

**THE WRONG DECISION AT THE RIGHT TIME:
HOW *AEREO* AND ITS AFTERMATH EXPOSED
THE NEED FOR CHANGE IN THE COPYRIGHT ACT**

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I. INTRODUCTION

Television, for better or for worse, is America's sweetheart.¹ Although traditional television has continually withstood the onslaught of new technologies and remains the top choice for media consumption, it has faced stiffer competition in recent years because of the prevalence of portable devices.² And even though there are only twenty-four hours in a day, companies and Americans alike are trying to figure out how to squeeze in as much time as possible with these new devices.³ Yet despite our love for screen time,⁴ many viewers may not understand the differences between the

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¹ See NIELSEN, *The Total Audience Report* (Dec. 3, 2014), <http://www.nielsen.com/us/en/insights/reports/2014/the-total-audience-report.html> [hereinafter NIELSEN, *The Total Audience Report*] (noting that because of the limited numbers of hours in a day, video consumption can increase only finitely, but content is still key for consumers and is being accessed by more online mediums). See also NIELSEN, *Shifts in Viewing: The Cross-Platform Report Q2 2014* (Sept. 8, 2014), <http://www.nielsen.com/us/en/insights/reports/2014/shifts-in-viewing-the-cross-platform-report-q2-2014.html> [hereinafter NIELSEN, *Shifts in Viewing*]. Although younger viewers (ages 18–34) are increasing their screen time overall, the use of digital devices is increasing across all age groups (ranging from 18–64). *Id.* In fact, older generations took more to digital devices between the second quarter of 2013 to the second quarter of 2014, increasing their use from 60 to 80%. *Id.* Even though the time spent viewing media on television decreased over all demographics, television still dominates how Americans access media. See *id.*

² See NIELSEN, *The Total Audience Report*, *supra* note 1.

³ See NIELSEN, *Shifts in Viewing*, *supra* note 1.

⁴ In 2013, the average American spent over five hours per day using digital media, while television use accounted for about four and a half hours per day. *Digital Set to Surpass TV in Time Spent with US Media: Mobile Helps Propel Digital Time Spent*, EMARKETER (Aug.

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forms of television they watch: broadcast and cable.⁵ This distinction is becoming more significant in both intellectual property and communications law as new technologies emerge and test the limits of existing law.⁶ Even more importantly, these legal battles reflect new ways typical media consumers receive content, and the combination of these cases with the potential changing front of media consumption could soon change the face of traditional television.⁷ This Note looks at the relationship between broadcast and cable, the repercussions of *ABC, Inc. v. Aereo, Inc.*⁸ and its effect on how Americans watch television, and what Congress should do about it.

II. BACKGROUND

A. *A Brief History of the Broadcast, Cable, and Copyright Relationship*

Although there are many rules and regulations covering cable providers, this section will focus on why cable providers are required to provide broadcast signals, and it will briefly look at the compulsory licensing system of the Copyright Act with respect to cable and broadcast.

The Communications Act of 1934 requires cable providers to seek consent from broadcasters before retransmitting broadcast signals.⁹ The broadcast station may require a fee for the retransmission.¹⁰ However, the

1, 2013), <http://www.emarketer.com/Article/Digital-Set-Surpass-TV-Time-Spent-with-US-Media/1010096#sthash.kMeLQKsT.dpuf>.

⁵ See Paul Rodriguez, *Broadcast, Cable . . . What's the Difference?* NCTA PLATFORM (Nov. 12, 2008), <https://www.ncta.com/platform/cable-programming/broadcast-cable-whats-the-difference>.

⁶ See, e.g., *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

⁷ See *EMARKETER*, *supra* note 4.

⁸ *Aereo*, 134 S. Ct. 2498.

⁹ Communications Act of 1934, 47 U.S.C. § 325(a) (2012). See also *Cable Carriage of Broadcast Stations*, FCC, <http://www.fcc.gov/guides/cable-carriage-broadcast-stations> (last updated Aug. 15, 2013).

Since 1934, broadcast stations that use the programming of other broadcast stations have been required to obtain the prior consent of the originating station. This requirement was made applicable to cable systems because the absence of this requirement was distorting the video marketplace and threatening the future of over-the-air television broadcasting.

Id.

¹⁰ FCC, *supra* note 9.

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Communications Act also contains a “must-carry” provision.¹¹ This means that cable operators must carry “the signals of local commercial television stations,”¹² and, if a broadcaster enforces its must-carry rights, it cannot also demand payment.¹³

In line with the must-carry provision, the 1976 Copyright Act provides a compulsory license to cable systems to transmit broadcast programming without imposing liability for copyright infringement.¹⁴ Together, these statutory provisions create a system which allows cable providers to retransmit broadcasters’ signals without infringing on the broadcasters’ copyrights.¹⁵ This complementary system makes sense because it would be contradictory to charge cable operators with infringement under the Copyright Act for what the Communications Act requires.

B. Direct Liability for Content Providers Under the 1909 Copyright Act

The United States Supreme Court has long had to deal with direct liability for service providers¹⁶ in the face of new technology.¹⁷ For example, in some areas such as West Virginia, it was difficult for individuals to catch over-the-air broadcast signals with their own equipment because of the mountainous terrain.¹⁸ As a solution, companies erected one large antenna to collect the signals, which were then sent to individual homes.¹⁹ This Community Access Television (CATV) system came under fire from

¹¹ 47 U.S.C. § 534(a); FCC, *supra* note 9.

¹² § 534(a).

¹³ *Id.* § 534(b)(10); FCC, *supra* note 9.

¹⁴ *See* Copyright Act of 1976, 17 U.S.C. § 111(c) (2012). The retransmission of this programming is referred to as a “secondary transmission” in the Copyright Act. *See id.* The secondary transmissions are the broadcast signals (which cable operators are required to carry) and the primary transmission is the cable signal. *See id.*

¹⁵ *See id.*; 47 U.S.C. § 534(a).

¹⁶ For the purposes of this Note, a service provider is an entity that does not transmit original programming, but solely collects and retransmits signals from broadcasters to consumers. Part II discusses this “collection and retransmission,” which often constitutes a performance under the Copyright Act and can be infringing if done without the permission of the broadcaster.

¹⁷ *See, e.g.,* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395–96 (1968).

¹⁸ *Id.* at 391; *see Evolution of Cable Television*, FCC, <http://www.fcc.gov/encyclopedia/evolution-cable-television> (last updated Mar. 13, 2012).

¹⁹ *Fortnightly*, 392 U.S. at 392; *see Evolution of Cable Television*, *supra* note 18.

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broadcasters who argued that the transmissions constituted copyright infringement.²⁰

In *Fortnightly Corp. v. United Artists Television, Inc.*,²¹ the U.S. Supreme Court held that the CATV system did not infringe on any copyright because it did not “perform” under the 1909 Copyright Act.²² The Court analogized the CATV system to a viewer, rather than a broadcaster, because it took a passive role in the transmission of the signals.²³ A few years later, in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,²⁴ the Court was faced with another CATV system.²⁵ One notable difference was that the system provided for not only local stations, but also those as far as 450 miles away.²⁶ The copyright owners argued the *Fortnightly* analysis was inapplicable because an individual could not capture these distant signals in his or her home; therefore, the CATV system provider was more analogous to a broadcaster as it provided a service the individual could not get on his or her own.²⁷ The Court rejected this argument and followed *Fortnightly*, holding that the CATV system did not infringe on the copyrights of the broadcasters.²⁸

It is important to note that both *Fortnightly* and *Teleprompter* were decided under the 1909 Copyright Act.²⁹ The 1909 Act granted a copyright owner the exclusive right to “perform” a work publicly, but it did not define the word “perform.”³⁰ Without clear guidance on the parameters of such an important word, the Court created two categories: broadcasters and viewers.³¹ Broadcasters “performed” by exhibiting the works.³² Viewers were audience members who took in the works and so did not “perform.”³³ Those who fell in the broadcaster category were subject to direct liability for

²⁰ See *Fortnightly*, 392 U.S. at 393.

²¹ *Id.* at 390.

²² *Id.* at 401–02.

²³ *Id.*

²⁴ 415 U.S. 394 (1974).

²⁵ *Id.* at 399–401.

²⁶ *Id.* at 400.

²⁷ *Id.* at 406.

²⁸ See *id.* at 412.

²⁹ *Id.* at 396; *Fortnightly*, 392 U.S. at 390.

³⁰ See Copyright Act of 1909, ch. 320, § 1(d), 35 Stat. 1075, 1075, *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

³¹ See *Fortnightly*, 392 U.S. at 398–99.

³² *Id.* at 398.

³³ *Id.*

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copyright infringement, while viewers were not.³⁴ In the Court's opinion, the CATV systems were more akin to individuals who collaborated to receive the content more effectively, and by the sheer collection and retransmission did not become like broadcasters who "perform[ed]" the transmission of the content.³⁵

C. *A New Act with New Definitions*

Shortly after *Teleprompter* was decided in 1974, Congress passed a new version of the Copyright Act.³⁶ A major reason cited for creating the new act was the existence and prevalence of myriad technological advances since the 1909 Act (e.g., television and radio).³⁷ As part of the 1976 Act, Congress formally defined many important terms that had previously been left to judicial interpretation under the 1909 Act.³⁸

1. *A New Understanding of "Perform"*

First, Congress was unhappy with the Court's decisions in the CATV cases and adopted a new expanded definition of "perform."³⁹ Under the 1976 Copyright Act, "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."⁴⁰ This new definition encompasses CATV systems because such systems "show [the] images" of audiovisual works and make the "sounds accompanying it audible."⁴¹ The new Act effectively reversed the Court's decisions in the CATV cases, moving such systems from the "viewer" to the "broadcaster" category.

³⁴ See *id.* at 398–99.

³⁵ See *id.* at 400.

³⁶ The 1976 Copyright Act was signed into law by President Ford in October 1976, but did not take effect until January 1978. See *Circular 1a, United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, <http://copyright.gov:8081/circs/circ1a.html> (last visited Oct. 11, 2015).

³⁷ See H.R. REP. NO. 94-1476, at 360 (1976).

³⁸ Compare 17 U.S.C. § 101 (2012), with Copyright Act of 1909, ch. 320, § 1(d), 35 Stat. 1075, 1075 (repealed 1976).

³⁹ See 17 U.S.C. § 101.

⁴⁰ *Id.*

⁴¹ *Id.*

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2. *How Public is “Public”?*

Under both the 1909 and 1976 versions of the Copyright Act, a copyright owner has the exclusive right to perform his or her works *publicly*, meaning a non-owner must publicly perform to infringe on this right.⁴² But, this key distinction between public and private performances was also left undefined under the 1909 Act.⁴³ Initially, courts were left to determine *how* public a performance had to be to constitute infringement.⁴⁴

Once again, Congress stepped in, and in the 1976 Act re-defined the key term “public” or “publicly.”⁴⁵ To perform “publicly” is:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁴⁶

Thus, there are two possible ways to directly infringe: either by performing the copyrighted work in a public place or by transmitting it to multiple members of the public through a device.⁴⁷

3. *The Transmit Clause*

The definition of performing “publicly” includes “to transmit . . . a performance.”⁴⁸ Adding a wrinkle, however, is the fact that “transmit” is yet another defined term in the 1976 Copyright Act.⁴⁹ “To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they

⁴² See Copyright Act of 1909 § 1(d); 17 U.S.C. § 106(4).

⁴³ See § 1(d).

⁴⁴ See *id.*

⁴⁵ 17 U.S.C. § 101.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

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are sent.”⁵⁰ The three terms—*perform*, *publicly*, and *transmit*—are interrelated and were all at issue in *Aereo*, the 2014 Supreme Court of the United States case at the heart of this Note.⁵¹ Understanding how courts have applied and interpreted all three is necessary to understand the logic and implications of *Aereo*. But before addressing cases interpreting these terms, it is crucial to understand the difference between direct and secondary liability and to appreciate what is at stake for service providers.

D. Secondary Liability Generally

Copyright owners hold the exclusive rights enumerated in section 106 of the 1976 Copyright Act, commonly referred to as “106 rights.”⁵² These include the right to perform literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works publicly.⁵³ As such, individuals are subject to direct liability if they infringe on one of the copyright owners’ rights themselves: for example, by publicly performing a copyrighted work.⁵⁴

In contrast, secondary liability is a product of case law—not statute—and imposes liability on the actor because of the conduct of another.⁵⁵ There are two traditional types of secondary liability: contributory and vicarious.⁵⁶ Both were defined in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*⁵⁷ “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”⁵⁸ And, “one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”⁵⁹ Courts have applied these theories for years, and though Congress has amended the

⁵⁰ *Id.*

⁵¹ *See Aereo*, 134 S. Ct. at 2503–04.

⁵² *See, e.g.*, Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 47 (1988).

⁵³ 17 U.S.C. § 106(4).

⁵⁴ *Id.* § 501(a).

⁵⁵ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).

⁵⁶ *See id.*

⁵⁷ 443 F.2d 1159, 1162 (2d Cir. 1971).

⁵⁸ *Id.*

⁵⁹ *Id.*

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Copyright Act multiple times,⁶⁰ it has never addressed them and thus has silently approved secondary liability.⁶¹

E. A Review of Direct Liability for Service Providers Under the 1976 Copyright Act

Courts have had the opportunity to apply direct and secondary liability to service providers,⁶² but as this section will show, direct liability is frequently applied to new technology that does not seem to fit squarely within the confines of the Copyright Act. However, a review of representative cases suggests unwillingness by courts to apply direct liability to more traditional media providers, such as equipment manufacturers, and—more importantly here—service providers.

1. Direct Liability for Service Providers

As suggested above, although courts have followed the statutory language of the 1976 Copyright Act, courts tend to find direct liability more often when the service provider is non-traditional, such as a hotel or a video rental store.⁶³

a. The Third Circuit's Redd Horne Decision

Though the technology at issue in *Columbia Pictures Industries, Inc. v. Redd Horne* may seem dated, the videocassette recorder (VCR) and video home system (VHS) were the first major tests of the limits of the 1976 Copyright Act.⁶⁴ These then-new VCR and VHS systems, which became popular and feasible for average consumers in the late 1970s, led to several prominent copyright decisions. These devices allowed consumers to watch and record copyrighted material, both at home and in new stores designed

⁶⁰ See, e.g., Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub. L. No. 111-295, § 4(b)(1)(B), 124 Stat. 3180 (2010); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, title I, § 105(c)(3), 122 Stat. 4260 (2008).

⁶¹ See *Gershwin*, 443 F.2d at 1161–62.

⁶² See, e.g., *On Command Video Corp. v. Columbia Picture Indus.*, 777 F. Supp. 787, 789–90 (N.D. Cal. 1991) (holding that under the public place clause, a movie video system is not a public performance in a hotel room; however, under the transmit clause, it is).

⁶³ See, e.g., *Columbia Pictures Indus., Inc. v. Redd Horne*, 749 F.2d 154, 156, 162 (3d Cir. 1984).

⁶⁴ See Sylvie Castonguay, *50 Years of the Video Cassette Recorder*, WORLD INTELL. PROP. ORG. (Nov. 2006), http://www.wipo.int/wipo_magazine/en/2006/06/article_0003.html.

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around this technology.⁶⁵ Copyright holders thought this technology violated their copyrights, as they no longer controlled when their content was viewed.⁶⁶ *Redd Horne* was one of a series of decisions that grappled with whether such recording devices violated copyright.⁶⁷

Redd Horne operated stores where customers could select a movie and then enter a private theatre within the store (seating one to four people); the store employees would enter the selected cassette in the front of the store.⁶⁸ Although the store employees physically entered the cassette into the VCR, customers could control settings such as volume, brightness, and color from inside the private theatre.⁶⁹

The Third Circuit concluded the stores were directly liable for infringement because they performed the copyrighted works publicly in violation of the copyright owners' section 106(4) right of performance.⁷⁰ The court quickly determined the actions of Redd Horne constituted a "performance," as playing the movie necessarily meant displaying both the images and accompanying sounds of the work.⁷¹

The court held that Redd Horne fit neatly within the first clause of the definition of "public performance."⁷² Specifically, it was considered "a place open to the public" because the stores were in fact open to the public and the services were available to anyone who paid the fee.⁷³ The Third Circuit, affirming the trial court, rejected the contrary conclusion that the *place* where the performance occurred was the individual private theatres (which were similar to individuals' homes) and not the store: "Simply because the cassettes can be viewed in private does not mitigate the essential fact that [the store] is unquestionably open to the public."⁷⁴

⁶⁵ *See id.*

⁶⁶ *See, e.g.,* Sony Corp. of Am. v. Universal City Studios Inc., 464 U.S. 416, 432 n.12 (1984); *Redd Horne*, 749 F.2d at 157.

⁶⁷ *See Redd Horne*, 749 F.2d at 156.

⁶⁸ *Id.* at 156–57.

⁶⁹ *Id.* at 157.

⁷⁰ *Id.* at 162.

⁷¹ *Id.* at 158.

⁷² *Id.* at 159.

⁷³ *Id.* (quoting 17 U.S.C. § 101 (1982)).

⁷⁴ *Id.*

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b. The Northern District of California's On Command Decision

Similar to *Redd Horne, On Command Video Corp. v. Columbia Picture Industries*⁷⁵ involved a non-traditional service provider.⁷⁶ The provider, On Command, created a system that enabled hotels to play cassettes and transmit the signals to guest rooms.⁷⁷

The On Command system allowed guests to select movies from their rooms, but the hotel staff could activate the service upon check-in or disable the service altogether, or they could simply disable certain features at the guest's request (such as adult movies).⁷⁸ The service also had certain limits. For example, once one guest chose a movie, other guests could not select it, and the movie would only play in that guest's room.⁷⁹

First, the *On Command* court determined the hotel room was not a "public place" for purposes of the Act.⁸⁰ It rejected the argument that the On Command system was in a public place solely because the equipment was located throughout the hotel and was controlled by the hotel.⁸¹ "At least for the purposes of public place analysis, a performance of a work does not occur every place a wire carrying the performance passes through; *a performance occurs where it is received*. Accepting defendants' argument would eviscerate both the concepts of 'performance' and 'public place.'"⁸² However, On Command did not escape copyright infringement liability, as the court found the system constituted a public performance under the transmit clause.⁸³

The Northern District of California held that On Command violated copyright because it communicated the movie's sounds and images beyond the original transmission to the hotel command center and through its system to the guest rooms.⁸⁴ The guests' involvement in the process, by selecting the movie, was immaterial to whether the system itself transmitted.⁸⁵ The

⁷⁵ 777 F. Supp. 787 (N.D. Cal. 1991).

⁷⁶ *See id.* at 788.

⁷⁷ *See id.* In a slight anomaly, On Command, the potential infringer, sued seeking a declaratory judgment that the hotel system did not infringe the defendants' copyrights, and the defendants then counterclaimed for copyright infringement. *See id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 789.

⁸¹ *Id.*

⁸² *Id.* (emphasis added).

⁸³ *See id.* at 789–90.

⁸⁴ *See id.*

⁸⁵ *See id.* at 790.

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court found the system was sufficiently public because the hotels, which used the system, were open to the public, and members of the public could use the system by paying a fee, similar to *Redd Horne*.⁸⁶ “Thus, whether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public.”⁸⁷ *On Command* is another illustration of how courts have traditionally applied direct liability to uncommon service providers in the face of a new technology.

2. *No Direct Liability for Service Providers*

In contrast to secondary liability, courts have been reluctant to find more traditional service providers directly liable, especially when it seems the consumer is the one controlling the transaction, and thereby choosing whether to infringe.

a. *The Supreme Court of the United States Decision in Sony*

In another case addressing the new problems created by the video tape recorder (VTR), the Court declined to hold an equipment provider liable for the possible infringements of its customers in *Sony Corp. of America v. Universal City Studios, Inc.*⁸⁸

The copyright owners in *Sony* were concerned that, with the rising popularity of VTRs, viewers would be able to simply record copyrighted content for free.⁸⁹ The copyright owners sought to hold Sony liable because it manufactured and marketed the VTR devices that viewers could use to infringe.⁹⁰

The Supreme Court recognized the absence of statutory secondary liability: “The Copyright Act does not expressly render anyone liable for infringement committed by another.”⁹¹ After contrasting the differences between the Copyright and Patent Acts (the Patent Act does include contributory liability in its statutory scheme),⁹² the Court declined to hold Sony liable for contributory or vicarious liability, as there was no evidence

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ 464 U.S. 417, 456 (1984).

⁸⁹ *See id.* at 421.

⁹⁰ *See id.* at 422.

⁹¹ *Id.* at 434.

⁹² *See* 35 U.S.C. § 271(c) (2012).

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in the record that Sony sold the devices with constructive knowledge that viewers would infringe with the VTRs.⁹³

The Court supported its decision that Sony was not responsible for customers' infringements by noting that Sony's devices had substantial non-infringing uses.⁹⁴ To do so, the Court viewed the device as a whole and concluded it had "substantial noninfringing uses,"⁹⁵ such as the ability for customers to "time-shift" programs; that is, for customers to record programs and view them later at their convenience and then delete them.⁹⁶

The Court was decidedly cautious in *Sony* and explicitly deferred to Congress throughout the opinion.⁹⁷ In conclusion, the Court called for congressional action: "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written."⁹⁸

b. The Second Circuit's Cablevision Decision

In a new version of a similar problem, *Cartoon Network, LP v. CSC Holdings, Inc.*,⁹⁹ dealt with a remote storage digital video recorder system (RS-DVR).¹⁰⁰ The plaintiffs were content providers, such as Cartoon Network, that sought to hold the defendant cable system, Cablevision, directly liable because it marketed the RS-DVRs to its customers.¹⁰¹ The

⁹³ See *Sony*, 464 U.S. at 437–39.

⁹⁴ See *id.* at 442.

⁹⁵ *Id.* at 456.

⁹⁶ *Id.* at 423. One proponent of these time-shifting abilities was Fred Rogers of *Mister Rogers' Neighborhood*. See *id.* at 445.

⁹⁷ See *id.* at 431.

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Id. (citations omitted).

⁹⁸ *Id.* at 456.

⁹⁹ 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009) [hereinafter *Cablevision*].

¹⁰⁰ See *id.* at 123.

¹⁰¹ *Id.*

(continued)

plaintiffs argued the transmissions of its copyrighted works via the RS-DVR were public performances.¹⁰²

Two features of the RS-DVR are significant when considering *Aereo*: (1) the RS-DVRs were located in a central hard drive maintained by Cablevision, and (2) the customer chose what content to record.¹⁰³ Therefore, the customer directed the server, because it did not record the program unless a customer requested it.¹⁰⁴

The Second Circuit, noted for its copyright prowess,¹⁰⁵ refused to hold Cablevision directly liable because the customer was calling the shots.¹⁰⁶

[T]o establish *direct* liability under . . . the Act, something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.¹⁰⁷

Moreover, the court did not find Cablevision's performances to be "to the public" because it only provided single copies to unique customers.¹⁰⁸ In doing so, it rejected the Northern District of California's interpretation in *On Command* that "to the public" means any commercial transaction.¹⁰⁹ The Second Circuit found this interpretation "untenable" and outside the statutory language.¹¹⁰ The court was careful to limit its holding and, with eerie foresight, predicted almost the exact situation at issue in *Aereo*:

This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by

¹⁰² *Id.*

¹⁰³ *See id.* at 124–25.

¹⁰⁴ *See id.* at 124.

¹⁰⁵ *See* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 218 n.74 (2012) (quoting William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 41 (2006)).

¹⁰⁶ *See Cablevision*, 536 F.3d at 133. There was an additional argument that Cablevision infringed on the reproduction right by buffering and storing seconds of the copyrighted works, but this was also rejected. *See id.* at 129–30.

¹⁰⁷ *Id.* at 130 (quoting *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)).

¹⁰⁸ *Id.* at 139.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

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making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement.¹¹¹

Thus, although the Second Circuit was willing to exempt the RS-DVR technology, it cautioned that its holding would not likely apply to creative attempts designed to circumvent the Copyright Act.

F. A Different Approach: Call It a Cable System

One recent attempt to avoid liability was denied in *WPIX, Inc. v. ivi, Inc.*¹¹² The *ivi* and *Aereo* systems were similar; both provided broadcast signals to consumers via the internet.¹¹³ In the *ivi* system, the shows were provided in real time and users could watch shows broadcasted in other major metropolitan areas rather than only those that would be accessible if the user tried to capture over-the-air broadcast signals.¹¹⁴

Rather than attempting to debate its way out of liability by arguing it was not transmitting a performance, *ivi* tried a new tactic.¹¹⁵ It admitted transmitting performances but argued it was a cable system under the Communications Act of 1934, and, therefore, it should be granted a compulsory license to retransmit broadcast signals.¹¹⁶ There was, of course, a catch. While *ivi* sought treatment as a cable system to gain the benefit of the Copyright Act's compulsory license under section 111, it also wanted to avoid complying with the regulations of the Communications Act.¹¹⁷ To do so, it argued it was not a cable operator under the parameters of the Communications Act.¹¹⁸ The Southern District of New York held *ivi* could not have its cake and eat it too:

In the thirty-five years since the passage of Section 111,
many companies have constructed business models

¹¹¹ *Id.* at 139–40.

¹¹² 765 F. Supp. 2d 594, 617 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275, 288 (2d Cir. 2012).

¹¹³ *Aereo*, 134 S. Ct. at 2500; *ivi*, 765 F. Supp. 2d at 598.

¹¹⁴ *See ivi*, 765 F. Supp. 2d at 598–99.

¹¹⁵ *See id.* at 599.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.*

(continued)

revolving around the use of new technologies and the statutory license. . . . No technology, however, has been allowed to take advantage of Section 111 to retransmit copyrighted programming to a national audience while not complying with the rules and regulations of the FCC and without consent of the copyright holder.¹¹⁹

Upon review of the statutory language, congressional intent, and agency interpretations, the Southern District of New York found it extraordinarily unlikely that *ivi* is a cable system.¹²⁰ First, the court held *ivi* was not entitled to use the license because it was too dissimilar from the companies Congress sought to protect.¹²¹ The court found the purpose of the Copyright Act's compulsory licensing system especially compelling.¹²² The purpose of section 111 of the Copyright Act is to balance compensation for the copyright holder without making costs prohibitive for the entity retransmitting the broadcast.¹²³ Additionally, the court took note of Congress's intent to make the compulsory license complement the existing Communications Act.¹²⁴

Second, the Copyright Office had already made multiple statements that it did not consider an *ivi*-type system to be a cable system under the Copyright Act.¹²⁵ Applying *Skidmore v. Swift & Co.*¹²⁶ deference, the court found the Copyright Office had clearly defined what technologies were and were not within the ambit of section 111.¹²⁷ Addressing internet retransmissions, former Register of Copyrights Marybeth Peters stated:

¹¹⁹ *Id.* at 602.

¹²⁰ *See id.* at 622.

¹²¹ *Id.* at 604.

¹²² *See id.* at 603.

¹²³ *Id.* at 603.

¹²⁴ *Id.*

¹²⁵ *Id.* at 604–05.

¹²⁶ 323 U.S. 134, 140 (1944) (holding that deference to an agency's interpretation of its own statute depending upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

¹²⁷ *ivi*, 765 F. Supp. 2d at 605–06. For instance, the Copyright Office had stated various non-internet providers, such as satellite carriers, multipoint distribution service and multichannel multipoint distribution services, were not cable systems within the meaning of the Copyright Act. *See* Cable Compulsory License; Definition of Cable System, 59 Fed. Reg. 67635-01 (Dec. 30, 1994) (to be codified at 37 C.F.R. pt. 201).

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It is my understanding that some services that wish to retransmit television programming over the Internet have asserted that they are entitled to do so pursuant to the compulsory license of section 111 of Title 17. I find this assertion to be without merit. The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity, and signal quota rules—issues that have also arisen in the context of the satellite compulsory license. Congress has properly concluded that the Internet should be largely free of regulation, but the lack of such regulation makes the Internet a poor candidate for a compulsory license that depends so heavily on such restrictions. I believe that the section 111 license does not and should not apply to Internet transmissions.¹²⁸

The Copyright Office has consistently reiterated its position that internet retransmissions do not fall within the section 111 compulsory licensing system.¹²⁹ Indeed, the Office stated if Congress wanted internet retransmissions to receive a license, it would need to enact new legislation.¹³⁰ Congress had yet to do so at the time of the *ivi* decision, and the court found this inaction “significant.”¹³¹

¹²⁸ Marybeth Peters, *Letter of Marybeth Peters, Register of Copyrights, to the Honorable Howard Coble* (Nov. 10, 1999), <http://copyright.gov/docs/regstat61500.html>.

¹²⁹ See Marybeth Peters, *Copyrighted Broadcast Programming on the Internet* (Jun. 15, 2000), <http://www.copyright.gov/docs/regstat61500.html>.

¹³⁰ *Id.*

¹³¹ *ivi*, 765 F. Supp. 2d at 616.

In fact, as far as this Court is aware, not a single member of Congress has even introduced legislation which would alter Section 111 in such a way that would positively impact *ivi*. In light of this history, it certainly appears that Congress has acquiesced to the prevailing administrative view, particularly given the consistency and resoluteness with which it has been established.

Id.

(continued)

The positions of courts regarding secondary liability and the Copyright Office's staunch refusal to recognize internet transmissions under section 111 set the stage for *Aereo*.¹³²

III. DISCUSSION & ANALYSIS

A. *Facts of Aereo*

Aereo provided broadcast shows to individual customers through its internet streaming service.¹³³ Similar to the VTRs in *Sony* and RS-DVRs in *Cablevision*, customers could choose to watch the shows in real time (the watch function), or record upcoming shows to watch later (the record function).¹³⁴ The watch function of Aereo was the only one before the Supreme Court.¹³⁵ Technologically, each Aereo customer subscribed to his or her own individual antenna.¹³⁶ This meant Aereo did not make one communal copy of a show and retransmit it to each customer who requested it; instead the customer controlled what was sent to his or her own antenna.¹³⁷ Despite Aereo's contentions to the contrary, the Supreme Court was skeptical of the system.¹³⁸ In the Court's eyes, the individual antennas appeared to have been adopted not to promote efficiency, but to avoid liability for copyright infringement.¹³⁹

¹³² Aereo filed for Chapter 11 reorganization bankruptcy in 2014 because of the pause in operations resulting from the Court's ruling. See Chet Kanojia, *A Letter to Our Consumers: The Next Chapter*, AEREO (Nov. 21, 2014), <https://web.archive.org/web/20141121224339/https://aereo.com>. It ultimately agreed to settle the lawsuit with CBS, FOX, ABC, and other broadcasters for \$950,000, less than one percent of what the broadcasters originally demanded. See Lisa Shuchman, *Reduced to Scrap, Aereo Makes Peace With Broadcasters*, LITIGATION DAILY (May 8, 2015), <http://www.international.law.com/id=1202726011173?slreturn=20150821173511>. For the purposes of this Note, the particular company is not as important to the copyright implications as the method of service it provided.

¹³³ *Aereo*, 134 S. Ct. at 2503.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ See Oral Argument at 30:16–34:36, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), http://www.oyez.org/cases/2010-2019/2013/2013_13_461 [hereinafter Oral Argument].

¹³⁹ *See id.* This system was predicted and cautioned against by the Second Circuit in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139–40 (2d Cir. 2008).

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The service was popular in major metropolitan areas such as New York City, where broadcast signals are often weak because of peaks and valleys caused by skyscrapers.¹⁴⁰ In this way, the system was similar to the old CATV systems, which provided broadcast signals to people in areas such as West Virginia, where the signals were often weak because of mountainous terrain.¹⁴¹

Chet Kanojia, founder and CEO of Aereo, stated:

We began this journey because we were frustrated with a system that we believed was broken and no longer served the consumer. When it came to watching live television, the options were few, the products available were cumbersome and didn't fit our increasingly mobile lifestyle, and costs were unreasonably high and rising. With that in mind, we put our collective engineering power to work to create an online technology that was simple, useful, and compelling, and provided consumers with a true alternative to how they watch local live TV. That's how Aereo came to life.¹⁴²

ABC and its fellow plaintiffs did not see Aereo as a legal alternative to traditional broadcast and cable systems and brought suit to end what it viewed as the system's infringement of its programming.¹⁴³

B. Procedural History of Aereo

Though *Aereo* has a complicated procedural history spanning multiple jurisdictions and lawsuits,¹⁴⁴ the decisions from the Southern District of New York and the Second Circuit are most relevant for the purposes of this Note. In the initial decision, the Southern District of New York denied ABC's motion for a preliminary injunction preventing Aereo from broadcasting its content.¹⁴⁵ The district court found the Second Circuit's decision and interpretation of "public performance" in *Cablevision* (finding no infringement for the service provider for providing and storing the

¹⁴⁰ See Ryan Waniata, *Aereo to NYC: Sorry, We're 'SOLD OUT'*, DIGITAL TRENDS (Jan. 31, 2014), <http://www.digitaltrends.com/home-theater/business-booming-aereo-tells-nyc-customers-sold>.

¹⁴¹ See *Fortnightly*, 392 U.S. at 391.

¹⁴² See Kanojia, *supra* note 132.

¹⁴³ See *Aereo*, 134 S. Ct. at 2503–04.

¹⁴⁴ See, e.g., *id.* at 2498; *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 676 (2d Cir. 2013); *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 373 (S.D.N.Y. 2012).

¹⁴⁵ See *Aereo*, 874 F. Supp. 2d at 375.

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potentially infringing device) controlling because the devices were so similar.¹⁴⁶ Accordingly, the injunction was denied in part because plaintiffs did not show that they were likely to win on the merits of their case.¹⁴⁷

The Second Circuit affirmed the denial of the injunction, and agreed with the district court that *Aereo* was not factually distinguishable from *Cablevision*, and so the system did not violate the Transmit Clause, nor did it publicly perform.¹⁴⁸ In dissent, Judge Denny Chin stated that *Aereo*'s system was a "sham" and that the service it provided was no different than a cable company.¹⁴⁹ Because it publicly performed, in the eyes of the dissent, *Aereo* was an infringer.¹⁵⁰

C. The Supreme Court's Decision

1. The Majority

The Supreme Court majority seemingly agreed with Judge Chin's criticisms: because *Aereo* looked like a cable system, it should be treated like a cable system.¹⁵¹ With this theme apparent from the start, it was not surprising that the Court treated *Aereo* as an infringer.¹⁵² This reasoning was apparent in oral argument, as Justice Sotomayor posed the first question: "Why aren't they [*Aereo*] cable companies?"¹⁵³ The Court rejected *Aereo*'s argument that it was simply a service provider and that any infringement was made by consumers, not *Aereo*.¹⁵⁴ Interpreting the Transmit Clause, the Court reviewed the CATV decisions of *Teleprompter* and *Fortnightly* and held that "[t]he [Transmit] Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals."¹⁵⁵ The

¹⁴⁶ *Id.* at 387.

¹⁴⁷ *Id.* at 405.

¹⁴⁸ *WNET*, 712 F.3d at 695.

¹⁴⁹ *Id.* at 697 (Chin, J., dissenting).

¹⁵⁰ *Id.* at 696. "[I]ndeed, 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." *Id.* Judge Chin's dissent was not particularly surprising as he was the district court judge who decided *Cablevision*, in which he held the RS-DVR system publicly performed. See *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 609, 624 (S.D.N.Y. 2007).

¹⁵¹ See *Aereo*, 134 S. Ct. at 2506.

¹⁵² See *id.*

¹⁵³ Oral Argument, *supra* note 138, at 00:42.

¹⁵⁴ See *Aereo*, 134 S. Ct. at 2506.

¹⁵⁵ *Id.*

(continued)

Transmit Clause, coupled with the complicated nature of section 111's compulsory licensing system, indicated to the majority that Congress meant to regulate cable companies which perform copyrighted works.¹⁵⁶

The Court decided that Aereo was a broadcaster rather than a viewer.¹⁵⁷ This was not because Aereo made the infringing decisions, but because it was too similar to a cable system, which Congress intended to regulate.¹⁵⁸ The majority did not find it persuasive that Aereo did not send programs until requested by the viewer, as opposed to the continuous transmission of copyrighted material to televisions in *Teleprompter* and *Fortnightly*.¹⁵⁹

Next, the Court decided Aereo did "perform publicly," despite its creative efforts to individualize performances by employing 10,000 antennas.¹⁶⁰ Again, the Court was not impressed with the individualization, as it did not alter Aereo's commercial purpose or affect the viewer's experience.¹⁶¹ It also did not matter whether Aereo transmitted one performance to multiple consumers, or individual performances to unique consumers, because "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."¹⁶²

2. *The Dissent*

The conservative bloc of the Court—Justices Scalia, Thomas, and Alito—dissented from the majority decision and rejected its "looks-like-cable-TV" logic.¹⁶³ The dissent focused solely on whether Aereo performed, and determined it did not.¹⁶⁴ Justice Scalia wrote that to "perform," Aereo must have engaged in some volitional conduct that infringed the plaintiffs'

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* at 2507.

¹⁵⁸ *See id.*

¹⁵⁹ *Id.* ("Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here.").

¹⁶⁰ *See id.* at 2503, 2508.

¹⁶¹ *Id.* at 2508–09.

¹⁶² *Id.* It did matter that the consumers were strangers. To fit within the Copyright Act, the infringer must perform at a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" to perform publicly. *See id.* at 2510 (quoting 17 U.S.C. § 101 (2012)).

¹⁶³ *Id.* at 2511–12 (Scalia, J., dissenting).

¹⁶⁴ *Id.* at 2512.

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copyrights.¹⁶⁵ The plaintiffs could not prove this because there was nothing to suggest Aereo selected the content or actively participated in the infringing conduct.¹⁶⁶ Instead, Aereo's equipment was passively used by subscribers who may or may not have infringed.¹⁶⁷ The dissent suggested Aereo should only have been secondarily liable.¹⁶⁸

To be clear, the dissent was not impressed by Aereo's system either.¹⁶⁹ Justice Scalia stated, "I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it."¹⁷⁰

Both the majority and the dissent of the Supreme Court decision found there was a performance; they just differed on who was doing the performing.¹⁷¹ This difference of opinion is exactly why the majority chose to find Aereo directly liable, finding it performed by providing the streaming service.¹⁷² In contrast, the dissent found only the consumers "performed" when they selected and watched programming.¹⁷³

D. Should Aereo Have Been Brought Under a Secondary Liability Theory?

The *Aereo* dissent makes a valid argument: the traditional approach, as illustrated in *Sony* and *Cablevision*, has been to attack service providers under a secondary liability theory rather than through direct liability.¹⁷⁴ This is because after *Sony* and under the statute's language, it is difficult to show service providers performed, but there is usually evidence of either vicarious or contributory liability.¹⁷⁵ Although the plaintiffs in *Aereo* won, the decision is a confusing divergence in copyright jurisprudence. Additionally, the plaintiffs likely would have won on a secondary liability theory as well, especially because Aereo's technology was so apparently distasteful to the Court.¹⁷⁶

¹⁶⁵ See *id.* at 2512.

¹⁶⁶ *Id.* at 2514.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 2514. This hypothetical is examined in Part III.D.

¹⁶⁹ See *Aereo*, 134 S. Ct. at 2517.

¹⁷⁰ *Id.*

¹⁷¹ See *id.* at 2508, 2517.

¹⁷² See *id.* at 2508.

¹⁷³ See *id.*

¹⁷⁴ See *supra* Part II.E.

¹⁷⁵ See *Aereo*, 134 S. Ct. at 2514–15 (Scalia, J., dissenting).

¹⁷⁶ See *id.* at 2517 (Scalia, J., dissenting).

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1. Vicarious Liability

The conduct in question seems to fit well within vicarious liability because “one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”¹⁷⁷ Because the equipment was stored within Aereo’s premises and under its control,¹⁷⁸ Aereo supervised the infringing activity. It could have turned the antennas off or disconnected subscribers, a much easier task than what would have faced Sony with its VTRs. Sony could not have reasonably overseen what customers viewed or recorded after they purchased the equipment, nor could it have seized the VTRs back if it learned customers were using them for infringing purposes. In contrast, because Aereo had physical control over the antennas, it could have disabled service upon notice of infringement.

Aereo also meets the second prong, as its revenue was earned by consumers paying to use the service.¹⁷⁹ Because of its control over the system and known profits, Aereo’s conduct easily fell within established precedent for vicarious liability.

2. Contributory Liability

It is less clear how Aereo would have fared if it had faced a contributory liability claim. A contributory infringer is “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”¹⁸⁰ Aereo would likely have argued it was unaware of infringing activity, or that any was occurring at all. Thus Aereo’s liability would have turned on the plaintiff introducing evidence that the customers were infringing on copyright by, for instance, saving and copying shows they received from Aereo. However, if such evidence of customer infringement was in the record, it would be hard for Aereo to argue it was blind to such practices because, as previously discussed,¹⁸¹ it controlled the equipment used by consumers. And it would still be easy to conclude Aereo materially contributed to the infringement because it provided the very equipment used to infringe.

¹⁷⁷ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

¹⁷⁸ *Aereo*, 134 S. Ct. at 2506.

¹⁷⁹ *See id.* at 2510.

¹⁸⁰ *Gershwin Publ’g Corp.*, 443 F.2d at 1162.

¹⁸¹ *See supra* text accompanying notes 133–39.

3. *Why It Matters*

The Court's decision leaves service providers, especially those of new and emerging technology, with few options other than seeking congressional action or closing their doors. In particular, the decision created two major problems. First, the "if it looks-like-a-cable-system" logic provides no clear guidance on who will be classified as a cable system or an infringer. Second, the decision departed from the norm by holding Aereo directly liable, but it is unclear if this was simply an irregularity reflecting the seriousness of Aereo's infringement.

The majority's use of the looks-like-a-cable-system test is dangerous and out of step with precedent. In its approach, the majority ignored not only the statutory language, but also the persuasive precedent from the Second Circuit, a copyright powerhouse. This is especially concerning in an area of law that deals with rapidly changing technology. Businesses and inventors may no longer rely on following the letter of the law for fear they will still look too similar to a cable system and thus face direct liability. *Aereo* is one of the few cases to impose direct liability on the content provider, and, because this ruling comes from the highest court in the country, other courts will be required to follow suit (assuming the facts are analogous) or choose to follow the looks-like-a-cable-system line of thinking, thus endangering new technologies.¹⁸²

In contrast, the dissent provided a reasonable suggestion of assigning only secondary liability to Aereo, which would have been in line with the established practice of lower courts, while also curbing the expansion of Aereo's disliked system.

E. Seeking a Middle Ground

Service providers like Aereo are facing difficult decisions as a result of the trifecta of the Supreme Court's decision in *Aereo*, changes in consumer viewing habits, and the emergence of new technology. Although the Court did not mention the *ivi* case in *Aereo*, it is necessary to consider both cases together to help determine the best path for future systems. Should new technologies seek to be treated as a cable system like *ivi*, or avoid this classification like Aereo? Either course seems to lead to a loss, especially after the decision in *Aereo* exposes these service providers to direct liability. However, if the *Aereo* decision closed off one route for service providers, its subsequent history and the reactions of the FCC point to a third possible option: become a Multichannel Video Programming Distributor (MVPD).

¹⁸² The dangers of this precedent are discussed further in Part IV.

After the Supreme Court's decision in June, 2014, Aereo paused all operations, but, in a letter to customers, stated it was seeking classification as an MVPD from the Federal Communications Commission.¹⁸³ An MVPD is defined as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."¹⁸⁴ Although MVPDs are not cable companies, they enjoy some benefits, such as requiring cable providers to work with MVPDs to set pricing for retransmission.¹⁸⁵ However, MVPDs must comply with FCC regulations, like carrying certain programs and requiring good faith negotiations with broadcasters to gain consent to rebroadcast.¹⁸⁶ On October 28, 2014, the FCC proposed classifying Aereo and other online live TV technologies as MVPDs.¹⁸⁷ The FCC recognized the growing demand for internet streaming of television shows, and on January 15, 2015, proposed a new rule expanding the interpretation of MVPDs to include service providers like Aereo.¹⁸⁸ "Specifically, we propose to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time."¹⁸⁹ New MVPDs would also be required to control some

¹⁸³ See Kanojia, *supra* note 132.

¹⁸⁴ 47 U.S.C. § 522(13) (2012).

¹⁸⁵ See *id.* § 325(b)(3)(C)(iii).

¹⁸⁶ See *id.*

¹⁸⁷ See Shalini Ramachandran, *Aereo Investors See a "Plan B" After FCC's Latest Move*, WALL ST. J. (Oct. 31, 2014), <http://blogs.wsj.com/cmo/2014/10/31/aereo-investors-see-a-plan-b-after-fccs-latest-move>.

¹⁸⁸ See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078 (proposed Jan. 15, 2015) (to be codified at 47 C.F.R. pt. 76).

The Commission has recognized that innovation must be encouraged, but not at the expense of technology-neutral public policies. . . . With these changes on the horizon, it becomes important to interpret the statutory definition of MVPD to ensure that our rules apply sensibly and in a way that encourages innovation regardless of how service is delivered and that the pro-consumer values embodied in MVPD regulation will continue to be served.

Id. at 2079.

¹⁸⁹ *Id.* at 2080.

(continued)

portion of the physical aspect of their services.¹⁹⁰ The rule is still in the proposal stages, and the FCC has sought comment on many aspects of how this new interpretation would fit within the FCC's other regulations.¹⁹¹

But, this potential classification still leaves open the question of copyright liability. If service providers were to fit within the new interpretation of MVPD, they could qualify for compulsory licensing under section 111.¹⁹² But it is doubtful that the Copyright Office would grant such a license given past indications to the contrary.¹⁹³ The FCC recognized this issue in its proposal, and specifically called attention to the potential for conflict between its new definition and copyright law.¹⁹⁴

In response, a group consisting of the Competitive Enterprise Institute, Tech Freedom, and International Center for Law and Economics, responded to the FCC proposal and spoke out against classifying services like Aereo as MVPDs, unless they were also required to comply with section 111 licensing.¹⁹⁵ The Comments point out that new MVPDs could potentially

¹⁹⁰ See *id.* at 2083.

¹⁹¹ See *id.* at 2078, 2087.

¹⁹² See *id.* at 2085.

¹⁹³ See Peters, *supra* note 128.

¹⁹⁴ See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. at 2087.

Some content creators and owners contend that the Commission, in interpreting the definition of MVPD in the Communications Act, should be cognizant of the interplay between Section 111 of the Copyright Act and the Communications Act and even suggest that a Commission decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law. But the market and legal landscape has changed significantly since content creators and owners made those claims. Therefore, we ask commenters to update the record with respect to how expanding the definition of MVPD in the Communications Act to include some Internet-based distributors interrelates with copyright law.

Id. See also *id.* at 2085 (“If we adopt the Linear Programming Interpretation and the Copyright Office does not afford statutory licenses to Internet-based video providers, how would we construe a broadcaster’s obligation to negotiate in good faith?”).

¹⁹⁵ See FCC, Comments of the Competitive Enterprise Institute, the International Center for Law & Economics, and TechFreedom 1, 2 (March 3, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001039178> [hereinafter FCC Comments]. The Comments primarily request that the FCC not adopt an expanded definition of MVPD at all, but ask that

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be classified as a “cable system” under the Copyright Act and therefore become eligible for section 111 licensing, but this system is problematic as well as unlikely.¹⁹⁶ First, section 111 has a complicated history with many decisions interpreting its contours.¹⁹⁷ Second, new MVPDs such as Aereo should not be boxed into the improper classification of “cable system.” This proposed system would relegate new technologies to the role of the ugly stepsister trying to wear the glass slipper: the line of precedent will never truly fit. It is exactly this type of misfit that caused the Court to decide *Aereo* as it did; it lacked a better label than “cable system,” and that unwieldy determination guided the rest of the decision.¹⁹⁸ Further, this system is retrospective, relying on old technologies and the laws regulating them, which makes little sense in the realm of rapidly changing technology and viewing preferences.

This prospective quagmire could be avoided if Congress amended the Copyright Act to create a new licensing system for the new MVPDs. Consequently, although Congress should adopt the proposed MVPD interpretation, it should also go one step further. It should sidestep the convoluted section 111 licensing system and create a provision that recognizes service providers like Aereo and grant a license if the provider meets the new interpretation and requirements of MVPD, including the requirement to negotiate in good faith with broadcasters. If this option were available, new technologies could completely avoid the confusion of the *Aereo* decision by seeking a license rather than rolling the dice and hoping not to look like a cable system.

F. The Need for Congressional Action

For a code that regulates the rapidly advancing fields of art and technology, the Copyright Act is dated. As discussed in previous sections, the Copyright Act has previously been overhauled to accommodate technologies that could no longer live within its restrictive bounds.¹⁹⁹ Aereo is a perfect example, and now is the perfect time to scrutinize the Copyright Act and make necessary changes to reflect advances in technology as well as shifts in media consumption.

if the FCC does expand the definition that it requires new MVPDs to comply with Section 111. *Id.*

¹⁹⁶ See *id.* at 14; Peters, *supra* note 128.

¹⁹⁷ See FCC Comments, *supra* note 195, at 14.

¹⁹⁸ See *supra* Part III.C.1.

¹⁹⁹ See *supra* Part II.C.

(continued)

Specifically, for service providers like Aereo, the Act should be updated to better comport with the American consumer's growing preference to watch media—including local broadcast—through alternative devices like phones and computers.²⁰⁰ In short, there is a middle ground between being a pure cable company and a pure infringer, and the Copyright Act should establish and govern the borders of this field.

Legislation should provide a bright-line rule for future technologies as well. Prior to the Supreme Court's ruling, companies like Aereo believed they were within the limits of the Copyright Act (even if toeing the line, as suggested by the Court, with creative workarounds to infringement). It was a profitable field to play in as well; just prior to the Court's June decision, the company had over 100,000 customers, a growth of forty percent from December 2013 to June 2014.²⁰¹ Although the business was criticized as too small to make any waves, its very existence and success could have encouraged other start-ups and entrepreneurs to enter the fray.²⁰² But, because of the Court's decision, the line has become even blurrier. The Court did not provide a clear test for broadcast streaming technologies to determine if they were infringing, and also departed from standard operating procedure by imposing direct, rather than secondary, liability.

Previously, when Congress did not like how the Court handled a new technology in the face of copyright, it changed the statute.²⁰³ In return, courts have called on Congress to make changes to the Copyright Act when they felt limited by the current law in deciding new technology cases.²⁰⁴ In *Aereo*, both the majority and the dissent indicated a need for congressional action.²⁰⁵ After the similarly unclear (and unpopular) decisions by the Court in *Fortnightly* and *Teleprompter*, Congress chose to act and regulate CATVs

²⁰⁰ See NIELSON, *The Total Audience Report*, *supra* note 1.

²⁰¹ Shalini Ramachandran, *In Its Last 6 Months of Existence, Aereo Subscriptions Grew 40%*, WALL ST. J. (Dec. 30, 2014), <http://blogs.wsj.com/cmo/2014/12/30/in-its-last-6-months-of-existence-aereo-subscriptions-grew-40>.

²⁰² See *id.* Aereo has chosen not to continue its services after its bankruptcy action. *Id.*

²⁰³ See *supra* Part II.C.

²⁰⁴ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430–31 (1984).

²⁰⁵ See *Aereo*, 134 S. Ct. at 2511, 2517. “[W]e note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress.” *Id.* at 2511. “Congress can [eliminate loopholes], I may add, in a much more targeted, better informed, and less disruptive fashion than the crude ‘looks-like-cable-TV’ solution the Court invents today.” *Id.* at 2517.

(continued)

differently than the Court proscribed.²⁰⁶ Congress should do the same again and provide clear and meaningful rules for broadcast streaming services. Adopting a new interpretation of MVPD to include such services would be a good start in that direction, but Congress should also fix the copyright side of the coin.

G. Proposed Changes

Aereo highlighted crucial flaws in the Copyright Act, namely its inelasticity to adapt to new technologies. Adopting an expanded interpretation of MVPD would create benefits for both service providers and broadcasters on the communications law side of things. Additionally, Congress should enact a new licensing system on the copyright side to protect the service providers who will become MVPDs from infringement claims.

The issue boils down to applying an ill-fitted licensing scheme to new services. Section 111 of the Copyright Act was passed to grant a compulsory license to cable systems, and does not fit new service providers like *Aereo* or *ivi*. Despite this, the Central District of California recently denied a motion for summary judgment against *FilmOn*, a provider similar to *Aereo*, because the court did not find that *Aereo* dealt with section 111; thus, the company could qualify for compulsory licensing.²⁰⁷ Some commenters believe this decision will lead to a circuit split, as this is exactly what the Second Circuit forbade in *ivi*.²⁰⁸

²⁰⁶ See Samuel J. Dykstra, Note, *Weighing Down the Cloud: The Public Performance Right and the Internet After Aereo*, 46 LOY. U. CHI. L.J. 989, 992, 1004–05 (2014).

²⁰⁷ See Order on Cross-Motions for Partial Summary Judgment, at 1, *Fox Television Stations, Inc. v. FilmOn X, LLC*, (No. 2:12-cv-06921) (C.D. Cal. July 24, 2015). District Judge George H. Wu acknowledged the Copyright Office's prior refusal to grant a section 111 license to such companies as a policy argument and highlighted the need for legislation by stating he was merely applying what the law was, not what it will be. Bill Donahue, *FilmOn Wins Big Ruling on Compulsory Copyright License*, LAW360 (July 16, 2015), <http://www.law360.com/articles/680282/filmon-wins-big-ruling-on-compulsory-copyright-license>. *FilmOn* had previously asked to stay the case until the FCC made a decision on MVPDs. Bill Donahue, *FilmOn Wants Copyright Fight Paused Until FCC Vote*, LAW360 (July 15, 2015), <http://www.law360.com/articles/679785/filmon-wants-copyright-fight-paused-until-fcc-vote>.

²⁰⁸ See Monty Tayloe, *FilmOn Ruling on Compulsory License Seen Leading to Circuit Split*, WASHINGTON INTERNET DAILY (July 21, 2015), <http://www.washingtoninternetdaily.com>. The ruling was certified for an immediate appeal to the Ninth Circuit. *Id.* For more on this topic, see Kevin Goldberg, *FilmOn Takes a Big Step Closer to Section 111* (continued)

Rather than attempting to rework section 111, which already has its own legislative history and case law regarding cable systems,²⁰⁹ Congress should start fresh with a new licensing system to cover new MVPDs and fill in the gaps new technology has so often exposed, such as in *Sony*. The system should mirror the new interpretation of MVPD for a seamless fit between communications and copyright law, decreasing the potential for litigation if a service provider fits within one act but not the other. Congress has recognized the benefit of this mirrored language. Discussion and proposals for the MVPD interpretation were underway, but were reportedly paused to allow Congress to consider amending the Copyright Act along with the Communications Act.²¹⁰ Any expanded interpretive language could be inserted directly into the Copyright Act, and service providers who comply would be granted a compulsory license from broadcasters or other content providers.

Such a system would be similar to the relationship between current MVPDs and section 111, which has proved workable in the past for those technologies, but would avoid throwing in a whole new group of potentially conflicting technologies to an established system. Additionally, there already is some protection in place for both broadcasters and service providers as the definition of MVPD provides for good faith negotiations. Adding such language and a new licensing system to the Copyright Act would only bolster protection for broadcasters and service providers alike.

In practice, a company could look to the expanded definition of MVPD and either try to design technology which fits within the definition, or alter existing technology to fit. If the definition of MVPD is adopted as proposed, this should not be too difficult because it encompasses more possibilities for streaming services. Then, at the same time as it is confirmed as an MVPD, the company would apply to the copyright office for a license. Provided the new technology passed the definition of MVPD without issue, this license would be automatically awarded. The company could then negotiate more effectively with broadcasters and other content providers who would be secure in the fact that the technology was a licensed MVPD, bringing along

Eligibility, COMMLAWBLOG (July 28, 2015), <http://www.commlawblog.com/2015/07/articles/broadcast/filmon-takes-a-big-step-closer-to-section-111-eligibility>.

²⁰⁹ See *supra* Part III.F.

²¹⁰ See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2078 (Jan. 15, 2015) (to be codified at 47 C.F.R. pt. 76); Doug Halonen, *Wheeler Backs Off On Exclusivity Rules*, TVNEWSCHECK (Oct. 29, 2015), <http://www.tvnewscheck.com/article/89609/wheeler-backs-off-on-exclusivity-rules?ref=search>.

all of the requirements and protections that come with those systems. This structure would also head off the potential circuit split created by the decisions in *ivi* and *FilmOn*, as there would be no need to address whether such companies were entitled to section 111 licensing. Instead, it would be clear that these companies could apply for and be granted the new license. In sum, such an amendment would be simple and effective, providing benefits and protection to all sides while making clear what the rules are.

H. What's the Catch?

A new system would of course come with its own drawbacks. Certainly, there are some individuals and media who would strongly oppose legislative action in this area.²¹¹ Yet it is undeniable that if the Copyright Act is truly to work for the American public, it must, at a minimum, be able to effectively regulate the subjects falling within its ambit.

1. The Cost

In considering if legislation is warranted, it is important to know what effect a reclassification will have on cost. If services like Aereo were classified as MVPDs, estimates indicate an increase in prices as these companies would be required to pay a transmission fee to broadcasters.²¹² However, this potential price increase is miniscule as compared to the average rates of major cable companies.²¹³ Additionally, if there is complementary legislation in both communications and copyright law, it will lessen confusion and therefore be less likely to lead to costly litigation.

2. Effect on Broadcasters

Within the broadcast industry, there is disagreement about the boon or burden of broadcast-streaming services.²¹⁴ In its amicus curiae brief, the

²¹¹ Thomas Mocarsky, *Over-The-Top Video Firms Push Back Against FCC MVPD Rule Making*, KATY ON THE HILL (July 27, 2015), <http://katyonthehill.com/over-the-top-video-firms-push-back-against-fcc-mvpd-rule-making>.

²¹² See Ramachandran, *supra* note 187 (noting the price could increase by approximately \$4 per month).

²¹³ Time Warner Cable charges customers, on average, \$40 for subscription to basic cable. See TIME WARNER CABLE, <http://www.timewarnercable.com/en/plans-packages/tv/digital-cable-tv-plans.html> (last visited Aug. 28, 2015). In contrast, a customer could pay between \$16 and \$20 each month for a streaming broadcast service. See Ramachandran, *supra* note 187.

²¹⁴ *Compare* Brief of the National Association of Broadcasters et al. as Amici Curiae in Support of Petitioners and Reversal at 4, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014)

(continued)

National Association of Broadcasters (representing ABC, NBC, CBS, and FOX) petitioned against Aereo, arguing Aereo's services deprive broadcasters of much-needed revenue from both advertising and transmission fees.²¹⁵ Specifically, the National Association of Broadcasters argued this lack of funds would cause the demise of quality local programming.²¹⁶ In stark contrast, the Small and Independent Broadcasters (SIBs)²¹⁷ stated Aereo had actually helped their business models; the SIBs called the technology “user-friendly”—as users did not have to set up any equipment themselves—and “cost-efficient” because consumers without televisions or cable could still have access to important local content.²¹⁸ These twin benefits allowed SIBs, without expending additional money in marketing, to reach wider audiences than were previously available via traditional viewing platforms.²¹⁹

Additionally, the problem of dwindling revenue for broadcasters is not new, and Aereo is not entirely to blame.²²⁰ There has been an ever-growing suspicion that free broadcast TV will be eliminated in the near future. As broadcast stations demand higher carrying fees from cable companies, more programming—and therefore advertising—is provided on the internet.²²¹

If the Copyright Office were to create a new licensing system modeled around the new interpretation of MVPD it could help to solve many of these problems. Broadcasters would benefit as they would earn revenue from streaming services' payment of transmission fees and would also be able to reach wider audiences.²²² Consumers would benefit from the increased freedom these services provide, namely lower costs and fewer devices.²²³

(No. 13-461) [hereinafter Brief of the National Association of Broadcasters], with Brief of Amici Curiae Small and Independent Broadcasters in Support of Respondent at 5, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13-461) [hereinafter Brief of Small and Independent Broadcasters].

²¹⁵ Brief of National Association of Broadcasters, *supra* note 214, at 2.

²¹⁶ *Id.*

²¹⁷ SIBs provide specialized content to local diverse communities, such as the Hmong population in Fresno, California. Brief of Small and Independent Broadcasters, *supra* note 214, at 5. Such content is “commonly overlooked by larger television providers.” *Id.*

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *See Free Broadcast TV May Go Way of the VHS Tape*, NBC NEWS (last updated Dec. 29, 2009, 9:29 AM), http://www.nbcnews.com/id/34619571/ns/business-us_business/t/free-broadcast-tv-may-go-way-vhs-tape/#.VL-CiEfF-8B.

²²¹ *Id.*

²²² *See Ramachandran*, *supra* note 187.

²²³ *See id.*

(continued)

Additionally, customers could watch broadcasts from further away than what is available with a simple antenna system.²²⁴ Although cable companies may lose customers who switch to such a service, this system could also ease the tense fee debates between broadcasters and cable companies, because broadcasters will have additional sources of revenue.²²⁵ Service providers would benefit from ease of mind, knowing that, if they comply with the twin statutes, they are protected and not infringing.

IV. SIGNIFICANCE

Aereo is an old problem wrapped in new packaging. For years, courts attempted to balance copyright holders' rights and concerns over potential new infringing technology with the desire to promote such advances.²²⁶ In many of these cases, courts that were stuck between a rock and a hard place because of the rigid structure of the Copyright Act called on Congress for help.²²⁷ *Aereo* is no different, but the significance of the decision highlights the urgent need for holistic legislation now. In short, the Supreme Court was faced with a law that did not fit the technology before it. This disconnect led to a decision that will "sow confusion for years to come"²²⁸—unless Congress takes the Court up on its offer and chooses to act.

Out of fear of going bankrupt from a copyright lawsuit, service providers may not create or market their services. This could change the technology available to the public and affect Americans' media consumption.²²⁹ Additionally, it will hinder small and independent broadcasters from reaching new audiences, thereby limiting some of the diverse and localized content available to the public.²³⁰

V. CONCLUSION

Aereo was wrongly decided. The majority fixated on its cable system analysis, and in doing so ignored significant statutory language and a slew of precedent.²³¹ Although *Aereo*'s system was seemingly designed to skirt the law, and it is understandable that the Court wanted to discourage similar future technologies by holding *Aereo* directly liable, it did much more. The

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See, e.g., Fortnighly*, 392 U.S. at 393.

²²⁷ *See, e.g., id.* at 408.

²²⁸ *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

²²⁹ *See Kanojia, supra* note 132.

²³⁰ *See supra* Part III.H.2.

²³¹ *See supra* Part III.C.1.

(continued)

Court's decision could have a chilling effect on companies seeking to create new devices. This stagnation will harm inventors, consumers, and content producers pursuing expanded audiences through such alternative devices.²³²

Aereo, like *Fortnightly* and *Teleprompter* before it, should spur congressional action. Courts and businesses are seeking clarity that only Congress can effectively provide.²³³ A new licensing system that mirrors the potentially expanded definition of MVPD is the best solution because it complements communications law and is both clear and fair to all sides.

Although *Aereo* was the wrong decision, it came at the right time. Congress is primed to act on the expanded definition of MVPD,²³⁴ and the emergence of new technologies, coupled with a steady shift in viewing preferences, signals that this is time to act to ensure meaningful change well into the future that will provide solutions for all involved.

²³² See Ramachandran, *supra* note 187.

²³³ *Aereo*, 134 S. Ct. at 2511.

²³⁴ See *supra* Part III.E–F.

