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**BEYOND THE CLOUD: WHY THE NARROW DECISION IN  
*AMERICAN BROADCASTING COS. V. AEREO, INC.* MAY HAVE  
BROADER IMPLICATIONS FOR CLOUD-COMPUTING**

*Robyn L. Rothman*\*

**I. INTRODUCTION**

The Supreme Court's decision in *American Broadcasting Cos. V. Aereo Inc. (Aereo)*<sup>1</sup> invites meaningful discussion about how legal provisions in the Copyright Act of 1976 should be applied to new and emerging technologies. In particular, Internet based storage, commonly known as "Cloud Services," now runs the risk of copyright infringement based upon the decision in *Aereo*.

At the time of the decision, the Court cautioned that its holding should be construed narrowly to the facts of the case. However, because the Court decided against employing an analysis of the technology, the decision reached by the Court created negative implications for new emerging companies that employ similar systems.<sup>2</sup> Thus, this holding could have potentially profound effects on both

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<sup>1</sup> 134 S. Ct. 2498 (2014).

<sup>2</sup> *Id.* at 2511.

current and emerging cloud-based technologies, as Aereo's system was designed to create user specific private performances.<sup>3</sup>

Part I will discuss the history of the current Copyright Act and its evolutionary application to modern advances in television and broadcasting technology. It will also focus on the complexity and ambiguity of language within the Transmit Clause of the Copyright Act of 1976,<sup>4</sup> examine how said language has caused varying interpretations of the document, and determine how those varying interpretations have led to legal complications within the growing tech-industry. Part II will describe the specific operation of Aereo's system and the function of "the Cloud," while also examining the history and evolution of the Public Performance right leading to the creation of the Transmit Clause. Part III will investigate the litigation Aereo faced, as it was alleged that Aereo had infringed upon the Network Broadcaster's exclusive right to publicly perform their copyrighted works, while also describing Aereo's use of the Cloud and how Cloud technology works.

Parts IV and V of this paper will outline the *Aereo* litigation from the Southern District of New York through the Supreme Court. Finally, Part VI will argue in-depth how the *Aereo* decision will potentially impact current and emerging cloud-based technologies and examine exactly why the prevailing application of the Transmit Clause, as was done in *Aereo*, will both enormously alter modern technology, and possibly stifle America's technological innovation in the future.

## II. THE PUBLIC PERFORMANCE RIGHT AND THE TRANSMIT CLAUSE

It has been a longstanding principle that artists, scientists, and innovators should be afforded adequate protections of their works without hindering advancement and progress in their respective fields.<sup>5</sup> Federal copyright law was born from the belief that Congress has the ability to promote the progress of the arts and sciences while simultaneously affording adequate protections to authors, artists, and

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<sup>3</sup> Mark P. McKenna, *The Limits of the Supreme Court's Technological Analogies*, SLATE (June 26, 2014, 12:07 PM), [http://www.slate.com/articles/technology/future\\_tense/2014/06/abc\\_v\\_aereo\\_ruling\\_the\\_supreme\\_court\\_s\\_terrible\\_technological\\_analogies.single.html](http://www.slate.com/articles/technology/future_tense/2014/06/abc_v_aereo_ruling_the_supreme_court_s_terrible_technological_analogies.single.html).

<sup>4</sup> 17 U.S.C. § 101 (2010).

<sup>5</sup> *A Brief Introduction and History*, UNITED STATES COPYRIGHT OFFICE, <http://copyright.gov/circs/circ1a.html> (last visited Mar. 16, 2016).

inventors.<sup>6</sup> When the Continental Congress included this principle in Article I, Section 8, Clause 8 of the Constitution, several states had already enacted copyright statutes.<sup>7</sup> Shortly after the ratification of the Constitution in 1790, the original version of the Copyright Act was passed in the second session of the first Congress.<sup>8</sup> This most primitive version of the 1790 Copyright Act allowed for the right of reproduction and distribution of only “maps, charts, and books,” but has since been amended several times over 180 years to include a more comprehensive listing of rights for other forms of artistic and scientific works.<sup>9</sup>

For the purposes of this paper, the most significant modification to the 1790 Copyright Act was in 1856, when the right of “public performance” of dramatic works was amended into the statute.<sup>10</sup> This particular 1856 amendment granted the copyright holder of a dramatic work the “sole right to . . . act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place . . . .”<sup>11</sup> This change gave the copyright holder the ultimate control over the work in all aspects, if the public were to see, view, or hear the copyrighted work, it was at the sole discretion of the copyright holder.

Another important alteration to the document came in 1897, when the Act was amended to include punishment for an unlawful public performance of a dramatic or musical composition in the form of monetary damages or imprisonment.<sup>12</sup> If the public performance of the work was “willful and for profit,” the person found in violation would receive the latter form of punishment.<sup>13</sup>

The Act was again revised in early 1909 to list the four exclusive rights copyright owners held in Section 1.<sup>14</sup> Thus, the 1909 Copyright Act became the first to distinguish between dramatic works and musical works under the public performance right.<sup>15</sup>

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<sup>6</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>7</sup> Benjamin W. Rudd, *Notable Dates in American Copyright 1783-1969*, 28 Q.J. LIBR. CONGRESS 137, 138 (1971), <http://www.copyright.gov/history/dates.pdf>.

<sup>8</sup> *Id.* at 138.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 139.

<sup>11</sup> U.S. Copyright Amendment Act of 1856, ch. 169, 11 Stat. 138.

<sup>12</sup> U.S. Copyright Amendment Act of 1897, ch. 4, 29 Stat. 481-82.

<sup>13</sup> *Id.*

<sup>14</sup> Copyright Act of 1909, 17 U.S.C. § 1(a)-(e) (1909).

<sup>15</sup> Copyright Act of 1909, 17 U.S.C. §§ 1(d), (e) (1909).

However, the 1909 Copyright Act provided that a public performance occurs regardless of whether the work was performed in part or in whole, yet never expressly defined what constitutes to the “public” or to perform such a work “publicly.”<sup>16</sup> The absence of any language establishing when a performance of a work becomes public has proven to be a serious difficulty for courts when dealing with the infringement of the public performance right.<sup>17</sup>

Even further, technological advancements in television broadcasting in the mid-twentieth century exposed the 1909 Copyright Act’s ambiguity in regard to “performing,” and doing so “publicly.” For example, the emergence of “community antenna television systems,” or CATV systems,<sup>18</sup> in the 1960s enabled broadcast signals to reach large groups of the population that were previously unable to receive those broadcasts due to mountainous terrain obstructing broadcast reception.<sup>19</sup> Advancements in CATV technology allowed one large antenna to retransmit one television broadcast signal to all of the company’s paid subscribers through a series of coaxial cables.<sup>20</sup> The user was then charged a monthly fee to watch the broadcasts instead of not being able to watch television broadcasts at all, or having to install antennas above their homes to gain reception of television broadcasting.<sup>21</sup> More modernly known as cable television, this new technology created a network that allowed television broadcasting to reach even the most remote regions of the United States.<sup>22</sup>

At the height of this monumental advancement in broadcast technology, the United States Supreme Court granted certiorari in two cases. In both cases, network television providers alleged that the CATV systems infringed upon their exclusive right to perform

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<sup>16</sup> *Id.*

<sup>17</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396-402 (1968), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 95-553, 90 Stat. 2541, *as recognized in American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Teleprompter Corp. v. Columbia Pictures Broad. Sys., Inc.*, 415 U.S. 394, 410-14 (1974), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 95-553, 90 Stat. 2541, *as recognized in American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>18</sup> *See Cable Television*, BRITANNICA, <http://www.britannica.com/technology/cable-television#ref262049> (last visited Mar. 29, 2016) (CATV systems are more modernly known as cable television systems).

<sup>19</sup> *Fortnightly*, 392 U.S. at 392.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 392-93.

<sup>22</sup> John P. Cole, *Community Antenna Television, the Broadcaster Establishment, and the Federal Regulator*, 14 AM. U. L. REV. 124, 125-27 (1965).

their copyrighted works publicly. In 1968, the Court in *Fortnightly Corp. v. United Artists Television, Inc.*,<sup>23</sup> determined that these new CATV systems merely enhanced viewer function because viewers did not necessarily “perform” in terms of the 1909 Copyright Act.<sup>24</sup> In other words, at this time, a viewer of a television broadcast did not facilitate the act of performing. Since CATV systems allowed a new set of viewers to watch these broadcasts, there was no performance. While many early televisions were able to pick up signals that were within a certain distance, many times additional equipment such as a signal boosting antenna or an Ultra High Frequency (UHF) converter was needed to improve reception of local and/or further broadcast signals.<sup>25</sup> Nevertheless, in certain areas of the country, such a signal was still nearly impossible to obtain, even with the most advanced home television equipment.<sup>26</sup> As far as the system in *Fortnightly* was concerned, viewers in those parts of the country who could not receive the signal, or received a faint signal, could now fully obtain these signals through their coaxial cable connected to the larger community antenna.<sup>27</sup> Thus, the Court in *Fortnightly* concluded that this new form of equipment was an enhanced form of what the viewers were already lawfully allowed to do.<sup>28</sup>

The Court then reaffirmed this position six years later in 1974 with *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*<sup>29</sup> While the CATV system in *Fortnightly* enabled viewers to receive signals within local broadcast areas, the system in *Teleprompter* enabled viewers outside the local broadcast signal area to receive these same signals.<sup>30</sup> The Court found this distinction to be of no consequence.<sup>31</sup> The Networks argued that extending the signals beyond the local broadcast area would significantly reduce retransmission fees to

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<sup>23</sup> 392 U.S. 390, 399 (1968).

<sup>24</sup> *Id.* at 398-99 (“Broadcasters perform. Viewers do not . . . . Essentially, a CATV system no more than enhances the viewer’s capacity to receive the broadcaster’s signals; it provides a well-located antenna with an efficient connection to the viewer’s television set.”).

<sup>25</sup> Roberto Baldwin, *The History of the Set-Top Box: From Bunny Ears to Apple TV*, WIRED (Jan. 18, 2016), <http://www.wired.com/2013/03/set-top-box-history-gallery-draft/>.

<sup>26</sup> *The Cable History Project*, THE CABLE CENTER, <http://cablecenter.org/cable-history/108-the-cable-history-project-overview.html> (last visited Mar. 29, 2016).

<sup>27</sup> *Fortnightly*, 392 U.S. at 392.

<sup>28</sup> *Id.* at 399.

<sup>29</sup> 415 U.S. 394 (1974).

<sup>30</sup> *Id.* at 399-400.

<sup>31</sup> *Id.* at 413-14.

secondary markets.<sup>32</sup> Ultimately, the Court found this argument unpersuasive and reiterated that CATV systems did not perform publicly because they were an enhancement of the viewer function, as reasoned in *Fortnightly*.<sup>33</sup> Under the Court's interpretation, viewers did not publicly perform at all.<sup>34</sup> A viewer was well within his or her right to receive the network broadcast signal and watch television in the comfort of his or her own home.<sup>35</sup> Thus, if the CATV systems only enhanced the viewer experience, these systems did not perform.<sup>36</sup>

The Court's hesitance to compromise the exclusive rights held by the Networks and the functions of the CATV systems in both *Fortnightly* and *Teleprompter* was due in part to pending legislative proceedings to amend the 1909 Copyright Act.<sup>37</sup> These proposed amendments finally came to fruition in 1976 when Congress enacted the current version of the Copyright Act.<sup>38</sup> This new and significant overhaul of the Copyright Act sought to encompass actions of CATV systems. The Act deemed these systems as infringing upon the exclusive rights enumerated under §106.<sup>39</sup> Congress then enacted lan-

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<sup>32</sup> *Id.* at 410-11.

When a copyright holder first licenses a copyrighted program to be shown on broadcast television, he typically cannot expect to recoup his entire investment from a single broadcast. Rather, after a program has had a 'first run' on the major broadcasting networks, it is often later syndicated to affiliates and independent stations for 'secondary run' propagation to secondary markets. The copyright holders argue that if CATV systems are allowed to import programs and rechannel them into secondary markets they will dilute the profitability of later syndications, since viewer appeal, as measured by various rating systems, diminishes with each successive showing in a given market.

*Id.*

<sup>33</sup> *Teleprompter*, 415 U.S. at 403.

<sup>34</sup> *Id.* (quoting *Fortnightly*, 392 U.S. at 398).

<sup>35</sup> *Id.* at 400-01.

<sup>36</sup> *Id.* at 403.

<sup>37</sup> See *Fortnightly*, 392 U.S. at 401; see also *Teleprompter*, 415 U.S. at 414, n. 16.

<sup>38</sup> H.R. REP. NO. 94-1476 at 47 (1976); 17 U.S.C. § 101; 17 U.S.C. § 111.

<sup>39</sup> Exclusive Rights in Copyrighted Works 17 U.S.C. § 106:

- (1) Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer or ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes,

guage, which not only defined when a performance is “public,” but also encompassed the activities of the CATV systems.<sup>40</sup> Specifically, subsection (2) of the definition of “public performance,” aptly named the “Transmit Clause,” afforded an alternative way to publicly perform a work through transmission (or retransmission) of a copyrighted work, by a signal or broadcast in one public place or multiple public places by any device or means capable of doing so.<sup>41</sup>

The addition of the Transmit Clause subsequently became a subject of highly contested debate. Since its inclusion in the Copyright Act, several cases have analyzed what constituted a transmission of a “public” or “private” performance. Many early cases attempted to reason that if an entity played the same copy of the underlying work in a public place or to many groups of people at different times in a public place this would be considered a “public performance” of the copyrighted work.<sup>42</sup> For example, in *Columbia Pictures Indus. v. Redd Horne, Inc.*,<sup>43</sup> a video rental store allowed customers to watch a copy of a movie which was transmitted from the front of the store, where the video cassette player was held, to the back of the store, where individual viewing booths were housed.<sup>44</sup> The Third Circuit court concluded that the defendant’s movie rental

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and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

<sup>40</sup> 17 U.S.C. § 101 To perform or display a work “publicly” means:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

<sup>41</sup> *Id.*

<sup>42</sup> On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991); Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008); Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); Fox TV Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013).

<sup>43</sup> 749 F.2d 154 (3d Cir. 1984).

<sup>44</sup> *Columbia Pictures Indus.*, 749 F.2d at 157.



store was publicly performing when it would transmit the same copy of the work to different members of the public at different times.<sup>45</sup> Similarly, the district court for the Northern District of California deemed a hotel was publicly performing when its video-on-demand system would show the same copy of the work to its patrons.<sup>46</sup>

The Second Circuit Court has provided arguably one of the most significant interpretations of the Transmit Clause, having drawn from both the Third Circuit Court and the Northern District of California Court cases. In *Cartoon Network LP v. CSC Holdings, Inc.*,<sup>47</sup> the Second Circuit found that the Remote Storage Digital Video Recorder (RS-DVR) technology did not infringe upon the broadcaster's exclusive public performance right.<sup>48</sup> The RS-DVR technology allowed subscribers of Cablevision to record shows for later viewing.<sup>49</sup> While the RS-DVR was similar to the traditional set-top DVR system that would record shows upon user demand,<sup>50</sup> the new RS-DVR was housed in a central unit controlled by Cablevision and the user had the RS-DVR software installed in the set-top cable box.<sup>51</sup> When Cablevision received a signal (the original transmission) from the broadcasters, the signal would split between a "live viewing function" and "record function."<sup>52</sup> Each single viewer received his or her own personal copy from the second "record" function stream. In other words, no two users had access to the same copy of a recorded show.<sup>53</sup>

The Second Circuit developed four guideposts to determine when a transmission is considered "public" or "private."<sup>54</sup> First, the court looked to "who was capable of receiving the transmission." Here, a transmission is private if the particular transmission is capable of being viewed by one individual, whereas, it is public if the transmission or retransmission is capable of being viewed by a much larger audience than the normal "family circle and its acquaintances"

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<sup>45</sup> *Id.* at 162.

<sup>46</sup> *On Command Video Corp.*, 777 F. Supp. at 789.

<sup>47</sup> 536 F.3d 121 (2d Cir. 2008).

<sup>48</sup> *Cartoon Network LP*, 536 F.3d at 139-40.

<sup>49</sup> *Id.* at 124.

<sup>50</sup> *Id.* at 125.

<sup>51</sup> *Id.* at 124.

<sup>52</sup> *Id.* at 124-25.

<sup>53</sup> *Cartoon Network LP*, 536 F.3d at 126.

<sup>54</sup> *Id.* at 134-39.

as defined in § 101.<sup>55</sup> Second, private performances could not be grouped together (or aggregated), as this would frustrate the purpose of the Transmit Clause.<sup>56</sup> This non-aggregation theory, as discussed further in this article, suggests that even if multiple private performances are created by one singular entity, this does not infringe upon the public performance right.<sup>57</sup>

Third, aggregation should only occur if private performances to members of the public in general, or members of the public in a public place, are being created from the same copy of the work.<sup>58</sup> Fourth, in walking through the Transmit Clause analysis, “any factor limiting the potential audience of a transmission is relevant.”<sup>59</sup> In other words, any entity creating multiple performances ensures there is no infringement if proper steps are taken to actively prohibit the audience of any given transmission to remain within the threshold of the “normal family circle and its acquaintances.”<sup>60</sup> This allowed Aereo to prevail in both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit.<sup>61</sup>

However, two other courts found this long accepted reasoning unpersuasive. In *Fox TV Stations v. BarryDriller Content Sys.*,<sup>62</sup> the district court for the Central District of California ruled that an Internet based television system infringed upon the public performance right.<sup>63</sup> This case held that a performance of a work is considered

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<sup>55</sup> *Id.* at 134.

<sup>56</sup> *Id.* at 135-36.

We cannot reconcile the district court's approach with the language of the transmit clause. That clause speaks of people capable of receiving a particular ‘transmission’ or ‘performance,’ and not of the potential audience of a particular ‘work.’ Indeed, such an approach would render the ‘to the public’ language surplusage. Doubtless the *potential* audience for every copyrighted audiovisual work is the general public. As a result, any transmission of the content of a copyrighted work would constitute a public performance under the district court's interpretation. But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after ‘performance.’

*Id.*

<sup>57</sup> See Section V, *infra*.

<sup>58</sup> *Cartoon Network LP*, 536 F.3d at 137-38.

<sup>59</sup> *Id.* at 137.

<sup>60</sup> *Id.* at 134.

<sup>61</sup> *American Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 404 (S.D.N.Y. 2012); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013).

<sup>62</sup> 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012).

<sup>63</sup> *Fox TV Stations, Inc.*, 915 F. Supp. 2d at 1146.

public when an entity retransmits the performance of the underlying work to members of the public, irrespective of whether users are watching individualized copies or transmissions of the work.<sup>64</sup>

This same conclusion was reached by the District Court for the District of Columbia in *Fox TV Stations, Inc. v. FilmOn X*.<sup>65</sup> This apparent split between Transmit Clause interpretations prompted the Supreme Court to grant certiorari to ABC, CBS, NBC, and the other Plaintiff Networks in their appeal of the Second Circuit decision in *WNET v. Aereo*.<sup>66</sup>

### III. THE AEREO AND THE CLOUD

#### A. Analysis of “the Cloud”

Modern Cloud computing, known affectionately as “the Cloud,” is a service that allows for the storage of data over the Internet instead of on a computer’s hard drive.<sup>67</sup> Third-party companies that house data centers, or hard drives in a separate location from the user also run the “Cloud.”<sup>68</sup> These off-site hard-drives are connected to an entire network, allowing paying subscribers to then access these remote hard drives from almost anywhere and from any Internet capable device.<sup>69</sup> For example, Apple Inc. offers one of the more commonly used cloud computing services today, aptly named, iCloud.<sup>70</sup> Every Apple device and service user has access to Apple’s iCloud, which will store anything saved to a user’s iTunes account or Apple device.<sup>71</sup> Each Apple device user has an iTunes account which stores information such as music purchased via the customers iTunes account, pictures, documents, phone numbers, etc.<sup>72</sup> While all iTunes users are allotted a certain amount of iCloud storage space, users al-

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<sup>64</sup> *Id.*

<sup>65</sup> 966 F. Supp. 2d 30 (D.D.C. 2013).

<sup>66</sup> *Aereo Inc.*, 134 S. Ct. at 2504.

<sup>67</sup> Eric Griffith, *What is Cloud Computing?*, PC MAGAZINE (Apr. 17, 2015), <http://www.pcmag.com/article2/0,2817,2372163,00.asp>.

<sup>68</sup> *Id.*

<sup>69</sup> *What is Cloud Computing?*, IBM, <http://www.ibm.com/cloud-computing/what-is-cloud-computing.html> (last visited Mar. 29, 2016).

<sup>70</sup> *iCloud*, APPLE, <http://www.apple.com/icloud/> (last visited Mar. 3, 2016).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

ways have the option of either deleting files or purchasing more space on iCloud for a small monthly fee.<sup>73</sup> Additionally, no two users have access to the same storage space. Accessing an iCloud account is a completely private and password-protected experience.<sup>74</sup>

Businesses of all sizes use cloud services as means to store hundreds of thousands of pieces of data electronically.<sup>75</sup> It is more efficient for businesses to store, organize, and protect sensitive documents via a third-party Cloud-based system. As opposed to handling paper filing systems that can be stolen, lost, or assume an exuberant amount of office space.<sup>76</sup> “The Cloud” has been proven to be a more convenient for people to store data than the conventional methods that preceded it. Therefore, more companies are beginning to work with the cloud model.<sup>77</sup>

### B. Aereo and Its Process

Aereo was an American Internet-based television provider, which allowed users to watch broadcast television without having to subscribe to a cable or satellite bundle package.<sup>78</sup> For a small monthly fee customers had the ability to watch broadcast television via any Internet-capable device.<sup>79</sup> At the time of litigation, Aereo was only available to customers in the New York Metropolitan area.<sup>80</sup> Currently, Aereo has ceased operations and has filed for Chapter 11 Bankruptcy.<sup>81</sup> However, in an interesting twist, Aereo has been acquired by TiVo, which plans to release a similar product claiming to be the legal alternative to Aereo.<sup>82</sup>

Aereo developed a system of tiny dime-sized antennas housed

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Uses of Cloud Computing*, APPRENDA, <https://apprenda.com/library/cloud/uses-of-cloud-computing/> (last visited Mar. 29, 2016).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Inside Aereo*, PROTECTMYANTENNA, <http://protectmyantenna.org> (last visited Mar. 29, 2016).

<sup>79</sup> *Id.*

<sup>80</sup> *American Broad. Cos. Inc.*, 874 F. Supp. 2d at 375.

<sup>81</sup> Jordan Clark, *Aereo Files for Chapter 11 Bankruptcy*, TECH CRUNCH (Mar. 29, 2014), <http://techcrunch.com/2014/11/21/aereo-files-for-chapter-11-bankruptcy/>.

<sup>82</sup> Bill Rosenblatt, *TiVo Moves Towards Legal Aereo Offering*, FORBES (Mar. 29, 2015), <http://www.forbes.com/sites/billrosenblatt/2015/05/20/tivo-inches-towards-legal-aereo/#2715e4857a0b76eeb5cf52d1>.

in a single warehouse in Brooklyn.<sup>83</sup> Each dime-sized antenna was dedicated to only one customer; meaning, no two customers could capture the broadcast television signals from the same antenna.<sup>84</sup> Aereo's antennas also remained idle when a customer was not watching or recording a show.<sup>85</sup> The antenna tuned into a frequency, in which no broadcast signals were available when the cable service was not in use.<sup>86</sup> Each antenna stood idle in this unreachable frequency, and only immediately became active when a user either elected to watch a show or recorded the show for later viewing.<sup>87</sup>

Once the antenna became active by the sole customer assigned to that antenna, it then tuned back into the frequency that captured the active over-the-air broadcast signal.<sup>88</sup> The antenna immediately began recording the broadcast and saved it to the cloud storage where it played for the customer to view on any Internet-capable device.<sup>89</sup> Aereo's customers had two functions available to them: "watch" a show or "record" a show.<sup>90</sup> When a customer elected the "watch" function, the antenna captured the signal, made a copy of that signal, and saved that copy to the cloud.<sup>91</sup> Only after the signal was saved to the cloud was the viewer able to "watch." In this case, a viewer was able to watch the television program in almost real-time with only a few seconds delay.<sup>92</sup> In comparison, when the customer elected to "record" the show, the antenna performed the same set of functions as it did for the "watch" feature with the copy stored in the cloud to be accessed by the user to be viewed later, as opposed to live playback.<sup>93</sup>

### C. Aereo: Cloud Zero

Beginning in 2010, Aereo offered cloud storage to users who

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<sup>83</sup> *WNET*, 712 F.3d at 682.

<sup>84</sup> *Id.* at 682-83.

<sup>85</sup> Brief for Appellee-Respondent at 28, *American Broad. Cos. et al. v. Aereo, Inc.* 134 S. Ct. 2498 (2014) (No. 13-461), 2013 U.S. S. Ct. Brief LEXIS 5050 [hereinafter Brief for Appellee-Respondent].

<sup>86</sup> Brief for Appellee-Respondent, *supra* note 85, at 7.

<sup>87</sup> Brief for Appellee-Respondent, *supra* note 85, at 28-29.

<sup>88</sup> Brief for Appellee-Respondent, *supra* note 85, at 28-29.

<sup>89</sup> Brief for Appellee-Respondent, *supra* note 85, at 8-9.

<sup>90</sup> Brief for Appellee-Respondent, *supra* note 85, at 7.

<sup>91</sup> Brief for Appellee-Respondent, *supra* note 85, at 9.

<sup>92</sup> Brief for Appellee-Respondent, *supra* note 85, at 9.

<sup>93</sup> Brief for Appellee-Respondent, *supra* note 85, at 9-10.

wanted to watch live or recorded broadcast television, but did not want to pay the high cost of cable or satellite television.<sup>94</sup> Users were able to watch live television or previously recorded television shows from any Internet-capable device from their Aereo account.<sup>95</sup> As aforementioned, no two users had access to the same account; no two users had access to the same antenna; and as long as each user was connected to the Internet in the geographic location where Aereo operated, they could watch their favorite shows.<sup>96</sup>

#### IV. THE NETWORK BROADCASTERS VERSUS AEREO

##### A. *Aereo I*

In 2011, Plaintiffs, ABC, NBC, WNET, CBS, among other television networks (collectively “Networks”) filed a suit in the Southern District of New York against the online television streaming service, Aereo.<sup>97</sup> The suit alleged that Aereo was infringing upon the public performance right by retransmitting the free over-the-air broadcast signals to the members of the public as defined by the transmit clause, and then charging a monthly fee for its use.<sup>98</sup> In this case, the District Court was called upon to address several issues. Firstly, the court had to determine if Aereo’s individual antennas worked as one large antenna or if they worked independently.<sup>99</sup> Secondly, the court assessed whether Aereo’s system was distinguishable from the facts and holding in *Cablevision* to determine if the network’s assertion of infringement was likely to succeed on the merits of their claim.<sup>100</sup> Lastly, the court had to decide whether an injunction was appropriate.<sup>101</sup>

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<sup>94</sup> PROTECTMYANTENNA, *supra* note 78.

<sup>95</sup> Brief for Appellee-Respondent, *supra* note 85, at 8-9.

<sup>96</sup> WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680-83 (2d Cir. 2013).

<sup>97</sup> *American Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

<sup>98</sup> *Id.* at 375.

<sup>99</sup> *Id.* at 379.

<sup>100</sup> *Id.* at 382.

<sup>101</sup> *American Broad. Cos., Inc.*, 874 F. Supp. 2d at 376 (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010). (“A preliminary injunction is an extraordinary remedy, granted only if the plaintiff establishes ‘that he is likely to succeed on the merits that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.’ Even if a plaintiff has not demonstrated a likeli-

The Plaintiff Networks asserted that, although Aereo's system was comprised of thousands of tiny dime-sized antennas specifically assigned privately to separate users, the system's overall structure was just a modern-day CATV system<sup>102</sup> They contended that because the tiny antennas were placed on a shared metallic substructure, these antennas worked essentially as one large antenna.<sup>103</sup> After hearing expert testimony that debated the significance of the individual antennae, the court then determined that Aereo's individual antennas worked independently of each other to create separate private performances and not as one larger antenna, which would create one large public performance.<sup>104</sup>

As well, the District Court determined the Networks' assertion of infringement was not likely to succeed on the merits because the controlling Second Circuit precedent in *Cablevision* was significantly applicable to the facts in *Aereo*.<sup>105</sup> The Networks claimed that Aereo's system was factually distinguishable from that in *Cablevision* for several reasons.<sup>106</sup> First, the Networks alleged that Aereo publicly performs because it is the functional equivalent of a CATV system.<sup>107</sup> Instead of accepting that each distinct copy was transmitted from an individual antenna, the Networks argued that the antennas collectively formed one larger antenna that pass along the original transmission to all of Aereo's customers and was thus illegal.<sup>108</sup>

The court's rejection of the claim that Aereo transmitted one collective broadcasting signal determines that Aereo's case is stronger here than it was in *Cablevision*. This is because Aereo's copies are made from separate streams of data from each antenna receiving the original signal as opposed to the single stream of data transmitted by *Cablevision*'s RS-DVR.<sup>109</sup> In other words, Aereo's system is not

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hood of success on the merits, a preliminary injunction may still be granted if the plaintiff shows 'a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiffs favor.'").

<sup>102</sup> *American Broad. Cos., Inc.*, 874 F. Supp. 2d at 385.

<sup>103</sup> *Id.* at 379.

<sup>104</sup> *Id.* at 381.

<sup>105</sup> *Id.* at 392 (citing *Cartoon Network LP v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008), which held that the RS-DVR technology used by the defendants did not create a public performance with respect to the Transmit Clause because each user was viewing his or her own exclusive private performance of the copyrighted work).

<sup>106</sup> *Id.* at 389.

<sup>107</sup> *American Broad. Cos., Inc.*, 874 F. Supp. 2d at 385.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 387.

continuously relaying one singular transmission to its users from one large antenna. Instead, each user receives his or her own transmission because each person is receiving just one copy from his or her own antenna.

Additionally, the Networks' argument failed because of its reliance on the time-shifting analysis that was used by the *Cablevision* court to address the RS-DVR's potential for infringement.<sup>110</sup> The court harshly criticized the Networks' reliance on time-shifting primarily because the *Cablevision* court did not apply the time-shifting analysis to the public performance issue in that case. Instead, the time-shifting element was used in the discussion of a different issue relating to fair use of the copyrighted work.<sup>111</sup>

Although the Court found that the Networks were likely to suffer irreparable harm from decreased viewership absent a preliminary injunction, the Plaintiffs' motion was ultimately denied. The Court found that doing so would create a burden upon Aereo that substantially outweighed any burden upon the Networks.<sup>112</sup>

## B. *Aereo II*

The Networks appealed the judgment of the Southern District to the Second Circuit asserting an abuse of discretion by the lower court in denying their motion for preliminary injunction,<sup>113</sup> asserting several arguments, which attempted to distinguish the *Cablevision* decision from *Aereo*, which ultimately failed.<sup>114</sup>

The Networks asserted that both the plain language of the Transmit Clause and the legislative intent behind the 1976 Copyright Act deemed Aereo's system analogous to a cable system.<sup>115</sup> Thus, the Networks asserted that Aereo publicly performed their copyrighted works. While the Networks attempted to distinguish *Aereo* from the controlling *Cablevision* case, the court found no merit to all of the Networks' arguments.<sup>116</sup> The Second Circuit rebuffed the Networks' assertion by carefully examining *Cablevision's* four prevailing

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<sup>110</sup> *Id.*

<sup>111</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>112</sup> *American Broad. Cos., Inc.*, 874 F. Supp. 2d at 405.

<sup>113</sup> *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

<sup>114</sup> *Id.* at 695.

<sup>115</sup> *Id.* at 686.

<sup>116</sup> *Id.* at 689-95.



guideposts to analyzing the Transmit Clause while also scrutinizing how Aereo's technology functioned in comparison to a cable television system.<sup>117</sup> In finding that *Cablevision* controlled and that the Network's assertions gave unpersuasive determinations, the Second Circuit affirmed.<sup>118</sup>

After losing two cases, the Networks found one judge who was persuaded by their argument.<sup>119</sup> In his dissent, Judge Chin was not convinced that Aereo's technology made Aereo distinctive from traditional cable systems.<sup>120</sup> He criticized Aereo's technology and deemed it a "Rube Goldberg-like contrivance" in that Aereo simply built their system to evade copyright liability.<sup>121</sup> Judge Chin organized his dissenting opinion into three sections.<sup>122</sup> First, Judge Chin argued that the 1976 Act's text applied directly to the activities of Aereo.<sup>123</sup> He implied that the separate private performances created by Aereo via the company's independent-acting antennae system should be aggregated because these performances were ultimately created by one entity.<sup>124</sup> He further asserted that even if separate performances were indeed limited to persons within the normal circle of the family and their acquaintances, ultimately, Aereo transmitted underlying performances to paying subscribers numbered in the thousands.<sup>125</sup> Thus, concluding that Aereo's broadcasting system performed publicly.<sup>126</sup>

Second, Judge Chin found that Aereo's activities fell within the legislative intent behind the amendment of the 1909 Act, which resulted in the 1976 Act.<sup>127</sup> His ruling is based on the idea that since Aereo charges for the use of the service to relay broadcast television and cloud storage space, it is essentially a cable system.<sup>128</sup> He further found that the amendment to the 1909 Act was done so with the emergence of new technologies in mind, asserting not only that the

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<sup>117</sup> *Id.* at 689.

<sup>118</sup> *WNET*, 712 F.3d at 695.

<sup>119</sup> *Id.* at 697-705 (Chin, J., dissenting).

<sup>120</sup> *Id.* at 701.

<sup>121</sup> *Id.* at 697.

<sup>122</sup> *Id.* at 696-705.

<sup>123</sup> *WNET*, 712 F.3d at 698-99.

<sup>124</sup> *Id.* at 698.

<sup>125</sup> *Id.* at 699.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *WNET*, 712 F.3d at 700.

Act was to cover all known technology, but that technology that would emerge for years to come.<sup>129</sup>

Finally, Judge Chin made his own comparison of the decision and technology in *Cablevision* to that of Aereo's technology. He found that Aereo's system is entirely distinguishable from the RS-DVR in *Cablevision* for two reasons.<sup>130</sup> First, Judge Chin argued that *Cablevision* was exclusively reproducing materials that it already held the right to retransmit.<sup>131</sup> In comparison, Aereo was allowing the copying and retransmission of copyrighted materials with no permission to do so.<sup>132</sup> In Judge Chin's view, infringement of copyright falls squarely on who has legal ownership over the work, and since *Cablevision* was legally allowed to publicly perform the work in the first instance, it was permissible that they allowed public performances in the second instance.<sup>133</sup> However, because Aereo did not have a right to the broadcasted materials, it follows that Aereo had no right to then allow its users to watch the materials.<sup>134</sup>

Judge Chin's second reason for why Aereo's system is factually distinct was slightly more contrived. He asserted that Aereo's system allowed the company to obtain copyrighted materials in which it had no license and provided users with two functions to watch the work, whereas *Cablevision* only gave their users one unlicensed option to watch the programs.<sup>135</sup> He claimed that user interaction was entirely different between Aereo and *Cablevision*.<sup>136</sup> Judge Chin's assessment that RS-DVR technology "was not designed to be a substitute viewing live television broadcasts" is subject to questioning.<sup>137</sup> He concluded that the two systems are inherently different because *Cablevision*'s users had to manually initiate the RS-DVR system to record, while Aereo's users do not intentionally ask Aereo to record a copy under the "watch" function; instead, it is the Aereo sys-

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<sup>129</sup> *Id.* at 701 ("While Congress in 1976 might not have envisioned the precise technological innovations employed by Aereo today, this legislative history surely suggests that Congress could not have intended for such a system to fall outside the definition of a public performance.").

<sup>130</sup> *Id.* at 701-03.

<sup>131</sup> *Id.* at 702.

<sup>132</sup> *Id.*

<sup>133</sup> *WNET*, 712 F.3d at 702.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 702-03.

<sup>136</sup> *Id.* at 702.

<sup>137</sup> *Id.* at 703.

tem automatically initiating the copy, not the users.<sup>138</sup>

While Aereo and Cablevision may differ slightly in regards to a user's experience of the record functions, Judge Chin's assessment that Aereo and Cablevision broadcasting systems are inherently different is entirely incorrect. As aforementioned, Aereo remained completely idle until a user logged in to order either the live broadcast or a recorded copy of live broadcast.<sup>139</sup> The copy that occurred during the live function was a buffering mechanism that would be continuously deleted when the user viewed that specific part of the show.<sup>140</sup> In his assessment of why *Cablevision* is factually distinguishable, he seemingly compared apples to oranges in order to conclude that Aereo and Cablevision are, in fact, apples and oranges, since he believes Aereo's technology is just a fancy cable system. While Judge Chin did focus on the differences in technologies between the two systems, he takes issue with how Aereo presented itself to the public as well as the issue of failing to hold a copyright for retransmission.<sup>141</sup> Further, his finding that because Aereo's users did not specifically ask for the system to begin making a copy under the "watch" function, the interaction was completely different from the user interaction in *Cablevision*.<sup>142</sup> However, Cablevision's system split the "live" and "record" streams without user command, whereas Aereo's system required user interaction to pick up or record a live stream for a performance to occur.<sup>143</sup> To Judge Chin, this was nothing more than an unnecessary distinction – essentially a 21<sup>st</sup> century mechanism for evading copyright laws.<sup>144</sup>

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<sup>138</sup> *WNET*, 712 F.3d at 701-02.

<sup>139</sup> See Section II(b), *supra*.

<sup>140</sup> *WNET*, 712 F.3d at 682.

<sup>141</sup> *Id.* at 702.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 703.

<sup>144</sup> *Id.* at 697. The author provided:

Aereo's "technology platform" is, however, a sham. The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.

*WNET*, 712 F.3d at 697.

## V. THE SUPREME COURT AND AEREO

In a six-to-three majority opinion written by Justice Breyer, the Networks' argument that Aereo publicly performed found success.<sup>145</sup> The majority focused more on the intent of the 1976 Copyright Act rather than setting a standard to interpret the ambiguous language of the Transmit Clause with respect to new technology.<sup>146</sup> The Court provides no discussion for why it found that the technological differences between a cable system and Aereo were insignificant. Instead, the majority takes a two-step approach in determining that Aereo publicly performed.<sup>147</sup> First, the Court inquired whether Aereo "performed" and if so, whether the performance was public?<sup>148</sup> The basis for the majority's opinion however, falls on a technologically – neutral approach to applying Aereo to the Transmit Clause.<sup>149</sup>

In writing for the majority, Justice Breyer spends little time incorporating the factual differences between Aereo's system and a cable system. While the majority decision briefly discusses how Aereo works, nevertheless, these facts are left almost entirely out of the legal analysis of the discussion. Instead, at the onset, the majority felt that Aereo was the modern day equivalent of a cable system and then preceded to use the historical context behind the 1976 Act to support this contention.<sup>150</sup>

The Court took a two-step approach to determine if Aereo infringed on the public performance right. First, the Court asked whether Aereo "performed" and then whether Aereo performed "publicly."<sup>151</sup> The Court's analysis followed a functionalist approach that looked not to the technological differences of Aereo's system with that of a cable system, but rather that Aereo's system in general functions like a cable system. In rejecting the Second Circuit's contentions that the Transmit Clause directs analysis to who is "capable of receiving" the transmission and any factor "limiting the potential audience" to a particular transmission, the Court found that it is the relationship between members of the public to the underlying work that

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<sup>145</sup> *Aereo*, 134 S. Ct. at 2500-02.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 2504-05.

<sup>148</sup> *Id.*

<sup>149</sup> Samuel J. Dykstra, *Weighing Down the Cloud: The Public Performance Right and the Internet After Aereo*, 46 LOY. U. CHI. L.J. 989, 1023-26, 1028-29, 1034, 1049 (2015).

<sup>150</sup> *Aereo*, 134 S. Ct. at 2504.

<sup>151</sup> *Id.*

will create a public performance.<sup>152</sup> In this sense, because the underlying performance (i.e., the original transmission) was made “to the public,” any retransmission would then be considered a “public performance” of the work.

While the Court did note at least one technological difference between Aereo and cable systems, it found this difference irrelevant.<sup>153</sup> Instead, the Court rendered Aereo’s discrete transmissions as indistinguishable from the retransmissions created from a CATV system and through implication, aggregated the private retransmissions made to the members of the public that the original transmission was made publicly available to determine that Aereo did in fact perform publicly.<sup>154</sup> The aggregation of the private performances led the Court to the conclusion that it is because Aereo allows members of the public to watch free over-the-air television; it is the functional equivalent to a cable system.<sup>155</sup>

The Court’s interpretation frustrates the long accepted understanding of whether a particular transmission is capable of reaching those outside of a normal family circle, which has been accepted primarily by the Second Circuit as well as other district courts throughout the country. The Court’s functional approach offered little guidance on how an entity performs publicly and instead leaves the lower courts with wide discretion in deciding whether the public performance right has been infringed in regard to new technologies.<sup>156</sup> This analysis deviates considerably from the complex analysis that the Second Circuit employed. While the Second Circuit looked closely to the facts of each case and differences in technologies, it paid closer attention to the language of the Transmit Clause, which in turn would then be carefully applied to the case at bar.<sup>157</sup> The Supreme Court in *Aereo* gave no technical analysis but instead offered the historical background of the development of the Transmit Clause as a pretext to the resulting analysis.<sup>158</sup> The Court essentially left new and emerging technologies at the mercy of cable companies and outdated case

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<sup>152</sup> *Id.* at 2507-08.

<sup>153</sup> *Id.* at 2507.

<sup>154</sup> *Id.* at 2508.

<sup>155</sup> *Aereo*, 134 S. Ct. at 2509-10.

<sup>156</sup> *Id.* at 2517.

<sup>157</sup> *WNET*, 712 F.3d at 686-94.

<sup>158</sup> *Aereo*, 134 S. Ct at 2504.

law.<sup>159</sup> Therefore, the Court found that because Aereo's activities were substantially similar to those of cable television companies, Congress intended to include a system like Aereo's under the 1976 Copyright Act.<sup>160</sup> However, as a preemptive measure, the Court established that its holding should only be strictly limited to systems functioning like Aereo's as to not frustrate current and emerging technologies.<sup>161</sup>

In writing for the dissent, Justice Scalia, joined by Justices Alito and Thomas, pointed out many of the inherent flaws that are associated with the majority's analogical reasoning.<sup>162</sup> In particular, Justice Scalia acknowledged that Aereo's technology is designed so that it is the user who controls Aereo's functionality.<sup>163</sup> The dissent begins with the discussion of the volitional conduct test that is associated with many copyright infringement cases that involve new technologies.<sup>164</sup> This test, which was fully recognized by the Supreme Court in *Sony*, looks at how the system is controlled.<sup>165</sup> This volitional conduct rule was adopted by the Second Circuit in *Cablevision* as a deciding factor in finding that the RS-DVR was not an infringement.<sup>166</sup> On the one hand, if the system is entirely or mostly controlled by user conduct, the system is not directly liable for copyright infringement, but is secondarily liable.<sup>167</sup> If the system leaves little control to the user, then it is directly liable for copyright infringement.<sup>168</sup> The dissent heavily criticizes the way the majority overlooks the technological differences, instead opting to simply compare Aereo to a cable company.<sup>169</sup> Although in his discussion, Scalia acknowledged that Aereo may nevertheless be skirting the

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<sup>159</sup> *Id.* at 2511.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 2510. ("We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect.")

<sup>162</sup> *Id.* at 2511-18 (Scalia, J., dissenting).

<sup>163</sup> *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting) (citing *Sony Corp.*, 464 U.S. at 433).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Cartoon Network LP*, 536 F.3d at 131-32.

<sup>167</sup> *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>168</sup> *Columbia Pictures Indus.*, 749 F.2d at 156-62; *On Command Video Corp.*, 777 F. Supp. at 788-90; *Cartoon Network LP*, 536 F.3d at 130-40; *Fox Television Stations, Inc.*, 915 F. Supp. 2d at 1143-46; *Fox Television Stations, Inc.*, F. Supp. 2d at 37-42, 45-49.

<sup>169</sup> *Aereo*, 134 S. Ct. at 2515-517.

Copyright Act, he rejected the way in which the majority finds for infringement.<sup>170</sup> The dissent points to the inherent confusion the majority will cast upon new forms of technology with respect to the public performance right because the Court failed to account for the very different functions of each system.<sup>171</sup>

## VI. WHERE THE SUPREME COURT WENT WRONG ON THE TRANSMIT CLAUSE

The majority in *Aereo* declined to assess the Transmit Clause in a way that could be applied to Aereo's system.<sup>172</sup> In opting for a simple and neutral approach to how the Clause should read with respect to new innovations, the decision leaves long-standing legal principles and new technologies waiting in the wind. This part will examine three ways in which the Court's decision broadened the scope of the Transmit Clause.

### A. Neutrality Over Complexity

The Supreme Court's analysis demonstrates its misunderstanding of why differences in technological functions are key to interpreting the Transmit Clause. Instead of rendering an opinion on how to interpret the language of the Transmit Clause with which the lower courts grappled with, the Court chose a route that can further confuse and invite a flood of litigation.<sup>173</sup> The crux of the Court's discussion falls primarily on the contention that Aereo is the functional equivalent of a cable system. While, on its face, Aereo might resemble a cable system, its differences in technology are important factors as to why Aereo should not be equated with a cable system. In relying solely on Congressional intent of the Transmit Clause, the Court overlooked over 35 years of technical innovation and case law and essentially tipped the Constitutional scale in favor of copyright holders and leaving the progression of the arts and sciences hanging by a thread.

The Transmit Clause was included in the 1976 Copyright Act

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<sup>170</sup> *Id.* at 2514-15 (Scalia, J., dissenting); 17 U.S.C.A. § 111 (West 2014).

<sup>171</sup> *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>172</sup> *Id.* at 2509 (explaining that, "[w]e do not see how the fact that Aereo transmits via personal copies of the programs could make a difference").

<sup>173</sup> *Id.* at 2512 (Scalia, J., dissenting).

as a way to encompass new technology emerging in broadcast television.<sup>174</sup> The majority took the approach that if an entity like Aereo looked like a cable company then it *is* a cable company, which then falls under what the 1976 Act sought to cover.<sup>175</sup> Cable television companies are granted a compulsory license through Section 111 of the Copyright Act.<sup>176</sup> This license enables cable companies to retransmit the copyrighted works in exchange for a fee instead of paying each network directly for a license to publicly perform each copyrighted work.<sup>177</sup> The Federal Communications Commission (FCC) reserves the right to regulate the cable industry and in turn, once a company is deemed a “cable company,” it is granted a compulsory license through Section 111.<sup>178</sup> However, as of today, Internet television providers are not considered “cable companies” under either the Copyright Act or the Federal Communications Act.<sup>179</sup>

Aereo and the Networks’ claim that Aereo is not a cable system is not due to compromise. This contention is supported by the FCC, which has determined that cable systems do not include any “facility that serves only to retransmit television signals of one or more television broadcast stations.”<sup>180</sup> While this does not support Aereo’s contention that its system does not publicly perform the Network’s copyrighted works, the FCC makes clear that any system similar to Aereo’s is not a cable system. Under FCC guidelines, employing a neutral approach to differences in technology seems misplaced. It then makes no sense as to why the Court would essentially deem Aereo a “cable company” if the FCC has outright denied that any equivalent to Aereo is not a cable system. The determination that Aereo is essentially a cable system in terms of the public performance right and Transmit Clause under the 1976 Copyright seems then to run counterintuitive to not only both Aereo’s and the Networks’ arguments, but a widely accepted understanding of cable systems set forth by a government run agency.

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<sup>174</sup> H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045.

<sup>175</sup> *Aereo*, 134 S. Ct. at 2506-07.

<sup>176</sup> 17 U.S.C.A. § 111 (West 2014).

<sup>177</sup> *Aereo*, 134 S. Ct. at 2506.

<sup>178</sup> *Id.*

<sup>179</sup> MARYBETH PETERS, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT, at 181 (June 2008).

<sup>180</sup> *Cable Television*, FCC, <https://www.fcc.gov/media/engineering/cable-television> (last visited Mar. 29, 2016).



### B. The Bigger and Badder Transmit Clause: Leaving Private Performances in the Cloudy Dust

Part II of the Court's majority opinion addresses the issue of whether Aereo "performs" as defined by the 1976 Copyright Act and then if Aereo performs, whether it does so "publicly."<sup>181</sup> The Court delved into a lengthy discussion of the history of cable systems and the public performance right in Part II of the opinion.<sup>182</sup> However, after determining that Aereo "performs," the Court's analysis becomes problematic. It is here that the Court deemed Aereo's system analogous to the cable systems in *Fortnightly* and *Teleprompter* but provided no technological analysis as to how it came to this conclusion.<sup>183</sup> The Court stated that the only difference between the systems is the consistent receiving and retransmitting by cable companies and the user controlled receiving and retransmitting by Aereo.<sup>184</sup> Instead, the Court saw no reason why this difference should be given any analytical weight because regardless, Aereo's basic function is equivalent to a cable system.<sup>185</sup> Further, the Court ignored that cable systems ran on one large antenna connected through users via a series of coaxial cables, whereas Aereo's systems run on hundreds of user specific antennae.<sup>186</sup> In cable systems, all of the subscribers tune into the same transmission coming from one antenna and share that singular stream. In terms of Aereo, each user is assigned his or her own antenna, which transmits its own copy to the cloud for that particular user to receive.<sup>187</sup> Without even laying a foundational argument as to why Aereo is similar to a cable system, the Court simply made the determinative assertion that Aereo is a functional equivalent, which leads the Court's conclusion to follow that Aereo performs because cable systems perform.<sup>188</sup>

Justice Scalia asserted in his dissent that because the Court deemed Aereo's system the functional equivalent of a cable system, the rest of the majority opinion's discussion is simply superfluous.<sup>189</sup>

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<sup>181</sup> *Aereo*, 134 S. Ct. at 2504.

<sup>182</sup> *Id.* at 2504-06.

<sup>183</sup> *Id.* at 2506.

<sup>184</sup> *Id.* at 2507.

<sup>185</sup> *Id.*

<sup>186</sup> *Aereo*, 134 S. Ct. at 2508-09.

<sup>187</sup> *Id.* at 2508.

<sup>188</sup> *Aereo*, 134 S. Ct. at 2507.

<sup>189</sup> *Id.* at 2515.

Under the 1976 Copyright Act, cable systems not only perform but they perform publicly.<sup>190</sup> Since the majority renders Aereo an equivalent to a cable system, any discussion as to “public performance” seems unnecessary. Even though the Court continued with a “public performance” analysis, the Court’s predetermination set up in Part II renders any conclusion on the issue unnecessary.

Regardless, Part III of the Court’s analysis attempts to address “whether Aereo performs petitioners’ works publicly.”<sup>191</sup> While it is here that the Court touches upon the fact that Aereo’s system creates discrete transmissions through multiple antennas dedicated to only one user, it still renders these differences indistinguishable from cable systems in terms of Congressional intent behind the 1976 Copyright Act.<sup>192</sup> The Court furthered this conclusion by applying the plain language of the Transmit Clause.<sup>193</sup> It is here that the Court began to forgo the Copyright Act’s non-applicability to private performances and implied that the language of the Transmit Clause calls for an aggregation of discrete performances regardless of whether they occur in the home to one person or to a place where a large gathering of the public occurs.<sup>194</sup>

The Court honed in on the specific language in the Transmit Clause – “whether the members of the public capable of receiving the performance or display receiving it in the same place or in separate places and at the same time or at different times” – to determine that when an entity transmits even separate and distinct transmissions, it is publicly performing.<sup>195</sup> To further this point, several examples were employed to support this conclusion.<sup>196</sup> What the Court does, however, is aggregate private performances to determine that a public

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<sup>190</sup> 17 U.S.C.A. §§ 101, 111 (West 2014).

<sup>191</sup> *Aereo*, 134 S. Ct. at 2507-08.

<sup>192</sup> *Id.* at 2508.

<sup>193</sup> *Id.* at 2509.

<sup>194</sup> *Id.* at 2509.

<sup>195</sup> 17 U.S.C.A. § 101 (West 2014).

<sup>196</sup> *Aereo*, 134 S. Ct. at 2509. The Court stated:

But the Clause suggests that an entity may transmit a performance through multiple discrete transmissions. That is because one can ‘transmit’ or ‘communicate’ something through a set of actions. Similarly, one’s colleagues may watch a performance of a particular performance. Whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

*Id.*

performance has occurred.<sup>197</sup> It then implicitly confuses the types of systems the courts dealt with in *Redd Horne* and *On Demand Video Corp* and asserted Aereo's system employed the same functions.<sup>198</sup>

This flawed assumption misinterprets both the public performance right and the Transmit Clause entirely. Perhaps the Court underestimated just how ambiguous the definitional language of public performance in § 101 really is. As mentioned previously, § 101 sets out two distinctions of when a copyrighted work is performed publicly; one being the threshold of when private becomes public, and the other being the Transmit Clause.<sup>199</sup> The Copyright Act makes clear that if a work is performed or displayed in the privacy of one's home in front of a normal family circle and its acquaintances, then the work is performed privately.<sup>200</sup> When a work is performed or displayed privately, it is not an infringement on a copyright holder's exclusive rights because the copyright holder only has the right to display or perform his or her works publicly or authorize such rights.<sup>201</sup> Therefore, under the plain meaning of the statute, Aereo's users are performing privately when they deliberately enable Aereo's user-specific individual antennas to capture the broadcast signal and play that signal in their own home.

Regardless of this reasoning, Aereo and its users' actions fall under the Transmit Clause which renders transmissions or communications "public performances" if they are done so to the public, as specified in subsection (1) by "any device or process" regardless if the members of the public are together or in separate places.<sup>202</sup> The Transmit Clause employs peculiar language in that a public performance of a work is transmitted or communicated to the public if the public is situated together or separately and receive it all at the same time or at different times. If this language were taken literally, it almost seems as if this language renders even private performances as public ones.<sup>203</sup>

Many prominent intellectual property law commentators have

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<sup>197</sup> *Aereo*, 134 S. Ct. at 2509-510.

<sup>198</sup> *Redd Horne*, 749 F.2d at 154; *On Command Video Corp.*, 777 F. Supp. at 787.

<sup>199</sup> *Fortnightly*, 392 U.S. at 390; *Teleprompter*, 94 S. Ct. at 1129; 17 U.S.C.A. § 101 (2010).

<sup>200</sup> MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 386 (2014) [hereinafter NIMMER].

<sup>201</sup> 17 U.S.C.A. § 106 (2002).

<sup>202</sup> RUDD, *supra* note 7, at 4.

<sup>203</sup> NIMMER, *supra* note 200, at 1.

discussed how the courts should look at the Transmit Clause and the public performance right.<sup>204</sup> Professor M. Nimmer has long advocated for the non-aggregation of private performances,<sup>205</sup> whereas Professor Paul Goldstein has supported a “pro-aggregation” approach.<sup>206</sup> This split in analyses has accurately reflected the complexity of both the Transmit Clause and the public performance right with respect to emerging technologies. The broad language of the Transmit Clause has led to confusion and uncertainty as to how the Clause should be applied and analyzed.<sup>207</sup>

One theory, Professor Nimmer’s “Non-Aggregation Theory,” postulates that the language of the Transmit Clause was intended to reflect an instance when the same copy or transmission of a work is played repeatedly to different members of the public although played at different times, resulting in a public performance of that copy.<sup>208</sup> This theory would seem to make better sense of the ambiguous language, and many courts have followed this reasoning.<sup>209</sup> This was the basis for *Cablevision’s* holding.<sup>210</sup> In accordance with Nimmer, the Second Circuit argued that the unique copies of the underlying performance have the capability of reaching only one user and no one else.<sup>211</sup> The production of individual copies substantially limits the exposure to anyone outside the normal family circle and its acquaintances, satisfying a private performance.<sup>212</sup>

A cable system works differently from Aereo’s system. A cable system not only retransmits free over-the-air signals to its customers but supplies their own unique programming as well. Since the decisions in *Fortnightly* and *Teleprompter*, the cable industry has grown tremendously, while still retaining many of the same basic

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<sup>204</sup> PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* (3d ed. 2009).

<sup>205</sup> NIMMER, *supra* note 200, at 42.

<sup>206</sup> GOLDSTEIN, *supra* note 204, at 167.

<sup>207</sup> NIMMER, *supra* note 200, at 29.

<sup>208</sup> NIMMER, *supra* note 200, at 29.

<sup>209</sup> *Cartoon Network LP*, 536 F.3d at 121 (finding that “the transmit clause directs us to examine who precisely is ‘capable of receiving’ a particular transmission of a performance.”); *Columbia Pictures Indus.*, 749 F.2d at 154 (holding that the defendant’s activities in exhibiting videocassettes of plaintiff’s films for a fee in private booths constituted public performances); *On Command Video Corp.*, 777 F. Supp. 787 (finding that, “whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public.”).

<sup>210</sup> *Cartoon Network LP*, 536 F.3d at 138.

<sup>211</sup> *Id.* (“[A] cable company performs when it retransmits a copyrighted work.”).

<sup>212</sup> *Id.*

functions. Cable television systems place various regional facilities which house signal reception equipment around their designated region of operation and each customer is plugged into these facilities through a complex system of coaxial cables.<sup>213</sup> When these facilities receive the broadcast signals, they retransmit a new singular stream of the data to their customers who then receive this singular stream.<sup>214</sup> The receiving equipment in these regional facilities receives the broadcast signals on a constant basis and then the retransmissions run constantly as well.<sup>215</sup> In accordance with both *Nimmer* and the Second Circuit's analysis, the retransmissions are capable of being received by members of the public outside the normal family circle.<sup>216</sup> Thus, the lack of individualized singular transmissions capable of only being received by each individual user is why a cable system performs publicly.<sup>217</sup> *Nimmer* calls for the aggregation of the private performances from the singular stream of data and not private performances from individualized retransmissions.<sup>218</sup>

*Aereo* and its Amici fully supported *Nimmer*'s "non-aggregation" theory and advocated that *Aereo* does not perform publicly.<sup>219</sup> In its brief, Dish Network defends *Nimmer*'s theory by emphasizing that the Transmit clause is applicable to "multicasting," a process by which a singular transmission reaches many members of the public.<sup>220</sup> However, *Aereo*'s system creates "unicasting," which is a one-to-one transmission, only capable of reaching one person, or

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<sup>213</sup> *The State of the Art and Evolution of Cable Television and Broadband Technology*, CTC TECH & ENERGY (Oct. 9, 2013), <http://www.ctcnet.us.html>.

<sup>214</sup> Krista Consiglio, *Aereo and FilmOn: Technology's Latest Copyright War and Why Aereo Should Survive*, 71 WASH. & LEE L. REV. 2557 (2014).

<sup>215</sup> *Id.*

<sup>216</sup> *NIMMER*, *supra* note 200, at 386; *Cartoon Network LP*, 536 F.3d at 121.

<sup>217</sup> *Aereo*, 134 S. Ct. at 2509-11.

<sup>218</sup> *NIMMER*, *supra* note 200, at 29.

<sup>219</sup> Brief for 36 Intellectual Property and Copyright Professors as Amici Curiae Supporting Respondents, *American Broad. Cos., Inc., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1348474; Brief for Intellectual Property & Copyright Law Professors as Amici Curiae Supporting Respondent, *American Broad. Cos., Inc., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2012 WL 5387386; Brief for The Electronic Frontier Foundation et al. as Amici Curiae Supporting Respondents, *American Broad. Cos., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1364988; Brief for Filmon X, LLC et al. as Amici Curiae Supporting Affirmance, *American Broad. Cos., Inc., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1348476.

<sup>220</sup> Brief for Dish Network, L.L.C. & EchoStar Technologies, L.L.C. as Amici Curiae Supporting Respondent, *American Broad. Cos., Inc., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1348475.

a group involving a close family circle.<sup>221</sup> The Transmit Clause does not cover this type of transmission, the brief notes, as this constitutes a private performance.<sup>222</sup> The amici brief for FilmOn X further asserts that the argument set forth by the Networks would render the scope of the Transmit Clause overly broad.<sup>223</sup> As discussed further below, the Networks believe that the Transmit Clause focuses on the potential audience of the underlying work and not the audience of the individual transmission. In its brief, FilmOn X finds this argument is too broad an interpretation of the Clause, as it would eviscerate an individual's ability to perform a work privately.<sup>224</sup> Under the view of the Networks, an individual private performance would then be a public one as an underlying work is inherently capable of being received by anyone with equipment enabling him or her to view the copyrighted work, whether that equipment is through a cable company or a roof-top antenna.<sup>225</sup>

Since the Supreme Court in *Aereo* first deemed Aereo's system a functional equivalent to a cable system, it incorrectly assumes that Aereo was transmitting the same performance of the underlying work to all of its users simultaneously from one antenna.<sup>226</sup> If Aereo's system had been transmitting the same performance of the underlying work to all of its users, then Nimmer's theory would apply, and thus, it would be appropriate to aggregate the individual showings of the same performance of the underlying work.<sup>227</sup> However, Aereo's system creates private performances because each antenna captures a signal for one specific user. This incorrect identification leads the Court to apply this aggregate theory to all private performances of the underlying work to find a public performance.

This interpretation is more akin to the analysis asserted by Professor Goldstein in his treatise, which rejects Nimmer's Non-Aggregation Theory.<sup>228</sup> Goldstein argues that the Second Circuit's

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 20-27.

<sup>223</sup> Brief for Filmon X, LLC et al. as Amici Curiae Supporting Affirmance, *American Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1348476.

<sup>224</sup> *Id.*

<sup>225</sup> Brief of 36 Intellectual Property and Copyright Professors as Amici Curiae Supporting Respondent, *American Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1348474.

<sup>226</sup> *Aereo*, 134 S. Ct. at 2507.

<sup>227</sup> NIMMER, *supra* note 200, at 1.

<sup>228</sup> GOLDSTEIN, *supra* note 204, at 167.

interpretation of the Transmit Clause “entirely undermined” the intent of the “same place-separate place . . . same time-different time . . .” language.<sup>229</sup> He reasons that the Second Circuit treated “transmissions” and “performances” as one in the same when he says “the Act clearly treats them as distinct . . . operative terms.”<sup>230</sup> Goldstein further argues that because the Court could not separate the two words, the Court essentially renders every distinct transmission as a private performance.<sup>231</sup> While Goldstein may perhaps be correct in determining that the Court decided to treat “transmission” and “performance” as one entity, his conclusion fails to incorporate the first part of the clause that determines when and where the transmission of a performance or display must occur to render it “public.”<sup>232</sup> If read in its entirety, the transmission of the performance only becomes “public” if it is done so outside of one’s home or to a small family gathering inclusive of the family’s social acquaintances.<sup>233</sup> Taken in that context, the Second Circuit still determined that each individual transmission of the performance was not sent to the public because they were sent to each individual user’s home.<sup>234</sup> This placed a limitation on who was capable of receiving the given transmission.<sup>235</sup> This limitation was important in determining whether the transmission was a public performance. It would be absurd to assume that Congress intended to reflect individualized transmissions of the performance to individual homes to fall within the “same place or in different places and at the same time or at different times” language of the statute simply because those individuals are situated in “separate places” and perhaps viewing their own individual transmissions “at the same time or different times.”<sup>236</sup> Under this reading, everyone watching that particular transmission of the performance would be publicly performing. To further drive the point that the Second Circuit did not confuse the two terms, Congress was clear in the 1976 House Report that “any act by which the initial performance . . . is

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<sup>229</sup> GOLDSTEIN, *supra* note 204, at 168.

<sup>230</sup> GOLDSTEIN, *supra* note 204, at 168.

<sup>231</sup> GOLDSTEIN, *supra* note 204, at 168.

<sup>232</sup> GOLDSTEIN, *supra* note 204, at 168. (The author also correctly asserts that nowhere in § 101 is the term “public” defined; it is implicitly defined in that section under subsection (1) of the Act’s definition of “[T]o perform or display a work ‘publicly.’”)

<sup>233</sup> GOLDSTEIN, *supra* note 204, at 167.

<sup>234</sup> *Cartoon Network LP*, 536 F.3d at 138.

<sup>235</sup> *Id.*

<sup>236</sup> 17 U.S.C.A. § 101 (2010).

transmitted, repeated, or made to recur would itself be a ‘performance’ . . . under the bill.”<sup>237</sup> This clear intention by Congress to consider a “transmission” synonymous with “performance” renders Goldstein’s interpretation of the Act invalid.<sup>238</sup>

While the Networks had ample support advocating for Goldstein’s theory and the fact that the Transmit Clause was meant to have a broad interpretation,<sup>239</sup> the Supreme Court nevertheless followed Goldstein’s interpretation due to a misinterpretation of Nimmer’s theory.<sup>240</sup> While the Court’s reasoning simply confirms that when the *same* work is given multiple showings, whether to people individually or together, it is a public performance of that work, what the Court assumes here is that Aereo is showing the *same* performance to all of its users even though they are all receiving individual performances of the underlying work individually. In other words, a public performance of a work occurs when the *same* performance of the underlying work is shown repeatedly to members of the public, whether they are alone at home or gathered at a public place and watching that *same* performance of the underlying work at different times. This is distinguished from individuals watching their own *individual* performance of the underlying work; this falls under the private performance exception implied in clause (1) of the definition for public performance. The Court here confused the *same* performance of a work with the original underlying work. This confirms why understanding Aereo’s technology is key to determining why Aereo does not in fact perform publicly.

As mentioned above, Aereo’s users are assigned an individual antenna, which is located among thousands of other antennas.<sup>241</sup> Each antenna is at the mercy of the user, picking up signals when it is told, staying idle in all other instances, and then transmitting those

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<sup>237</sup> H.R. REP. NO. 94-1476, at 63 (1976).

<sup>238</sup> *Id.*; GOLDSTEIN, *supra* note 204, at 167.

<sup>239</sup> Brief for the Petitioners, *American Broad. Cos., Inc., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 1976 WL 14045; Brief for Time Warner, Inc. & Warner Bros. Entertainment, Inc. as Amici Curiae Supporting Petitioners, *American Broad. Cos., Inc., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2013 WL 6040359; Brief for American Intellectual Property Law Association as Amicus Curiae Supporting Petitioners, *American Broad. Cos., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828067; Brief for the United States as Amicus Curiae Supporting Petitioners, *American Broad. Cos., v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079.

<sup>240</sup> *WNET*, 712 F.3d at 698 (Chin, J., dissenting); *Aereo*, 134 S. Ct. at 2509.

<sup>241</sup> *Aereo*, 134 S. Ct. at 2509.



signals to its owner and no one else.<sup>242</sup> Aereo was designed to store a rooftop antenna equivalent in a remote location which would work exactly the way a rooftop antenna would work, by picking up signals when the user turns on the system.<sup>243</sup> Here, a rooftop antenna is picking up the original broadcast signal and would then send that transmission to the television.<sup>244</sup> However, it is clear that the Court sees that because Aereo houses these antennas and not the user, it then becomes a cable system, even though at no time is the same performance of the underlying work being transmitted to multiple users at the same time or at different times.<sup>245</sup>

After implicitly adopting the argument that all individual private performances should be aggregated to determine that Aereo performed publicly, the Court looked to the relationship between the public and the underlying work.<sup>246</sup> This argument is explained through an example of a parking valet and a parking garage.<sup>247</sup> The Court postulates that if an entity transmits a performance to users who own or possess the underlying work then this is not a public performance.<sup>248</sup> This reasoning has no basis in either the Act or the House Report as neither contains any language imposing a requirement that every member of the public must have a relationship to the underlying work.<sup>249</sup> The Court asserts that a private performance occurs when entities transmit performances of copyrighted works to the

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<sup>242</sup> *Id.*

<sup>243</sup> PROTECTMYANTENNA, *supra* note 78, at 1.

<sup>244</sup> *Antennas and Digital Television*, FCC, <https://www.fcc.gov/consumers/guides/antennas-and-digital-television> (last visited Mar. 29, 2016).

<sup>245</sup> *Aereo*, 134 S. Ct. at 2506-507.

<sup>246</sup> *Id.* at 2510.

<sup>247</sup> *Id.* The Court explained:

This is relevant because when an entity performs to a set of people, whether they constitute “the public” often depends upon their relationship to the underlying work. When for example, a parking valet attendant returns cars to their drivers, we would not say that the parking service provides cars ‘to the public.’ We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cars to the public, for it sells cars to individuals who lack a pre-existing relationship to the cars.

*Id.*

<sup>248</sup> *Id.* (“Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform ‘to the public,’ whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.”).

<sup>249</sup> 17 U.S.C.A. §§ 101, 106 (2010).

owners themselves.<sup>250</sup> If the Act were to impose such a requirement, it would have found no need to provide for a private performance exception, because then everyone would either be holders of the exclusive rights, or would have to pay the holder of the rights to view the materials. The 1976 amendments made perfectly clear that it would be against public policy to require every member of the public to pay a copyright holder for the private use and enjoyment of the work.<sup>251</sup> It would then follow that the only members of the public who have any prior relationship to the copyrighted works are the copyright holders themselves and any member of the public viewing such work would be infringing upon that right even if it was done so privately.

### C. I Infringed, but You Were Blamed: Diminishing the Volitional Conduct Rule

In copyright infringement cases concerning Internet based services or equipment providers, it has long been accepted by the Courts that direct liability is sometimes not an appropriate avenue in determining if conduct was infringing.<sup>252</sup> The Supreme Court set this precedent in the 1980s when videocassette tapes were introduced into the market.<sup>253</sup> In these cases, secondary liability is a more appropriate avenue since the defendant does not directly cause the infringing conduct but rather “intentionally induces or encourages infringing acts by others for profits from such acts while declining to exercise a right to stop or limit them.”<sup>254</sup> It is in this instance, the volitional conduct rule comes into play. When a defendant is found directly liable it is because she committed the infringement by her own will, however when she induces or encourages such an act that causes someone *else* to commit the infringing activity she is then only secondarily liable.<sup>255</sup>

The dissent recognized that this case should have focused on

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<sup>250</sup> *Aereo*, 134 S. Ct. at 2510.

<sup>251</sup> 17 U.S.C.A. § 101 (2010).

<sup>252</sup> *Sony Corp.*, 464 U.S. at 433; *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

<sup>253</sup> *Sony Corp.*, 464 U.S. 417.

<sup>254</sup> *Aereo*, 134 S. Ct. 2489 at 2512 (Scalia, J., dissenting) (quoting *Grokster Ltd.*, 545 U.S. at 930).

<sup>255</sup> *Id.*

conduct rather than similarity of function.<sup>256</sup> Infringement cases concerning service providers or equipment manufacturers are typically determined by classifying liabilities with respect to users and the providers.<sup>257</sup> While volitional conduct is not usually at issue in direct-infringement cases, it becomes a point of contention when the factual nature of the dispute deems it necessary.<sup>258</sup> Justice Scalia points out that conduct is crucial in examining a liability claim and employing a proper analysis on it.<sup>259</sup>

Noticeably absent from *Aereo*'s majority opinion is any qualitative discussion on volitional conduct. The dissent finds that the volitional conduct requirement is entirely necessary to determining if *Aereo*'s system directly infringes or if it is the users that commit the infringement.<sup>260</sup> The Supreme Court in *Sony* established that liability in infringement suits involving service providers and equipment manufacturers should be determined by identifying who was in charge of the infringing act.<sup>261</sup> Although in *Aereo*, the charge was direct infringement, Justice Scalia nevertheless found that *Aereo*'s system gives a substantial amount of the control of the system to *Aereo*'s users.<sup>262</sup> Justice Scalia then likens *Aereo*'s system to a copy shop.<sup>263</sup> He emphasizes that a copy shop is never directly liable for its customers' infringing activities because it is the customers who control the equipment and not the shop or the employees themselves.<sup>264</sup> This analysis more accurately reflects *Aereo*'s function, yet the majority finds that this comparison is wholly inadequate.<sup>265</sup>

The Second Circuit in *Cablevision* applied the volitional conduct rule to further support that the RS-DVR technology did not infringe.<sup>266</sup> The RS-DVR would only produce a copy on command of the user; otherwise, the data would stay in the buffer system. The Second Circuit then applied this analysis when determining whether *Aereo* infringed. It found that since *Aereo*'s antennas were solely at

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<sup>256</sup> *Id.*

<sup>257</sup> *Sony Corp.*, 464 U.S. at 417; *Cartoon Network LP*, 536 F.3d at 133.

<sup>258</sup> *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>259</sup> *Id.* at 2512-514.

<sup>260</sup> *Id.*

<sup>261</sup> *Sony Corp.*, 464 U.S. at 435.

<sup>262</sup> *Aereo*, 134 S. Ct. at 2514.

<sup>263</sup> *Id.* at 2513.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 2507.

<sup>266</sup> *Cartoon Network LP*, 536 F.3d at 132-33.

the mercy of Aereo's users, Aereo was not directly liable.<sup>267</sup> In arguing for releasing Aereo from direct liability, the amici curiae brief for FilmOn X acknowledges that the Court recognized that equipment suppliers and manufacturers are not involved in any activities that are infringing.<sup>268</sup>

The absence of any discussion of secondary liability and the volitional conduct rule is troublesome. While Aereo's system is not quite an equipment supplier, Aereo was by no means acting on the behalf of any users when initiating user-specific antennas. Instead, Aereo's users had full control on the operation of the antennae and the signals for which the antennae were to receive.

## VII. STORM CLOUDS AHEAD: WHAT AEREO MEANS FOR CLOUD-BASED SERVICES

The Court failed to appreciate why a ruling against Aereo could have a larger impact on current cloud-computing technology.<sup>269</sup> In fact, the decision merely discussed the function as a formality to inform the reader of the facts at issue.<sup>270</sup> The majority found Aereo's system similar to a cable system because the user has no physical control over Aereo's equipment or servers.<sup>271</sup> The Court's decision to leave Aereo's cloud technology out of its analysis, and thus, rendering Aereo essentially a cable system is detrimental to cloud based technologies for two reasons. The absence of analysis into Aereo's cloud service could have been an implication that the Court did not fully understand the functionality of a cloud-based service. A cloud-based service is essentially a storage space for data.<sup>272</sup> When a company offers "cloud storage" it is essentially offering storage space on its own servers dedicated for solely that use. The cloud can be accessed through the Internet and can be opened on any Internet capable device. No individual has physical access of the cloud or the service. Take for example, the popularly used Google Drive. Anyone

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<sup>267</sup> *WNET*, 712 F.3d at 694.

<sup>268</sup> Brief of FilmOn X, LLC, FilmOn.TV, Inc. et al. as Amici Curiae Supporting Respondents, *American Broad. Cos., Inc., et al., v. Aereo, Inc.*, at 13-14, 134 S. Ct. 2498 (2014) (No. 13-461).

<sup>269</sup> *Aereo*, 134 S. Ct. at 2517.

<sup>270</sup> *Id.* at 2503.

<sup>271</sup> *Id.* at 2506.

<sup>272</sup> *What is cloud computing?*, IBM (Dec. 12, 2014, 2:24PM), <http://www.ibm.com/cloud-computing/us/en/what-is-cloud-computing.html>.

with a Google account can effectively upload the entire contents of their computers to Google Drive's "Cloud" as an additional way to keep their files safe in the event their personal computer breaks down in some way, rendering those files irretrievable from that device.<sup>273</sup> That same person can access those files that were saved in the cloud from another device simply by logging in, where the files are safe from harm. The Court's failure to find this feature distinctive leaves an important question unanswered. Do cloud based services perform publicly when members of the public access their personal files in various different places? Suppose several users of Apple's iCloud have the movie "My Fair Lady" saved to their individual cloud files. Now assume those users decide to watch "My Fair Lady" on or about the same time. Under the Court's ruling, this could potentially cause Apple to be publicly performing that movie even though individual users are watching distinctive copies of that movie.<sup>274</sup>

The most important take-away from the adoption of Goldstein's aggregation theory and the Court's decision is that now, the Transmit clause directs us to look at who is capable of receiving the underlying performance. In addition, this reasoning leads us to aggregate private performances created by one entity regardless of whether the user intentionally caused the performance. The reasoning disregards whether the person obtained the work legally because once that user has uploaded the work onto the cloud-based hard drive, any subsequent streaming of that performance renders it a public one because it is the cloud service that retains and performs the streaming of the work. To reiterate the example above, if two users lawfully obtain "My Fair Lady" and wish to watch their individual copy at the same time, it is now the cloud service who is publicly performing that work which they had not obtained a license for because the user's conduct under *Aereo* has now been disregarded, and the private performances should be aggregated because they came from the same entity.

The Court made clear that Aereo is not an equipment provider because users do not have physical access to every part of its technology, including the servers that hold copies of the transmissions

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<sup>273</sup> *Using Drive*, GOOGLE (Feb. 16, 2016), <https://accounts.google.com/signup>. (The first 15 gigabytes of storage are free when signing up for a Google Drive account, any increase in storage space is available for an additional fee).

<sup>274</sup> Cablevision Systems Corp., *Aereo and the Public Performance Right*, CABLEVISION (Dec. 2013), [http://www.cablevision.com/pdf/cablevision\\_aereo\\_white\\_paper.pdf](http://www.cablevision.com/pdf/cablevision_aereo_white_paper.pdf).

and/or relay transmission to the user.<sup>275</sup> The Court however, does attempt to answer this quandary by providing that the holding would pertain to technology only resembling that of cable companies.<sup>276</sup> The most troubling part of the majority's analysis is the acknowledgement that Aereo's system only begins to run when the user purposely communicates with Aereo's system that he or she wishes to watch or record a show.<sup>277</sup> However, this function is found to have no significant impact on whether Aereo performs.<sup>278</sup> This astounding acknowledgement and disregard for this crucial feature essentially obliterates the precedent set forth by *Sony*.<sup>279</sup> Yet, it is because the Court failed to employ an analysis based on Aereo's technology and instead offered reasoning based on function, which simply compared Aereo to a cable system, that cloud technology could possibly face a flood of litigation.

However, as society relies on further technological advancements, developers have an added burden not to resemble older technologies, as the Court may not recognize the difference.

### VIII. CONCLUSION

While it remains to be seen whether Cloud storage systems will be liable for copyright infringement under Aereo, there are still unanswered questions. While for the time being, the Court seemed to place its toes in the water by giving some leeway to Cloud storage systems, as technology develops, the Courts may not be able to rest upon certain principles such as technological blindness or that many cloud users actually have obtained copyrighted works stored in their clouds legally.<sup>280</sup> Many commenters on *Aereo* have suggested that either Congress needs to develop legislation more rapidly to adapt to the ever-changing technological climate, others feel as if the Courts needs to implement an additional step in how to distinguish new

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<sup>275</sup> *Aereo*, 134 S. Ct. at 2506.

<sup>276</sup> *Id.* at 2509-11.

<sup>277</sup> *Id.* at 2507.

<sup>278</sup> *Id.* at 2503-04.

<sup>279</sup> *Sony Corp.*, 464 U.S. at 432-33.

<sup>280</sup> Yvette Joy Liebesman, *When Does Copyright Law Require Technology Blindness? Aiken Meets Aereo*, 30 BERKELEY TECH. L. J. 1383 (2015); Patrick C. Tricker, Abstract, *The Internet After Aereo: How to Save Innovation from the Public Performance Right*, 17 VAND. J. ENT. & TECH. L. 815 (2015); Craig B. Whitney, *Aereo Post-Mortem: Was it Ever Really About the Cloud?*, ABA, [http://www.americanbar.org/publications/landslide/2014-15/may-june/aereo\\_postmortem\\_was\\_it\\_ever\\_really\\_about\\_cloud.html](http://www.americanbar.org/publications/landslide/2014-15/may-june/aereo_postmortem_was_it_ever_really_about_cloud.html) (last visited Mar. 29, 2015).

technologies from older ones.<sup>281</sup> The most promising change might come from the Federal Communications Commission. In as late as December 2014, the FCC released a Notice of Proposed Rulemaking, which sets out to include platforms akin to Aereo in the list of entities that may be able to apply for a § 111 compulsory license.<sup>282</sup> However, there still has not been a ruling on the matter and any changes regarding licensing for Internet television providers may not come for quite some time.

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<sup>281</sup> Collette Corser, Recent Development, *American Broad. Cos. v. Aereo: How the Supreme Court's Flawed Rationale Will Implicate Problems in New Technologies*, 16 N.C. J.L. & TECH. ON 1, 27-30 (2015); Amanda Asaro, Comment, *Stay Tuned: Whether Cloud-Based Service Providers Can Have Their Copyrighted Cake and Eat It Too*, 83 FORDHAM L. REV. 1107, 1140-42 (2014); Geoffrey Palachuk, *Aereo: Bringing the NFL to a "Cloud" Near You: How Evolving Technology Demands Rapid Reevaluation of Legislative Protections in Light of Streaming Television Broadcasts*, 50 GONZ. L. REV. 117, 137-43 (2015).

<sup>282</sup> 29 FCC Rcd. 15995.