COMMENTS

THE AEREO LOOPHOLE: A RETROSPECTIVE INQUIRY INTO THE LEGALITY OF ANTENNA FARMS AND INTERNET-BASED TELEVISION*

"[T]he transmit clause is not a model of clarity."[1]

I. INTRODUCTION

The Supreme Court recently held that Aereo's Internet-based television system infringed the copyrighted works of the television producers, marketers, distributors, and broadcasters that own the copyrights in the programs that Aereo streamed.[2] The controversy behind Aereo has been brewing since 2012, when Aereo first introduced its novel "antenna-farm" system, which captured broadcast television signals and then retransmitted these signals to its subscribers' Internet-connected devices for a fee.[3] The broadcasters argued that Aereo was publicly performing their copyrighted works in violation of section 106 of the Copyright Act of 1976 (Copyright Act), which gives a copyright owner exclusive rights.[4] One of these rights includes the exclusive right, "in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly."[5] Aereo countered that it was not publicly performing the broadcasters' works because its antenna-farm system assigned one antenna to each subscriber and created an individual copy of each program for each unique

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1. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 136 (2d Cir. 2008).

2. ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014).

3. *See* ABC, Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 375 (S.D.N.Y. 2012) (providing that, in 2012, a group of television broadcasters brought a copyright infringement suit against Aereo), *rev'd and remanded*, 134 S. Ct. 2498 (2014); Adam Liptak & Bill Carter, *Justices Take Case on Free TV Streaming*, N.Y. TIMES, Jan. 11, 2014, at B1 (noting that the Supreme Court, in 2014, granted certiorari to resolve the dispute between television broadcasters and Aereo).

4. Brief for *Aereo* Plaintiffs-Counter-Defendants-Appellants at 2–4, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2807-cv, 12-2786-cv), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014); *see also* 17 U.S.C. § 106 (2012) (listing the exclusive rights granted to copyright owners).

5. 17 U.S.C. § 106(4).

user.[6] Essentially, Aereo argued that this kind of system was not a "public performance," but rather several private performances.[7] Aereo accordingly argued that these kinds of private performances did not violate the broadcasters' performance rights under the Copyright Act.[8]

Lower courts, however, were split on whether such systems were legal under current law.[9] As multiple federal district courts and one circuit court of appeals decided on the legality of Aereo's system and Aereo-like systems under the Copyright Act, two dominant interpretations emerged.[10] One interpretation of the public performance right focused on the underlying program that was being transmitted.[11] Under this view, Aereo publicly performed the broadcasters' copyrighted works by retransmitting programs to all of its subscribers.[12] The other interpretation focused on the discrete individual transmissions rather than the underlying work as a whole.[13] Under this view, Aereo did not publicly perform the broadcasters' copyrighted works because its system transmitted a private performance to each individual subscriber.[14] In fact, such activity was eventually allowed in the Second Circuit, home of media hub New York City, while barred in the Ninth Circuit, home of Los Angeles, another major media hub.[15]

6. Consolidated Brief of *Aereo* Defendant-Counter-Claimant-Appellee Aereo, Inc. at 24–28, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

7. *See id.* at 38–42 (arguing that each transmission in this case "is a quintessential private performance" that is exempt from liability under the Copyright Act).

8. *Id.*

9. David Oxenford, *The Courts Continue to Split on Streaming TV Services—As Boston Court Denies TV Broadcasters' Request for an Injunction Against Aereo*, BROADCAST L. BLOG (Oct. 11, 2013), http://www.broadcastlawblog.com/2013/10/articles/the-courts-continue-to-split-on-streaming-tv-services-as-boston-court-denies-tv-broadcasters-request-for-an-injunction-against-aereo/.

10. *Id. Compare* WNET, Thirteen v. Aereo, Inc. (*WNET, Thirteen I*), 712 F.3d 676, 680 (2d Cir. 2013) (denying plaintiff-broadcasters' motion for a preliminary injunction as Aereo's transmissions were likely not a public performance under the Copyright Act), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014), *and* Hearst Stations Inc. v. Aereo, Inc., 977 F. Supp. 2d 32, 39 (D. Mass. 2013) (holding that Aereo did not publicly perform the plaintiff-broadcaster's copyrighted works but rather transmitted private performances to subscribers), *with* Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 46 (D.D.C. 2013) (holding that the Copyright Act prohibited the defendant, which operated an Internet-based television service, from retransmitting plaintiffs' copyrighted programs), *and* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1148 (C.D. Cal. 2012) (granting plaintiff-broadcasters' preliminary injunction against the defendant that operated an Internet-based television service because the transmissions were likely a public performance under the Copyright Act).

11. *See, e.g.*, *BarryDriller Content Sys., PLC*, 915 F. Supp. 2d at 1144–46 (endorsing an interpretation of the public performance right of the Copyright Act that focuses on the underlying work).

12. *Cf. id.* (finding that a similar antenna-farm system infringed the broadcasters' copyrights).

13. *See, e.g.*, *WNET, Thirteen I*, 712 F.3d at 690 (endorsing an interpretation of the public performance right of the Copyright Act that focuses on discrete transmissions).

14. *Id.*

15. *Compare id.* at 696 (denying the broadcasters' motion for a preliminary injunction within the geographic boundaries of Second Circuit), *with BarryDriller Content Sys., PLC*, 915 F. Supp. 2d at

This Comment examines the Copyright Act, with a keen eye on the Supreme Court's recent decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*[16] It primarily analyzes the language of the statute and its legislative history, and assesses the public policy implications under each interpretation of the public performance right. Ultimately, this Comment agrees with the Supreme Court that Aereo's Internet-based television system was infringing under the Copyright Act. This Comment further analyzes how the federal courts had, prior to the Court's decision, dealt with applying the statute to Aereo's engineering, and criticizes the ambiguities of the relevant provisions of the Copyright Act. Finally, this Comment provides a potential solution that would revise a provision of the statute to more closely align the Act with congressional intent. This statutory proposal could possibly help avoid future copyright issues with emerging technology.

Part II.A explores what exactly Aereo was and how its behind-the-scenes technology operated. This Part includes a discussion of what Aereo's product was from the perspective of a subscriber, as well as how specifically the engineering and technology supporting Aereo's system worked and functioned. Part II.B examines the public performance right, which the Copyright Act grants to the creator of a copyrighted work. This Part includes an in-depth look at the statutory language of that provision, as well as a detailed discussion of the legislative history behind the current Copyright Act. Part II.C discusses the "Transmit Clause," the relevant provision of the Copyright Act that has been particularly troublesome in the case of Internet-based television. This Part includes a detailed look at how federal district courts and courts of appeals interpreted the Transmit Clause, and how these interpretations ultimately determined the fate of Aereo's product in the lower courts. Part II.D concludes with a brief discussion of the Supreme Court's recent decision, in which it ultimately held that Aereo's system was infringing the television broadcasters' rights to perform their copyrighted works publicly.

Section III takes a position that agrees with the Supreme Court and argues that the proper reading of the Copyright Act provides that Aereo's system was infringing the exclusive performance rights of the broadcasters. Accordingly, Part III.A offers various explanations as to why the Transmit Clause should be interpreted in a way that finds that Aereo's technology was infringing. This Part also examines how the Supreme Court's ruling may affect similar technologies, such as Remote-Storage DVR. Part III.B discusses how expanding precedent to allow Aereo and Internet-based television to persist would have been inconsistent with how courts have resolved similar cases and would have clashed with the views of the Department of Justice. Part III.C explores, from a public policy perspective, the potential implications that Aereo's business model would have had, such as discouraging media networks from producing creative content. Part III.D discusses the future of Internet-based television and the potential

1150–51 (granting the broadcasters' motion for a preliminary injunction within the geographic boundaries of the Ninth Circuit).

16. 134 S. Ct. 2498 (2014).

ways in which Aereo could have adapted its business model in light of the Supreme Court's ruling. Finally, Part III.E examines how Congress should respond by amending the statute to clarify congressional intent, rather than letting the statute persist in its current ambiguous form.

II. OVERVIEW

This Overview discusses the Copyright Act and the right to the exclusive public performance of a copyrighted work, the legislative development and judicial interpretations of the current copyright statute, and the legality of Internet-based television against this background. Part II.A begins by explaining what exactly Aereo was and how its antenna-farm system worked, and takes an in-depth look into the technology that supported Aereo's system. Part II.B discusses the public performance right of the Copyright Act, including the history behind its enactment and the two main interpretations of the Transmit Clause. Part II.C then explores how lower courts have analyzed the public performance right specifically in the context of Internet-based television services. Part II.D examines the 2014 Supreme Court decision in *Aereo*, which held that Aereo was infringing the copyrighted works of the television broadcasters. Part II.D determines exactly what questions the Court answered, and more importantly, what areas of gray were left unanswered.

A. Aereo

1. What Was Aereo?

Aereo was a telecommunications technology company that, before filing for bankruptcy, offered a subscriber service that allowed customers to watch and record broadcast television from any Internet-connected device.[17] A subscriber familiar with the audiovisual technology would notice that Aereo functioned much like a television with a Digital Video Recorder (DVR)[18] and Slingbox[19] combined.[20] Thus, in combining all of these features, Aereo's service allowed

17. *See* EMILY M. LANZA, CONG. RESEARCH SERV., R43359, AEREO AND FILMON X: INTERNET TELEVISION STREAMING AND COPYRIGHT LAW 1 (2014), *available at* http://fas.org/sgp/crs/misc/R43359.pdf. It is noteworthy that while this discussion focuses on the brand name Aereo, the technology behind Internet-based television is used by other companies, such as FilmOn X. *Id.* at 2 (describing the similar technology used by Aereo and FilmOn X to transmit broadcast television to their subscribers). It is also noteworthy that on November 21, 2014, Aereo filed for Chapter 11 bankruptcy, pointing to the "regulatory and legal uncertainty" resulting from the Supreme Court's decision. *A Letter to Our Consumers: The Next Chapter*, AEREO (Nov. 21, 2014), https://www.aereo.com/.

18. A DVR is a digital VCR, which can be programmed to record television shows at the user's whim. Jonathan Strickland & James Bickers, *How DVR Works*, HOWSTUFFWORKS (May 7, 2007), http://electronics.howstuffworks.com/dvr.htm.

19. A Slingbox is a device that allows a user to watch television programming on his or her laptop, mobile device, or tablet via the Internet. *Slingbox M1*, SLINGBOX, http://www.slingbox.com/en-US/Products/SlingboxM1/HowItWorks.aspx (last visited Mar. 6, 2015).

20. *WNET, Thirteen I*, 712 F.3d at 680.

users to "watch regional over-the-air television shows . . . on [their] own time, from anywhere, on Windows PCs, Mac PCs, Linux PCs, Roku and iOS devices like iPhones and iPads."[21] Much like Slingbox, Aereo "placeshifted" television.[22] A Slingbox typically does this by forwarding the television cable signal that a user would ordinarily receive at his or her house to any Internet-based device on which the user wishes to watch that programming.[23] Therefore, a Slingbox is a complementary feature to whatever cable package a user has already purchased, and its operation is predicated on the existence of the user having a cable package (or an antenna if a user only wishes to watch broadcast television).[24]

Aereo's "placeshifting" system worked differently, however, in that it could operate independently and required no preexisting cable subscription or home antenna.[25] Instead Aereo let the subscriber use one of its many antennas to receive the signal.[26] Aereo then took the feed that it received from that antenna, made a copy of the show that the user selected, and then placeshifted that copy to the user's Internet-connected device.[27] In essence, Aereo provided its subscribers with the rental use of an antenna, recorded programs its subscribers wanted to watch, and then forwarded them the feed of the requested program, which the subscribers could watch at their leisure.[28] All for the bargain price of eight dollars per month.[29]

2. How Aereo's System of Internet-Based Television Operated

The specific technology and engineering behind Aereo's system was relatively complex. At its most basic level, Aereo used individual antennas to capture broadcast signals for each of its subscribers that wanted to access a television program.[30] At its facility, Aereo constructed large antenna boards.[31] Each of these antenna boards had approximately eighty dime-sized antennas, each of which could receive separate broadcast television signals.[32] Thus,

21. Virginia Heffernan, *Aereo Is All the TV You Don't Want, Whenever You Want It*, YAHOO! NEWS (Nov. 5, 2013, 10:09 AM), http://news.yahoo.com/aereo-review-tv-you-dont-want-150713358.html.

22. *Id.; see also Work With Us*, SLINGBOX, http://www.slingbox.com/sitecore/content/Home/About/WorkWithUs?sc_lang=en-US (last visited Mar. 6, 2015) (describing how Slingbox "placeshifts" a user's television programming).

23. *See* Julia Layton, *How Slingbox Works*, HOWSTUFFWORKS (Jan. 4, 2006), http://electronics.howstuffworks.com/slingbox.htm (explaining the technology used by Slingbox to forward a user's television signal to any device he or she wishes to use).

24. *See* Heffernan, *supra* note 21.

25. *Id.*

26. *Id.*

27. *See* LANZA, *supra* note 17, at 2–3 (explaining Aereo's placeshifting system).

28. *Id.*

29. Michael Phillips, *Aereo and the Future of Affordable TV*, NEW YORKER (Apr. 24, 2014), http://www.newyorker.com/business/currency/aereo-and-the-future-of-affordable-tv.

30. *WNET, Thirteen I*, 712 F.3d 676, 681 (2d Cir. 2013), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

31. *Id.* at 682.

32. *Id.*

thousands of antennas at Aereo's facility were independently receiving broadcast signals.[33] When a subscriber chose a television channel or program to watch or record, that selection was sent through a signal to Aereo's "antenna server."[34] Next, the antenna server automatically assigned one of the individual antennas to the user[35] and then tuned the assigned antenna to the proper television station.[36] The server encoded the data that this assigned antenna received, buffered it, and sent it to another Aereo server.[37] There, a copy of the program was saved to a large hard drive reserved for that Aereo user.[38] Consequently, the subscriber was not watching the program live.[39] Instead, "the feed from that antenna [was] used to create a copy of the program on the Aereo server, and that copy [was] then transmitted to the user."[40]

A few more technical aspects of the Aereo system are noteworthy. First, each Aereo user was assigned an individual antenna.[41] Even if a user was watching or recording the same program as another user, no two users ever shared the same antenna at the same time.[42] In addition, when a specific antenna received the signal to create an individual copy of a selected program, that individual copy was stored in the specific directory of the user who requested to watch the program.[43] Therefore, even if two users were watching or recording the same exact show, a separate copy of the show was created for each separate user.[44] Thus, when a user watched a recorded show, the user saw an individual copy on his or her computer or television.[45] In other words, if Aereo created a copy of a specific show for User A to watch, nobody but User A could ever watch that specific copy.[46] Even if User B wanted to watch the same exact show, User B would instead watch a separate copy that was created specifically for that user.[47]

B. The Public Performance Right

The Copyright Act gives the owner of a copyright several exclusive rights to do and to authorize others to do a number of acts with the copyrighted work.[48]

33. *Id.*
34. *Id.*
35. *Id.* at 682–83.
36. *Id.*
37. *Id.* at 682.
38. *Id.*
39. *Id.* at 683.
40. *Id.* at 682.
41. *Id.* at 682–83.
42. *Id.* at 683.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 683.
47. *See id.*
48. Copyright Act of 1976, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 106 (2012)).

However, much debate exists as to the amount of protection these statutory rights truly offer a copyright owner.[49] "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ."[50] "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright or right of the author, as the case may be."[51] If any of these exclusive rights of the copyright owner is violated, then the owner is entitled to remedies for infringement.[52]

1. The Copyright Act Gives the Copyright Holder the Exclusive Right to Perform the Work Publicly

The Copyright Act gives the owner of a copyright the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly."[53] Common examples of "audiovisual works" under the statute are content like movies and television shows.[54] The statutory definition of public performance is found in 17 U.S.C. § 101.[55] The definitional section indicates that to perform 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 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.[56]

49. *See* Jeffrey Malkan, *The Public Performance Problem in* Cartoon Network LP v. CSC Holdings, Inc., 89 OR. L. REV. 505, 553–54 (2010) (arguing that the Second Circuit's decision in *Cartoon Network* improperly limits the public performance right given to copyright owners under the Copyright Act).

50. 17 U.S.C. § 102(a) (2012).

51. *Id.* § 501(a).

52. *See id.* §§ 502–505. The remedies for infringement under the Copyright Act are found in sections 502 through 505. Section 502 discusses temporary and final injunctions "as [the court] may deem reasonable to prevent or restrain infringement of a copyright." *Id.* § 502(a). Section 503 discusses impounding and disposition of infringing articles, which includes "the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights." *Id.* § 503(b). Section 504 discusses damages and profits, and notes that an infringer is generally liable for either "the copyright owner's actual damages, and any additional profits of the infringer" or "statutory damages." *Id.* § 504(a)(1)–(2). Section 505 discusses the discretionary recovery of full costs and reasonable attorney's fees. *Id.* § 505. Additionally, section 506 discusses possible criminal repercussions for persons who willfully infringe a copyright. *Id.* § 506.

53. *Id.* § 106(4).

54. *See* U.S. Copyright Office, *Help: Type of Work*, COPYRIGHT (Oct. 2, 2014), http://www.copyright.gov/eco/help-type.html (providing examples of audiovisual works).

55. *See* 17 U.S.C. § 101 (defining public performance and what it means to "perform" or "display" a copyrighted work).

56. *Id.*

This second clause of the public performance definition under the Copyright Act is what courts and commentators frequently refer to as the "Transmit Clause."[57]

2. The History of Public Performance and the Transmit Clause

The present Copyright Act was enacted in response to two major Supreme Court decisions regarding cable television.[58] In a 1968 case, *Fortnightly Corp. v. United Artists Television, Inc.*,[59] the Court held that the royalty-free retransmission of broadcast television signals was not a violation the Copyright Act of 1909.[60] The case concerned a corporate-owned community antenna television (CATV) system in West Virginia.[61] The system consisted of antennas located in hilly areas, which were designed to capture television broadcast signals that were unavailable in the lowlands.[62] These antennas attached to coaxial cables that would carry these broadcast signals to the homes of individual subscribers on utility lines.[63] The corporation's system did not edit or create any of the transmitted content, nor did the corporation pay a licensing fee to any of the owners of these copyrighted programs.[64]

The Court held that these CATVs did not infringe any exclusive rights because they did not perform the copyrighted works within the meaning of the Copyright Act of 1909.[65] It reasoned that this system took a *passive role* by merely receiving and redistributing programs that were released to the public.[66] The Court, however, did note that the statute was drafted "long before the development of the electronic phenomena with which we deal here."[67] The opinion further implied that new legislation might be something that Congress should consider in light of these technological advances.[68]

In a second case, *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[69] the Court applied the same reasoning to a similar set of facts that differed only in that *Teleprompter* featured a more powerful CATV system.[70] The

57. See *infra* Part II.C for a detailed discussion of the Transmit Clause and the two alternative interpretations of its meaning.

58. *See* Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 44 (D.D.C. 2013) (noting the significance of *Fortnightly Corp. v. United Artists Television, Inc.,* 392 U.S. 390 (1968) and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974) on the Copyright Act of 1976).

59. 392 U.S. 390 (1968).

60. *Fortnightly Corp.*, 392 U.S. at 400–02.

61. *Id.* at 391.

62. *Id.* at 392.

63. *Id.*

64. *Id.* at 392–93.

65. *Id.* at 401–02.

66. *Id.* at 399–400.

67. *Id.* at 395.

68. *See id*. at 395–96, 401–02 (noting the technological advances since the law's enactment and responding to the Solicitor General's suggestion that the Court render a compromise decision by stating, "That job is for Congress. We take the Copyright Act of 1909 as we find it.").

69. 415 U.S. 394 (1974).

70. *Teleprompter Corp*., 415 U.S. at 401.

plaintiff–copyright owners attempted to distinguish the defendant's CATV systems because they were importing distant signals from communities that were farther away than those at issue in *Fortnightly*—communities that would not have been able to receive these signals through a standard home-antenna mechanism.[71] The Court found this to be a distinction without a difference.[72] It reasoned that "[i]n the case of importation of 'distant' signals, the function is essentially the same."[73] Once again, however, the Court implied at the end of its decision that Congress should revisit the Copyright Act of 1909 to adapt to these technological advances.[74]

In both of these decisions, the Court based its opinions on the notion that an individual could privately accomplish the same result as the CATV systems without violating the law.[75] It hypothesized that if an individual erected an antenna on a hill and connected that antenna to his or her house via cables and amplifying equipment, there would be no doubt that that individual would not have been "performing" the programs on her television.[76] Further, the result would not have changed if several neighbors collectively erected a cooperative antenna and strung cables to each of their respective television sets.[77] Therefore, if an individual or a group of individuals would not be illegally "performing" the program, the only difference in the case of CATV was that "the antenna system [was] erected and owned not by its users but by an entrepreneur."[78]

Congress, however, was critical of these decisions.[79] It believed the difference between an antenna erected and operated by a user and one erected and operated by an entrepreneur or a company was significant.[80] It also acknowledged that the television industry not receiving compensation for the retransmission of its broadcasts had become a major problem.[81] Because the

71. *Id*. at 406.

72. *Id.* at 408.

73. *Id.*

74. *See id.* at 414 ("These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.").

75. *See id*. at 408–09 (holding that a company operating a CATV system was not performing under the Copyright Act of 1909 by analogy to a private individual); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400 (1968) (same).

76. *Fortnightly Corp.*, 392 U.S. at 400.

77. *Id.*

78. *Id.*

79. *See* Vivian I. Kim, *The Public Performance Right in the Digital Age:* Cartoon Network LP v. CSC Holdings, 24 BERKELEY TECH. L.J. 263, 277 (2009) ("In response to the decisions in *Fortnightly* and *Teleprompter*, Congress gave copyright holders rights against cable operators in the 1976 Act.").

80. Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012).

81. H.R. REP. NO. 94-1476, at 88–89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703; *see also BarryDriller Content Sys., PLC*, 915 F. Supp. 2d at 1146 (citing the congressional record as support for

profitability of the entire cable industry relied directly on its exclusive ability to broadcast and retransmit copyrighted content, the industry's entire business model was in jeopardy.[82] Accordingly, Congress enacted the Copyright Act of 1976 to overturn these decisions.[83] This Act is considered "a complete overhaul of its predecessor, the Copyright Act of 1909."[84]

C. Lower Courts Have Primarily Interpreted the Transmit Clause by Focusing on Either the Underlying Work or the Audience Capable of Receiving a Particular Transmission

Courts have interpreted the complex statutory language of the Transmit Clause in two different ways with regard to whether a broadcast performance is to the public.[85] The proper interpretation of the Transmit Clause was the main issue facing the lower courts when considering Aereo's antenna-farm system.[86] The specific issue was whether Aereo's transmission of broadcast television over the Internet was a public performance under the Transmit Clause.[87] Consequently, the legality of Aereo's service turned on the proper interpretation of the second clause of the public performance definition: "to transmit . . . a performance . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."[88]

1. The Interpretation of the Transmit Clause that Focuses on the Underlying Work

The first interpretation of the Transmit Clause considers the audience of the underlying work.[89] Under this interpretation, the plain language of the statute requires courts to look at the potential audience of any broadcast program.[90]

the assertion that Congress believed cable operators should pay copyright royalties to the creators of programs that cable companies retransmitted).

82. H.R. REP. NO. 94-1476, at 88–89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703–5704.

83. *Id.*; *see also* Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

84. Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 44 (D.D.C. 2013).

85. See *supra* note 56 and accompanying text for the statutory text of the Transmit Clause.

86. *See, e.g.*, *WNET, Thirteen I*, 712 F.3d 676, 680 (2d Cir. 2013) (discussing that the district court held Aereo's transmissions were unlikely to be public performances under the Copyright Act), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014); *FilmOn X LLC*, 966 F. Supp. 2d at 48–49 (holding that defendants' use of technology analogous to Aereo's was likely a public performance under the Copyright Act).

87. *See* Jason B. Binimow, Annotation, *When Is Internet Distribution "Public Performance" Under Copyright Act (17 U.S.C.A. §§ 101 and 106(4))*, 77 A.L.R. FED. 2D 1 (2013) (discussing multiple cases that differed over whether Aereo's and analogous companies' transmissions of copyrighted works were public performances).

88. 17 U.S.C. § 101 (2012).

89. Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1143–44 (C.D. Cal. 2012).

90. Brief for *Aereo* Plaintiffs-Counter-Defendants-Appellants, *supra* note 4, at 8; *see also* 17 U.S.C. § 101 (directing that a public performance includes a transmission "to the public . . . whether

Therefore, when looking at multiple transmissions and trying to determine whether they are a public performance of that work, "the total audience capable of receiving those transmissions should be aggregated, even if separated temporally . . . or geographically."[91] Such an analysis requires determining whether (1) the potential infringer "communicate[s] . . . performance[s]," (2) "those communications are 'to the public,'" (3) "they emanate directly from the broadcaster's initial transmission and are sent 'beyond the place'" from which they are received or captured, and (4) they are "made through a 'device or process.'"[92] This analysis, which the broadcasters and copyright holders advocated, simply breaks down the language of the statute piece by piece and asks whether the potential infringer did all of these things.[93]

The broadcasters argued that this interpretation is proper because Congress intended the public performance right to be read broadly.[94] Accordingly, courts should read the Transmit Clause as Congress's way of protecting copyright owners' exclusive public performance rights.[95] Under this interpretation, the method of transmission should not determine whether a performance is public, as courts must anticipate these kinds of technological advances in the area of audiovisual engineering.[96] This reading, therefore, ensures that the last portion of the Transmit Clause, which indicates that a performance may still be public even if the members of the public receive it in "separate places" or at "different times," is not superfluous.[97]

Courts advocating this approach have concluded that the primary inquiry is with the performance of the copyrighted *work*, and that it is irrelevant from

the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times").

91. Brief for *Aereo* Plaintiffs-Counter-Defendants-Appellants, *supra* note 4, at 19.

92. *Id.*

93. *Id.*

94. *Id.* at 21–24.

95. *See* Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d. 30, 47 (D.D.C. 2013) (acknowledging that the legislative history confirms Congress's intent for the Transmit Clause to be applied broadly); Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc., 772 F. Supp. 614, 650–51 (D.D.C. 1991) (noting that "it would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public" (quoting David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1988))).

96. Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012); *see also FilmOn X LLC*, 966 F. Supp. 2d at 48 ("[T]he aggregation of several new kinds of technology does not avoid the Copyright Act because Congress intended 'device or process' in the Transmit Clause to include . . . *any other techniques and systems not yet in use or even invented*.").

97. *See BarryDriller Content Sys., PLC*, 915 F. Supp. 2d at 1144 (observing that the Transmit Clause "does not by its express terms require that two members of the public receive the performance from the same transmission"); *see also* 17 U.S.C. § 101 (2012) (defining a public performance to include a transmission "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").

which copy of the work the transmission is made.[98] One of these courts noted that "[v]ery few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*" because "[p]eople are interested in watching the *performance* of the *work*."[99] Consequently, under this approach, the plain language of the Copyright Act is concerned with the public performance of the copyrighted *work*.[100] Therefore, these courts have expressly disagreed with contrary decisions of other courts, with one court emphasizing that a "focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute."[101]

2. Courts Supporting an Interpretation of the Transmit Clause that Focuses on the Underlying Work Concluded that an Aereo-Like Service Was Publicly Performing the Broadcasters' Copyrighted Works

Lower courts that focused on the potential audience of the underlying work consistently held that an Aereo-like Internet-based television service—FilmOn X—was performing the broadcasters' works publicly, and thus was an infringer under the Copyright Act.[102] As the broadcasters argued, this was the logical result that follows from a plain language interpretation of the statute.[103] First, by retransmitting the copyrighted broadcast programs, FilmOn X communicated performances.[104] Second, those performances were to the public, which consisted of FilmOn X's subscribers.[105] Third, by receiving and retransmitting the broadcasters' signals, FilmOn X naturally took the copyright owners' initial signals and sent them beyond the place from which they were received.[106] Finally, FilmOn X's complex system of antennas, hardware, software, and servers created the kind of device or process that the Transmit Clause covers.[107] Thus, by analyzing its system and looking at what it specifically did, the broadcasters contended that FilmOn X was an infringer under a plain reading of the statute.[108]

98. *See FilmOn X LLC*, 966 F. Supp. 2d at 48 (arguing that every broadcast of a television program could be described as generated from the same copy—that is, the original source); *BarryDriller Content Sys., PLC*, 915 F. Supp. 2d at 1144–45 (noting that courts should look to the performance of the copyrighted work, not to the transmission).

99. *BarryDriller Content Sys., PLC*, 915 F. Supp. 2d at 1144–45.

100. *Id.*

101. *Id.* at 1145.

102. *See, e.g.*, *id.* at 1146 (finding infringement where content providers employed technology analogous to Aereo's technology).

103. Brief for *Aereo* Plaintiffs-Counter-Defendants-Appellants, *supra* note 4, at 18.

104. *Id.* at 19.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

Prior to the Supreme Court's decision, multiple district courts had adopted this interpretation.[109] Echoing the opinion of the District Court for the Central District of California, the District Court for the District of Columbia found the provisions of the Copyright Act clear and unambiguous.[110] In particular, the court emphasized how broad and sweeping the Copyright Act is on its face.[111] In light of the statute's language, the court held that FilmOn X violated the broadcasters' exclusive rights to perform their works publicly.[112] By making the performances available to any member of the public who accesses its service, the service provider performed the copyrighted work publicly under the Transmit Clause.[113] The court specifically observed that under the Copyright Act, "[a] 'device,' 'machine,' or 'process' is one now known [*i.e.* in 1976] *or later developed*" and that to "'transmit' a performance or display is to communicate it by any *device or process*."[114] The court noted that "[t]hese two definitions are facially broad and encompass FilmOn X's convoluted process for relaying television signals."[115] "The Transmit Clause, which applies whether '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,' also plainly captures FilmOn X's DVR-like capabilities."[116] Finally, the court applied the facts of the FilmOn X system to its interpretation of the public performance definition under section 101 of the Copyright Act, and held that FilmOn X infringed the plaintiffs' copyrights under section 106(4).[117]

In essence, the district court's analysis in *FilmOn X LLC* was based on three basic premises. First, FilmOn X transmitted the performance because it communicated an original over-the-air broadcast of a copyrighted work from antenna farms to a user over the Internet.[118] Second, these transmissions were to members of the public that consisted of all people who accessed FilmOn X's service.[119] Finally, these members of the public received the performance in separate places and at different times, as the Transmit Clause anticipates.[120]

109. *See* Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 44–48 (D.D.C. 2013) (finding that FilmOn X's service violates the copyright owners' right to perform the copyrighted work publicly); Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1145–46 (C.D. Cal. 2012) (holding that the copyright owners proved a likelihood of success on the merits regarding their public performance theory of liability).

110. *FilmOn X LLC*, 966 F. Supp. 2d at 46–47.

111. *Id.* at 46.

112. *Id.*

113. *See id.* (stating that the Transmit Clause covers FilmOn X's system, which was analogous to Aereo's antenna-farm system).

114. *Id.* (quoting 17 U.S.C. § 101 (2012)).

115. *Id.*

116. *Id.*

117. *Id.* at 46–47.

118. *See id.* (stating that FilmOn X communicates the performance to users from "mini-antenna through servers over the Internet").

119. *Id.* at 47.

120. *Id.*

3. The *Cartoon Network* Interpretation of the Transmit Clause Based on the Audience Capable of Receiving a Particular Transmission

Under a second interpretation of the Transmit Clause, the key for determining whether a performance is "to the public" lies in the question of who is capable of receiving a particular *transmission*.[121] This analysis also looks to the plain language of the Transmit Clause.[122] However, unlike the interpretation focused on underlying work, this interpretation focuses on the "transmit . . . a performance" language of the statute.[123] Thus, a copyrighted work, such as a television show, is not "performed" until it is "transmitted."[124] This interpretation is not concerned with the specific underlying television show or work, rather, it concludes that such a work is performed to the public only when a specific copy of the work (or performance) is transmitted to the public.[125]

The landmark case that provided this interpretation of the Transmit Clause is *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*[126] In this case, the Second Circuit held that Remote-Storage Digital Video Recorder (RS-DVR) technology does not infringe copyright owners' exclusive public performance rights under the Transmit Clause.[127]

The facts of *Cartoon Network* set up a perfect inquiry into how the statute dictates whether a performance has been made "to the public." The cable company Cablevision offered a new service to its subscribers known as RS-DVR.[128] Unlike a standard DVR from which the customer could record programming, Cablevision's new system split the television feed, which it licensed from the networks, into two streams.[129] One stream went live directly to the viewing subscribers, while the other stream went to one of Cablevision's servers.[130] Cablevision's servers then determined whether any Cablevision

121. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 135–36 (2d Cir. 2008); *see also* Malkan, *supra* note 49, at 529–32 (discussing the court's analysis in *Cartoon Network*).

122. *WNET, Thirteen I*, 712 F.3d 676, 681 (2d Cir. 2013) (examining the statutory text of the Copyright Act), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014); *Cartoon Network LP, LLLP*, 536 F.3d at 134–35 (same).

123. 17 U.S.C. § 101 (2012). See *supra* note 56 and accompanying text for the statutory text of the Transmit Clause.

124. *See* DAVID POST, ANALYSIS OF THE PUBLIC PERFORMANCE RIGHT UNDER US COPYRIGHT LAW 3 (2013), http://www.scribd.com/doc/191857362/Analysis-of-the-Public-Performance-Right-Under-US-Copyright-Law (arguing that there cannot be a performance "in an audiovisual transmission system unless and until the service provider actually transmits the content through the system").

125. *See id.* ("[W]hen Congress speaks of transmitting a performance to the public, it refers to the performance *created by the act of transmission*." (internal quotation marks omitted)).

126. 536 F.3d 121 (2d Cir. 2008).

127. *Cartoon Network LP, LLLP*, 536 F.3d at 139–140.

128. *Id.* at 124; *see also WNET, Thirteen I*, 712 F.3d 676, 686 (2d Cir. 2013) (discussing *Cartoon Network* and its analysis of Cablevision's RS-DVR technology), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

129. *WNET, Thirteen I*, 712 F.3d at 686.

130. *Id.*

subscriber had requested to record the program via his or her RS-DVR.[131] If so, Cablevision would buffer the data for that program, record a copy of it, and store it on part of the remote-storage hard drive assigned only for that individual subscriber.[132] "Thus if 10,000 Cablevision customers wished to record the Super Bowl, Cablevision would create 10,000 copies of the broadcast, one for each customer."[133] Finally, each copy of the broadcast could only be accessed by the specific customer who requested the copy.[134] Copyright holders in the movies and television shows (the broadcasters) sued, arguing that RS-DVR infringed their public performance rights under the Transmit Clause by transmitting these copies without an additional license.[135]

The Second Circuit concluded that because the Transmit Clause looks to the potential audience of a given transmission, one must look to the potential audience capable of receiving a particular transmission to determine if it is "to the public."[136] The court first noted that the statute does not specifically define the terms "performance" or "to the public."[137] By looking at the plain language of the statute, the court decided that because it says "capable of receiving the performance" rather than "capable of receiving the transmission," the logical conclusion is that "a transmission of a performance is itself a performance."[138] Additionally, the court found relevant text from the legislative history to support this interpretation, as parts of the House Report refer specifically to a *performance* being made by a *transmission*.[139]

The court held that the district court, which had granted summary judgment in favor of the broadcasters, erred in considering the potential audience of the underlying program, rather than "the potential audience of [the] particular transmission."[140] However, as the court indicated, the statute clearly discusses "people capable of receiving a particular transmission or performance, and not

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 124 (2d Cir. 2008). The broadcasters also sued for violation of their reproduction right. *Id.*

136. *Cartoon Network LP, LLLP*, 536 F.3d at 135.

137. *Id.* at 134.

138. *Id.* Some commentators have questioned this "leap" as a major mishap in the decision. *See* Terry Hart, *How* Cablevision *Made a Mess of the Public Performance Right*, COPYHYPE (Apr. 18, 2013), http://www.copyhype.com/2013/04/how-cablevision-made-a-mess-of-the-public-performance-right/.

139. *See Cartoon Network LP, LLLP*, 536 F.3d at 135 ("Under the bill, as under the present law, a performance made available *by transmission to the public at large* is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the *potential recipients* was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the *potential recipients of the transmission* represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service (citing H.R. REP. NO. 94-1476, at 64–65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679)).

140. *Id.*

of the potential audience of a particular work."[141] The court further stated, "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."[142]

Thus in the Second Circuit's view, one must not focus primarily on the potential audience of an underlying work. As the court noted, "[T]he use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made 'to the public.'"[143] That is, because the potential audience of one copy naturally must be one viewer, there is no fear that the performance is public.[144] Accordingly, Cablevision's RS-DVR transmissions were not performances to the public "[b]ecause each RS-DVR playback transmission is made to a single subscriber."[145] The court clarified that this holding was not to be interpreted as a loophole for services to create and transmit individual copies of a work to avoid liability.[146] However, it did not elaborate on this crucial issue.

4. Lower Courts Supporting the Interpretation of the Transmit Clause that Focuses on the Underlying Work Concluded that Aereo Was Not Publicly Performing the Broadcasters' Copyrighted Works

In 2013, in *WNET, Thirteen v. Aereo, Inc.*,[147] the Second Circuit considered the legality of the Aereo antenna-farm system. Applying *Cartoon Network*, the court held that Aereo's technology does not infringe the copyrights of the television networks.[148] The court found specifically that Aereo's system creates a unique copy for each user, and that when the user opts to watch the program, "the transmission sent by Aereo and received by that user is generated from that unique copy."[149] As a result of this engineering, "[n]o other Aereo user [could] ever receive a transmission from that copy. Thus, just as in [*Cartoon Network*], the potential audience of each Aereo transmission [was] the single user who requested that a program be recorded."[150]

141. *Id.* (internal quotation marks omitted).

142. *Id.* at 135–36.

143. *Id.* at 138.

144. *Id.*

145. *Id.* at 139.

146. *Id.* at 139–40 ("This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber 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.").

147. 712 F.3d 676 (2d Cir. 2013), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

148. *WNET, Thirteen I*, 712 F.3d at 686–87, 697.

149. *Id.* at 690.

150. *Id.*

Prior to the Supreme Court's decision, this "capable of receiving the transmission" test was expressly followed in another district court case involving Aereo.[151] The District Court for the District of Massachusetts, in denying the television network's motion for a preliminary injunction against Aereo, concluded that the "capable of receiving the transmission" test set forth by the Second Circuit in both *Cartoon Network*[152] and *WNET, Thirteen*[153] was the better interpretation of the Transmit Clause in light of canons of statutory interpretation and the legislative history of the Copyright Act.[154] The court noted that "while the Transmit Clause is not a model of clarity, the Court finds at this juncture that Aereo presents the more plausible interpretation."[155]

D. The Supreme Court Finds Aereo Infringing: If It Looks Like a Cable System and Smells Like a Cable System, By Golly, It's a Cable System

In a six-to-three decision, in June 2014 the Supreme Court held that Aereo performs the broadcasters' copyrighted works publicly as those terms are defined by the Transmit Clause.[156] The majority opinion, written by Justice Breyer, parsed the question of Aereo's legality into two main issues: (1) does Aereo "perform" at all? And (2) if so, does Aereo do so "publicly"?[157]

With regard to whether Aereo "performs," the Court particularly emphasized that "one of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act's scope."[158] It noted that the "[c]able system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this [amended] language to cover."[159] Furthermore, the Court concluded that the Transmit Clause "makes clear that an entity that acts like a CATV system performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals."[160] The fact that Aereo's system remained inert until a subscriber decided to watch a program was simply too small of a difference between Aereo and CATVs.[161] Given Aereo's "overwhelming likeness" to the CATV companies targeted by the Copyright Act of 1976, the Court reasoned that Aereo's system must be covered by the Act.[162]

151. Hearst Stations Inc. v. Aereo, Inc., 977 F. Supp. 2d 32, 39–41 (D. Mass. 2013).
152. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008).
153. *WNET, Thirteen I*, 712 F.3d at 686–87
154. *Hearst Stations, Inc.*, 977 F. Supp. 2d at 38.
155. *Id.* at 39.
156. ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014).
157. *Id.* at 2504.
158. *Id.*
159. *Id.* at 2506.
160. *Id.*
161. *Id.* at 2507.
162. *Id.*

With regard to whether Aereo performed the broadcasters' works "publicly" within the meaning of the Transmit Clause, the Court found that any differences between Aereo's system and standard cable systems, which clearly *do* perform publicly, were insignificant.[163] The Court found that Aereo's complex system of creating personal copies of programs, "[v]iewed in terms of Congress' regulatory objectives," should not matter in its determination.[164] The Court stated that Aereo's behind-the-scene systems "do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers."[165] Therefore, "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."[166] Having found that Aereo performed the broadcasters' copyrighted works publicly, as defined by the Transmit Clause, the Court held that Aereo was infringing copyrighted works.[167]

It is noteworthy that, on multiple occasions, the Court emphasized that its ruling was very limited and fact specific.[168] For example, the Court noted that "the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo 'perform[s],' but it does not determine whether different kinds of providers in different contexts also 'perform.'"[169] Furthermore, it noted that "we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content."[170] The Court clearly did not want to address other technologies with this decision, and even suggested that Congress may be the more competent institution to do so.[171]

III. DISCUSSION

The struggles that courts displayed when applying the Copyright Act of 1976 to technology that was developed decades after its enactment undoubtedly illustrate the need for new copyright legislation. One cannot help but sympathize with Aereo, a startup company that invested significant resources, time, money, and energy to develop a useful, productive, and visionary service.[172] It did so

163. *Id.* at 2508.

164. *Id.*

165. *Id.*

166. *Id.* at 2509.

167. *Id.* at 2510–11.

168. *Id.* at 2510.

169. *Id.*

170. *Id.* at 2511.

171. *Id.* ("[T]o 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.").

172. *See* Julie Bort, *Internet Streaming TV Service Aereo Snags Another $34 Million Investment*, BUS. INSIDER (Jan. 7, 2014), http://www.businessinsider.com/aereo-snags-another-34-million-2014-1 (indicating that Aereo had raised nearly $97 million from investors as of January 2014).

with a keen eye on the only relevant precedent that existed at the time—*Cartoon Network*—and ensured that its technology aligned with that court's holding.[173]

However, in light of the goals of copyright protection, it made little practical sense to read the Transmit Clause in the way that Aereo suggested—that is, by expanding the doctrine of *Cartoon Network*, which counsels a court to examine the potential audience for each individual transmission. Viewers do not care or notice which individual transmission of *The Amazing Race*[174] they are watching. Rather, viewers care about and notice only the underlying work they are watching—that is, the program known as *The Amazing Race*. While the Supreme Court's decision emphatically avoided the issue of RS-DVR systems, this Comment suggests that *Cartoon Network* must be viewed as outdated law, or alternatively, the factual differences between Aereo's antenna-farm system and RS-DVR must be sufficient to distinguish the two technologies.

Thus, this Comment agrees with the Supreme Court that Aereo's system was infringing the broadcasters' rights under the Copyright Act by performing their programming to the public without their permission. Part III.A analyzes the Transmit Clause in detail and concludes that under a proper reading of the statute, Aereo's retransmission of these signals was a public performance. It specifically views the recent Supreme Court decision in light of *Cartoon Network* and attempts to reconcile the two legal doctrines. Part III.B explores how reading the Copyright Act expansively to allow Aereo's retransmission of the broadcasters' copyrighted works would have disregarded relevant precedent and clashed with the opinion of the Department of Justice. Part III.C examines the potential implications that Aereo's expansion would have inevitably had and suggests that sound policy demanded that the statute not be interpreted in the way Aereo suggested. Part III.D explores the future of Internet-based television services and the potential ways in which those services can adapt their business models in light of the Supreme Court's ruling. Finally, Part III.E suggests a revision of the Copyright Act that is more in line with congressional intent. This revision eliminates many of the ambiguities that persist in the statutory language of the Transmit Clause and provides additional safeguards that will ensure that there is still a place for emerging technologies in the digital-media industry.

A. The Proper Reading of the Transmit Clause in Light of Aereo *and* Cartoon Network

The Supreme Court chose not to address the legality of RS-DVR technology specifically, which was the subject of *Cartoon Network*.[175] However, there are only two ways to analytically rationalize the Supreme Court's recent

173. See *supra* Part II.C.4 for a detailed discussion of how the Second Circuit applied the legal doctrine from *Cartoon Network* to hold that Aereo was not infringing any copyrights.

174. *The Amazing Race*, CBS, http://www.cbs.com/shows/amazing_race/ (last visited Mar. 6, 2015).

175. *See Aereo, Inc.*, 134 S. Ct. at 2511 (specifically not considering "whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content").

limited ruling in *Aereo* with *Cartoon Network* and RS-DVR technology. The first finds that *Cartoon Network* was wrongly decided, while the second finds that even under the assumption that *Cartoon Network* is good law, the doctrine from *Cartoon Network* could not be extended to reach Aereo because of significant differences between the two systems at issue.

1. *Cartoon Network* Got It Wrong Because the Proper Transmit Clause Interpretation Requires a Focus on the Underlying Work

If *Cartoon Network* is an incorrect interpretation of the Transmit Clause, then it would logically follow that the technology behind Aereo is not allowed as well. Aereo's technology was based on the legal standard established by *Cartoon Network*, which requires an inquiry into the potential audience of a particular transmission, rather than the potential audience of the underlying work.[176] Accordingly, Aereo relied on *Cartoon Network*'s broad interpretation of the Transmit Clause.[177]

In contrast, a proper reading of the Transmit Clause requires one to focus on the "[transmission] . . . of the work,"[178] not on the actual transmission itself. The Second Circuit erroneously reasoned that "performance" and "transmission" have the same meaning under the Copyright Act, despite basic principles of statutory interpretation that suggest Congress intends different words to have different meanings.[179] One copyright scholar contends that "[s]witching the words 'performance' and 'transmission' changed the outcome of the case."[180] The text of the Transmit Clause anticipates that "the members of the public capable of receiving the performance . . . [can] receive it in the same place or in separate places and at the same time or at different times."[181] However, it is "difficult to imagine a single transmission capable of reaching people 'in separate places' or 'at different times.'"[182] Consequently, a "transmission" cannot be synonymous with a "performance" under the language of the Transmit Clause.

In addition, *Cartoon Network* erroneously focused the inquiry of public performance on the existence of unique "copies," when Congress never

176. See *supra* Part II.C.3 for a detailed discussion of *Cartoon Network* and how the Second Circuit determined that Cablevision's RS-DVR did not "publicly perform" the plaintiffs' copyrighted works.

177. WNET, Thirteen v. Aereo, Inc. (*WNET, Thirteen II*), 722 F.3d 500, 506 (2d Cir. 2013) (Chin, J., dissenting) (dissenting from the Second Circuit's denial of rehearing en banc and acknowledging that the "majority's decision [was] based entirely on [*Cartoon Network*]").

178. 17 U.S.C. § 101 (2012).

179. *WNET, Thirteen II*, 722 F.3d at 507–08 ("[W]e generally presume Congress intends different terms in the same statute to have different meanings" (citing Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 825 (2013))).

180. Malkan, *supra* note 49, at 532.

181. 17 U.S.C. § 101; *see also WNET, Thirteen II*, 722 F.3d at 509.

182. *WNET, Thirteen II*, 722 F.3d at 508.

envisioned copies being the deciding factor for public performances.[183] In fact, given that the Copyright Act was enacted in the mid-1970s, it is difficult to imagine that Congress was at all aware of digital-media copies. The statutory definition of public performance does not even include the term "copies."[184] Given that the Copyright Act does define "copies," Congress certainly could have incorporated that term into the Transmit Clause had it wanted to do so.[185] Accordingly, multiple courts[186] and legal commentators[187] have reasoned that *Cartoon Network* improperly creates a legal standard that looks to the audience capable of receiving individual transmissions, in opposition to the plain language of the statute.

The legislative history behind the Copyright Act also conflicts with *Cartoon Network*'s interpretation of the Transmit Clause. Nowhere in the Act's legislative history is the word "copies" used in the manner that the Second Circuit suggests is correct.[188] Thus, even if the statute is ambiguous on its face, its legislative history would indicate that Aereo was illegally performing copyrighted work to the public.[189]

Congress drafted the Copyright Act of 1976 specifically to prevent novel technology from being used to circumvent copyright protection.[190] It wanted to be clear that this new legislation was in response to emerging technologies that harmed copyright holders—namely, CATVs.[191] Furthermore, legislators intended the Act to be encompassing and constructed in a way that would adapt to novel technologies.[192] Moreover, Congress indicated that the performance could be received in "separate places" and at "different times" under the public

183. *Id.* at 509 (questioning the likelihood that Congress "intended the transmit clause inquiry to turn on the existence of 'copies'").

184. 17 U.S.C. § 101.

185. *Id.* (defining "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

186. Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 33 (D.D.C. 2013); Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012).

187. *See, e.g.*, Malkan, *supra* note 49, at 530; Barry Neil Shrum, *Second Circuit Gets It Wrong in* Cartoon Network v. Cablevision, LAW ON THE ROW (Aug. 5, 2008), http://lawontherow.com/2008/08/05/second-circuit-gets-it-wrong-in-cartoon-network-v-cablevision (arguing that the court in *Cartoon Network* "jumps through numerous irrational hoops" to come to the conclusion that the Transmit Clause is focused on the potential audience of a transmission).

188. *WNET, Thirteen II*, 722 F.3d 500, 509 (2d Cir. 2013) (Chin, J., dissenting).

189. *Id.* at 505.

190. See *supra* Part II.B.2 for a detailed discussion of the Supreme Court cases that Congress overturned in enacting the current Copyright Act.

191. See *supra* Part II.B.2 for a discussion of the history of the exclusive right to perform a copyrighted work publicly, before and after the passage of the current Copyright Act.

192. *WNET, Thirteen II*, 722 F.3d at 505 (citing H.R. REP. NO. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678). For example, Congress noted that "[e]ach and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and *if the transmission reaches the public in [any] form*, the case comes within the scope of clauses (4) or (5) of section 106." *Id.*

performance definition.[193] Congress's action shows that it intended a technology such as Aereo's to be covered under the statute. As the Supreme Court agreed, Aereo was nothing more than a twenty-first-century CATV.[194] Thus, "no matter how Aereo's system function[ed] as a technical matter, because its unlicensed retransmissions reach[ed] the public, it [was] surely engaging in copyright infringement as Congress intended the statute to be interpreted."[195]

2. Cablevision's RS-DVR System Is Factually Distinct from Aereo's System

The differences between Cablevision's RS-DVR system and Aereo's antenna-farm system have legal implications that could potentially lead to different outcomes under the Transmit Clause. Unlike Aereo, Cablevision's RS-DVR technology is not a purposeful attempt to exploit a loophole in copyright law.[196] Even if one assumes that *Cartoon Network* did reach the correct conclusion, there still exist many factual differences between the RS-DVR system at question in *Cartoon Network* and Aereo's Internet-based television technology.[197]

Primarily, Cablevision was a provider of cable services, which had a license to retransmit programming to its subscribers.[198] In *Cartoon Network*, the lawsuit brought by the plaintiff–copyright holders only sought a ruling that Cablevision would need additional licenses to allow its subscribers to record and replay shows though the RS-DVR system.[199] Because Cablevision already had authorization to rebroadcast television programming to its customers, the absence of licensing was not an issue in that case.[200] Instead, Cablevision split the stream of licensed data into two copies.[201] One of these streams was sent to the subscriber immediately to watch the content live, just as the cable system had been operating before the advent of RS-DVRs.[202] The other stream went through the RS-DVR system so the server could then determine whether it

193. *Id.*; 17 U.S.C. § 101 (2012).

194. ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2506–07 (2014).

195. *WNET, Thirteen II*, 722 F.3d at 505.

196. See *supra* Part II.C.3 for a detailed discussion of how Cablevision's RS-DVR technology functioned.

197. The Supreme Court seemed to hint that the correct way to reconcile its decision is by acknowledging that playing back copies that were already lawfully acquired presents a much different situation. *See Aereo, Inc.*, 134 S. Ct. at 2511 (indicating that the Court has "not considered . . . the remote storage of content").

198. *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 123–25 (2d Cir. 2008) (describing Cablevision's RS-DVR technology).

199. *WNET, Thirteen I*, 712 F.3d 676, 686 (2d Cir. 2013) (Chin, J., dissenting), *rev'd and remanded sub nom.* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

200. *See id.* (noting that a Cablevision subscriber could use his or her own DVR to record and play back licensed programming because Cablevision had a license to retransmit programming).

201. *Id.*

202. *Id.*; *see also Cartoon Network LP, LLLP*, 536 F.3d at 124–25 (providing a detailed description of the method of operation behind Cablevision's RS-DVR system).

needed to record the program for a subscriber.[203] In this context, there are two clear differences between *Cartoon Network* and the recent cases involving Aereo's technology that make the two systems that were at issue technologically distinct.

The first distinction is that Aereo operated *entirely* as an independent means of watching television.[204] Conversely, Cablevision's RS-DVR operates to *supplement* an already legal means of watching television.[205] The core business models of the two systems are fundamentally different, which alone is enough to distinguish the technologies factually: "Aereo's use of copies is essential to its ability to retransmit broadcast television signals, while Cablevision's copies were merely an optional alternative to a set-top DVR."[206] A headline page of Aereo's website advertised this by immediately displaying the following: "With Aereo, you can watch real, live TV through a tiny remote antenna you control over the Internet—from home or anywhere in your home coverage area."[207] It even emphasized the fact that a cable subscription was not necessary. The page proclaimed: "Watch live TV online. Save shows for later. No cable required."[208]

Conversely, Cablevision advertises its RS-DVR as a supplement to its paid services. The RS-DVR system is an additional way of watching the shows for which the subscriber has already purchased a license to watch vis-à-vis their monthly fee to Cablevision, which in turn pays the copyright holders.[209] Its website advertises that "[n]ot only will you never miss a show, you'll never miss recording a show, because with Web DVR you can control your DVR online, record shows, see scheduled recordings and more."[210]

Consequently, unlike Cablevision, Aereo had no right to retransmit the broadcasters' copyrighted content. This difference is clear. Cablevision subscribers could use their own personal DVRs to record the programming

203. *WNET, Thirteen I*, 712 F.3d at 701.

204. *See* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2506 (2014) (noting that Aereo sells a service, uses its own equipment, and deploys its own means of technology to provide customers with copyrighted material).

205. *See WNET, Thirteen II*, 722 F.3d 500, 506 (2d Cir. 2013) (Chin, J., dissenting) ("Cablevision subscribers already had the ability to view television programs in real-time through their authorized cable subscriptions, and the RS-DVR was merely a supplemental service that allowed subscribers to store that authorized content for later viewing.").

206. *WNET, Thirteen I*, 712 F.3d at 702.

207. Shelly Palmer, *Aereo v. Broadcasters: Things to Ponder*, HUFFINGTON POST (June 28, 2014, 5:59 AM), http://www.huffingtonpost.com/shelly-palmer/aereo-v-broadcasters-thin_b_5226206.html. The website was removed following Supreme Court decision. It now features a letter from Aereo CEO Chet Kanojia. *A Letter to Our Consumers: The Next Chapter, supra* note 17.

208. Joan E. Solsman, *How Supreme Court Ruling Affects Aereo, the Cloud, and You*, CNET (June 26, 2014, 8:09 AM), http://www.cnet.com/news/how-the-supreme-court-ruling-affects-aereo-the-cloud-and-you/.

209. See *supra* Part II.C.3 for a detailed discussion of how Cablevision's RS-DVR technology functioned.

210. *Optimum TV: Better Television*, OPTIMUM, http://www.optimum.com/digital-cable-tv/features/ (last visited Mar. 6, 2015). Cablevision offers some of its services under the "Optimum" name.

provided by Cablevision, through Cablevision's own licensed transmission.[211] Aereo subscribers could not do the same.[212] That is, Aereo subscribers could not use their own personal DVR "to lawfully record content received from Aereo because Aereo ha[d] no license to retransmit programming."[213] Furthermore, "at best, Aereo could only illegally retransmit public broadcasts from its remote antennas to the user."[214]

The second distinction between Cablevision's RS-DVR and Aereo's service is that Aereo played a very direct and active role in the making and retransmitting of the copies of the copyrighted programming.[215] While Cablevision's RS-DVR played no part if a user was only watching live television, Aereo's system required its servers to start copying the copyrighted programming even if the user was only trying to watch "live" television.[216]

Cartoon Network highlighted the fact that the cable operator's RS-DVR system was factually similar to a VCR or to a standard set-top DVR.[217] It is well established that VCR manufacturers cannot be held liable for direct or contributory infringement when copies of copyrighted content are made with their systems.[218] As a result, Cablevision's RS-DVR did not change the service substantially—it merely added a "record" option *if the user specifically instructed the system to record*.[219]

In contrast, Aereo's system primarily existed and operated only to stream live television over the Internet.[220] As such, Aereo's ingenious design was its own downfall. Aereo suggested that it could avoid liability because it retransmitted individual copies of the copyrighted content to its viewers, regardless of whether they were watching live programming or recorded programming.[221] As a result of this system, however, Aereo had to begin copying the copyrighted content as soon as a user tried to watch "live" programming.[222] This consequently was a much more active role than Cablevision's RS-DVR played.

211. *WNET, Thirteen I*, 712 F.3d at 702 (Chin, J., dissenting).

212. *Id.*

213. *Id.*

214. *Id.*

215. *See id.* (contrasting Cablevision's system to Aereo's, stating that Cablevision's "subscribers provided the 'volitional conduct' necessary to make a copy" (quoting Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 131 (2008))).

216. *Id.* Judge Chin noted that Aereo's system by its very definition is different from Cablevision's RS-DVR: "Aereo's system is much different than a VCR or DVR—indeed, as Aereo explains, it is an antenna, a DVR, and a Slingbox rolled into one—and for that reason *Cablevision* does not control our decision here." *Id.* at 703.

217. *See Cartoon Network LP, LLLP*, 536 F.3d at 131 (stating the court's belief that an RS-DVR user is not factually distinguishable from a VCR user).

218. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (holding that the VCR manufacturers' sales did not constitute contributory infringement).

219. *Cartoon Network LP, LLLP*, 536 F.3d at 131.

220. *WNET, Thirteen I*, 712 F.3d at 703 (Chin, J., dissenting).

221. *Id.*

222. *Id.*

B. *An Expansion of* Cartoon Network *to Include Aereo Would Have Ignored Second Circuit Precedent and the Views of the Department of Justice*

There are other noteworthy features of certain court opinions and briefs that, although not mentioned by the Supreme Court in its *Aereo* ruling, indicate that the Court was correct by not following and expanding the *Cartoon Network* precedent. The first is discussed in *Cartoon Network*. In the conclusion of the opinion, the majority specifically emphasized that it did not intend for its decision to allow content delivery systems to avoid liability by creating and transmitting individual copies of the programming.[223] Nevertheless, that is exactly what Aereo was doing—using *Cartoon Network*'s holding to allow itself to avoid copyright liability merely by creating individual copies of the programs and retransmitting them to its subscribers.[224]

Additionally, other parties agreed that *Cartoon Network* should not be extended beyond its unique factual circumstances. In the United States' amicus brief in opposition to the grant of certiorari in a case involving the legality of Cablevision's RS-DVR technology, the Department of Justice suggested that an important factor in its position was that *Cartoon Network* was to be limited to the facts of the case: "Taken as a whole, however, the court of appeals' analysis of the public-performance issue should not be understood to reach [video-on-demand] services or other circumstances *beyond those presented in this case*."[225] However, Aereo was doing exactly what the Department of Justice sought to prohibit. Aereo attempted to take the *Cartoon Network* holding, which the Department of Justice thought would be limited to the RS-DVR facts, and expand it to include Internet-based television.

Finally, at a macro level, courts generally acknowledge that streaming copyrighted television over the Internet or other electronic means is a public performance.[226] For example, even the Second Circuit has stated that "streaming copyrighted works without permission . . . would drastically change the industry, to [the] detriment" of copyright holders.[227] That is, the potential ramifications of rebroadcasting copyrighted content are very real and are a true cause for

223. *Cartoon Network LP, LLLP*, 536 F.3d at 139 (stating that the holding did not "permit content delivery networks to avoid all copyright liability by 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").

224. See *supra* Part II.C.4 and accompanying text for a discussion of how some courts have extended the holding from *Cartoon Network* to Aereo's system.

225. Brief for the United States as Amicus Curiae at 21, CNN, Inc. v. CSC Holdings, Inc., 129 S. Ct. 2890 (2009) (No. 08-448), 2009 WL 1511740, at *21 (emphasis added).

226. *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 914 (2005) (holding that "one who distributes a device with the object of promoting its use to infringe copyright" can be held liable for the resulting act of infringement); Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 199–200 (1931) (holding that "the reception of a radio broadcast and its translation into audible sound" is a performance); On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 789–90 (N.D. Cal. 1991) (holding that a hotel system that transmitted to individual hotel rooms movies being played from individual video tapes by remote control from a central system in the hotel's equipment room "'publicly performs' . . . movies under the meaning of the transmit clause").

227. WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 286 (2d Cir. 2012).

concern. The Second Circuit also stated that "[c]ontinued live retransmissions of copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry."[228]

Accordingly, it remains somewhat difficult to rationalize the Second Circuit's earlier views with its opinion addressing Aereo's system. While Aereo's creativity in adapting to the relevant *Cartoon Network* doctrine was impressive, the Supreme Court came to the correct conclusion by not allowing Aereo's exploitation of a statutory loophole to dictate its decision. It should not matter from a copyright perspective if an infringer is rebroadcasting copyrighted content directly over the Internet or if it stealthily acquires and copies the copyrighted content before rebroadcasting it. In either case, an underlying work is being retransmitted to the public and the act of retransmission is infringing the broadcasters' copyrights.

C. Potential (Avoided) Implications of Aereo

Had Aereo been allowed to continue broadcasting television without acquiring the rights to do so, then many of the licensing deals that the broadcast television stations had made with cable, satellite, broadcast, and Internet-streaming service providers would have become less valuable. This is because Aereo would suddenly have become the direct competition of these companies and their licensees.[229] By essentially mimicking a cable system, Aereo had become a direct competitor of the networks and of the networks' licensees, such as Hulu, iTunes, and DirecTV.[230] As a result, Aereo was causing great financial harm to the copyright holders, thereby limiting their incentive to produce content.[231]

The chain reaction that could have occurred if Aereo had been permitted to continue its system of free riding the networks' creative content was very clear and real. Essentially, Aereo's service would have undermined the ability of the networks to license their content to traditional broadcast television transmitters, such as cable and satellite providers, as well as new Internet-based services.[232] This damage would have been compounded by the networks' diminished ability to perform their programming over their own websites.[233] Even more so, the

228. *Id.*

229. *See* Complaint for Injunctive Relief and Damages at 9–10, Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC., No. CV12-6921 (C.D. Cal. Aug. 10, 2012), 2012 WL 3581895, at ¶ 37 (arguing that defendant's unauthorized Internet-streaming service would undermine plaintiff's licensing agreements with other Internet-streaming service companies).

230. *See id.* (arguing that Aereo's conduct was undermining its business relationships with traditional transmitters of television programing and services that deliver television programing over the Internet.)

231. *Id.*

232. *Id.*

233. *Id.*; *see, e.g.*, *Full Episodes*, FOX, http://www.fox.com/full-episodes/ (last visited Mar. 6, 2015) (showing that networks provide access to their videos over their own websites).

networks would have lost the ability to manage the quality standards of their programming.[234]

For example, individuals may have decided not to subscribe to cable if they were only interested in a few shows that they could have watched or recorded through Aereo for a mere eight dollars per month.[235] Therefore, individuals would be less inclined to pay for basic cable. For similar reasons, individuals may not have wanted to pay for Hulu[236]—and miss out on the cloud DVR that came with Aereo—or have to wait an extra day after the original television broadcast for content to become available on Hulu.[237] Thus, because Aereo stole subscribers from the broadcasters' paying licensees, the broadcasters could have eventually lost these licensees entirely. This would certainly have discouraged the networks from investing in new creative content.

In addition, prior to the Supreme Court's ruling, Aereo appeared eager to *expand* its service by teaming up and partnering with other companies.[238] For example, there were indications that Aereo had been in talks with AT&T to have subscribers purchase AT&T's Internet service packaged with Aereo's television service.[239] Additionally, there had been reports of the Dish Network possibly looking to partner with Aereo to offer an inexpensive Internet-based television package.[240] As a direct result, there were indications that some of the television broadcasters were considering changing their entire business models if Aereo had continued to infringe.[241] Supporting the broadcasters, the National

234. *See* Complaint for Injunctive Relief and Damages, *supra* note 229, at 9–10, (arguing that unauthorized transmission of a network's programming prevents the network from maintaining its quality and security controls).

235. *See* Phillips, *supra* note 29 (stating that Aereo subscribers had the ability to watch over-the-air broadcast television by paying as little as eight dollars per month for an Aereo antenna). Aereo's service also included twenty hours of DVR space. Jordan Crook, *Aereo Switches Up Pricing: $8/Month for 20 Hours of DVR, $12/Month for 60 Hours Starting May 15*, TECHCRUNCH (May 13, 2013), http://techcrunch.com/2013/05/13/aereo-switches-up-pricing-8month-for-20-hours-of-dvr-12month-for-60-hours-starting-may-15/.

236. HULU, http://www.hulu.com/ (last visited Mar. 6, 2015).

237. *See* Adrian Covert, *Aereo: Pay for Free TV*, CNNMONEY (Apr. 11, 2013, 2:26 PM), http://money.cnn.com/2013/04/11/technology/innovation/aereo-tv-review/ (providing some of the differences between Aereo and Hulu and suggesting that people with limited programming interests, like local news or sports, may prefer Aereo over Hulu and Netflix).

238. Prior to the Supreme Court's June 2014 decision, Aereo CEO Chet Kanojia estimated that twenty-five percent of homes could be subscribers within seven years. JP Mangalindan, *Aereo CEO: We'll Be in 25% of Homes in a Few Years*, FORTUNE (July 23, 2013, 3:08 AM), http://tech.fortune.cnn.com/2013/07/22/aereo-ceo-well-be-in-25-of-homes-in-a-few-years/?iid=EL.

239. Shalini Ramachandran, *TV Service Providers Held Talks with Aereo*, WALL ST. J. (Mar. 31, 2013, 7:21 PM), http://online.wsj.com/news/articles/SB10001424127887323501004578391023454905916.

240. *Id.*

241. *See* John M. Gatti & Crystal Y. Jonelis, *Second Circuit Deals Blow to Rights of Broadcasters Under the Copyright Act*, 25 INTELL. PROP. & TECH. L.J. 16, 18 (2013) (noting that "the [Second Circuit] decision is causing broadcasters to rethink their programming strategies"); Liptak & Carter, *supra* note 3, at B1 (noting that "[a]t least two of the networks, CBS and Fox, have already said that they would consider abandoning broadcasting over public airwaves altogether and becoming pay cable channels").

Football League and Major League Baseball asserted that, should Aereo not be shut down, they would consider airing games exclusively on cable stations such as ESPN and TNT, which could have meant the end of free sports on broadcast television.[242] Such a result would have been detrimental to the sixty million Americans who use an antenna to watch free television.[243]

D. The Future of the Internet-Based Television

In light of the Supreme Court's June 2014 ruling, Aereo suspended its television service and filed for Chapter 11 reorganization proceedings.[244] The Court in essence held that Aereo was a cable system, and therefore, should be treated like one for copyright purposes.[245] The Court's holding poses a question for Aereo, and similar Internet-based television service providers: how can the industry reinvent its business model? Although in the immediate aftermath of the Court's decision Aereo emphatically noted its "journey is far from done,"[246] by filing for bankruptcy, Aereo has apparently decided that reinventing itself is not a feasible option.

Given the Supreme Court's clear ruling, commentators argued, "the only option that remains available to Aereo would be to change its business model and pay the broadcasters to distribute content."[247] Before bankruptcy, Aereo seemed to be pursuing this option. Aereo's attorneys initially indicated that they were "proceeding to file the necessary statements of account and royalty fees" in order to gain the rights to legally retransmit broadcast programming.[248] Although Aereo's business model seemed to be predicated on its ability to acquire and retransmit broadcast signals—essentially maximizing its profit margin—it arguably still could have provided a unique service by providing subscriber-friendly bundles of channels over the Internet.[249] However, as media conglomerates worked alongside cable companies to do everything in their power to slow down the expansion of Internet-based television,[250] Aereo opted

242. Julianne Pepitone, *NFL and MLB: Aereo May Kill Sports on Free TV*, CNNMONEY (Nov. 18, 2013, 1:22 PM), http://money.cnn.com/2013/11/18/technology/nfl-mlb-aereo/.

243. *See* Janko Roettgers, *Cord Cutters Alert: 60 Million Americans Now Use an Antenna to Watch Free TV*, GIGAOM (June 21, 2013, 2:14 PM), http://gigaom.com/2013/06/21/ota-60-million-antenna-users-cord-cutting/ (noting that "22.4 million households representing 59.7 million Americans get their TV for free").

244. *A Letter to Our Consumers: The Next Chapter*, *supra* note 17.

245. ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2508–09 (2014).

246. Brian Stelter, *Aereo Suspends TV Service . . . but Not 'Shutting Down'*, CNNMONEY (June 28, 2014, 11:14 AM), http://money.cnn.com/2014/06/28/media/aereo-suspended/?iid=EL (quoting Aereo CEO Chet Kanojia's email to subscribers following the Court's decision).

247. *Id.*

248. Brian Stelter, *Aereo's Future: Online Cable Provider?*, CNNMONEY (July 10, 2014, 3:12 PM), http://money.cnn.com/2014/07/10/media/aereo-as-a-cable-system/.

249. *See id.* (noting that "[a] number of other companies, some big and others small, are also exploring how to sell a cable-like bundle of channels via the Internet in a way that's more customer-friendly than the bundles that most American households currently buy").

250. Steven J. Vaughan-Nichols, *After the Aereo Decision: The Future of Internet TV*, ZDNET (June 30, 2014, 11:29 AM), http://www.zdnet.com/after-the-aereo-decision-the-future-of-internet-tv-

for bankruptcy. While Aereo's fate is all but sealed, an amendment to the Transmit Clause could have clarified Aereo's obligations under the Copyright Act and avoided the protracted litigation and resulting legal uncertainty over Aereo's antenna-farm system.

E. How to Fix the Transmit Clause Problem Caused by Cartoon Network *and* Aereo*: A Model Statute*

New legislation is necessary to clarify the statutory labyrinth that is the Transmit Clause of the public performance definition.[251] The recent Supreme Court decision in *Aereo* illuminated this need by emphasizing that it was not ruling on any other technology not brought before it.[252] Consequently, the legality of new services from a copyright perspective will generally involve very fact-specific inquiries.[253] Barring a complete Copyright Act overhaul, simply amending the language of the Transmit Clause could significantly clarify the inquiry for lower courts and companies utilizing emerging audiovisual service technologies.

However, there are many complexities and variables that make a clearer drafting of the statute difficult. The confusion primarily flows from how to reconcile the terms "transmi[ssion]" and "performance."[254] Thus, removing any reference to the word "performance" would clarify most of these issues and would seemingly be more in line with what Congress intended in overruling the pre–Copyright Act Supreme Court cases through its enactment of the current Copyright Act.[255]

7000031034/ (suggesting that "the media companies, which work arm-in-arm with cable companies" will likely not invest in Internet broadcasting).

251. This view has been echoed by the U.S. Department of Commerce which recently stated that "[t]o the extent that judicial decisions undermine a meaningful public performance right, Congressional action may be needed." DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 20 (2013), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf.

252. *See* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2510 (2014) (noting that the history of cable broadcast transmissions that led to the enactment of the Transmit Clause "does not determine whether different kinds of providers in different contexts also 'perform'").

253. Eleanor Lackman, *Symposium: Preferring Substance over Form and Nature over Manner, Supreme Court Finds that Aereo Runs Afoul of the Purposes of the Copyright Act*, SCOTUSBLOG (June 26, 2014, 4:23 PM), http://www.scotusblog.com/2014/06/symposium-preferring-substance-over-form-and-nature-over-manner-supreme-court-finds-that-aereo-runs-afoul-of-the-purposes-of-the-copyright-act/.

254. *Compare ABC, Inc.*, 134 S. Ct. at 2507 (holding that Aereo performs because its antennas transmit the performance for viewers to watch), *with id.* at 2514 (Scalia, J., dissenting) (arguing that Aereo does not perform because the viewer controls when the transmission occurs).

255. See *supra* Part II.B.2 for a detailed description of the Supreme Court cases that Congress overruled in enacting the current Copyright Act.

Congress should revise the statute, and in doing so, consider a definition of public performance that focuses on the *transmission* of the work. This Comment proposes the following amendments to the Transmit Clause:

> (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 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 *transmission* receive it in the same place or in separate places and at the same time or at different times.[256]

Eliminating any reference to "performance" or "performing" and focusing on the "transmission" aspect ensures that there is no confusion or conflation of the terms. In addition, this drafting is more likely to align with the intentions of the Congress that enacted the Copyright Act of 1976.[257]

Admittedly, this version of the statute would not get rid of all of the statutory interpretation issues, and may even create some new ones. However, many of the issues raised by this simplification of the Transmit Clause can be resolved via proper licensing and the doctrine of fair use.[258] The doctrine of fair use states that certain violations of a copyright holder's exclusive rights are not infringing.[259] Fair use has long been used as a "safety valve, ensuring that copyright protection is not used to stifle innovation," and has historically been "called upon to strike balances in the face of innovative technologies."[260] Take *Cartoon Network* for example.[261] It is very likely that under this version of the Transmit Clause, Cablevision's RS-DVR technology may have been found to be

256. The Transmit Clause currently states: "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." 17 U.S.C. § 101 (2012) (defining a public performance).

257. See *supra* notes 79–84 and accompanying text for a discussion of Congress's reaction to the Supreme Court's interpretation of the Copyright Act of 1909.

258. Fair use is an affirmative defense to copyright infringement. 17 U.S.C. § 107. It essentially acts as a "'built-in' safeguard in copyright law for mediating tensions between interests of copyright owners in controlling exploitations of their works and free speech and expression interests of subsequent authors and members of the public." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2546 (2009).

259. *See* 17 U.S.C. § 107. Fair use looks to a variety of factors, none of which are exclusive, including: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.* This is a flexible doctrine.

260. LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS 457 (3d ed. 2012).

261. See *supra* Part II.C.3 for a detailed description of *Cartoon Network*.

infringing.[262] However, Cablevision certainly could have worked out some sort of licensing agreement with the broadcasters. As Cablevision likely attracted new customers and new revenue by offering an RS-DVR, the broadcasters may have reasonably wanted a larger contract, and the parties could have worked out an agreement.

Alternatively, an expansion of the doctrine of fair use by the courts or by Congress could properly balance the interests of novel technologies and copyright owners under this revised version of the Transmit Clause. While fair use is generally used as a defense for unauthorized copying or reproducing of a work, such as using a VCR or DVR to record a program, nothing in the statutory language limits fair use to a defense of unauthorized reproductions.[263] Therefore, a flexible fair use defense could certainly be utilized if, for example, Congress included additional factors for a court to consider in a fair use defense—such as the effect of the use on emerging technologies. Thus, while this amended Transmit Clause narrows the ability of new technology services to enter the market and be noninfringing for the sake of statutory clarity, fair use counterbalances this by allowing courts to determine on a case-by-case basis whether the interests of the creators of a new technology should take precedence over copyright owners' rights. This also seems to be an approach that the Supreme Court encouraged in its ruling in *Aereo*.[264]

IV. CONCLUSION

Prior to the recent Supreme Court decision in *Aereo*, the legal dispute of Aereo's technology created substantial business uncertainty and inconsistencies among the courts. Accordingly, the Supreme Court properly ruled that Aereo was infringing the copyrights of the broadcasters and television networks. A national standard that would have allowed Aereo to continue farming antennas, and intercepting and retransmitting copyrighted content, would have greatly discouraged networks from broadcasting their creative content, and certainly could have led to the extinction of free antenna-based broadcast television.

Ultimately, however, Congress should revisit the Copyright Act to address rapidly evolving digital-media technology. The Copyright Act served its purpose in the 1970s, but recently Aereo presented a problem that is much more sophisticated than—though strikingly similar to—the CATV systems addressed by the previous revision. Like those systems, Aereo exploited ambiguities in the

262. Given that Cablevision's RS-DVR is now clearly protected under settled law, there could be a clause that grandfathered prior technologies that the courts have already determined to be noninfringing. This revision would be proactive. In essence, novel technologies will be found to be infringing more easily under this revised Transmit Clause than under the current, ambiguous Transmit Clause. That is the expense of having a clear Transmit Clause. To remedy this, there would have to be some incentives that encourage novel technology services and copyright owners to reach licensing agreements more readily, or there would have to be an expanded utilization of the doctrine of fair use by the courts or an express expansion from Congress.

263. *See* 17 U.S.C. § 107.

264. *See* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014) (stating that "the doctrine of 'fair use' can help to prevent inappropriate or inequitable applications of the Clause").

Copyright Act and created a process by which it could profit off broadcasters' creative content. Although the Supreme Court reached the correct decision in this specific context, Congress must clarify the language of the Copyright Act to provide better notice to emerging technology companies.