *Aereo: Everything You Need to Know*, PC MAGAZINE (April 22, 2014), http://www.pcmag.com/article2/0,2817,2417555,00.asp.

[58] *See Super Bowl XLVIII Draws 111.5 Million Viwers, 25.3 Million Tweets*, NIELSEN NEWSWIRE (Mar. 3, 2014), http://www.nielsen.com/us/en/insights/news/2014/super-bowl-xlviii-draws-111-5-million-viewers-25-3-million-tweets.html (chronicling annual viewership since the Super Bowl's inception).

Aereo's system as 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."[59] Some commentators argued that Aereo, through its technology, flouted what its supporters perceived as a loophole in the Copyright Act.[60] These critics pointed to the fact that there is no technological or economic rationale for the implementation of individual antennas or for the creation of a unique digital copy of each recorded program for each individual subscriber.[61] In fact, according to Aereo, the electricity cost to power all of its antennas in New York City was its largest expense, which of course would have only increased[62] with the company's growth.[63] Cable companies, on the other hand pay, in addition to utilities, billions of dollars per year in retransmission fees to broadcast companies and copyright owners for the permission to carry their content.[64]

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[59] Aereo II, 712 F.3d at 697.

[60] *See e.g.,* Terry Hart, *Copyright Alliance Files Amicus Brief in Aereokiller Case*, COPYRIGHT ALLIANCE (May 7, 2013), http://www.copyrightalliance.org/2013/05/copyright_alliance_files_amicus_brief_aereokiller_case#.UqEHt2RDvIc (describing the perceived loopholes of copyright law attempted to be used by Aereokiller, a service similar to Aereo).

[61] Peter Leung, *Why Aereo Encourages the Wrong Kind of Innovation*, MANAGING INTELL. PROP. (April 23, 2013), http://www.managingip.com/Blog/3195457/Why-Aereo-encourages-the-wrong-kind-of-innovation.html.

[62] Aereo founder and CEO Chet Kanojia argued that electricity costs could go down, however, once Aereo secures contracts with content providers utilizing fiber optic cables. *See* Shalini Ramachandran & Amol Sharma, *Electricity Use Impedes Aereo's March: Streaming-Video Service Has Other Challenges Besides Broadcasters' Laws*, THE WALL ST. J. (Oct. 28, 2013 7:50 PM), http://online.wsj.com/news/articles/SB10001424052702304470504579163383906312194.

[63] *See id.*

[64] Other commentators warned of Aereo's inherent size or scaling limitations. *See* Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-up*, PANDODAILY.COM (July 14, 2012), http://pando.com/2012/07/14/dont-root-for-aereo-the-worlds-most-ridiculous-start-up/. At the end of January 2014, those warnings become reality when Aereo temporarily "sold out" of antennas in both its New York City and Atlanta markets. *See* Karl Bode, *Aereo Has Also Run Out of Capacity in Atlanta*, DSLREPORTS.COM (FEB. 4, 2014 04:34PM), http://www.dslreports.com/shownews/Aereo-Has-Also-Run-Out-of-Capacity-in-Atlanta-127612; Jordan

Aereo's technology and the service that it provided illustrate two points. First, consumers have clearly expressed a desire for a service that allows them to view over-the-air broadcast television on Internet-connected devices. Aereo was a natural, if not belated, extension of the general trend away from subscribing to cable companies to consumers' preference to pay for numerous, but select, individual content providers.[65] Second, as noted, both the copyright owners and Aereo argued that the purpose of Aereo's technology was to avoid liability under the Copyright Act. While both parties had different motivations for making that point, both sides agreed that the Copyright Act and the Communications Act are ill equipped to address the technological and consumer preference-based innovations that Aereo triggered.

This Note argues that the state of the law itself was the cause of Aereo's Rube Goldbergian technology. However, rather than eviscerating a company such as Aereo and the service it ventured to provide, as did the Court in its opinion, Congress should acknowledge the value of such a service by amending existing law.

## II. BACKGROUND AND LEGAL AUTHORITY

The *Aereo* litigation centered on differing interpretations of the Transmit Clause in the Copyright Act of 1976.[66] Any future

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Crook, *Aereo Sells Out of Capacity in NYC*, TECHCRUNCH.COM (Jan. 31, 2014), http://techcrunch.com/2014/01/31/
aereo-sells-out-of-capacity-in-nyc/. As many technology start-ups are eschewing brick-and-mortar operations for services that utilize Internet-based or cloud servers and storage, Aereo's technology required it to occupy a substantial amount of physical space strategically located within the cities it serviced. *See* Julia Boorstin, *Aereo's CEO Dishes on Expansion Plans and Legal Controversy*, CNBC (Sep. 24, 2013), http://www.cnbc.com/id/ 101059672. Of course, both parties agreed that the purpose behind these technological quirks was to avoid liability under the Copyright Act.

[65] *See, e.g.,* David Carr, *Spreading Disruption, Shaking Up Cable TV*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/
business/media/barry-dillers-aereo-service-challenges-cable-television.
html?pagewanted=all; *see also* Vikas Baijaj, *Ready to Cut the Cord?*, N.Y. TIMES (Apr. 6, 2013), http://www.nytimes.com/2013/04/07/opinion/sunday/
ready-to-cut-the-cord.html.

[66] Aereo II, 712 F.3d at 685; 17 U.S.C. § 101 (2104).

challenge to emerging technologies such as cloud computing will likely also center on those same clauses and use many of the same arguments. This Note will endeavor in part V to discuss some of the implications the Court's opinion might have on the cloud computing industry. However, it is first necessary to discuss the specific statutory provisions of the Copyright Act as applied in *American Broadcasting Companies, Inc. v. Aereo, Inc*. The *Aereo* litigation concerned two primary questions: first, what "performance" was at issue—the underlying performance provided by the broadcast company or the unique transmission that Aereo made for each user; and, second whether Aereo's system publicly performed the broadcasters' copyright material through its system.

In 1976, Congress gave copyright holders the exclusive right to "perform [their] copyrighted work publicly."[67] Congress defined "publicly" in the Transmit Clause in two ways. The first is obvious: "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[68] A court can easily determine liability under the first definition of "publicly." For example, if Aereo threw an extravagant launch party for its new service and invited a large number of members of the public, it might be liable for copyright infringement under this section if it projected copyrighted films on large screens throughout the party.

Congress's second definition of a public performance has proven less clear. A public performance is also:

> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[69]

This second clause is where Aereo, the broadcaster companies and copyright holders and the courts each had divergent interpretations.

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[67] 17 U.S.C. § 106(4).

[68] *Id.* § 101.

[69] *Id.*

It is clear that Congress broadly defined public performance in the Transmit Clause of the Copyright Act in order to encompass new technology unforeseeable at the time of its drafting.[70] The language "by means of any device or process" is meant to signal that a transmission or a communication is still a transmission or communication even if the technology used (device or process) is different than those that were in existence at the time of the statute's enactment.[71] An obvious example of the breadth of this provision is the Internet. Courts were not hard pressed to apply the "by means of any device or process" portion of the statute to the Internet:[72] a performance of a copyrighted song over the Internet to the public is copyright infringement just as it would be over radio waves, on a record player to a public audience, or over broadcast television.[73]

It is further clear that Congress also intended a broad definition of "public."[74] As renowned intellectual property scholar Professor Jane Ginsburg points out, Congress underscored in a 1976 House Report that "the members of the public capable of receiving the performance do not stop being members of the public just because they are capable of receiving the performance one at a time."[75]

For example, if a cable company like Time Warner Cable receives the over-the-air signal from the New York City NBC affiliate and retransmits that signal to each of its 1,000,000 subscribers in the New York City area, it is publicly performing the broadcast company's content even in the event that only a solitary insomniac is watching an infomercial in the middle of the

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[70] Jane C. Ginsburg, Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?, 25 (Columbia Public Law & Legal Theory Working Paper Grp., No. 08158, 2008), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1050&context=columbia_pllt [hereinafter Ginsberg, *Exclusive Rights on the Ebb?*].

[71] *Id.*

[72] *See* U.S. v. Am. Soc. of Composers, Authors and Publishers, 485 F. Supp. 2d 438, 442–43 (S.D.N.Y. 2007).

[73] *See id.* at 146 (finding that a download, however, was not a performance but a potential violation of reproduction rights).

[74] *See* Ginsberg, *Exclusive Rights on the Ebb?*, *supra* note 70.

[75] *Id.*

night.[76] This is because a performance is public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places."[77] Because all 1,000,000 of Time Warner Cable's subscribers are *capable* of receiving the transmission by virtue of their subscriptions, each of those members of the public comprise the relevant "public" for the purposes of the Transmit Clause.

Additionally, while Congress may have intended a broad reading of the language "at the same time or at different times" in determining whether a performance is public or private, this portion of the Transmit Clause has proven less clear.[78] It might be helpful to ask how different individuals can receive the same performance but at different times. Logic dictates that there are three possible examples of how this might occur.

### *A. Three Examples of a "Public" for Purposes of the Copyright Act*

The first example accounts for differences in time zones across the country. For example, suppose NBC creates and copyrights a highly anticipated made-for-TV movie and decides to premier this movie over a special broadcast nationwide at each time zone's 8:00 p.m. If a cable company has subscribers in both in New York City and Los Angeles, the Copyright Act considers as part of the same public both the New York City subscribers who view the performance at 8 p.m. Eastern Time and the Los Angeles subscribers who view it three hours later at 8 p.m. Pacific Time. Indeed, the cable company transmits the made-for-TV movie to the same public when it is first shown on the East Coast even though its customers on the West Coast are not "capable" of receiving the broadcast at the same time. The plain language of the Transmit Clause supports this interpretation: "whether the members of the

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[76] Put another way, if 1,000 residents of a town are capable of receiving Cable Company A's transmissions, Cable Company A has transmitted it to the public despite the fact that each of the 1,000 residents watches television alone in his or her own home.

[77] 17 U.S.C. § 101 (2014).

[78] *See generally*, Jeffrey Malkan, *The Public Performance Right in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505 (2010).

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*."[79]

Professor Jeffrey Malkan points out in his article about this very question, however, that the retransmissions within each time zone are already public, so this reading of the Transmit Clause "would serve only to confirm the obvious."[80] That is, the performance of the special broadcast at 8 p.m. on the East Coast is sufficient to establish a public performance; the broadcast is already public to all those in the East Coast so it is not necessary to include the West Coast viewers in order to make that determination. In other words, the fact that a cable company transmits the special broadcast *again* to different viewers in another time zone is not necessary to render any transmission public. Rather, it only reconfirms that the original New York City transmission is public.

There is a second scenario in which this clause is applicable: when the relevant members of the public who are "capable" of receiving the performance at the same time do in fact receive the performance at different times. This is because the individual members of the public tune into a broadcast at different times.

The second example is slightly more helpful than the first. An illustration of this scenario might be the solitary insomniac watching an infomercial in the middle of the night. When the infomercial ends at 4:59 a.m. and at 5:00 a.m. the popular morning-news program begins, the insomniac is a member of the same "public" as the graveyard shift worker returning home and tuning in at 5:15 a.m. to unwind, the investment banker who flips it on at 5:30 a.m. while scrolling through her smartphone and the morning jogger who stretches to it at 5:45 a.m. However, to repeat Professor Malkan's conclusion, this also would seem to confirm the obvious.[81] A broadcast of a copyrighted work that is *capable* of being received by the public (situated in different places, *i.e.*, their individual homes) is public regardless of whether those individuals tune in at the beginning, middle, or end of the program. A

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[79] 17 U.S.C. § 101 (emphasis added).

[80] *See* Malkan, *supra* note 78, at 514.

[81] *See id.*

broadcast is public even if no one ever tunes in at all. Accordingly, this language flows from the same prophylactic wellspring as does Congress's use of the "same or in separate places" and "by any means or device" language.

Finally, and most relevant to the question posed by *Aereo*, is the third example of what Congress might have intended when it drafted the "same time or at different times" language. This is a situation in which a single copy of a copyrighted work is played to individual members of the public at different instances over the course of hours, days, or years. Professor Melville Nimmer in his famous treatise on copyright law and the facts of a Third Circuit case *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*[82] both provide a nice illustration of this scenario.

Professor Nimmer queried in his treatise *Nimmer on Copyrights* that "it would seem that what must have been intended [by the Transmit Clause] 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."[83] Professor Nimmer's hypothetical was brought to life in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*[84] In that case, the defendant was Maxwell's Video Showcase, an establishment that provided a service allowing its customers to enter a private video booth and select and pay to view a particular videotape, which the store clerk then played for the customer.[85] But, because the same videotape was used to fulfill different patrons' requests throughout the night, Maxwell's Video Showcase's act of playing the same tape over and over again to a single individual at a time constituted a public performance in the aggregate.[86] While the Third Circuit ultimately ruled in favor of the plaintiffs on other grounds,[87] Maxwell's

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[82] Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984).

[83] MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 8.14 [C][3] 139 (Matthew Bender rev. ed. 1993).

[84] *Redd Horne, Inc.*, 749 F.2d at 154.

[85] *Id.* at 156–57. The rest of the details can be left to the imagination.

[86] *Id.* at 159.

[87] The court found that Maxwell's Video Showcase was a public place and

Video Showcase's service nicely illustrates Nimmer's presumption.[88] Regardless of the spatial and temporal differences between each private viewing, repeated individual performances of the same copy of a copyrighted work to individual members of the public is a public performance for the purposes of the Copyright Act.

In an amici brief submitted in support of the broadcast companies and copyright holders in *Aereo*, Professors David Nimmer and Peter S. Menell expanded on the public performance section of Professor Nimmer's father's treatise.[89] The amici brief argued that Congress intended that the public performance right would be implicated by a service such as Aereo's because according to a 1966 House Report, the Judiciary Committee stated that a performance is public if it is "capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public."[90] Indeed, the amici brief characterizes the Committee's passage as coming "eerily close to describing Aereo's technology."[91]

On the surface, the Committee's description does come close to describing Aereo's service. In fact, however, the Committee was describing an early computer system in which a copy of copyrighted material was digitally stored on a central hard drive through which that same copy might be played back at different times by anyone capable of accessing the content. The hypothetical posed by the Committee, however, simply describes what the 2015 version of Maxwell's Video Showcase might look like. That is, if

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therefore the "transmissions" or "performances" when the clerk played a video for each customer did not matter for liability. *See id.*

[88] For illustration: Viewer A walks in at 12:00 midnight and watches Video X in Booth C; Viewer B then walks in 1:00 am and watches the same Video X but in Booth D. Viewer A and Viewer B have both watched the same copyrighted performance contained on Video X albeit at different times and in different places.

[89] Brief for Professors Peter S. Menell and David Nimmer as Amici Curiae in Supporting Petitioners at 8, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461) [hereinafter Menell and Nimmer Brief].

[90] COPYRIGHT LAW REVISION, H.R. REP. NO. 89-2237, at 58 (1966).

[91] Menell and Nimmer Brief, *supra* note 89, at 15.

instead of popping a videotape into a VCR the patron sidled up to a computer monitor and double-clicked on a centrally-stored video file which then played on that patron's monitor, the result would be the same: a single copy of a copyrighted work is played for different members of the public at different times.

Accordingly, it is clear that the Committee's Report cannot fairly be analogized to the specific technology (or, attempted liability-circumventing devices) employed by Aereo. Indeed, Professors Nimmer and Menell point out in their amici brief that the Report "did not refer to separate recording devices for each subscriber."[92] However, the amici nevertheless attempted to overcome that omission by arguing that the Report was drafted "more than a decade before the emergence of the household videocassette recorder (VCR)."[93] Those assertions are irreconcilable.

Nevertheless, Professors Nimmer and Menell also argue in their brief that "[i]t is difficult to imagine the drafters not considering Aereo to fall comfortably within their conception of a public performance right when they describe both cable services and recording devices that can deliver performances to individual members of the public on demand as falling within the public performance right."[94] While this is very likely true, the professors' argument follows the same "I know it when I see it"[95] test that Justice Scalia's dissent accuses Justice Breyer of applying in his majority opinion.[96] While this test may work in the context of Aereo's technology, given its functional proximity to cable

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[92] *Id.*

[93] *Id.*

[94] *Id.* at 16.

[95] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[96] *See* Aereo III, 134 S.Ct. 2498, 2512 (2014) (Scalia, J., dissenting) ("The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard ('looks-like-cable-TV') that will sow confusion for years to come.").

television and the precedents that Congress overturned in drafting the 1976 legislation, it is wholly inapplicable to other technologies.

### *B. The Performance at Issue for Purposes of the Copyright Act*

The Copyright Act is also ambiguous in regard to which performance constitutes the relevant performance when determining whether a public performance has occurred. The Copyright Act defines "[t]o 'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."[97] Additionally, to perform an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible."[98] Accordingly, there are potentially two performances at issue: first, the performance made by the broadcast company via the over-the-air signal, and second, the performance made by Aereo (or its customers) through the playback of a selected broadcast signal.

For the purposes of the Copyright Act, a performance in the context of an audiovisual work is defined as a transmission that is "contemporaneously perceived" by the recipient.[99] In *United States v. Am. Soc'y of Composers, Authors, Publishers*, the Second Circuit affirmed the lower court's determination that a website did not "perform" when it allowed its subscribers to download digital files containing copyrighted songs.[100] This is because, as the court reasoned, the song is not contemporaneously audible during its download.[101] Such a service might infringe a copyright holder's

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[97] 17 U.S.C. § 101 (2014).

[98] *Id.*

[99] *See* United States v. Am. Soc'y of Composers, Authors, Publishers, 627 F.3d 64, 73 (2d Cir. 2010) ("The fact that the statute defines performance in the audio-visual context as 'show[ing]' the work or making it 'audible' reinforces the conclusion that 'to perform' a musical work entails contemporaneous perceptibility. ASCAP has provided no reason, and we can surmise none, why the statute would require a contemporaneously perceptible event in the context of an audio-visual work, but not in the context of a musical work.").

[100] *Id.* at 72.

[101] *See id.* at 72–73.

exclusive right to *reproduce* its copyrighted works but not its right to publicly *perform* them.[102] Accordingly, a website does perform for purposes of the Copyright Act when it streams or web-casts copyrighted content.[103]

Aereo's service did not provide its viewers with digital files of over-the-air broadcast television but a nearly live stream of it. Accordingly, as will be discussed in Part III, the Court determined that Aereo (and its customers) performed the broadcasters' and copyright holders' work during each unique transmission to each individual customer. Despite the Court's determination that Aereo's system produced thousands of unique performances, the Court also found that the thousands of unique performances to individual customers nevertheless constituted a public performance in violation of the Copyright Act.

## III. SUPREME COURT DECISION

On June 25, 2014, the Supreme Court issued its decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.* By a 6-3 majority,[104] the Court held that Aereo's service likely violated the plaintiffs' exclusive rights under the Copyright Act to publicly perform their copyrighted content. The Court's decision effectively ended both Aereo's legal saga[105] and its viability as a company.[106]

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[102] *See id.* at 72.

[103] *See* United States v. Am. Soc'y of Composers, Authors, Publishers, 485 F. Supp. 2d 438, n.4 (S.D.N.Y. 2007) (citing the Digital Millennium Copyright Act Section 104 Report (Aug. 2002), at xxii-xxiv, *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf).

[104] Justice Breyer wrote the majority opinion. *See* Aereo III, 134 S.Ct. 2498, 2511 (2014). Justice Scalia dissented, joined by Justices Thomas and Alito. *See id.* at 2512.

[105] Following the Supreme Court's ruling, Aereo filed an emergency motion before Judge Nathan, urging the court to allow it to function like a cable company. Jonathan Stempel, *Aereo, 'Bleeding to Death,' Seeks Emergency Court Help*, REUTERS (Aug. 1, 2014), http://www.reuters.com/article/2014/08/01/us-aereo-survival-idUSKBN0G14HC20140801. Aereo argued that "[u]nless it is able to resume operations in the immediate future, the company will likely not survive." *Id.* And, that it "is figuratively bleeding to death." *Id.* Judge Nathan declined to address the request, stating that it had "jumped the gun" because it had filed prematurely. *See* Alex Barinka & Edvard

This section will briefly outline the issues that were before the Court, Justice Breyer's majority opinion and Justice Scalia's dissent. It will conclude with a brief introduction to the opinion's implications for cloud computing. That issue will be taken up again in Part V.

The Court framed the question presented in *American Broadcasting Companies, Inc. v. Aereo, Inc.* so that it essentially only had to consider whether Aereo's service fell within a loophole of the Copyright Act. The difference between the parties' proposed questions presented is illustrative of the varying but equally dispositive ways in which Aereo's technology could have been viewed. Prior to oral argument, the Supreme Court announced that the question presented would be that proposed by the broadcaster-petitioners: "[w]hether a company 'publicly performs' a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet."[107] Conversely, Aereo had posed the question as: "[w]hether Aereo 'perform[s] publicly,' under Sections 101 and 106 of the Copyright

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Pettersson, *Aereo Asks Court to Stop 'Bleeding,' Allow New Life*, BLOOMBERG (Aug. 1, 2014), http://www.bloomberg.com/news/2014-08-01/aereo-asks-court-to-stop-bleeding-allow-new-life.html.

[106] Aereo declared bankruptcy in November 2014, *see* Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankru ptcy.html, following several last ditch efforts, including its attempt to convince the Federal Communications Commission ("FCC") to extend its regulations for satellite television providers to Aereo and other online video distributors like Netflix and Hulu. *See* Brian Fung, *Aereo to the FTC: Let us Join the cable companies we tried to replace*, THE WASHINGTON POST (Oct. 13, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/10/13/aereo-to-the-fcc-let-us-join-the-cable-companies-we-tried-to-replace/. FCC Chairman Tom Wheeler went further and published a blog post encouraging the FCC Commission to start a rulemaking that would support Aereo and other nonlinear content providers. *See* Joshua Brustein, *The FCC Wants to Let Aereo Become a Cable Service*, BLOOMBERG BUSINESSWEEK (Oct. 28, 2014), http://www.businessweek.com/articles/2014-10-28/the-fcc-wants-to-let-aereo-become-a-cable-network. *See also* Steel, *supra* note 24; Barinka & Pettersson, supra note 105; *see generally* PROTECT MY ANTENNA: AEREO, http://protectmyantenna.org/ (last visited Oct. 10, 2014) (A website where Aereo explains its plans following the Supreme Court's ruling).

[107] Manjoo, *supra* note 64.

Act, by supplying remote equipment that allows a consumer to tune an individual, remotely located antenna to a publicly accessible, over-the-air broadcast television signal, use a remote digital video recorder to make a personal recording from that signal, and then watch that recording."[108] As will be addressed in Part V, had the Court adopted Aereo's question presented and still found in favor of the broadcaster-petitioners, its opinion would have more completely addressed many of the questions posed in the amicus briefs supporting emerging technologies such as cloud computing. Yet, the Court adopted the broadcast-petitioner's proposed question presented and in doing so did not directly address those concerns. Rather, Justice Breyer's opinion seems to hinge on the Court's impression that Aereo looks and feels like a cable company and therefore should be treated as one under the law.[109]

The majority summarily dismissed Aereo's arguments by diminishing the putative legal distinctions that Aereo attempted to draw between its technology and that of a cable company.[110] Citing generally to "Congress' regulatory objectives," Justice Breyer concluded that any technical, albeit actual, differences between Aereo's service and that of a cable company's were legally insignificant.[111] He did so by pointing out that any differences concern "the behind-the-scenes way in which Aereo delivers television programming."[112] Moreover, the technological differences neither "render Aereo's commercial objective any different from that of a cable company" nor "significantly alter the viewing experience of Aereo's subscribers."[113] Justice Breyer concluded by posing this question to his readers:

> Why would a subscriber who wishes to watch a television show care much whether the images and

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[108] Brief for Respondent on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at I, 134 S.Ct. 2498, 2501 (2014) (13-461).

[109] *Aereo III*, 134 S.Ct. at 2501.

[110] *Id.*

[111] *Id.* at 2501–02.

[112] *Id.* at 2508.

[113] *Id.*

> sounds are delivered to his screen via a large multi-subscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after few seconds' delay, or whether they are transmitted directly or after a personal copy is made?[114]

According to the Court, it was the look, feel and effect of Aereo's service as compared to a cable company's—not its technical details—that rendered it liable for copyright infringement.[115]

The Court further grounded its opinion in the plain language and purpose of the Transmit Clause in the greater context of the Copyright Act. The Court did so by holding that "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."[116] This is because the Copyright Act applies to transmissions "by means of any device or process." Accordingly, "retransmitting a television program using user-specific copies is a 'process' of transmitting a performance."[117] The Court held that the Transmit Clause required this reading, because "were the words 'to transmit . . . a performance' limited to a single act of communication, members of the public could not receive the performance communicated 'at different times.'"[118]

The second question the Court addressed was what role a *copy* of a copyrighted work plays in the Transmit Clause, which states that to publicly perform is "to transmit or otherwise communicate a performance or display of the work" to the public.[119] The Court queried whether the "performance or display of the work" is the underlying work at issue or the copy of the underlying work made

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[114] *Id*. at 2508–09.

[115] *Id.* In his dissent, Justice Scalia argues, however, that the majority's test complicates the issue. *Id.* at 2511. Justice Scalia believes that the case should have been resolved on a question of direct or secondary liability. *See id.* at 2512 (Scalia, J., dissenting).

[116] *Id.* at 2509.

[117] *Id.*

[118] *Id*.

[119] 17 U.S.C. § 101 (2014).

for an individual.[120] If it were the latter, then the individual receiving her unique copy from Aereo would not constitute the public.[121] If it were the former, as the broadcasters urged, then the mere creation of a copy of an underlying work (the so-called Rube Goldberg-like contrivance) would not immunize Aereo from infringement liability.

The Court assumed, *arguendo*, that Aereo's interpretation of the clause was correct. Specifically, the Court held that "for present purposes, to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work."[122] Or, stated another way, Justice Breyer concluded that when Aereo streamed a program over the Internet to a subscriber, it was contemporaneously communicating the work's images and sounds and therefore "Aereo transmit[ted] a performance whenever its subscribers watch[ed] a program."[123]

Justice Scalia took a fundamentally different tack in his dissent. Primarily, he argued that Aereo's liability should have been assessed under a secondary liability standard as opposed to the direct liability rule that the majority applied. The Court granted certiorari only to answer the question of whether Aereo publicly performed the petitioners' copyrighted material. In doing so, the question centered on whether Aereo directly infringed, which the dissenting justices believe created a flawed opinion.[124]

Justice Scalia framed the difference between the direct and secondary liability rules quite succinctly: "[t]he volitional-conduct requirement is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant's conduct is infringing (*e.g.*, Does the defendant's design copy the plaintiff's?), rather than whether the defendant has acted at all (*e.g.*, Did this

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[120] *Id.*; *Aereo III*, 134 S.Ct. at 2509–10.

[121] *Id.*

[122] *Id.* at 2508.

[123] *Id.*

[124] *Id.* at 2503 ("We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.").

defendant create the infringing design?)."[125] In other words, Justice Scalia argued, "the comparison [is] between copy shops and video-on-demand services."[126] In the former, the customer chooses the content and activates the copying function while "the photocopier does nothing except in response to the customer's demands."[127] In the latter, "video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content*."[128] That is, the video-on-demand services provide a library from which a subscriber selects, unlike a copy shop to which you bring your own content to copy.

Justice Scalia concluded that Aereo is neither a copy shop nor a video-on-demand service but rather is a "copy shop that provides its patrons with a library card."[129] Because, according to Justice Scalia, "Aereo does not provide a prearranged assortment of movies and television shows," like Netflix or Hulu, the performances created by Aereo are *not* "the product of Aereo's volitional conduct."[130] Accordingly, Justice Scalia argues that Aereo cannot be liable under a direct infringement theory.[131]

Justice Scalia also pointed out the technological features of Aereo's system and those of a cable system to which the majority compared it. While Aereo argued that the technological nuances of its system should exonerate it from copyright liability based on the public/private performance distinction,[132] Justice Scalia argued that there are "material differences between the cable systems at issue in" *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[133] and *Fortnightly Corp. v. United Artists Telelvision, Inc.*[134] and the transmissions at issue in *Aereo*.[135] The systems at issue in those two cases were community-antenna television (CATV) systems

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[125] *Id.* at 2513.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 2514.
[130] *Id.*
[131] *Id.* at 2514–15.
[132] *Id.* at 2504 (majority opinion) (citing Brief for Respondent at 41).
[133] 415 U.S. 394 (1974).
[134] 392 U.S. 390 (1968).
[135] *Aereo III*, 134 S.Ct. at 2515 (Scalia, J., dissenting).

that "captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmits only specific programs selected by the user, at specific times selected by the user."[136] Again, this distinction does not center on the public or private performance question but rather whether Aereo directly or secondarily infringed the broadcasters' copyrights. The answer, according to Justice Scalia, was that Aereo did not directly infringe but would likely be liable for secondary infringement.[137]

Lastly, Justice Scalia argued that the majority's opinion distorted the Copyright Act in order to find Aereo liable.[138] According to Justice Scalia, the majority created and applied an "ad-hoc rule for cable-system lookalikes."[139] Justice Scalia asserted that the majority muddled two questions: what the 1976 amendments to the Copyright Act "were meant to do and how they did it . . . ."[140] It was the latter question, according to Justice Scalia, that governed the Aereo dispute.[141] According to Justice Scalia, the majority set a dangerous precedent because it held that a system such as Aereo "performs" for purposes of copyright liability.[142] According to Justice Scalia's dissent, the majority "greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work. If that test is not outcome determinative in this case, presumably it is not outcome determinative elsewhere as well."[143]

Justice Scalia's dissent makes clear that the Copyright Act in its current form can adequately protect copyright holders' rights despite Aereo's divisive, if not novel, application of relatively simple technology. In other words, Justice Scalia shifts the focus to an analysis of liability and not of whether a system performs publicly or not. The analysis, accordingly, mandates a threshold

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[136] *Id.* at 2515–16.
[137] *Id.* at 2517.
[138] *Id.*
[139] *Id.* at 2516.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

determination of whether the defendant is directly or secondarily liable.

## IV. CURRENT LEGISLATIVE AND EXECUTIVE ACTION

There are several possible outcomes in the years ahead for Aereo-like services. The most likely is that Aereo-like services provided directly by the broadcasters and copyright holders will fill the void created by the Court's decision and Aereo's subsequent bankruptcy. It is also likely that Congress will amend the Copyright Act or Communications Act to account for ambiguities that have resulted from the Court's decision. Part V of this Note will attempt to articulate an argument in support of a carve-out in the Copyright Act to allow for third-party services to provide online access to local broadcast television. Before that, however, it is important to point out in this section the current legislative and executive action in this area. Additionally, Part IV.B will briefly discuss a case that arose out of the United Kingdom that touches on some of the same issues as in the *Aereo* litigation.

### *A. Current Legislation*

Before the Court issued its decision in *Aereo*, Senator John D. Rockefeller IV of West Virginia, Chairman of the Commerce Committee, introduced his Consumer Choice in Online Video Act on November 12, 2013.[144] The bill is a proposed amendment to the Communications Act[145] and specifically touches on antenna-rental services like Aereo.[146] The bill would allow for antenna-rental companies—without paying retransmission fees—to provide

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[144] *See* Joan E. Solsman, *Want to See Aereo Survive? This Senate Bill Does Too*, CNET (Nov. 12, 2013), http://news.cnet.com/8301-1023_3-57611962-93/want-to-see-aereo-survive-this-senate-bill-does-too/.

[145] *See* Consumer Choice in Online Video Act, S. 1680, 113th Congress (2013–2014).

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

subscribers online access to over-the-air broadcast television.[147] An important provision in the proposed legislation would also restrict the third-party transmission to the DMAs in which the over-the-air broadcast content was originally received, e.g., an antenna-rental service based in Boston could not allow a subscriber there to watch the San Diego local news on her iPhone because the Boston subscriber could not otherwise receive the San Diego content with a Radio Shack antenna.[148]

Senator Rockefeller's bill also deals with the even more contentious issues of "à la carte pricing of channels"[149] and "Net neutrality."[150] While it is unlikely that a deadlocked Congress could pass such broad-sweeping legislation in the coming years,[151] a smaller bill tailored to antenna-rental services should be proposed, as it would bring the appropriate policy balance back to copyright protection in the broadcast television industry.

### *B. Executive Action*

On the other side of the debate, however, commentators reviewing a leaked early working draft of the Trans-Pacific Partnership (TPP)[152] published on WikiLeaks highlighted a

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[147] S. 1680, *supra* note 145. *See also* Press Release, Senator Rockefeller, U.S. Senate Comm. on Commerce, Sci., and Transp., 113th Cong., Chairman Rockefeller's Consumer Choice in Online Video Act (outlining the Senator's proposed bill, but highlighted "a la carte" programming), *available at* http://publicknowledge.org/files/Online%20Video%20fact%20sheet.pdf; Hayley Tsukayama, *Rockefeller Announces Online Video Bill*, WASH. POST (Nov. 12, 2013), http://www.washingtonpost.com/business/technology/rockefeller-announces-online-video-bill/2013/11/12/9527a89c-4bb4-11e3-be6b-d3d28122e6d4 _story.html (outlining Senator Rockefeller's proposed bill).

[148] S. 1680, *supra* note 145.

[149] Senator John McCain also proposed legislation in early 2013 to "force cable operators to offer their channels piecemeal rather than in bundles." *See* Solsman, *supra* note 144; *see also* Tsukayama, *supra* note 147.

[150] *See* Solsman, *supra* note 144.

[151] Tsukayama, *supra* note 147. *See also* Tim Karr, *Defying Washington to Save the Internet*, SOSHITECH (Dec. 21, 2013), http://soshitech.com/tag/congress/ ("[M]any D.C. insiders think the bill has little chance of becoming law.").

[152] Press Release, White House Office of Press Sec'y, Trans-Pacific Partnership Leaders Statement (Oct. 8, 2013), http://www.whitehouse.gov/

proposal supported by President Obama that would ban unauthorized public Internet retransmissions of over-the-air broadcast television.[153] The proposal mirrors provisions in existing treaties such as the Free-Trade Agreement between the United States and Australia.[154] This proposal has the potential to escalate and pose major barriers to any attempts to amend existing legislation in favor of Aereo-like services. In their amici brief in support of the broadcasters, Major League Baseball and the National Football League specifically argued that the Second Circuit's reading of the Copyright Act in *Aereo II* "places the United States in violation of its international obligations; it also makes the United States an outlier in the world community in terms of failing to safeguard copyright owners' right to authorize Internet retransmissions of their broadcast programming."[155] While

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the-press-office/2013/10/08/trans-pacific-partnership-leaders-statement.

[153] Cyrus Farivar, *Secret treaty leaks, Mexico wans copyright extended even more than US does*, ARSTECHNICA (Nov. 13, 2013, 5:56 PM), http://arstechnica.com/tech-policy/2013/11/secret-treaty-leaks-mexico-wants-copyright-extended-even-more-than-us-does/ ("[N]o Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.").

[154] Registrar of Copyrights, U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act: Section 109 Report 188 (June 2008), *available at* http://www.copyright.gov/reports/section109-final-report.pdf.

> Specifically, the United States has ratified several free trade agreements which contain the obligation that 'neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal. . . .' This provision clearly prohibits a statutory license for the retransmission of any television signals on the Internet. An Internet statutory license would require renegotiating the relevant FTAs with other countries. Noting the highly contentious nature inherent in possible renegotiations, this is a reason in itself not to recommend expanding the licenses to cover Internet retransmissions.

*Id.* (quoting Australia FTA, U.S.-Austl., Article 17.4.10(b) (internal citations omitted).

[155] *See* Brief for Nat'l Football League and Major League Baseball as Amici Curiae Supporting Petitioners at 34, Am. Broad. Cos., Inc. v. Aereo, Inc.,

the proposed TPP agreement only prohibited "public broadcasts," the existing FTAs prohibit all transmissions of broadcast television over the Internet.[156]

### *C. Similar Issues Abroad*

Europe also addressed the legality of third-party services that provide customers access to local over-the-air broadcast television on Internet-enabled devices in *TV Broadcasting Ltd. & Ors v. TVCatchup Ltd.*, which arose out of the United Kingdom. The dispute involved TVCatchup, a British company that provides its subscribers access to over-the-air broadcast television on their wireless devices or computers.[157] UK-based broadcast companies IVT, Channel 4, and Channel 5 sued TVCatchup for copyright infringement.[158] The Court of Justice of the European Union held on a certified question from the United Kingdom's High Court that retransmitting over-the-air broadcast television via the Internet to individuals otherwise entitled to view the content on their televisions is nevertheless a public communication for purposes of intellectual property protections.[159]

There are several interesting differences between Aereo and TVCatchup that are worth exploring. First, TVCatchup does not

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134 S.Ct. 2498 (2014) (No. 13-461).

[156] While there is no express mention of a private/public distinction in the TPP's language, it might be argued that if a private retransmission were made over the Internet it would not implicate the Copyright Act and therefore would not conflict with the provisions of the treaty obligation. For example, SlingBox technology is technically over the Internet, but is a private performance. *See* Shekar Sathyanarayana, *Slingbox: Copyright, Fair Use, and Access to Television Programming Anywhere in the World*, 25 J. MARSHALL J. COMPUTER & INFO. L. 187, 200 (2007).

[157] *See* Case C-607/11, ITV Broadcasting Ltd & Ors v. TVCatchup Ltd, [2013] C.M.L.R. 1, paras. 35–36, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=134604&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=143508.

[158] Because of EU treaty agreements, The High Court of England referred the question to the Court of Justice before deciding the case under the United Kingdom's copyright provisions. *See id*. at para. 163.

[159] *See id.* at para. 9.

use miniature antennas like Aereo in order to provide private transmission.[160] TVCatchup is more technologically efficient in that way (and possibly less perturbing to copyright holders and jurists). Second, British regulations require residents to acquire and pay for a TV License in order to receive a broadcast signal.[161] Users of TVCatchup are required to enter their TV License identification information in order to subscribe to the service.[162] Like Aereo, TVCatchup argued that it was not providing the broadcast television to a "new public," but rather was only providing access to those already entitled to the content.[163] While TVCatchup does not provide unique transmissions (or copies) of the broadcast content, it does restrict its retransmissions to individuals entitled to those broadcasts. Unconvinced that this made a difference and refusing to acknowledge a no-new-public exception to liability, the Court of Justice held that such transmissions are nevertheless public and remanded the case back to England's High Court of Justice.[164]

England's High Court of Justice held that TVCatchup is still able to provide its service to paying subscribers, althoug h it must limit it.[165] Section 73 of the United Kingdom's Copyright, Designs, and Patents Act of 1988 allows for the retransmission of copyrighted work carried on "qualifying

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[160] *See id*. at paras. 9, 13; *see also*, *CJEU and U.S. Court Issue Contrasting Decisions On the Legality of Streaming Video/remote DVR Service,* TTLF NEWSLETTER ON TRANSATLANTIC ANTITRUST AND IPR DEVELOPMENTS (May 24, 2013), http://ttlfnews.wordpress.com/ 2013/05/24/ cjeu-and-u-s-court-issue-contrasting-decisions-on-the-legality-of-streaming-videoremote-dvr-services/ ("Like TVCatchup, Aereo offers its users access to broadcast television programs over the Internet . . . Differently from TVCatchup however, Aereo re-transmits these broadcasts through mini-antennas.").

[161] *See* TV LICENSING, http://www.tvlicensing.co.uk/check-if-you-need-one/?WT.ac=home_plt_check (last visited Oct. 10, 2014).

[162] *See* TVCATCHUP, http://tvcatchup.com/ (last visited Oct. 10, 2014).

[163] *See* Case C-607/11, ITV Broadcasting Ltd , 3 C.M.L.R. 1, para 37.

[164] *See id.* at para. 40.

[165] *See* ITV Broad. Ltd. v. TV Catchup Ltd., [2014] EWCA Civ. 1071, available at http://presscentre.itvstatic.com/presscentre/sites/presscentre/files/TVCatchup.pdf.

services."[166] Qualifying services include regional and national public broadcast channels, including some of those managed by the complaining broadcasters in the underlying lawsuit.[167] Many of the broadcast channels that TVCatchup had provided its customers were not qualifying services and were therefore impermissibly retransmitted.[168] While relatively narrow in its allowances, the decision reflects the United Kingdom's recognition of the importance of access, and the improvement of that access, to the content carried over public broadcast airwaves.[169] The United States should similarly recognize that it is in the public interest to increase viewership of broadcast television through the proliferation of services that enable more convenient and efficient viewing of broadcasters' copyrighted content.

### *D. Aereo's Public Interest Efforts*

During the lead-up to oral arguments, Aereo launched a website and campaign entitled Protect My Antenna.[170] On the website, Aereo provides visitors with information regarding the public's right to free over-the-air broadcast television.[171] Additionally, the website provides a platform to "speak out," including a prompt to enter your ZIP code which then automatically generates email, Twitter, and Facebook messages to

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[166] Copyright, Designs and Patents Act, 1988, c. 3, § 73 (U.K.) ("The copyright in the broadcast is not infringed . . . if and to the extent that the broadcast . . . forms part of a qualifying service.").

[167] *Id.* § 73(6).

[168] *See* Jamie Harris, TVCatchup Forced to Remove 21 ITV, Channel 4 and Channel 5 Live Streams, DIGITALSPY (Oct. 11, 2013, 2:06 PM EDT), http://www.digitalspy.com/tech/news/a523079/tvcatchup-forced-to-remove-21-itv-channel-4-and-channel-5-live-streams.html#%7EoSkaLeTM4vMZ5h ("TVCatchup has been ordered to remove 21 channels owned by ITV, Channel 4 and Channel 5 . . [these channels] flagship channels will remain on the website due to . . the Copyright Designs and Patents Act, which allows certain qualifying services to be retransmitted – although the three channels [cannot] be streamed on mobile devices.").

[169] Copyright, Designs and Patents Act, 1988, c. 3, § 73 (U.K.).

[170] PROTECT MY ANTENNA: AEREO, *supra* note 106.

[171] *See id.*

any or all of the visitor's Congressional representatives.[172] The website also provides its visitors with a video explaining Aereo's technology and services along with access to the most relevant court documents, including the court opinions, Aereo's briefs and its amicus briefs.

It is clear that Aereo attempted to evolve from an online, for-profit service into a cause. Aereo's use of clever technology to attempt to exploit a perceived loophole in the Copyright Act failed before the Court. However, the lasting impression of the convenience and popularity of its service and its exploitation of the strictures of the Copyright Act in the area of broadcast television might not fail in front of Congress.

It is unlikely that Congress will adopt Aereo's legal argument that a service that provides multiple, but individual, members of the public access to a unique transmission (or performances) of copyrighted work is not liable for violating a copyright holder's exclusive right to publicly perform that work. However, it is possible that Congress will recognize the public desire for better access to broadcast television. While current executive actions such as the proposed TPP treaty indicate significant barriers to legislation, Congress may nevertheless decide to allow for an exception for the Internet transmission of broadcast television so long as its availability is restricted only to those individuals who are otherwise entitled to view it for free.

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[172] *See id.* For email, the message is:

> The Supreme Court got it wrong. On June 25, 2014 the United States Supreme Court issued a decision that could deny me the right to use the antenna of my choice to access live over-the-air broadcast television. This is a massive setback for all consumers. The spectrum that the broadcasters use to transmit over-the-air programming belongs to the American public and I should have a right to access that programming whether my antenna sits on the roof of my home, on top of my television or in the cloud. Please take action to ensure that my right to use the antenna of my choice is protected.

*Id*. For twitter and Facebook the message is: "#SCOTUS got it wrong. I should have the right to use a cloud-based antenna to watch TV live. Pls take action #ProtectMyAntenna." *Id.*

## V. PROPOSAL FOR A BROADCAST TELEVISION EXCEPTION IN THE COMMUNICATIONS ACT

This Note proposes a Congressional carve-out for Aereo-like antenna-rental services to provide free over-the-air broadcast television to paying subscribers. Specifically, the proposed carve-out could amend either the Copyright Act or the Communications Act. Such a carve-out would allow a third-party exempt from retransmission fees to provide a service through which its customers are able to view the over-the-air broadcast television that they are otherwise entitled to view for free. For example, New York City residents would be able to view New York City regional broadcast programming with an antenna and a television set but would be unable to view Los Angeles broadcast television with the same equipment. Such a service would be viewed merely as a technological improvement that facilitates the availability of broadcast television to the public—as opposed to buying an antenna, a digital receiver and a television set, a consumer could choose to simply pay a fee to a third-party service in order to view broadcast content. Some of the public policy, legal and economic justifications for such a carve-out will be outlined below.

### *A. Public Policy Advantages*

From a public policy point of view, such a carve-out would underscore the de facto license that the public has to view free over-the-air broadcast television.[173] Broadcast companies are trustees of the limited public broadcast spectrum over which they transmit their signals.[174] Broadcasters have been "granted the free and exclusive use" of the spectrum, which is "a limited and

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[173] This Note uses the term "de facto" in an attempt to describe the existing agreement between Congress and the broadcasters; this agreement protects the public's interest in free over-the-air broadcast television. Allowing the public to have more of a voice in actively engaging with the accessibility of that content would underscore that de facto license.

[174] *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 99 (1973) ("The regulatory scheme evolved slowly, but very early the [broadcast] licensee's role developed in terms of a 'public trustee' charged with the duty of fairly and impartially informing the public audience.").

valuable part of the public domain."[175] Congress has imposed a duty on the broadcast companies to provide the public not only with free content, but also with content that is beneficial to the public interest.[176] A carve-out that increases the public's access to the spectrum would serve to strengthen Congress's protection of it.

Additionally, the Federal Communications Commission (FCC) and broadcasters share a responsibility to promote reliable and beneficial broadcasting. For example, the FCC states that in order to promote the "free flow of information and the importance of information in our democracy,"[177] the FCC is required by the Communications Act and the First Amendment to abstain from telling broadcast stations what to broadcast.[178] However, the FCC's 1960 Programming Policy Statement[179] outlines fourteen "major elements usually necessary to the public interest."[180] And, despite major deregulation over the last fifty years regarding the types of programming that networks are required to broadcast, the FCC has nevertheless maintained rules regarding children's educational programming, local news and public affairs, and candidate access, among others.[181] These requirements thus underscore the duty owed by broadcast companies to the public. Accordingly, a carve-out that requires broadcast companies to allow their signals to be retransmitted by third parties without remuneration would be a natural extension of existing agreement between the government, the broadcast companies and the public.

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[175] Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.).

[176] *See Columbia Broad.*, 412 U.S. at 94.

[177] THE MEDIA BUREAU, FED. COMMC'NS COMM'N, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 13 (2008), *available at* http://www.fcc.gov/guides/public-and-broadcasting-july-2008#JOURNALISM (last visited Oct. 10, 2014).

[178] *See Columbia Broad.*, 412 U.S. at 94.

[179] FED. COMMC'NS COMM'N, REPORT AND STATEMENT OF POLICY RES: COMM'N EN BANC PROGRAMMING INQUIRY 44 F.C.C. 2303 (1960).

[180] *Id.* at 2314.

[181] *See Columbia Broad.*, 412 U.S. at 94.

### *B. Economic Advantages*

There are also strong economic rationales that should motivate Congress to allow Aereo-like services to carry broadcast programming for free to the public. A legislative scheme enabling development in this area would incentivize companies to provide ever more efficient and economical means for the public to enjoy broadcast programming. An open marketplace of innovation among third-party services would ultimately determine the optimal cost and most efficient technology for providing broadcast television over the Internet to paying customers.

Additionally, the broadcast companies have economic incentives to allow third-party services to carry their signals. Broadcast television is valuable in two contexts. First, it is highly valuable by virtue of the retransmission fees that broadcasters can charge cable and satellite companies that bundle their content with other channels.[182] This value is falling, however, as a result of the ever-increasing cost of cable subscriptions and the concomitant ever-increasing number of "cord cutters" who leave cable for alternative content-delivery systems.[183] These alternatives—such as Hulu, Amazon Prime, and Netflix—fall outside of "live" television.[184] Accordingly, live broadcast television only retains this value if the cable companies from which it extracts retransmission fees continue to pay.[185] Moreover, cable companies will only pay as long as they are able to maintain a number of subscribers that make the retransmission fees that broadcast

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[182] Derek Thompson, *The End of TV and the Death of the Cable Bundle*, THE ATLANTIC (July 12, 2012, 1:54 PM), http://www.theatlantic.com/business/archive/2012/07/the-end-of-tv-and-the-death-of-the-cable-bundle/259753/.

[183] *See, e.g.*, Janko Roettgers, *Cord Cutters Alert: 60 Million Americans Now Use an Antenna to Watch Free TV*, GIGAOM (June 12, 2013, 2:14 PM), http://gigaom.com/2013/06/21/ota-60-million-antenna-users-cord-cutting/.

[184] *See id.*

[185] *See* Bill Carter, *After a Fee Dispute With Time Warner Cable, CBS Goes Dark for Three Million Viewers*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/03/business/media/time-warner-cable-removes-cbs-in-3-big-markets.html.

companies demand sustainable.[186] As more and more viewers cut the cord, the value of live broadcast programming is falling and the cable companies' incentive to continue to pay retransmission fees also falls. Broadcast companies therefore have an incentive to increase access to their live programming on platforms other than cable television. Aereo-like services provide that very platform.

Second, broadcast television is also highly valuable when it is provided for free over the air. During the years following the economic downturn in 2008, throngs of households cut cable and returned to antenna television in addition to subscribing to other less expensive content-delivery services such as Netflix or Hulu.[187] The potential increase in availability and convenience provided by services like Aereo would likely increase viewers of broadcast television to those individuals or households without television sets. The copyright holders do not otherwise benefit from these viewers. Additionally, advertising revenue increased from 2012 to 2013 on broadcast television, which also increases the value of the underlying content.[188] Improved availability of broadcast television would also likely increase advertising revenue, which in turn increases the underlying value of the broadcast content.

Moreover, from 2010 to 2013, researchers gauged a 38% increase in the number of households that left cable for an antenna.[189] Television viewers relying on antennas now account for nearly 20% of total viewers, or 60 million people.[190] This study also found that minorities make up to 41% of antenna households, and that 28% of all households with a head of the household under age thirty-five employ only an antenna.[191] These statistics show

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[186] *See id.*

[187] Brad Tuttle, *Gotta Have Cable: Has the Cord-Cutting Trend Slowed Down?*, TIME (Nov. 1, 2011), http://business.time.com/2011/11/01/gotta-have-cable-has-the-cord-cutting-trend-slowed-down/.

[188] *See Ad Spending Q4 2012 vs. Q4 2013 Television*, TVB LOCAL MEDIA MARKETING SOLUTIONS**,** http://www.tvb.org/trends/4705 (last visited Oct. 10, 2014).

[189] *See* David Tice, *Confessions of a Cord Cutter Skeptic Revisited*, GFK BLOG (June 17, 2013), http://blog.gfk.com/2013/06/confessions-of-a-cord-cutter-skeptic-revisited/.

[190] *Id.*

[191] *Id.*

that the denial of alternative affordable means to view broadcast television has the potential to adversely impact minorities, young adults, and students. It also shows that platforms that improve the convenience with which all members of the public can view free over-the-air broadcast television will likely increase the number of individuals among these groups that leave cable for alternative services.

A recurring response to the public policy and economic arguments in support of Aereo-like services is that these services charge a fee for something the public is already entitled to view for free.[192] However, Aereo highlighted in its brief that numerous Copyright Act amendments underscore the importance of the accessibility of over-the-air broadcast programming. And, Aereo's service, despite its fee, actually increased that access.[193] Moreover, as evidenced by the relative success and general support of Aereo,

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[192] *See*, Ryan Lawler, *Barry Diller Says Aereo Isn't About Charging For Something That's Free, But About Moving TV to IP*, TECHCRUNCH.COM (May 29, 2013), http://techcrunch.com/2013/05/29/barry-diller-says-aereo-isnt-about-charging-for-something-thats-free-but-about-moving-tv-to-ip/ (Barry Diller, an investor in Aereo, presenting and refuting arguments against his company.).

[193] Aereo, in its Respondent's Brief before the Supreme Court, points out several amendments to the Copyright Act that preserved the basic balance of interests between the public's access to free over-the-air copyrighted content and broadcasters' use of the spectrum. Brief for Respondent-Appellee at 6, Am. Broad. Cos., Inc. v. Aereo, 134 S.Ct. 2498 (2014) (No. 13-461). Aereo's argument was as follows:

> In 1995, when Congress created a digital performance right in sound recordings, it exempted retransmissions of broadcast radio within 150 miles of the original broadcast, *see id*. § 114(d)(1)(B)(i)-(ii), 'to permit retransmitters . . . to offer retransmissions to their local subscribers of all radio stations that the retransmitter [can] pick up using an over-the-air antenna.' S. Rep. No. 104-128, at 20 (1995). And, in 1999, Congress enacted 17 U.S.C. § 122, which allows satellite systems to retransmit a broadcaster's signals in-market without paying copyright royalties. Satellite carriers should not pay to retransmit such content, Congress concluded, "because the works have already been licensed and paid for with respect to viewers in those local markets.' H.R. Conf. Rep. No. 106-464, at 92-93 (1999).

*Id.* (some internal quotation marks and citations omitted).

the public seemed willing to embrace its model.[194] Accordingly, an Aereo-like service is likely not only to ensure that broadcast television will both remain a viable and popular platform on which copyright owners will distribute their content, but it will potentially help broadcasters increase their audience as well.[195]

Another economic justification for a congressional carve-out in favor of Aereo-like antenna rental services is that the broadcast companies would be able to capture much of the revenue generated by such services. In the event that Congress solidifies the Court's holding in *Aereo* by explicitly prohibiting antenna-rental, the copyright holders and broadcast companies would not benefit from any of this potential growth in viewers and advertising dollars that these services might create.[196]

To counter this potential lost opportunity, the broadcast companies assert that they are in the process of developing their own service that would allow users to view over-the-air broadcasts on smartphones and other popular devices.[197] It is true that such a service would, like Aereo did, increase viewership of broadcast programming.[198] However, also like Aereo, the broadcasters' *own*

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[194] *See, e.g.*, Jolie Lee, *Would you pay for network TV online?*, USA TODAY (Nov. 1, 2013, 4:35 PM), http://www.usatoday.com/story/tech/personal/2013/11/01/aereo-web-tv/3324599/.

[195] As of November 2013, traditional cable subscriptions and cable TV ratings were at a historic low. Jim Edwards, *TV Is Dying, And Here Are The Stats That Prove It,* BUSINESS INSIDER (Nov. 24, 2013, 10:11 AM), http://www.businessinsider.com/cord-cutters-and-the-death-of-tv-2013-11. Almost 5 million cable TV subscribers have left their providers in the last five years, and for the first time ever, the number of cable TV subscribers in the United States for major cable providers is projected to fall below 40 million. *Id.*

[196] Broadcast companies can charge more and advertisers will pay more if more viewers are tuned in. Nielsen Ratings now counts web-linked television, ensuring that those viewers are accounted for in advertisement rate negotiations. *See* Brian Stelter, *Nielsen Adjusts Its Ratings to Add Web-Linked TVs*, N.Y. TIMES BLOG (Feb. 21, 2013, 2:24 PM), http://mediadecoder.blogs.nytimes.com/2013/02/21/tvs-connected-to-the-internet-to-be-counted-by-nielsen/.

[197] Brief for Appellants, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461).

[198] Jeff Bercovici, *Holy Cow: Two of the Big Four TV Networks Are Considering Going Off the Air*, FORBES (Apr. 8, 2013, 1:54 PM), http://www.forbes.com/sites/jeffbercovici/2013/04/08/holy-cow-two-of-the-big-

content-delivery services would detrimentally influence their *own* retransmission fee negotiations with the cable companies.[199] In other words, the broadcast companies themselves would be responsible for pulling customers from the cable and satellite companies with which they must continuously renegotiate retransmission fees. The broadcast companies might gain revenue through increased viewership on their own Internet-based platforms, but they would lower the value of their retransmission fees to cable and satellite companies. This would likely result in higher costs for all parties involved as the broadcast companies would compensate for their lost revenue by either increasing retransmission fees to cable companies or by using (and potentially charging for) their own Internet-streaming sites. In either case, the increased costs would likely be passed on to the consumer.[200]

### *C. Repercussions on Consumers*

There are also many potential repercussions to consumers that

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four-tv-networks-are-considering-going-off-the-air/.

[199] If Time Warner Cable created its own Aereo-like system, two scenarios might play out. First, the broadcasters would leave their content on free over-the-air broadcast television but would feel the effect of a decrease in viewers. Accordingly, they would charge more to the cable companies in retransmission fees. Second, the broadcast companies could remove their content from their free over-the-air channels and create new cable channels. If the cable companies wanted to carry these channels (as they would not be available for free), they would have to pay the higher retransmission fees associated with the premium content.

[200] Broadcast companies would nevertheless continue to charge as much as possible in retransmission fees. *See, e.g.*, Dorothy Pomerantz, *CBS Is Kicking Cable's Butt*, Forbes (Nov. 6, 2013), http://www.forbes.com/sites/dorothypomerantz/2013/11/06/cbs-is-kicking-cables-butt/. Because of the cable companies decreased margins, the cost would be passed on to the consumer. *See, e.g.*, Darrel Pae John, *Toward a Fairer, Subscriber-Empowered Multichannel Television Regime: Injecting Substance into the Good-Faith Requirement on Retransmission Consent Negotiations*, 66 FED. COMN. L.J. 141, 163 (2013). And, the broadcast companies might decide to charge a fee for the ability to view over-the-air content on wireless enabled devices in order to compensate for lost revenue from cable companies. Given viewing trends, this would turn a formerly free system into one that a consumer has no choice but to pay for.

stem from denying third-party Aereo-like services from providing alternate access to local broadcast television for a nominal fee. For example, contrast the consumers' vulnerability and their lack of any real bargaining power with the power of the broadcast companies and the cable and satellite companies that carry their signals. Cable and satellite providers do not have the right to retransmit broadcast content without a license.[201] However, Congress kick-starts the negotiations between the parties by granting mandatory retransmission consent to cable and satellite companies.[202] Accordingly, the two parties are placed into a position to negotiate.[203] The motivating factor in these negotiations is to increase the number of viewers, as this in turn would mean higher retransmission fees for the broadcasters and higher revenues from subscription fees for the cable companies.[204] These negotiations take into account the ultimate cost of both parties' businesses, the underlying quality of the content at issue and, increasingly, the offering of enhanced services (such as video-on-demand, DVR capabilities, and the ability to view content on Internet-enabled devices) that maximize advertising dollars and the viewer's experience.[205] If a dispute arises as to the extent of permissions in a retransmission agreement, the two parties are in the position to *re*-negotiate the license.[206] Stated another way, there is no de facto or de jure ban on negotiations between the two parties. Our regulatory scheme requires them, technological

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[201] *See Cable Carriage of Broadcast Stations*, Federal Commc'ns Comm'n, http://www.fcc.gov/guides/cable-carriage-broadcast-stations (last visited Oct. 10, 2014).

[202] *See Retransmission Consent*, Federal Commc'ns Comm'n, http://www.fcc.gov/encyclopedia/retransmission-consent (last visited Oct. 10, 2014).

[203] Judge Chin highlighted this reality when distinguishing Cablevision's RS-DVR service with that of Aereo's unauthorized use of over-the-air broadcast signal for its service. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting).

[204] Paul Bond, *21st Century Fox COO Chase Carey Explains the Logic Behind Retransmission Negotiations*, THE HOLLYWOOD REPORTER (Nov. 14, 2013, 2:08 PM), http://www.hollywoodreporter.com/news/21st-century-fox-coo-chase-656145.

[205] *Id.*

[206] *Id.*

changes incite them, and marketplace demands fuel them. Consumers, however, possess no such bargaining power. And, if Congress were to proscribe an Aereo-like service, it would sever a potentially productive link between the consumers and the broadcast and cable companies.[207]

It is also important to note that in the event that Congress provides for a carve-out in an amended Copyright Act for services that facilitate over-the-air broadcasts, NewsCorp (which owns the FOX network), CBS, the NFL, and MLB have threatened to move their content from free over-the-air broadcast channels over to cable.[208] Of course, it is likely that if one broadcast company made such a move, the others would follow suit. However, broadcast companies generate a substantial portion of their profits from advertising dollars.[209] The twenty percent of American television viewers who exclusively use an antenna would no longer contribute to the viewership that makes advertising valuable.[210]

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[207] Brian Stetler, *Aereo as Bargaining Chip in Broadcast Fees* Battle, N.Y. TIMES (July 21, 2013), http://www.nytimes.com/2013/07/22/business/media/with-prospect-of-cbs-blackout-time-warner-cable-to-suggest-aereo-as-alternative.html?_r=0.

[208] Sam Gustin, *NFL, MLB Warn of the End of Free Sports on Television*, TIME (Nov. 18, 2013), http://business.time.com/2013/11/18/nfl-nba-warn-of-the-end-of-free-sports-on-television/; Ryan Lawler, *News Corp COO Threatens to Pull Fox Broadcast Signal If Aereo Prevails in Legal Battle*, TECHCRUNCH (Apr. 8, 2013), http://techcrunch.com/2013/04/08/news-corp-coo-threatens-to-pull-fox-broadcast-signal-if-aereo-prevails-in-legal-battle/; *CBS May Go Online, Cut Off Its Broadcast Signal If Aereo Prevails – CEO*, REUTERS (Mar. 11, 2014), http://www.foxbusiness.com/industries/2014/03/11/cbs-may-go-online-cut-off-its-broadcast-signal-if-aereo-prevails-ceo/.

[209] 88% of a cable companies' revenue comes from advertising according to the Brief of the National Association of Broadcasters, et. al. *See* Brief of the Nat'l Ass'n of Broadcasters et al. as Amici Curiae in Support of Petitioners and Reversal at 20, 134 S.Ct. 2498 (2014) (No. 13–461), (citing The Video Competition Report, 28 FCC Rcd. at 10,583); 14th Video Competition Report, 27 FCC Rcd. at 8695, ¶ 190; *see also* SNL Kagan, Radio/TV Station Revenue Projections: 2011-2021, Aug. 28, 2012 (stating that broadcaster revenue in 2011 relied heavily on advertising sales).

[210] The broadcast companies would no longer be able to reach these viewers and therefore the rates they could demand for advertising would diminish. *See* Roettgers, *supra* note 188.

Furthermore, cable companies would have to pay a proportional fee to carry this added formerly-broadcast-now-cable content.[211] Cable companies are already receiving the broadcast channels for lower retransmission fees than cable channels.[212] If the broadcast companies repackaged their highest-rated broadcast content into cable channels, the fees the broadcast companies charge the cable companies would no doubt increase.[213] Again, this cost would be passed on to the consumer if the consumer decided to subscribe to cable.[214] If not, the broadcasters would lose out on retransmission fees, advertising dollars, and good will.

Additionally, if Congress does not allow for a broadcast television carve-out, the rising costs would continue to be passed on to the consumer. Currently, if an individual moves into a new apartment and does not have a television set, but wishes to watch the Super Bowl, the American Idol finale or even the nightly news *live*, she has to purchase a new television that includes a digital receiver ($100) and an antenna ($20).[215] This is a cost of $120 to

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[211] In the event that Congress amends the Copyright Act to provide for the potential for a service such as Aereo, the tension between the cable and satellite companies would surely increase. The cable and satellite providers have already challenged the ever-increasing retransmission fees. Notably, in the summer of 2013, a dispute between CBS and Time Warner Cable resulted in a service blackout in the New York metropolitan area. *See* Carter, *supra* note 185. As cable companies continue to balk at the retransmission fees that they are required to pay in order to carry broadcast content, the content providers themselves must weigh the potential that their service will not be carried by the cable companies, or that the viewing public paying higher and higher cable bills will associate those rising costs with the broadcasters, and not the often demonized cable companies.

[212] Bond, *supra* note 204.

[213] Alex Sherman, *Why an ESPN Blackout on Dish Could Make Sense*, BLOOMBERG (Sep. 9, 2013, 8:27 PM), http://go.bloomberg.com/tech-deals/2013-09-09-why-an-espn-blackout-on-dish-could-make-sense/.

[214] For example, if FOX took its highest-rated show off its free over-the-air broadcast channel and placed them on a dedicated cable channel, it could demand an even higher rate from the cable companies than it currently does for its free channel. Like most increases in cost, it would be passed on to the consumer.

[215] Or, a used television ($50 for the television, $50 for the digital receiver, so $100 all the same). These prices are based on Amazon.com searches. *See, e.g.*, AMAZON.COM, http://www.amazon.com/ (last visited Oct. 10, 2014).

watch television in a fixed location with an antenna that dwarfs her nineteen-inch screen. Now, if our new apartment dweller has some money to spare and she wishes to watch live television on a wireless device (for the sake of the example, she moved in owning a smart phone and a laptop), then she must also purchase a SlingBox ($90) to transmit the "free" over-the-air broadcast content from her television set to her wireless device.[216] This brings the total cost to a minimum of $210. In other words, over the course of a year, it would cost $10 per month for old-fashioned viewing and $17.50 per month for wireless viewing. Alternatively, Aereo cost $8 per month ($96 per year). Over a lifetime, the cost of the traditional set up is less than it would have been to maintain an account with Aereo.[217] However, it is clear that based on current viewing trends, access to live broadcast television on wireless and mobile devices would benefit the copyright holders and broadcast networks through increased advertising dollars.

## VI. *AEREO'S* IMPLICATIONS FOR CLOUD COMPUTING

The Court's decision in *Aereo* generated considerable confusion and consternation among those concerned with cloud computing. Namely, the two primary concerns of those interested in cloud computing mirror the major legal arguments at issue before the Court. Tailored to the cloud computing context, those questions are: (1) whether a transmission from the computer network to the individual user constitutes a performance "to the public" under the Transmit Clause when the transmission is accessible only by the individual user who initiated it; and (2) whether the application of the Transmit Clause "turns on whether it is the transmission of a separate user-specific copy of the work or of one master copy of the work."[218] Accordingly, the cloud computing industry is premised on a technological efficiency directly implicated by the questions posed and only partially

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[216] *See* SLING, http://support.slingbox.com/get/KB-2000571 (last visited Oct. 10, 2014).

[217] For example, after two years the cost of subscribing to Aereo at its current rate would exceed the cost of the traditional set up.

[218] BSA Brief *supra* note 28, at 4.

answered by the Court's opinion in *Aereo*.

As such, a cloud computing system might be subjected to liability under the Copyright Act merely through its basic operation. This is evident from the scenarios cited by Professors Nimmer and Menell in their amici brief and by the modern-day Maxwell's Video Showcase illustrated in this Note. While a full discussion of Copyright Act jurisprudence and its implications on cloud computing is beyond the scope of this Note, this section will briefly discuss the arguments made before the Court and how its decision has the potential to affect the cloud computing industry in the near future.

The United States argued to the Court in its amici in support of the broadcast company-petitioners by distinguishing the cloud computing industry from Aereo's service on the basis, again, that Aereo appeared to function like a cable company and therefore its technology should be treated as one under the law. Accordingly, the United States asserted that the "legitimate" cloud computing industry would not be harmed by a reversal of the Second Circuit's opinion.[219] In doing so, the United States' brief purported that "one function of [legitimate cloud computing] services is to offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired."[220] Indeed, the United States claimed that cloud computing is unlike Aereo's service, which "provides a means by which consumers can gain access to copyrighted content *in the first instance*—the same service that cable companies have traditionally provided."[221] As discussed above, the contention that Aereo provided consumers anything beyond "more numerous and convenient means of playing back copies that [they] have already lawfully acquired" is unavailing.[222]

Despite its direct engagement with cloud computing, the United States explicitly attempted to avoid fueling confusion among those concerned with the emergence of novel technologies

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[219] Brief for the United States as Amicus Curiae Supporting Petitioners at 15, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014) (No. 13-461).

[220] *Id.* at 14.

[221] *Id.* at 31.

[222] *Id.*

like cloud computing. Significantly, the Solicitor General argued, by quoting the Court's decision in *Sony Corp. of America v. Universal City Studios*, *Inc.* ("*Betamax*"),[223] that "questions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,' should await a case in which they are squarely presented."[224] The citation to *Betamax* is significant as the United States attempted to distinguish cloud-based storage services as a device or service, like the VCR at issue in *Betamax*, that offers consumers "more numerous and convenient means of playing back copies that the consumers have already *lawfully* acquired."[225]

Just as the Betamax or the VCR allowed an individual in his or her home to record and play back at a later time a program that he or she was already lawfully entitled to view, a cloud-based service would allow an individual to play back anytime or anywhere a certain song or video that he or she has already lawfully acquired. The *Betamax* case ultimately relied on the doctrine of fair use as a defense to copyright liability.[226] Justice Breyer reminds his readers that the same doctrine is equally applicable in cases like *Aereo* in order to "prevent inappropriate or inequitable applications of the [Transmit] Clause" in the cloud computing realm.[227]

On the other hand, BSA, The Software Alliance argued in its amicus brief that the cloud computing industry would be hindered if either of the two prongs mentioned above created liability for the cloud computing service. That is, "[i]f transmissions of the same work could be aggregated to impose copyright liability, providers would have to hobble their systems in ways neither consumers nor businesses would expect, want, or understand—or risk copyright liability."[228] BSA also argued that "a holding that separate user-specific copies are required would impose very significant and

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[223] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[224] *See Aereo III,* 134 S.Ct. at 2511 (citing Sony Corp. of Am. v. Universal Studios, 464 U.S. 417, 431 (2012)).

[225] *Id.*

[226] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432–33 (1984).

[227] *Aereo III*, 134 S.Ct. at 2511.

[228] BSA Brief, *supra* note 28 at 3–4.

unnecessary cost burdens on cloud computing providers and render these services much less efficient."[229]

Despite these arguments, the Court left open the question of what exactly distinguished Aereo from other cloud-based services. The Court seemed to hold that because Aereo looks like a cable company and cable companies are required to pay retransmission fees to broadcast companies, its services must be illegitimate.[230] Justice Scalia characterizes this as a "results-driven"[231] rule and one that leaves open the question of what other services might be considered illegitimate. So, is the Copyright Act implicated and a service deemed illegitimate only when that service looks like a cable company? What about a radio station, or an (e-)bookstore or any number potential content delivery systems? Commentators have queried what exculpates cloud computing from the Court's decision in *Aereo* other than the fact that it does not deal with broadcast television or resemble a cable company.[232] Cloud computing is on unsteady ground if a cloud-based service's liability would be determined through the dichotomy of whether it either provides its customers with "more numerous and convenient means" of doing something they are otherwise entitled to do or if it looks like a cable company.

Lastly, the questions posed by Justice Scalia in his dissent will likely haunt those engaged in cloud computing. Can a cloud computing service be held secondarily liable if its system provides numerous individual members of the public access to the same file if some of those individuals are not otherwise lawfully entitled to access to that file? It would seem that, based on the Court's opinion, access to that file would be a public performance. It also appears likely that a case will soon arise that poses that very question. However, as Justice Scalia concludes, the Copyright Act may very well not be equipped to adequately answer that question. He quotes the Court's opinion in *Betamax*: "It may well be that Congress will take a fresh look at this new technology, just as it so

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[229] *Id.* at 4.

[230] *Aereo III*, 134 S.Ct. at 2514.

[231] *See id.*

[232] *See, e.g.*, Alex Barinka and Caitlin McCabe, BLOOMBERG (June 26, 2014), http://www.bloomberg.com/news/2014-06-26/aereo-ruling-sidesteps-cloud-computing-copyright-question.html.

often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written."[233]

Despite the fact that many companies' services may be based in the cloud, they nevertheless require sound legal footing to develop their businesses. The Court should have held that Aereo, while likely liable under a secondary infringement standard, did not publicly perform the broadcasters' copyrighted content.

## VII. CONCLUSION

The Supreme Court's decision in *Aereo* did not, and could not, answer all of the questions posed by Aereo's technology and the response from the broadcast television industry. Accordingly, Congress must act in accordance with its mandate to balance the interests of the copyright holders with those of the public. Currently, there are robust protections of copyright-holders' interests in their creative works and those protections are essential. The issues discussed in this Note would be for naught without the efforts of the individuals and corporations creating and protecting copyrighted work. However, the challenges that Aereo posed to both the Copyright Act and the Communications Act presents an opportunity for Congress to recalibrate the law so that it further serves both the consumer and the creator fairly.

Again, the Copyright Clause of the United States Constitution states: "To Promote the Progress of Sciences and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[234] The promotion of the progress of sciences and useful arts will increase with a legislative and regulatory scheme that motivates companies like Aereo to provide access to broadcast content. Such access does not harm but promotes the copyright holders' interests. Aereo's technology was innovative in its ability to escape liability for as long as it did and to generate as much interest in an alternative scheme for viewing broadcast television while it fought for its life. But, Aereo's efforts, and those of other emerging

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[233] *Aereo III*, 134 S.Ct. at 2514 (Scalia, J., dissenting); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

[234] U.S. CONST. art. I, § 8, cl. 8.

technology companies, would be better spent continuing to improve access, increase efficiency, and reduce costs to consumers by affecting change to the industry. Congress should recognize this and amend the legislation accordingly.