The future of broadcast television: online streaming infringement and the U.S. Supreme Court

Elizabeth Cuttner
Louisiana State University and Agricultural and Mechanical College

Follow this and additional works at: https://repository.lsu.edu/gradschool_theses

Recommended Citation
Cuttner, Elizabeth, "The future of broadcast television: online streaming infringement and the U.S. Supreme Court" (2014). LSU Master's Theses. 2130.
https://repository.lsu.edu/gradschool_theses/2130

This Thesis is brought to you for free and open access by the Graduate School at LSU Scholarly Repository. It has been accepted for inclusion in LSU Master's Theses by an authorized graduate school editor of LSU Scholarly Repository. For more information, please contact gradetd@lsu.edu.
THE FUTURE OF BROADCAST TELEVISION: ONLINE STREAMING INFRINGEMENT
AND THE U.S. SUPREME COURT

A Thesis

Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Master of Mass Communication

in

The Manship School of Mass Communication

by

Elizabeth Cuttner
B.A., University of Georgia, 2010
May 2014
ACKNOWLEDGEMENTS

First, I would like to thank my parents, Craig and Nancy Cuttner, for their support not just in researching and writing this thesis, but throughout the past four years during my time at LSU. If not for them, I would not have had the courage to go to graduate school and law school. I thank them for their unwavering support and faith in me. I also thank my sister, Allison, for inspiring me to work harder in my academic pursuits and being an excellent role model in overcoming obstacles.

Second, I would like to thank the friends I have made while at LSU. They have become more like family, and I will miss them dearly as we take the next steps after graduation. Without their support, I could not have survived law school or this thesis, and I am grateful to have them in my life during this time.

Third, I want to thank my thesis committee for their guidance and feedback during this process. I especially thank Dr. Amy Reynolds for serving as my committee chair. Her excitement and enthusiasm as I embarked on this daunting topic drove me forward, and I am so appreciative of her feedback throughout this process.

Thank you all.
# TABLE OF CONTENTS

ACKNOWLEDGEMENTS .................................................................................................................. iii

ABSTRACT ......................................................................................................................................... v

CHAPTER 1. INTRODUCTION ........................................................................................................... 1

CHAPTER 2. BACKGROUND .............................................................................................................. 4
  The Functionality of Aereo and FilmOn X ......................................................................................... 4
  A Summary of the Court Proceedings .............................................................................................. 8
    Aereo in the Second Circuit ........................................................................................................... 8
    FilmOn X in the Ninth Circuit ....................................................................................................... 14
    FilmOn X in the District of Columbia Circuit ............................................................................... 17
    Aereo in the First Circuit .............................................................................................................. 19
    Aereo in the Tenth Circuit ........................................................................................................... 20
    The U.S. Supreme Court Grant of Certiorari ............................................................................ 21

CHAPTER 3. THE TRANSMIT CLAUSE – A HISTORY ...................................................................... 23
  The 1909 Copyright Act .................................................................................................................. 23
  Case Law Before the 1976 Revision ................................................................................................ 26
  The 1976 Revision .......................................................................................................................... 32
  Case Law – Post-Revision ............................................................................................................. 36

CHAPTER 4. THE CABLEVISION DECISION IS INCORRECT ............................................................. 42
  Cablevision and the Transmit Clause: The Second Circuit Decision ............................................. 42
  A Critique of the Cablevision Decision .......................................................................................... 47

CHAPTER 5. THE TROUBLE WITH AEREO ...................................................................................... 55
  Aereo’s Reliance on Cablevision .................................................................................................... 55
  Aereo and the Transmit Clause ....................................................................................................... 58

  National Policy in Support of Copyright ......................................................................................... 61
  The Structure of the Television Model ............................................................................................ 62
  Effect on Innovation ....................................................................................................................... 68

CHAPTER 7. CONCLUSION ............................................................................................................... 72

REFERENCES ....................................................................................................................................... 74

VITA .................................................................................................................................................... 79
ABSTRACT

Aereo and FilmOn X are online streaming services that allow subscribers to watch and record broadcast content online by capturing over-the-air signals through antennas assigned to each user and streaming that content to subscribers. The broadcasters and media owners who own copyrights in the content transmitted via the over-the-air signals that Aereo and FilmOn X capture argue that this service infringes upon their exclusive right of public performance, specifically under the Transmit Clause. The broadcasters have brought suit against both Aereo and FilmOn X for copyright infringement in several courts across the United States; some courts have found the online streaming services to be infringing, while others have found no infringement—thus creating a split among the U.S. circuit courts of appeals.

While courts have interpreted and applied the Transmit Clause in prior cases, one case in particular in the U.S. Court of Appeals for the Second Circuit, Cablevision, has come under critique for its interpretation of the law; this case’s precedence is what causes the current issue in the circuit courts, which can only be resolved through a ruling from the U.S. Supreme Court.

Using traditional legal research methods, this thesis examines whether Aereo and FilmOn X are infringing broadcasters’ copyrights in their over-the-air signals and concludes that they are infringing under the Transmit Clause. The Second Circuit’s opinion favoring Aereo is wrong because of its incorrect reliance upon Cablevision and based upon the plain language of the statute, the legislative history, and prior case law, which all support a finding of infringement.
CHAPTER 1. INTRODUCTION

In intellectual property litigation, courts must often apply legal principles to technology that far outpace that which what was originally contemplated by the law. When a new development threatens the system by infringing upon a content owner’s copyright, courts must urgently adapt the existing law to the new technology or risk misapplying the law—and allowing an infringing action to continue unchecked.¹ Recently, two online streaming services have caused courts to struggle in applying a provision of the public performance copyright, leaving a rare split in the U.S. circuit courts of appeals along the way. Some courts hold that the streaming service is infringing and have enjoined operations, while other courts hold that there is no infringement. The current split decisions in the courts creates uncertainty for copyright owners, with greater implications for the future of media distribution and consumption, and begs for urgent resolution.

The two allegedly infringing devices causing this dismay are Aereo and FilmOn X, Internet services that allow subscribers to watch and record broadcast content online by capturing over-the-air signals through antennas assigned to each user and streaming that content to subscribers. The broadcasters and media owners who own copyrights in the content transmitted via the over-the-air signals that Aereo and FilmOn X capture argue that this service infringes upon their exclusive right of public performance, specifically under the Transmit Clause of the Copyright Act of 1976. While courts have interpreted and applied the Transmit Clause in prior cases, one case in particular in the U.S. Court of Appeals for the Second Circuit,

Cablevision,\(^2\) has come under critique for its interpretation of the law; this case’s precedence is what causes the current issue in the circuit courts and can only be resolved through a ruling from the U.S. Supreme Court.

Using traditional legal research methods, this thesis examines whether Aereo and FilmOn X are infringing broadcasters’ copyrights in their over-the-air signals. Based upon this analysis, Aereo and FilmOn X are infringing upon the broadcasters’ exclusive right of public performance of their copyrighted material under the Transmit Clause. The Second Circuit’s opinion favoring Aereo\(^3\) is wrong because of its incorrect reliance upon Cablevision and based upon the plain language of the statute, the legislative history, and prior case law, which all support a finding of infringement.

Chapter two presents a background of the functionality of the online streaming services, Aereo and FilmOn X, and a summary of the court proceedings leading to the U.S. Supreme Court’s grant of petition for writ of certiorari.\(^4\) Chapter three chronicles a history of the Transmit Clause, beginning with the 1909 Copyright Act and through the revisions to the 1976 Copyright Act and subsequent case law. Chapter four discusses the Cablevision opinion and why it was incorrectly decided. Chapter five analyzes the Aereo decision in the Second Circuit and why it was incorrectly decided as well. Chapter six offers policy considerations and why these cases matter for copyright infringement and the future of broadcast television.


Before proceeding, this thesis requires clarification of the two online streaming services at issue in the infringement allegations. *Aereo* refers to the case decided in the U.S. Court of Appeals for the Second Circuit that is currently granted writ of certiorari and will be heard by the U.S. Supreme Court.\(^5\) While that case is limited to whether or not Aereo is engaging in copyright infringement, the Court’s decision will apply to all technology like it—including FilmOn X, which operates almost exactly the same. Although the litigation up to this point has only pertained to FilmOn X and Aereo, the decision by the Supreme Court will apply to all services and technology that operate within the purview of the opinion. Therefore, this thesis outlines the case history of both Aereo and FilmOn X, yet shifts focus to Aereo for an analysis of the arguments, because that is the service currently under review by the highest court. Additionally, FilmOn X petitioned to intervene before the U.S. Supreme Court, yet the Court denied that petition.\(^6\) Nevertheless, while only Aereo’s service is at issue in the Supreme Court case, the decision will impact FilmOn X’s pending litigation as well.

\(^5\) See *Aereo*, 712 F.3d 676.

CHAPTER 2. BACKGROUND

The Functionality of Aereo and FilmOn X

First launched in February 2012 in New York City, Aereo is an online subscription service that allows subscribers to watch and record broadcast channels on the Internet. Backed by media mogul Barry Diller, Aereo attempts to operate within the confines of copyright law by legally allowing subscribers to access broadcast channels through their free, over-the-air signals and record content from those channels through a “cloud DVR.”7 On the West Coast, competitor FilmOn X, formerly known as Aereokiller, operates a substantially identical online service.8 Founded by Alkiviades “Alki” David, FilmOn X offers both free and subscription access to a variety of content, including broadcast channels, as well as the ability to watch or record programming.9 For the purposes of this thesis, I will refer to Aereo when discussing the technology and functionality of the online service generally and will distinguish between Aereo and FilmOn X when discussing the court cases.

Aereo is a subscription service that allows subscribers to access over-the-air broadcast signals via remote antennas and either watch or record that content through the Internet.10

---


9 Id. at *8.

Similar to how a digital video recorder (DVR) and online streaming device such as Slingbox function with a television, Aereo gives subscribers access to the over-the-air broadcast signals available in their area on any device that offers an Internet browser. Thus, “Aereo’s system . . . provides the functionality of three devices: a standard TV antenna, a DVR, and a Slingbox-like device” in one.

Though a gross oversimplification, from start to end, Aereo’s service can be broken down into three steps: 1) the subscriber’s content request; 2) the capture of that requested content; and 3) the delivery of that requested content to the subscriber. First, the subscriber logs onto Aereo’s website through any web browser on a computer, tablet, television, or mobile device. Once logged in, the subscriber will have the option to either watch or record broadcast channels available in her market. The subscriber selects a program from the channel guide to either watch live, if it is currently airing, or to record, if it airs at a future time.

---

11 Aereo, 712 F.3d at 680–81.  
12 Id. at 682.  
13 Id. at 681; see also ABC, 874 F. Supp. 2d at 377.  
14 Id. Aereo claims that subscribers are limited to the market in which the service is offered through a series of information and location checks through the subscription process. First, language in Aereo’s Terms of Use limits the service only to the market in question. Second, the subscriber’s credit card information is cross-checked with a physical billing address located in the market. Third, the subscriber’s Internet Protocol (IP) address is checked to determine the location of the subscriber whenever she logs into Aereo’s website. If the subscriber fails this initial geo-location check, other steps are taken to determine her location within the market; if the subscriber fails these further checks, she is prompted with questions verifying her location within the market pursuant to Aereo’s Terms of Use. Aereo Second Circuit Brief, supra note 10, at 29–31.  
15 Aereo, 712 F.3d at 681–82; see also ABC, 874 F. Supp. 2d at 377.
Second, when the subscriber selects a program to either watch or record through Aereo, a signal is sent to Aereo’s antenna server to begin capturing the requested content.\textsuperscript{16} Aereo’s antennas are located on a rooftop in the market area on large antenna boards, each of which contains approximately 80 unique antennas.\textsuperscript{17} The antenna server assigns the subscriber’s request to one, individual antenna;\textsuperscript{18} as an important feature, “under no circumstance . . . is an antenna ever used by more than one consumer at any given time.”\textsuperscript{19} The assigned antenna tunes to the channel airing the requested content and begins receiving the over-the-air signal.\textsuperscript{20} As the antenna receives the broadcast signal, Aereo’s server simultaneously sends the data received to a hard drive file designated to that individual subscriber, thereby creating a copy of the requested content accessible only by that individual subscriber.\textsuperscript{21} According to Aereo, the signal, from its initial capture by the assigned antenna to the copy recorded and stored in the individual file on the hard drive, “is associated solely with the consumer who tuned the antenna, and cannot be used or accessed by any other consumer.”\textsuperscript{22}

Third, depending upon whether the content was requested under either the “watch” or “record” feature, the subscriber has access to the copy of the program recorded to the hard drive.

\textsuperscript{16} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 377–78.

\textsuperscript{17} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 379.

\textsuperscript{18} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 377–78.

\textsuperscript{19} \textit{Aereo Second Circuit Brief}, supra note 10, at 23; \textit{see also} \textit{Aereo}, 712 F.3d at 682–83.

\textsuperscript{20} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 378.

\textsuperscript{21} \textit{Id}.

\textsuperscript{22} \textit{Aereo Second Circuit Brief}, supra note 10, at 23; \textit{see also} \textit{Aereo}, 712 F.3d at 683.
through Aereo’s website.\textsuperscript{23} If the subscriber initially selected to “watch” the content, the server begins streaming the content once six or seven seconds of the program are saved on the hard drive.\textsuperscript{24} From the time the subscriber selected “watch,” she is able to pause or rewind the program, but cannot move forward beyond what is airing live from the broadcast signal.\textsuperscript{25} Thus, the subscriber is watching a near-contemporaneous copy of content available through the over-the-air signal.\textsuperscript{26} If the subscriber initially selected to “record” the program airing in the future, Aereo’s server preserves a copy of the program in its entirety for the subscriber to access at her discretion.\textsuperscript{27} When she selects to watch the recording, the server streams the content to the subscriber from the recording stored in her individual file on Aereo’s hard drive.\textsuperscript{28} At any time during the “watch” feature, the subscriber may select to “record” the program; this creates a copy of the program from the time the subscriber began watching it to when the program ends that she will be able to access at a later date.\textsuperscript{29} If the subscriber does not select “record,” she will not be able to access a copy of the program in the future.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{23} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 377–79.
  \item \textsuperscript{24} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 378.
  \item \textsuperscript{25} \textit{Aereo}, 712 F.3d at 681.
  \item \textsuperscript{26} \textit{Id.} Additionally, as an important distinction, “even when an Aereo user is watching a program using the “Watch” feature, he is not watching the feed directly or immediately from the antenna assigned to him. Rather the feed from that antenna is used to create a copy of the program on the Aereo server, and that copy is then transmitted to the user.” \textit{Id.} at 682. \textit{See also} \textit{ABC}, 874 F. Supp. 2d at 377.
  \item \textsuperscript{27} \textit{Aereo}, 712 F.3d at 681; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 377.
  \item \textsuperscript{28} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 378.
  \item \textsuperscript{29} \textit{Aereo}, 712 F.3d at 682; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 377.
  \item \textsuperscript{30} \textit{Aereo}, 712 F.3d at 681; \textit{see also} \textit{ABC}, 874 F. Supp. 2d at 377.
\end{itemize}
Currently, Aereo has launched its service in eleven metropolitan areas, with plans to expand to a total of twenty-seven cities soon.\(^{31}\) FilmOn X recently expanded into its 16\(^{th}\) market in September 2013.\(^{32}\)

**A Summary of the Court Proceedings**

**Aereo in the Second Circuit.**

Following the February 2012 service launch in New York City, several parties owning copyright interests in the channels and content streamed by Aereo filed copyright infringement lawsuits against Aereo in the U.S. District Court for the Southern District of New York.\(^{33}\) Plaintiffs filing suit included local broadcasters, such as WNET, WNJU, Thirteen, and WPIX, and larger media corporations, such as ABC, NBCUniversal, CBS, Fox, PBS, Disney, Telemundo and Univision.\(^{34}\) After filing the infringement complaints, the plaintiffs moved for a preliminary injunction against Aereo to enjoin the online service from utilizing the infringing content.\(^{35}\) Specifically, the movant-plaintiffs limited the motion to enjoin Aereo “from

---


\(^{34}\) See ABC, 874 F. Supp. 2d 373, for a complete list of plaintiffs.

\(^{35}\) Aereo Second Circuit Brief, supra note 10, at 15–17.
transmitting programs to its subscribers while the programs are still airing, claiming that those transmissions infringe their exclusive right to publicly perform the work.”

On July 11, 2012, the U.S. District Court for the Southern District of New York issued its opinion denying the plaintiff’s motion for preliminary injunction. To prevail on a motion for preliminary injunction, a plaintiff must establish that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Before addressing the elements of the preliminary injunction, the district court clarified the facts disputed by the plaintiffs and defendant, namely, the operation of Aereo’s antennas.

Aereo claims that their antennas function independently of each other when receiving an incoming broadcast signal, while the plaintiffs assert that the antennas operate collectively as a single antenna, as a result of the structure of the boards that house the antennas. The district court summarizes their factual findings regarding Aereo’s antenna structure:

Each of Aereo’s antennas consists of a pair of metal loops roughly the size of a dime. Eighty such antennas are packed on one end of a circuit board, with a metal rail that separates the area with the antenna elements from an area housing the electronic components used to operate the antennas and process the signal. Sixteen such boards are stored parallel to one another in a metal housing, like books on a shelf, with the portion of the circuit board containing the antennas sticking out of the housing. When the boards are placed in the housing, the metal rails fit close together and form a barrier between the antennas and the other electronic elements of Aereo’s system.

---


37 ABC, 874 F. Supp. 2d 373.

38 Id. at 376 (internal citations omitted).

39 Id. at 379.

40 Id. (internal citations omitted).
Through expert testimony, the district court next determined whether the above-described antennas technically functioned individually or as a unit. In support of their argument, the plaintiffs presented Dr. John Volakis, who, in a declaration submitted to the court, testified as to the science behind how the antennas captured the signal and the results of tests he conducted on the independent functionality of the antennas.\textsuperscript{41} Dr. Volakis concluded that, based on the small size and compact proximity of the antennas, and further illustrated by testing, “the incoming signal does not see the loops [of each antenna] as separate elements, but rather as one continuous piece of metal,” thereby impeding the antenna’s ability to exclusively capture the signal independent of the surrounding antennas.\textsuperscript{42}

In response, Aereo presented experts Dr. Horowitz and Dr. Pozar, who disputed the reliability of Dr. Volakis’s conclusions based on flaws in his experimentation that made his results not comparable to Aereo’s functionality.\textsuperscript{43} Aereo’s experts also provided the court with “significant evidence that each antenna functions independently” based on differences in recordings of signals captured by different antennas and the strength of the signal received.\textsuperscript{44} Due to the unreliability of Dr. Volakis’s testing and the fact that criticisms of his conclusions went unrebutted at the hearing, coupled with the weight granted to Aereo’s expert testimony, the

\begin{footnotes}
\footnote{\textit{Id.}.}
\footnote{\textit{Id.} (internal citations omitted).}
\footnote{\textit{Id.} at 380.}
\footnote{\textit{Id.} at 380–81.}
\end{footnotes}
district court concluded that Aereo’s antennas function independently, and thus constitute private performances, when receiving the over-the-air broadcast signal.\textsuperscript{45}

Following the factual determination, the court assessed each element of the preliminary injunction: first, an analysis of the plaintiff’s probability of success on the merits. Whether the plaintiffs have a successful claim for copyright infringement hinges on the court’s interpretation of the Transmit Clause, which states that

\textquoteright{}to perform or display a work \textquoteleft{}publicly\textquoteright{} means . . . to transmit or otherwise communicate a performance or display of the [copyrighted] work . . . 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.\textsuperscript{46}

The U.S. Court of Appeals for the Second Circuit, in which the district court is located (and therefore its jurisprudence controls the district court’s interpretation), previously interpreted the Transmit Clause in \textit{Cablevision}, where it determined that remote storage digital video recorders (RS-DVRs) constitute private performances and do not infringe on the television content providers’ copyrights.\textsuperscript{47} In \textit{Cablevision}, the Second Circuit interpreted the Transmit Clause with two premises in mind: first, that “a transmission of a performance is itself a performance for infringement purposes;”\textsuperscript{48} and second, that courts must “examine who precisely is capable of receiving a particular transmission of a performance to determine if a performance is public.”\textsuperscript{49} Applying those premises, the Second Circuit determined that because each subscriber’s RS-DVR

\textsuperscript{45} Id.


\textsuperscript{48} \textit{ABC}, 874 F. Supp. 2d at 383 (internal citations omitted).

\textsuperscript{49} Id. at 384 (internal citations omitted).
playback constituted a unique copy of the program, the potential audience of the transmission was limited to that subscriber and was therefore private, not public.\textsuperscript{50}

With \textit{Cablevision} as precedent, the district court concluded that “Aereo’s system is materially identical to that in \textit{Cablevision},” and therefore its decision should align with the rationale of the previous case.\textsuperscript{51} The district court found that “[t]he overall factual similarity of Aereo’s service to \textit{Cablevision} on these points suggests that Aereo’s service falls within the core of what \textit{Cablevision} held lawful”\textsuperscript{52} and, after dismissing each of the plaintiff’s arguments in turn, concluded that they were unlikely to succeed on the merits.\textsuperscript{53} Because the first element was not met, the court denied the plaintiff’s motion for preliminary injunction.

On appeal, the plaintiffs challenged the district court’s application of \textit{Cablevision} and the denial of the preliminary injunction.\textsuperscript{54} A three judge panel of the U.S. Court of Appeals for the Second Circuit reviewed the district court’s decision for abuse of discretion; “[a] district court abuses its discretion when its decision rests on legal error or a clearly erroneous factual finding, or when its decision . . . cannot be located within the range of permissible decisions.”\textsuperscript{55} Upon review of the district court’s application of \textit{Cablevision}, as well as the legislative history of the 1976 Copyright Act and the drafting of the Transmit Clause, the appellate court found no abuse

\textsuperscript{50} \textit{Id.} (citing \textit{Cartoon Network LP, LLLP v. CSC Holdings, Inc.}, 536 F.3d 121 (2d Cir. 2008)).

\textsuperscript{51} \textit{Id.} at 386.

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.} at 396.


\textsuperscript{55} \textit{Id.} at 684 (internal citations omitted).
of discretion from the district court and upheld the denial of the motion for preliminary injunction.\textsuperscript{56}

Of the three judges on the panel, one dissented.\textsuperscript{57} In defense of his decision to grant the plaintiff’s preliminary injunction, Judge Chin turned to the statutory interpretation of the Transmit Clause, concluding that “[b]y any reasonable construction of the statute, Aereo is engaging in public performances and, therefore, is engaging in copyright infringement.”\textsuperscript{58} Even though Judge Chin found that there was no ambiguity in the plain language of the Transmit Clause, he continued to defend his interpretation through the legislative history behind the 1976 Copyright Act, opining that Aereo’s behavior to circumvent the copyright system and exploit a protected work was exactly the type of system Congress intended to address with the Transmit Clause.\textsuperscript{59} Lastly, Judge Chin distinguished Aereo’s system from the one at issue in Cablevision, stating that Cablevision already had a license to transmit broadcast channels to its subscribers initially, whereas Aereo does not; therefore, Cablevision does not control.\textsuperscript{60} Because of the plain reading of the Transmit Clause, the supportive legislative intent, and the distinction from Cablevision, Judge Chin concluded that the preliminary injunction should be granted.\textsuperscript{61}

\textsuperscript{56} Id. at 696.

\textsuperscript{57} Id. (Chin, J., dissenting).

\textsuperscript{58} Id. at 699 (Chin, J., dissenting).

\textsuperscript{59} Id. (Chin, J., dissenting) (focusing on Congress’ intent to overturn the Supreme Court’s decisions in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), and Teleprompter Corp. v. Columbia Broadcast System, Inc., 415 U.S. 394 (1974), which concerned cable systems that utilized a broadcast “capture and distribute” system similar to Aereo’s).

\textsuperscript{60} Id. at 702–03 (Chin, J., dissenting).

\textsuperscript{61} Id. at 705 (Chin, J., dissenting).
Not satisfied with the Second Circuit’s decision, the plaintiffs moved for a rehearing *en banc*, or by the full bench of the appellate court.\(^6^2\) Lacking a majority in favor of an *en banc* review, the rehearing was denied.\(^6^3\) Judge Chin again dissented, this time joined by one other judge.\(^6^4\) Judge Chin reiterated many of the points expressed in his dissent to the panel’s decision, highlighting that *en banc* review should be granted in cases involving a question of exceptional importance, which he believed this case presented.\(^6^5\)

Following the U.S. Supreme Court’s grant of writ of certiorari, district court Judge Nathan denied Aereo’s motion for summary judgment. Although discovery in the case was not yet completed, the decision noted that continuing the proceeding would not be an efficient use of resources while the issue is pending at the highest court.\(^6^6\)

**FilmOn X in the Ninth Circuit.**

Following Aereo’s win in the U.S. District Court for the Southern District of New York, broadcasters moved forward against Aereo’s competitor, FilmOn X, then known as Aereokiller. Plaintiffs filed a motion for preliminary injunction in the U.S. District Court for the Central District of California, located in the U.S. Court of Appeals for the Ninth Circuit.\(^6^7\) Plaintiffs filing suit included major broadcast networks such as Fox, NBCUniversal, ABC, CBS, as well as

\(^{62}\) WNET, Thirteen v. Aereo, Inc., 722 F.3d 500 (2d Cir. 2013) (reh’g en banc denied).

\(^{63}\) *Id.* at 501.

\(^{64}\) *Id.* (Chin, J., dissenting).

\(^{65}\) *Id.* at 502 (Chin, J., dissenting).


local affiliates. Similar to the Second Circuit Aereo case, plaintiffs “accuse[d] defendants of offering their copyrighted content through internet and mobile device streaming.” In response, defendant FilmOn X analogized their streaming service to that of Aereo’s and, emphasizing the legality of Aereo’s service as determined by the Second Circuit, argued that the online streaming was not infringing upon the broadcasters’ copyrights.

On December 27, 2012, the U.S. District Court for the Central District of California granted in part and denied in part the motion for preliminary injunction. Adhering to the same elements required to establish preliminary injunction relief as the Second Circuit, the district court focused primarily on the first element, the plaintiffs’ likelihood of success on the merits. The court acknowledged: “Assuming that defendants accurately describe[d] their technology … Second Circuit law would support defendants’ position,” referencing the Cablevision decision. However, the court correctly pointed out that “Second Circuit law has not been adopted in the Ninth Circuit, and this Court would find that the Ninth Circuit’s precedents do not support adopting the Second Circuit’s position on the issue.” Therefore, Cablevision’s precedent is not binding in the Ninth Circuit and, upon applying Ninth Circuit precedent, which is binding for

---

68 Id. at 1140.
69 See supra p.8; BarryDriller, 915 F. Supp. 2d at 1140.
70 BarryDriller, 915 F. Supp. 2d at 1140–41.
71 Id. at 1139–40.
72 Id. at 1141–43.
73 Id. at 1143.
74 Id.
this case, the district court concluded that FilmOn X’s service engages in public performances and is infringing upon the Plaintiffs’ exclusive right.\textsuperscript{75}

Upon concluding that the \textit{Cablevision} decision was not binding, the district court addressed its own interpretation of the Transmit Clause. Specifically, the district court distinguished its reading of the Transmit Clause from the Second Circuit’s reading in \textit{Cablevision}. While the Second Circuit’s decision in \textit{Cablevision} centered on the \textit{transmission} in determining public performance under the Transmit Clause, the California district court, in line with Ninth Circuit precedent, focused on the \textit{performance} of the work and the potential audience for that performance, regardless of the uniqueness of the transmission.\textsuperscript{76} Without the rationale in \textit{Cablevision} to rely upon, the district court concluded that FilmOn X’s service would most likely constitute a violation of the broadcasters’ public performance right and determined the plaintiffs’ likelihood of success on the merits.\textsuperscript{77}

With regard to the remaining elements for preliminary injunction, the district court found in favor of the plaintiffs. The district court concluded that broadcasters had demonstrated irreparable harm, that FilmOn X could claim “no equitable interest in continuing an infringing activity” when considering the balance of harms, and that injunction serves the public interest.\textsuperscript{78} Furthermore, when considering the scope of the preliminary injunction, the district court limited

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at 1144–45; \textit{cf.} On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991).

\textsuperscript{77} \textit{BarryDriller}, 915 F. Supp. 2d at 1146.

\textsuperscript{78} \textit{Id.} at 1147–48.
the remedy only to the geographic scope of the Ninth Circuit, which spans a vast majority of the western states.\textsuperscript{79}

FilmOn X has appealed the district court’s preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit, which heard oral arguments on the appeal last August.\textsuperscript{80}

**FilmOn X in the District of Columbia Circuit.**

After the loss in district court in the Ninth Circuit, FilmOn X faced another challenge from broadcasters in the U.S. District Court for the District of Columbia.\textsuperscript{81} The district court sat in the unique position of having both Aereo’s successful dismissal of the preliminary injunction in the Second Circuit and the broadcasters’ success in granting the preliminary injunction in the Ninth, thus drawing from opinions supporting both sides of the argument.\textsuperscript{82} Yet, the court stated that it “is tasked with making a legal judgment” and conducted its own analysis of the Transmit Clause.\textsuperscript{83} Following a thorough outline of the Second Circuit cases, *Cablevision* and *Aereo*, and

\textsuperscript{79} Id. at 1148.


\textsuperscript{82} The district court practically acknowledged the clear-cut determination before it: “To some extent, this case could just boil down to a binary choice between the reasoning of the Second Circuit in *Aereo* or the California district court in *BarryDriller.*” *FilmOn X LLC*, 2013 U.S. Dist. LEXIS 126543, at *15–16.

\textsuperscript{83} Id.
the Ninth Circuit case, *BarryDriller*, the district court addressed the first element when determining whether to grant preliminary injunction: the likelihood of success on the merits.\(^8^4\)

As in *Aereo* and *BarryDriller*, the issue before the D.C. district court hinged upon whether the online streaming service was copyright infringement under the Transmit Clause. To analyze the statutory text, the district court turned to the legislative history of the 1976 Copyright Act, finding the House Report to emphasize the potential audience of the work through the performance, rather than the audience of each individual transmission.\(^8^5\) When a court interprets a statute, the court may not expound its interpretation beyond the statutory text when the language is clear and unambiguous.\(^8^6\) Here, the district court concluded that the statutory language of the Transmit Clause is clear: FilmOn X’s streaming of the broadcasters’ copyrighted works constitutes a public performance under the Transmit Clause.\(^8^7\) Therefore, the court found that the broadcasters satisfied the first element for preliminary injunction and showed a likelihood of success on the merits.\(^8^8\)

Turning to the remaining elements, the district court found that the plaintiffs also showed the likelihood of irreparable harm, that the balance of harms tipped in the plaintiffs’ favor, and that granting the preliminary injunction would be in the public interest.\(^8^9\) However, unlike the *BarryDriller* court, which reached a similar conclusion, the district court granted the plaintiffs’

\(^{8^4}\) *Id.* at *16–32.

\(^{8^5}\) *Id.* at *36–41.

\(^{8^6}\) *Id.* at *41–42.

\(^{8^7}\) *Id.* at *42–43.

\(^{8^8}\) *Id.* at *44.

\(^{8^9}\) *Id.* at *50–57.
request for nationwide relief, enjoining FilmOn X from operating anywhere in the United States, with the exception of the Second Circuit, where the Aereo precedent favored the defendant.\textsuperscript{90}

\textbf{Aereo in the First Circuit.}

In the fall of 2013, plaintiff Hearst Stations, which owns local Boston-area broadcast television station WCVB, filed suit against Aereo for copyright infringement in the U.S. District Court for the District of Massachusetts.\textsuperscript{91} The district court, located in the U.S. Court of Appeals for the First Circuit, denied the plaintiff’s motion for preliminary injunction.\textsuperscript{92} Through its assessment of the four elements required to satisfy when granting a preliminary injunction, the district court concluded that the first element, likelihood of success on the merits, did not tip in Hearst’s favor.\textsuperscript{93} Specifically, the district court interpreted the Transmit Clause and, by focusing on the statutory text, legislative history, and case law, agreed with Aereo’s reading of the statute, which supported the determination that its online streaming was a private performance of the copyrighted work and therefore not infringing.\textsuperscript{94}

With regard to the remaining elements for granting a preliminary injunction, the district court found that while Hearst has shown the possibility of minimal irreparable harm in the

\textsuperscript{90} \textit{Id.} at *59.


\textsuperscript{92} \textit{Id.} at *2.

\textsuperscript{93} \textit{Id.} at *9.

\textsuperscript{94} \textit{Id.} at *14–15; the court also considered Hearst’s infringement claims for the exclusive rights of reproduction, distribution, and creation of derivative works, yet found no likelihood of success for these claims as well; \textit{see id.} at *15–19.
absence of a preliminary injunction, it was not sufficient enough to enjoin Aereo.\textsuperscript{95} The court determined that neither the balance of hardships nor the consideration of public interest factors favor one side over the other.\textsuperscript{96} Nevertheless, the district court denied the plaintiff’s motion for preliminary injunction, essentially granting Aereo a “win” in yet another district.\textsuperscript{97}

**Aereo in the Tenth Circuit.**

In February 2014, local broadcasters in Utah filed a motion for preliminary injunction against Aereo, which had scheduled to launch its service in Salt Lake City in the coming weeks.\textsuperscript{98} The U.S. District Court for the District of Utah, Central Division, declined Aereo’s motion to stay the proceedings pending the U.S. Supreme Court’s upcoming decision and granted the broadcasters’ motion for preliminary injunction, thus enjoining Aereo from operating in the United States for the first time.\textsuperscript{99}

In deciding in the broadcasters’ favor, the district court found that all four of the elements required in granting a preliminary injunction tipped in the broadcasters’ direction. Most favorably, the broadcasters established a likelihood of success on the merits.\textsuperscript{100} The district court acknowledged the prior decisions impacting both Aereo and FilmOn X across the country, while also noting that the court was not bound by those holdings, and found the decisions in the Ninth and District of Columbia circuits, as well as the dissent in the Second Circuit case, to be the most

\textsuperscript{95} Id. at *18.

\textsuperscript{96} Id. at *21–22.

\textsuperscript{97} Id. at *22.


\textsuperscript{99} Id. at *41.

\textsuperscript{100} Id. at *23.
Furthermore, the district court conducted its own analysis of the Transmit Clause and, based on the plain language of the statute, the legislative intent, and the factual distinguishability of Aereo’s system from *Cablevision*, determined that Aereo was engaging in an infringing public performance of the broadcasters’ copyrighted works. The district court limited its injunction to the Tenth Circuit.

**The U.S. Supreme Court Grant of Certiorari.**

On October 11, 2013, the broadcasters filed a petition for a writ of certiorari, asking the U.S. Supreme Court to hear an appeal of the Second Circuit’s decision. The petition asked the Court to address “whether a company ‘publicly performs’ a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.” Aereo responded, and although their reply framed the question before the Court around supplying equipment that allows the consumer to watch and record over-the-air television, Aereo did not object to the Court granting the appeal. On January 10, 2014, the Supreme Court granted the petition and, interestingly, adopted the issue as presented by the broadcasters. Justice Alito recused himself from the conference. FilmOn X moved to

---

101 *Id.* at *10.

102 *Id.* at *8–23.

103 *Id.* at *28–29.


intervene in the case, yet the justices denied the motion; Justice Alito took no part in that decision as well.109 Additionally, once the Court granted the petition, proceedings in the lower courts—Aereo in the First Circuit, and FilmOn X in the Ninth and D.C. Circuits—were stayed pending the Supreme Court decision.110 The Court has scheduled oral arguments for April 22, with a decision predicted in June or July.111

108 Id.

109 Id.


CHAPTER 3. THE TRANSMIT CLAUSE – A HISTORY

To better understand the issues the courts have struggled with in the Aereo and FilmOn X litigation, this thesis will offer a brief history of the law—both statutory and jurisprudential—surrounding the Transmit Clause. This section first outlines the performance right of the 1909 Copyright Act and the courts’ application of that law to broadcast and cable copyright infringement. Next, this section discusses Congress’ response and revision of copyright law to encompass transmissions as public performances. Finally, this section briefs the courts’ interpretation and application of the Transmit Clause in various factual scenarios, leading up to the most pertinent interpretation in *Cablevision*.

The 1909 Copyright Act

Derived from the English common law and the Statute of Anne,\(^{112}\) the Founding Fathers granted to Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” in Article I of the U.S. Constitution.\(^{113}\) A year after ratification, Congress codified the common law copyright into U.S. law.\(^{114}\) U.S. intellectual property law underwent many additional revisions and modifications over the years, but for the purposes of this thesis, I will focus on the 1909 Copyright Act through to the most recent revision to U.S. copyright law, the Copyright Act of 1976.

---


\(^{113}\) U.S. Const. art. I, § 8, cl. 8.

The first iteration of the copyright act in 1790 granted to authors “the sole right and liberty of printing, reprinting, publishing and vending [the copyrighted work].”\textsuperscript{115} This list of exclusive rights was first expanded in 1870 and again more substantially in 1909 to include a performance right.\textsuperscript{116} The 1909 performance right encompassed subsections (c), (d), and (e) of § 1: subsection (c) included the right “to deliver, authorize the delivery of, read, or present [a nondramatic literary work] in public for profit;”\textsuperscript{117} subsection (d) included the right “to perform or represent [a dramatic work] publicly;”\textsuperscript{118} and subsection (e) included the right “to perform [a musical composition] publicly for profit.”\textsuperscript{119} Together, these three subsections comprised the public performance right from 1909 until the revision in 1976.\textsuperscript{120}

At the time of the adoption of the 1909 Act, the technological understanding of what constituted a “public performance” was rather antiquated: “Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development.”\textsuperscript{121} Furthermore, the Act neglected to define important terms such as “performance” and “public performance,” leaving courts with no guidance in defining and

\textsuperscript{115} Id. at 259 (citing Act of May 31, 1790 at § 1, 1 Stat. 124).

\textsuperscript{116} Id.

\textsuperscript{117} Act of July 1, 1909 at § 1(c), 35 Stat. 1075. A nondramatic literary work includes “a lecture, sermon, address or similar production.” Id.

\textsuperscript{118} Id. § 1(d).

\textsuperscript{119} Id. § 1(e).


\textsuperscript{121} H.R. Rep. 94-1476, 47.
applying those concepts.⁵² Though the 1909 § 1 rights in subsections (c), (d), and (e) were written with expansive language that encompassed “any manner,” “any method,” or “any form” of performance or display, courts struggled when applying the law in infringement cases where the technology utilized was so drastically different than what existed in 1909.⁵³ In fact, as a prime example, “the [1909] Act … does not mention the right of broadcasting”⁵⁴ nor did the public performance right expand to motion pictures.⁵⁵ As broadcasting (primarily radio) began to expand, it fell upon the courts to align the 1909 law with the new technology. In Remick, the Sixth Circuit addressed whether a radio broadcast was a public performance:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.⁵⁶

Adopting this premise, courts agreed that broadcasting a copyrighted work constituted a public performance. It was not until the advent of cable television, however, that further complicated

---

⁵² Patry on Copyright § 14:5 (2014).


⁵⁴ STANLEY ROTHEMBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC 24 (1954).

⁵⁵ Patry on Copyright § 14:4.

how the 1909 public performance right applied to infringement cases, thus prompting congressional intervention and revision of the existing law.\(^{127}\)

**Case Law Before the 1976 Revision**

Prior to the 1976 revision of U.S. copyright law, the U.S. Supreme Court decided two important cases that highlighted the need for adaption in the law to emerging technology, especially in the field of television. The first case, *Fortnightly Corp.*, was decided in 1968 and involved the operation of a community antenna television (CATV) system.\(^{128}\) CATV systems utilized an antenna located on a hill to capture local broadcast signals and, through coaxial cables, carried the signals from the antenna to television sets located in subscribers’ homes.\(^{129}\) Such systems were beneficial in areas where broadcast signals were weaker, thus distributing signals to homes that would not be capable of receiving the signal through a rooftop antenna. Additionally, CATV systems allowed subscribers to access distant signals for broadcast stations in neighboring areas—signals that were never capable of reception or intended to be received via rooftop antenna.\(^{130}\)

Petitioner, Fortnightly, owned and operated a CATV system in West Virginia in the late 1950s.\(^{131}\) The system provided subscribers with access to five additional television stations that the subscriber would not have been able to access (either clearly or at all) through an antenna on

---


\(^{129}\) *Id.* at 392.

\(^{130}\) *Id.* at 391–92.

\(^{131}\) *Id.*
the roof of their home.\textsuperscript{132} The CATV system operated as a passive carrier of the broadcast signal; Fortnightly did not edit or modify the programming received through the signal, though it did convert the signal to different frequencies in order to improve strength and transmit the signal more efficiently to the subscriber.\textsuperscript{133}

Respondent, United Artists Television, brought suit against Fortnightly for copyright infringement.\textsuperscript{134} United Artists had granted licenses to the five broadcast stations transmitted by the CATV system to broadcast their copyrighted material; Fortnightly, however, did not obtain a license from either United Artists or the five stations to carry the signals.\textsuperscript{135} Therefore, Fortnightly was not authorized, either by the copyright owner of the content or the broadcast signal, to carry the signals through the CATV system to subscribers.\textsuperscript{136}

To resolve whether Fortnightly’s CATV system infringed upon United Artists’ copyrights, the Court applied § 1 of the Copyright Act of 1909, which was current law at the time the case was decided.\textsuperscript{137} Section 1 established the exclusive rights granted to copyright owners; at issue here were the exclusive rights enumerated in § 1(c), to perform non-dramatic literary works in public for profit, and § 1(d), to perform dramatic works publicly.\textsuperscript{138} Almost immediately into its analysis, the Court concluded that Fortnightly’s CATV system did not

\textsuperscript{132} Id. at 392.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 393.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 393–94.
\textsuperscript{138} Id. at 393.
“perform” the copyrighted work in any way envisaged by Congress when the 1909 law was adopted: “[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.”\footnote{Id. at 395.} To determine whether the CATV distribution of the signal was a “performance” under the 1909 Act, the Court overturned the U.S. Court of Appeals for the Second Circuit’s quantitative test in favor of a functionality test.\footnote{Id. at 396–97.} Specifically, the Court inquired as to “the function that CATV plays in the total process of television broadcasting and reception.”\footnote{Id. at 397.}

In determining CATV’s function, the Court identified the different and dichotomous roles of broadcasters and viewers. Broadcasters, according to the Court, select, obtain, and distribute works via electronic signals for public consumption.\footnote{Id.} Viewers, conversely, receive the signals from the broadcasters and, through antennas and television sets, convert those signals into “the visible images and audible sounds of the program.”\footnote{Id. at 397–98.} With regard to the copyrighted work, “broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience.”\footnote{Id. at 398.}
Through this framework, the Court concluded that CATV systems should be classified as viewers, not performers of the work.\footnote{Id. at 399.} While the Court conceded that Fortnightly’s role is active in enhancing reception of the broadcast signal, it ultimately determined that the CATV’s function “is little different from that served by the equipment generally furnished by a television viewer.”\footnote{Id.} Specifically, and an important distinction to address in the Aereo and FilmOn X cases, the Court focused its analysis on the fact that Fortnightly was offering a service comparable to what individuals could lawfully do themselves: “If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be ‘performing’ the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose.”\footnote{Id. at 400.} Thus, because CATV does not perform the works in the same way a broadcaster does, the Fortnightly service cannot perform the works under the 1909 Copyright Act.\footnote{Id. at 400–01.}

Following Fortnightly, copyright owners brought suit against another CATV operator, Teleprompter, for copyright infringement.\footnote{Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974).} Plaintiffs, including broadcaster CBS, attempted to distinguish the facts from those in Fortnightly to elicit a favorable decision by fixating on the greater distance between the subscriber’s home and the original point of transmission in Teleprompter’s CATV service.\footnote{Id. at 398–400.} Building off of the Supreme Court’s analysis in Fortnightly,
the U.S. Court of Appeals for the Second Circuit focused on two distinct categories of CATV functionality: 1) “where the broadcast signal was already ‘in the community’ served by a CATV system, and could be received there either by standard rooftop or other antennae,” or 2) “where the CATV systems imported ‘distant’ signals from broadcasters so far away from the CATV community that neither rooftop nor community antennae located in or near the locality could normally receive signals.”¹⁵¹ The court of appeals determined that when undergoing the second function, the CATV system was functioning as a broadcaster and, therefore, was performing the copyrighted work.¹⁵² Thus, where Teleprompter was operating to import distant signals it was engaging in copyright infringement by performance.¹⁵³

In their appeal, plaintiffs argued that regardless of distance between the signal’s origination point and the home of the CATV subscriber, Teleprompter was performing their copyrighted works.¹⁵⁴ Additionally, where the court of appeals found that Teleprompter was performing the work by importing the distant signal, the defendant argued that performing such a function was not an infringing action.¹⁵⁵ To distinguish from the facts of Fortnightly, plaintiffs highlighted three developments in CATV systems: 1) many CATV systems develop independent programming in addition to carrying broadcast signals; 2) Teleprompter sells advertising time to businesses in the areas where its CATV service is available; and 3) many CATV systems sell the right to redistribute its original programming to other CATV systems, effectively functioning as

¹⁵¹ Id. at 401.
¹⁵² Id.
¹⁵³ Id. at 401–02.
¹⁵⁴ Id. at 402.
¹⁵⁵ Id. at 406.
broadcasters with regard to that content.\textsuperscript{156} Yet despite these developments, the Court did not adopt the plaintiffs’ argument because “in none of these operations is there any nexus with the defendants’ reception and rechanneling of the broadcasters’ copyrighted materials.”\textsuperscript{157} Therefore, Teleprompter was not a performer of the broadcast signals, according to \textit{Fortnightly}’s classification of the CATV function, and was not engaging in copyright infringement.\textsuperscript{158}

Turning to the defendant’s appeal of the lower court’s decision that importing distant signals was an infringing performance, the Court concluded “a CATV system does not lose its status as a nonbroadcaster, and thus a ‘nonperformer’ for copyright purposes, when the signals it carries are from distant rather than local sources.”\textsuperscript{159} Additionally, Teleprompter’s service enhanced the reception of the distant signals by helping customers access those channels in a way that they lawfully (albeit physically could not) do.\textsuperscript{160} In support of its conclusion, and an important point to address in Aereo and FilmOn X’s cases, the Court stated that the “electronic signals it receives and rechannels have already been ‘released to the public’ even though they may not be normally available to the specific segment of the public served by the CATV system.”\textsuperscript{161} Therefore, adhering to the “broadcasters perform, viewers do not perform”

\textsuperscript{156} \textit{Id.} at 403–04.

\textsuperscript{157} \textit{Id.} at 405.

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} at 409.

\textsuperscript{160} \textit{Id.} at 408–09.

\textsuperscript{161} \textit{Id.} at 410.
functionality distinction presented in *Fortnightly*, the Court found that Teleprompter’s CATV system did not broadcast the distant signals and was not engaging in copyright infringement.\(^{162}\)

In both *Fortnightly* and *Teleprompter*, both the majority and dissenting opinions purported that Congress had an important, yet ultimately untapped, role in the outcome of these cases.\(^{163}\) The split in the majority and dissenting opinions hinged on the function of the Court in essentially “legislating” from the bench by applying the outdated 1909 law to CATV systems. The majority opinions felt that finding against Fortnightly and Teleprompter would be beyond the scope of the existing copyright law, and was for Congress to change.\(^{164}\) Conversely, both Fortas’ dissent in *Fortnightly* and Douglas’ dissent in *Teleprompter* hinged on the fact that this was really a decision for Congress and that any modification to the 1909 performance rights that the Court would undergo to fit the copyright law to the facts here should be legislated, not adjudicated.\(^{165}\)

**The 1976 Revision**

Following the U.S. Supreme Court’s decisions in *Fortnightly* and *Teleprompter*, Congress seemed to take the Court up on its suggestion to revise the 1909 Copyright Act. In fact, prior to *Fortnightly*, in 1955 Congress reinvigorated its efforts to revise U.S. copyright law; several bills were proposed between 1964 and 1975.\(^{166}\) However, it was not until 1975 when

\(^{162}\) *Id.* at 409; *see also* *Fortnightly* Corp. v. United Artists Television, Inc., 392 U.S. 390, 398 (1968).

\(^{163}\) *See Fortnightly*, 392 U.S. at 401; *id.* at 408 (Fortas, J., dissenting); *Teleprompter*, 415 U.S. at 414; *id* at 421–22 (Douglas, J., dissenting).

\(^{164}\) *Fortnightly*, 392 U.S. at 401–02; *Teleprompter*, 415 U.S. at 414.

\(^{165}\) *Fortnightly*, 392 U.S. at 407–08; *Teleprompter*, 415 U.S. at 421–22.

Congress proposed and eventually passed the overhauled Copyright Act of 1976. The bill updated many aspects of the 1909 law that had become outdated or inadequate in the face of the rapid technological advancements following the proliferation of radio and broadcast television in the 1920s. The update most relevant to the topic of this thesis was the expansion of the definition of “public performance” through the adoption of the Transmit Clause.

Under the 1909 copyright law, a performance was infringing if it was public and for profit. As illustrated by the Supreme Court decisions in *Fortnightly* and *Teleprompter*, the understanding of “public” did not encompass transmissions made to the public. The 1976 revision added a second clause to the statutory definition of public performance:

To perform or display a work “publicly” means –
(b) 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.

---


170 Act of July 1, 1909 at § 1(c), (d), (e), 35 Stat. 1075.


172 17 U.S.C. § 101; Clause one of the public performance definition states that a performance is made to the public if the work is performed or displayed “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.” *Id.*
Therefore, in addition to performances before a physical gathering of multiple people, a work is performed publicly if transmissions of the work are received (or are capable of being received) by members of the public—regardless of whether they are gathered together.

To explain its rationale behind adopting the Transmit Clause, as with any new legislation, both the House and Senate judiciary committees issued reports outlining the legislative history and intent behind the statutory language. The bill that was ultimately adopted, S. 22, originated in the Senate; upon passing the Senate, the bill was then submitted to the House for voting. Before the bill reached the House for the vote, the Senate judiciary committee issued its report regarding the bill. The House judiciary committee then submitted its report, which for portions relevant to this thesis reiterated the Senate’s report.

The Senate and House reports offer guidance as to the legislative intent behind the passage of the Transmit Clause. When taken together, the definitions in § 101 of “perform,” “display,” “publicly,” and “transmit” “cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.” Because language is crucial to the interpretation of the statute, each term by itself offers additional explanation as to what types of works or performances the bill intended to encompass. In the definition of “perform,” for example, the inclusion of the phrase “either directly or by means of any device or process” evinces the congressional intent to include “any

175 See S. Rep. 94-473.
sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented." Specifically with regard to the new language added in the Transmit Clause, the legislative reports explain that the definition of “transmit” is intended to be broad:

[The definition] is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each 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 [the exclusive rights of public performance and public display].

As applied to both clause one and two of the definition for public performance in the statute, a transmission is “‘public’ even though the recipients are not gathered in a single place, and even if there is no direct proof that any of the potential recipients [is] operating his receiving apparatus at the time of the transmission.” Specifically to clause two, the Transmit Clause, “the definition of ‘publicly’ is applicable ‘whether the members of the public are 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.’” Now, with a progressive definition of public performance under the Transmit Clause, it fell to the courts to apply Congress’ intended scope of the law to emerging technology.

---


Case Law – Post-Revision

The issue of public performance has presented itself in many different iterations in the courts. One of the most prevalent topics for discussion has been in the creation of a copied recording and transferring that copy either by downloading or streaming. The seminal case in copying determined that a recording device, the VCR, was not infringing when users made tape copies because it had a primarily legitimate, non-infringing home use for customers.\(^{182}\) Additionally, the court has also concluded that downloads of copyrighted works constitute a transfer of one copy to an individual and not a public performance\(^ {183}\) yet that streaming copyrighted works online does constitute a public performance and requires licensing agreements from the copyright holders.\(^ {184}\) The distinction must be noted, however, that the creation of a copy, though a component of Aereo’s plea to prove non-infringement, is not at issue in the application of the Transmit Clause and whether the transmission is a public performance. Therefore, for the purpose of this thesis, I will focus primarily on the case law concerning the interpretation of the Transmit Clause of the public performance right.

According to *Nimmer on Copyright*, a leading treatise on copyright law, cases involving the Transmit Clause and public performance have primarily hinged upon transmissions made when the audience is physically dispersed and those made when the audience is temporally dispersed.\(^ {185}\)

---


\(^{183}\) United States v. Am. Soc’y of Composers, 627 F.3d 64 (2d Cir. 2010).

\(^{184}\) WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d Cir. 2012).

\(^{185}\) See 2-8 Nimmer on Copyright § 8.14 (2013).
Based upon the legislative history behind the Transmit Clause, a performance 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.”\textsuperscript{186} Therefore, Congress intended that the Transmit Clause apply even when the audience is not located together in the same location to receive the transmission. In 1991, the U.S. District Court for the Northern District of California interpreted the Transmit Clause in a case concerning transmissions from a centralized terminal to customers located in individual hotel rooms.\textsuperscript{187} On Command developed a system which allowed hotel guests to select movies available for rental in their rooms; selecting a title to watch sent a signal to a central console, which automatically began playing a video cassette tape and transmitting the movie to the room.\textsuperscript{188} While the district court did not find that the transmission constituted a public performance under the Public Place clause,\textsuperscript{189} the court concluded that On Command’s system did publicly perform the defendants’ movies under the Transmit Clause.\textsuperscript{190} Although the rooms themselves are private, “hotel guests watching a video movie in their room through On Command’s system … are nonetheless members of ‘the public’” because “the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, ‘public’ one regardless of where the viewing takes place.”\textsuperscript{191} Finding support in the


\textsuperscript{188} \textit{Id.} at 788.

\textsuperscript{189} \textit{Id.} at 789.

\textsuperscript{190} \textit{Id.} at 790.

\textsuperscript{191} \textit{Id.}
legislative history of the Transmit Clause, the district court concluded that “whether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public.” 192 By this reasoning, On Command’s system was an infringing public performance of the defendant’s copyrights.

In PrimeTime, the U.S. Court of Appeals for the Second Circuit addressed whether PrimeTime publicly performed NFL’s copyrighted material when it transmitted football broadcasts via satellite without a license. 193 Though the case focused primarily on PrimeTime’s secondary transmissions of the broadcast material without a license, which is a violation under § 111 of the Copyright Act of 1976, the court addressed whether PrimeTime was still infringing under the public performance right. 194 The court interpreted the Transmit Clause to intend that “a public performance … includes ‘each step in the process by which a protected work wends its way to its audience.’” 195 As applied to PrimeTime’s transmissions, even before the transmission reaches a public audience, PrimeTime is publicly performing the NFL’s copyrighted material. 196 Therefore, while the transmission has not yet been received by any individual, the transmission is still a public performance because the work is transmitted to members of the public.

In addition to transmissions received by a geographically dispersed audience, a performance is public when the audience is temporally dispersed. In Redd Horne, the U.S. Court

192 Id.


194 Id. at 12–13.

195 Id. at 13.

196 Id.
of Appeals for the Third Circuit found that a video cassette rental store which rented rooms for customers to view tapes played by an employee and transmitted into the room was engaging in a public performance.\textsuperscript{197} Although the store, Maxwell’s, was open to the public, the court focused its discussion on whether or not the video performances transmitted to the private viewing rooms were public performances under the Transmit Clause.\textsuperscript{198} Again turning to the legislative history, the court concluded that “the fact that members of the public view the performances at different times” does not alter the fact that they are public performances: “the transmission of a performance to members of the public, even in private settings such as hotel rooms or Maxwell’s viewing rooms, constitutes a public performance.”\textsuperscript{199}

The next year, in \textit{Aveco}, the U.S. District Court for the Middle District of Pennsylvania dealt with a similar business as that in \textit{Redd Horne}.\textsuperscript{200} Aveco operated a video rental store, the Nickelodeon, where customers could rent tapes and/or rooms to view either the rented tapes or tapes they owned.\textsuperscript{201} The case was not very factually distinguishable from \textit{Redd Horne}: both were public places with rental services for both the videos and viewing rooms.\textsuperscript{202} Thus, the court upheld \textit{Redd Horne} and found that Aveco’s store was similarly engaging in a public performance of the copyrighted tapes: “The Nickelodeon is open to the public just as Maxwell’s was open to the public. The cassettes are performed at the Nickelodeon by Nickelodeon customers and the

\textsuperscript{197} Columbia Pictures Indus. v. Redd Horne, 749 F.2d 154, 158 (3d Cir. 1984).

\textsuperscript{198} \textit{Id.} at 159.

\textsuperscript{199} \textit{Id.}


\textsuperscript{201} \textit{Id.} at 316.

\textsuperscript{202} \textit{Id.}
cassettes are therefore publicly performed…. By enabling its customers to perform the cassettes, [Aveco] infringe[s] the Plaintiffs’ exclusive [public performance] right.”

While the decisions in On Command, Redd Horne and Aveco suggested a trend towards a broader interpretation of a public performance under the Transmit Clause, the decision in Professional Real Estate Investors indicated where the court would factually draw the line as to what constituted “public.” In that case, the U.S. Court of Appeals for the Ninth Circuit held that “a hotel did not violate the Copyright Act by renting videodiscs for viewing on hotel-provided video equipment in guests’ rooms.” Thus, the court determined that viewing the copyrighted materials in guests’ hotel rooms were neither a public place nor public under the language of the Transmit Clause. In making that determination, the court set the direction for future interpretations of “transmission” and public performance: “when one adds up the various segments of clause (2), one must conclude that under the transmit clause a public performance at least involves sending out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent.”

Here, the hotel, through its rental system, was not engaging in any infringing action under the Transmit Clause—transmission required a signal capable of being received by the public to constitute a public performance.

This line of cases established the crucial inquiry to determine whether an action infringed upon a copyright owner’s exclusive right of public performance. Even if the signal is received in a private place, it may constitute a public performance if the transmission is capable of being

203 Id. at 319.

204 Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors, Inc., 866 F.2d 278, 279 (9th Cir. 1989).

205 Id. at 281–82.

206 Id. at 282.
received by members of the public, regardless of whether the public receives it simultaneously or sequentially. However, as technology developed and transmitting a signal became more complicated, courts struggled to expand this inquiry to encompass more nuanced transmissions as public performances.
CHAPTER 4. THE CABLEVISION DECISION IS INCORRECT

Cablevision and the Transmit Clause: The Second Circuit Decision

In 2006, through a natural progression of time-shifting technology offered by cable providers to consumers, cable company Cablevision introduced the “remote-storage digital video recorder” (RS-DVR). Prior to the RS-DVR, customers utilized VCRs or set-top DVRs to manually record programming streamed by the cable provider onto a videocassette tape or hard drive, respectively. The RS-DVR, however, moved the recording process off of the device physically located in the customer’s home and onto a remote hard drive located in a central cable facility. Simply put, whenever the customer selected the record feature on the guide, a signal would be sent to start creating a separate streaming copy of the program, to be stored in that customer’s personal “file” on the hard drive. Owners of the copyrights to programming eligible for RS-DVR recording alleged that Cablevision was infringing on their exclusive copyrights by making unauthorized copies and unauthorized transmissions of their programming, and brought suit to enjoin Cablevision from operating its RS-DVR system.


208 Id. at 611–12; in Betamax, the Court found that Sony’s VCR was not liable for contributory infringement of the programming owners’ copyright. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (Betamax).

209 Twentieth Century Fox, 478 F. Supp. 2d at 612.

210 See id. at 612–16 for an in-depth overview of the technology. The court also highlights other features of the recording process, such as the buffering of the programming data, the limited size of each customer’s hard drive, and how playback of a recorded program is only available to the customer who requested the recording.

211 Id. at 617; in addition to the injunction, plaintiffs also sought declaratory judgment that Cablevision’s RS-DVR violates their copyrights. Id. at 609.
The U.S. District Court for the Southern District of New York found that Cablevision’s RS-DVR system did engage in infringement by making unauthorized copies and transmissions of the copyrighted programming.²¹² First, the district court addressed the issue of unauthorized copying. Since Cablevision conceded that producing copies was an integral part of the RS-DVR system, the court focused on precisely who was making those copies to determine if Cablevision was liable.²¹³ Cablevision argued that its role in the RS-DVR process was completely passive; the customer, rather than the cable provider, was making the copy when he or she requested to record programming.²¹⁴ The district court disagreed, holding that by providing a service, Cablevision is engaged in copying the content.²¹⁵ Therefore, the court granted summary judgment in favor of the plaintiffs and enjoined Cablevision from copying the plaintiffs’ works without a license.²¹⁶

Second, the district court turned to whether Cablevision was engaging in an unauthorized transmission of plaintiffs’ copyrighted works, under the Transmit Clause.²¹⁷ By following the same rationale that Cablevision is actively involved in the copying process, the district court found that “Cablevision actively participates in the playback process” as well.²¹⁸ Focusing on the

---

²¹² Id. at 609.

²¹³ Id. at 617.

²¹⁴ Id. at 617–18.

²¹⁵ Id. at 618; “Cablevision has physical control of the equipment at its head-end, and its personnel must monitor the programming streams at the head-end and ensure that the servers are working properly.” Id. at 619.

²¹⁶ Id. at 622.

²¹⁷ Id.

²¹⁸ Id.
plain language of the Clause, the court determined that Cablevision’s RS-DVR service satisfies the statute’s definition of “to the public.”\footnote{Id. at 622–23.} Under the Transmit Clause, a transmission is “to the public” (and therefore a public performance) “even if members of the public receive the transmission at separate places at different times.”\footnote{Id. (quoting Copyright Act of 1976, 17 U.S.C. § 101 (2012)).} The district court’s interpretation of this definition, as applied to Cablevision, focused on the potential audience for the performance of the work, regardless of whether the customer was watching the work in real time or through a recording on the RS-DVR.\footnote{Id. at 623.} The district court found support for this interpretation in both the legislative history behind the Transmit Clause and case law, citing \textit{On Command and Redd Horne} as authoritative cases.\footnote{Id. at 623 (citing On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) and Columbia Pictures Indus., Inc. v. Redd Horne, 749 F.2d 154 (3d Cir. 1984)).} Additionally, “where the relationship between the party sending a transmission and [the] party receiving it is commercial, as would be the relationship between Cablevision and potential RS-DVR customers, courts have determined that the transmission is one made ‘to the public.’”\footnote{Id. (citing On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991)).} Therefore, the district court concluded that Cablevision would engage in an infringing public performance of the plaintiffs’ copyrighted works through transmission over the RS-DVR system and granted summary judgment to plaintiffs, further enjoining Cablevision from operating the RS-DVR.\footnote{Id. at 624.}
Cablevision appealed the district court’s decision to the U.S. Court of Appeals for the Second Circuit. Through a *de novo* review of the lower court’s decision in favor of the plaintiffs, the circuit court overturned the judgment granting summary judgment to the plaintiffs and ruled in favor of the defendants. With regard to Cablevision’s alleged infringement through the production of copies, the court found that the buffer copies only existed for less than a transitory duration and did not satisfy the duration requirement for infringement. Additionally, the copy created through the recording of a work to the RS-DVR did not expose Cablevision to direct liability. Like the district court, the circuit court focused its discussion of liability for copying on who was making the copy, yet came to the conclusion opposite that of the lower court, finding that “the district court erred in concluding that Cablevision, rather than its RS-DVR customers, makes the copies carried out by the RS-DVR system.”

Turning to the issue of infringement through the public performance of the transmission, the circuit court directly overruled the district court’s interpretation and application of the Transmit Clause. First, the circuit court looked at the statutory language of the Transmit Clause:

---


226 *Id.* at 126.

227 *Id.* at 130.

228 *Id.* at 132.

229 *Id.* at 130–33. The circuit court declined to analyze whether Cablevision had any contributory liability through its RS-DVR system based on the limited facts and scope of the issue of the case. *Id.* at 133.

230 *Id.* at 135.
The plain language instructs us that, in determining whether a transmission is “to the public,” it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times. The implication from this same language, however, is that it is relevant, in determining whether a transmission is made to the public, to discern who is “capable of receiving” the performance being transmitted. The fact that the statute says “capable of receiving the performance,” instead of “capable of receiving the transmission,” underscores the fact that a transmission of a performance is itself a performance.

By this reading of the plain language of the Transmit Clause, as well as cited support in the 1976 House legislative history, the circuit court drastically shifted the focus for determining infringement from the potential audience of the performance of the copyrighted work to the potential audience of the transmission. Because Cablevision’s RS-DVR system transmits a unique copy of a work to a subscriber, recorded at that subscriber’s bequest, and only capable of performance on that subscriber’s set-top box, “only one subscriber is capable of receiving any given RS-DVR transmission.” Therefore, the potential audience for public performance of the work is one, which does not meet the definition of “public” under the statute, and does not constitute a public performance.

Based on its analysis of Cablevision’s creation of copies and transmission of those copies to RS-DVR subscribers, the circuit court overturned the district court’s summary judgment to the plaintiffs and awarded summary judgment to the defendant, Cablevision. Plaintiffs did appeal the

---

231 Id. at 134.

232 Id. at 134–36.

233 Id. at 135.

234 Id. at 137 (“[B]ecause the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is a single subscriber whose self-made copy is used to create the transmission.”).
decision to the U.S. Supreme Court, but their petition for writ of certiorari was denied.\textsuperscript{235} The court did limit its holding, however, to the facts: “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 to the network, or by giving their subscribers the capacity to make their own individual copies.”\textsuperscript{236} Nevertheless, the Second Circuit’s interpretation of the Transmit Clause, with the focus of public performance shifted to the potential audience of a transmission rather than the performance of the work, remains binding as precedent in the Second Circuit.

A Critique of the Cablevision Decision

Although the U.S. Supreme Court decided not to hear the Cablevision case on appeal,\textsuperscript{237} its interpretation of the Transmit Clause has garnered much criticism since the ruling was handed down in the Second Circuit. The most glaring, fundamental error of the Cablevision decision is the Second Circuit’s confusion of the terms “performance” and “transmission” when interpreting the public performance statute. The language of the Transmit Clause states that to perform a work publicly is “to transmit or otherwise communicate a performance or display of the [copyrighted] work … to the public … 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.”\textsuperscript{238} At issue is what Congress intended to be the pivotal “action” to trigger infringement: the transmission or the performance. The Cablevision court concluded that “the

\textsuperscript{236} Cablevision, 536 F.3d at 139.
\textsuperscript{237} Cable News Network, 557 U.S. 946.
transmit clause directs us to identify the potential audience of a given transmission’ and if the ‘transmission is made to a single subscriber using a single unique copy produced by that subscriber,’ then the transmission is a private performance.”239 By focusing on the audience of the transmission, rather than the audience of the performance of the work, the court drastically skewed both the plain reading of the statute and the legislative intent.

The term “performance” can encompass many different meanings, either as a noun or as a verb in the form of “to perform.” A performance can mean either the presentation of a work or the act of transmitting the work.240 While the statute defines “public performance” under clause two as “to transmit … to the public,” the statute fails to define “performance” or “transmit,” thus leaving the court to draw its own distinction between the two terms. In the first part of clause two, “a performance or display” of the work refers to what is transmitted or otherwise communicated. In the second part of clause two, the use of “receiving” when referring to the potential audience confuses what is intended to be the “performance or display.” Put another way, while it is clear that the “performance or display” of the work to the public by transmission encompasses the action of perception (referencing the exclusive rights of performance and display—as compared to other exclusive rights such as making copies or derivative works), the second part of the statute—the “what makes the transmission public” section—focuses on the potential audience for the receipt of the “performance or display.” The emphasis on receipt could imply that receiving the “performance or display” is different from perceiving the “performance or display” (for example, a member of the public might be capable of receiving the “performance

239 WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 507 (2d Cir. 2013) (reh’g en banc denied) (Chin, J., dissenting) (quoting Cablevision, 536 F.3d at 139).

or display” without ever viewing it). Through this reading, the two meanings of “performance” are present in the statute: the first reference is to the presentation of the work, while the second may refer to the transmission of the work. Nevertheless, although this interpretation—which is the interpretation ultimately adopted by the Second Circuit—is plausible, it is not correct upon further consideration of the statutory language and the legislative intent.

As stated before, the Second Circuit incorrectly substituted “transmission” for “performance” in the Transmit Clause and failed to distinguish which action makes the public performance infringing. Jane Ginsburg of Columbia University School of Law, by focusing on the context surrounding the statute’s use of “performance” and “transmission,” highlights the correct statutory interpretation: “The statute does not refer to the performance created by the act of transmission. The transmission does not itself ‘perform’ (as in ‘play’ or ‘render’) the work; it communicates a work so that its performance will be perceived as the member of the public receives the communication.”  

If the statute had intended the performance created by the act of transmission as the infringing action, the results would be absurd. Furthermore, if Congress had intended for the second use of “performance or display” to mean something different from the first use, it clearly would have said so or chosen a more appropriate, different term. As Judge Chin stated in his dissent in the denial of Aereo’s rehearing en banc,

> there is no indication Congress meant anything other than what it said: the public must be capable of receiving the performance or display, not the transmission. All that matters is whether the transmitter is enabling members of the public to

---


receive the copyrighted work embodied in the *performance or display*, not whether they can receive the same legally insignificant *transmission*.\(^{243}\)

Clearly, by the legislative intent and a plain reading of the statute, the Second Circuit erred in its holding in *Cablevision* by incorrectly substituting “transmission” for “performance.”

The *Cablevision* holding is also incorrect because it renders other components of the Transmit Clause obsolete. The Second Circuit’s interpretation cannot be cleanly read with the statute’s description of “to the public.”\(^ {244}\) Clause two states that a public performance exists “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.”\(^ {245}\) The Second Circuit’s holding, however, by fixating on the “individual copy” transmitted as a private performance, would suggest that a work is not performed publicly because the transmission cannot be received at the same time as other “transmissions.” Yet the statute is clearly intended to encompass instances where the public receives the performance “at the same time or at different times.” A transmission—if read as the performance, as the Second Circuit found—is a single action; each transmission, if at different times, would be a single performance. Therefore, there is no possible way that a transmission—*by itself*—can be received by the public “at

\(^{243}\) *WNET, Thirteen*, 722 F.3d at 508 (reh’g en banc denied) (Chin, J., dissenting).

\(^{244}\) See Ginsburg, *supra* note 241, at 26–27.

different times.” As Ginsburg concludes, “the court’s interpretation thus reads non simultaneous receipt out of the statute.”

Another issue with the Second Circuit’s ruling is that the court determines that the creation of a “unique” copy equals a private performance. In *Cablevision*, the cable company was splitting its licensed data stream of content into two: one stream was immediately transmitted to the subscriber’s cable box (a traditional cable television transmission) and a second stream was sent to the RS-DVR system. Under the Second Circuit’s reading of the Transmit Clause, as long as the second stream transmission was unique—that is, created from an individual’s data stream and for that individual alone—it constituted a private performance, even if the work would now be viewed by members of the public at different places and at different times. However, this interpretation does not comport to the legislative intent; the legislative history indicates that Congress intended for a broad scope in the application of the Transmit Clause. Congress drafted the statute to apply to transfer “by means of any device or process,” which would include the creation and transmission of an individual copy of the copyrighted work. Again, it is absurd to think that the type of “copy” transmitted would not be a

---

246 “It is difficult to imagine a single transmission capable of reaching people ‘in separate places’ and ‘at different times.’” *WNET, Thirteen*, 722 F.3d at 508 (reh’g en banc denied) (Chin, J., dissenting).


249 See Carrie Bodner, *Master Copies, Unique Copies and Volitional Conduct: Cartoon Network’s Implications for the Liability of Cyber Lockers*, 36 COLUM. J.L. & ARTS 491, 506 (2013) (“[W]henever a transmission is tailored to a particular person, such that only that person is capable of receiving that transmission, it is not ‘to the public.’ It is easy to see how many transmissions could be reframed as ‘unique’ and thus nonpublic under this reasoning.”).

consideration encompassed in the broad language of the statute.\textsuperscript{251} Additionally, the Second Circuit’s “unique copy” distinction is at odds with the statute’s “audience capable of receiving” determination. The statute distinguishes between members of the public capable of receiving the performance in the same or different places and at the same or different times. If we see the unique transmission as the performance itself, as the \textit{Cablevision} holding would suggest, then the “audience capable of receiving” the performance is limited to that subscriber’s cable box that can decode the transmission.\textsuperscript{252} If Congress had intended to place the onus on copies of the work rather than the potential audience for the work, it would not have included the place/time distinction.

In the same vein, the Second Circuit misinterpreted the congressional intent of “to the public” in the Transmit Clause. The Utah court’s \textit{Aereo} decision puts it succinctly:

\begin{quote}
[T]he \textit{Cablevision} court appears to discount the simple use of the phrase “to the public” because it concludes that the final clause within the Transmit Clause—“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”—was intended by Congress to distinguish between public and private transmissions.\textsuperscript{253}
\end{quote}

Thus, the place/time distinction was intended to \textit{broaden} the potential audience beyond that encompassed in clause one, the Public Place Clause, which has a physical and temporal

\begin{footnotesize}
\begin{footnote}
\textsuperscript{251} “If Congress had intended the definition to turn on whether a unique copy was used, it knew how to say so.” \textit{WNET, Thirteen}, 722 F.3d at 509 (reh’g en banc denied) (Chin, J., dissenting).
\end{footnote}
\begin{footnote}
\textsuperscript{252} See Jeffrey Malkan, \textit{The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.}, 89 Or. L. Rev. 505, 530 (2010) (“The reason only one subscriber will be capable of receiving a particular RS-DVR transmission is that each transmission will be ‘made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber’s cable box,’ wrote Judge Walker. ‘This argument accords with the language of the transmit clause, which … directs us to consider the potential audience of a given transmission.’”).
\end{footnote}
\begin{footnote}
\end{footnote}
\end{footnotesize}
requirement (i.e., all members viewing the performance must be gathered in the same place at the same time). As the Utah court points out, “the term ‘whether’ does not imply that the ensuing clause encompasses limitation. Rather, the introduction of the clause with the word ‘whether’ implies an intent to explain the broad sweep of the clause and the many different ways it could apply to members of the public.” The Second Circuit’s reading would essentially “cut out” an entire portion of the public that Congress intended to include in the determination of the potential audience. Such a restrictive interpretation, in light of the non-ambiguous statutory text, cannot be supported.

Lastly, Cablevision is wrong because its holding is inconsistent with prior case law. Although the prior Transmit Clause interpretation cases came from a variety of circuit courts of appeals, they all had—until Cablevision—consistently held that on-demand performances via separate transmissions was an infringing action. In fact, the cases that concerned the transmission of an individual copy (one that could only be viewed or transmitted one at a time), On Command, Redd Horne, and Aveco, all found that the action constituted an infringing public performance. Coupled with Professional Real Estate Investor’s conclusion that a public performance requires sending out a signal to the public via some device or process, it is troubling

---

254 Id. at *16.

255 See Miller, supra note 248, at 593 (“Prior courts considering on-demand performances via separate transmissions have held that the copyright owner’s public performance right had been infringed.”).

that the Second Circuit could so easily cast aside prior precedent and come to the opposite conclusion with regard to the RS-DVR system.\textsuperscript{257}

\textsuperscript{257} See Miller, \textit{supra} note 248, at 593 (“It is puzzling that the \textit{Cartoon Network} court came to the opposite conclusion, finding that this transmission is a non-infringing use.”).
CHAPTER 5. THE TROUBLE WITH AEREO

Aereo’s Reliance on Cablevision

The favorable Aereo decision in the Second Circuit relies almost entirely on the appellate court’s prior ruling in Cablevision.258 Because the Cablevision ruling is incorrect, the Aereo court’s reliance on it is no longer supported, and the Aereo decision should be reversed.

In its decision upholding the district court’s denial of preliminary injunction, the Second Circuit concluded that Aereo’s system is not factually distinguishable from the RS-DVR system in Cablevision.259 Because the systems are analogous, the rationale in Cablevision supports the court’s finding of no public performance. This blind reliance on Cablevision is improper; Aereo’s system is factually distinguishable from the RS-DVR system. Therefore, the court cannot indiscriminately apply Cablevision’s holding to Aereo’s system.

How Aereo’s system functions is distinguishable from the facts surrounding how Cablevision’s RS-DVR system operates. In fact, Cablevision filed an amicus brief in the Second Circuit to distance itself from Aereo and the court’s holding that the two systems are analogous.260 Judge Chin, in his dissent of the Second Circuit decision, highlighted several facts that the lower court should have considered with more weight when distinguishing Aereo from Cablevision. First, Cablevision had a license from the copyright holders for the initial

---


259 Id. at 695.

transmission to its cable subscribers.\footnote{\textit{Aereo}, 712 F.3d at 697 (Chin, J., dissenting); see also Brief for Paramount Pictures Corporation, Warner Bros. Entertainment Inc., et al. as Amici Curiae Urging Reversal at 10, Am. Broad. Cos., Inc. v. Aereo, Inc., \textit{consolidated in} WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (No. 12-2786) [hereinafter \textit{Paramount Amicus Brief}] (“Aereo’s and Cablevision’s services are \textit{not} ‘materially identical.’ The RS-DVR service that Cablevision defended before this Court was based on broadcast and cable transmissions that Cablevision was licensed to retransmit to its subscribers in the first instance. Aereo has no re-transmission licenses.”).} The law required Cablevision, as a cable company, to pay licensing and retransmission consent fees for the right to retransmit copyrighted works to subscribers.\footnote{\textit{Aereo}, 712 F.3d at 697 (Chin, J., dissenting).} Cablevision then split this licensed content stream into two, transmitting one stream in real time and sending the other stream to the RS-DVR system.\footnote{Miller, \textit{supra} note 248, at 588.} While the issue in \textit{Cablevision} hinged on whether the cable company needed to obtain a separate license for the RS-DVR system stream, the fact remains that Cablevision already had a license to transmit the content; Aereo, conversely, does not have a license. Therefore, whereas in \textit{Cablevision} the content owners received at least some compensation for the retransmission of the copyrighted works by the cable company, under the Aereo system they receive nothing. Whether receiving initial compensation for the work is a crucial factor in determining the legality of the transmission or not may be a question for the court to address, but this distinction between the Cablevision and Aereo systems should not be overlooked.

As a second factual distinction, Cablevision offers its RS-DVR system as a supplemental service for its cable subscribers, whereas Aereo exists solely to conform to \textit{Cablevision’s} copyright loophole. The RS-DVR system allows cable subscribers to better utilize their authorized access to the copyrighted content by recording and later viewing their selected programming. Aereo, on the other hand, mirrors the RS-DVR system only in such a way that it...
complies with the Second Circuit’s decision in Cablevision.\textsuperscript{264} Even giving Aereo the benefit of the doubt—that its system is not specifically designed to fit into the Cablevision loophole—it is still factually distinguishable that the RS-DVR system exists to facilitate a legitimate cable television service, while Aereo’s service relies entirely upon the broadcaster’s over-the-air, and free-to-the-public, signals.

Third, questions may still exist over whether or not Aereo is actually capable of creating individual copies that are sufficient to claim Cablevision’s protection. In Cablevision, because the data stream was licensed and transmitted directly from the content owner, Cablevision could control how the data stream was split and transmitted for use in the RS-DVR system. Aereo, through its antenna-capture system, may not be able to claim the same control over the creation of the “individual copy.” Aereo claims that its system basically “rents” a unique antenna to a subscriber when that subscriber logs in to access the content.\textsuperscript{265} Recall that in discovery, the district court dismissed the testimony of the broadcasters’ expert witness as unreliable and gave considerable weight to Aereo’s expert.\textsuperscript{266} If there are such concerns regarding the functionality of Aereo’s antennas and the creation of an individualized copy, the court should not be so cavalier to apply Cablevision’s holding, which hinges upon the creation and use of unique copies. Rather,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} See Petition, supra note 105, at 21 (“There is no dispute that Aereo has developed a business model around the massive, for-profit exploitation of the copyrighted works of others.”); Brief of Time Warner Inc. and Warner Bros. Entertainment Inc. as Amici Curiae in Support of Petition for Certiorari at 21, Am. Broad. Cos., Inc. v. Aereo, Inc., No. 13-461 (U.S. filed Nov. 12, 2013) [hereinafter Time Warner Amicus Brief] (“In the present case, the Aereo company and its business plan were created specifically to exploit the two legal fictions established in the Cablevision case.”).
\item \textsuperscript{265} Aereo, 712 F.3d at 682; see also Am. Broad. Cos., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 377–78 (S.D.N.Y. 2012).
\item \textsuperscript{266} See supra pp.9–11; ABC, 874 F. Supp. 2d at 380–81.
\end{itemize}
\end{footnotesize}
the court should focus heavily on the exact technical aspects of Aereo’s service and ensure that its functionality truly does align with the RS-DVR system in order to claim Cablevision’s ruling.

**Aereo and the Transmit Clause**

Setting aside the Aereo decision’s reliance on Cablevision, Aereo is engaging in infringing public performances because of the statutory language, the legislative intent, and the prior case law surrounding the Transmit Clause.

By any plain reading of the Transmit Clause, Aereo’s service fits squarely within its meaning. The statute, at its core, makes transmissions of a copyrighted performance by means of any process or device infringing when they are received at a location beyond where the signal is transmitted. Aereo satisfies these requirements: the antennas capture the broadcast signal and transmit the copyrighted material to subscribers. This service involves a process or device transmitting the copyrighted works to the public at a location beyond where the signal is initially captured. As the dissent to the Second Circuit’s denial of rehearing en banc concluded, “under any reasonable construction of the statute, Aereo is performing the broadcasts publicly as it is transmitting copyrighted works ‘to the public.’”

Furthermore, where any doubt as to Aereo’s inclusion under the Transmit Clause remains from the statutory interpretation, the legislative history eradicates it. As stated before, the House and Senate reports indicate that Congress intended for the Transmit Clause to be broad in scope and to apply to all methods by which the images and sounds comprising a performance are conveyed to the public. In fact, Congress intended the scope of the statute to be so broad so as “to include all conceivable forms and combinations of wired or wireless communications media,

---

267 WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 505 (2d Cir. 2013) (reh’g en banc denied) (Chin, J., dissenting); see also Petition, supra note 105, at 23–24.

268 See supra pp.34–35.
including but by no means limited to radio and television broadcasting as we know them.” 269 To accommodate this new approach to public performance, Congress expanded the definition of “public” to include transmissions made at different times and to different locations so that performances made to the public expanded well beyond the physical restraints of the Public Place Clause. Both the expanded concept of the potential public audience and application to any device or process evince the congressional intent to leave the Transmit Clause as broad as possible to include future infringing actions not yet invented or operational. As recognized by the D.C. district court in FilmOn X, “nothing in the 1976 Act or its legislative history suggests that Congress intended a commercial entity that rebroadcasts copyrighted material for consumption by the public … to avoid liability for infringement of the copyright holders’ exclusive right of public performance.” 270 Clearly, Aereo’s service is exactly the sort of infringing device or process Congress intended to fall under the scope of the Transmit Clause.

Aereo is infringing upon the broadcasters’ copyrights because its service is very similar to the CATV systems in Fortnightly and Teleprompter—which were explicitly overruled by the adoption of the Transmit Clause. 271 Discussed earlier, 272 in Fortnightly and Teleprompter, the U.S. Supreme Court held that an antenna that captured broadcast signals and transmitted them by cable to subscribers was not copyright infringement. In response, Congress revised the existing copyright law in 1976 and added the Transmit Clause to the definition of public performance.


272 See supra pp.26–32.
While perhaps not at a micro-level, Aereo’s service is comparable to the CATV system on a macro-level. From a technical perspective, all broadcast viewers must use an antenna to capture over-the-air signals; signal strength and reception depends upon where the antenna is located in relation to the signal’s point of transmission. Primarily, antennas are intended for private use (thus complying with the Public Place Clause of the public performance definition) and located on top of a viewer’s residence. CATV systems allowed subscribers to access distant signals that they would not normally have been able to due to their location in relation to the signal’s point of transmission by transmitting the signal via cable. Similarly, Aereo captures the over-the-air signal on behalf of subscribers and transmits the signal over the Internet. The main difference in the two operations is where the signal derives from: Aereo subscribers may only access signals that they would be capable of receiving via a personal antenna located at their residence, whereas CATV systems imported distant signals. Nevertheless, the fundamentals are the same: both Aereo and CATV systems capture broadcast signals and retransmit them to subscribers without a license. Furthermore, coupled with the holding of *Professional Real Estate Investors*, the fact that Aereo transmits a signal via a device or process to be received at a place beyond where it is sent only places it more under the scope of the Transmit Clause.\(^{273}\) If Congress drafted the Transmit Clause with the intent to overrule *Fortnightly* and *Teleprompter*, then Aereo’s glaring similarities to how the CATV systems functioned cannot go unnoticed. As applied to Aereo, the Transmit Clause prohibits the service as an infringing public performance.

\(^{273}\) *Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989).
CHAPTER 6. THE IMPACT OF THE AEREo DECISION: WHY SHOULD WE CARE?

Although the Aereo case appears to concern only a small percentage of media content providers and an even smaller percentage of the general population, the implications of the decision are far-reaching. Whether the U.S. Supreme Court decides in favor of Aereo or the broadcasters this summer, how we distribute and receive media content could dramatically change. Specifically, the Court’s decision on whether Aereo is infringing or not will impact copyright law policy in the future, the balance between traditional broadcast and other methods of content distribution, and the progress of innovation in online media content distribution.

National Policy in Support of Copyright

Under the U.S. Constitution, Congress has the power to “promote the Progress of Science and useful Arts” by granting copyrights to authors of works.274 The inclusion of copyright protection as a constitutional right was not by chance; the Founders understood a long-standing common law and wanted to ensure that the new Congress would have the power to continue that tradition.275 Through this power, Congress has enacted statutory protection for intellectual property continuously since 1790.276 Additionally, the courts have long recognized the purpose behind U.S. copyright protection: “the purpose of copyright is ‘to secure a fair return for an “author’s” creative labor’ with the ‘ultimate aim…. by this incentive, to stimulate artistic creativity for the general public good.’”277 As the broadcasters point out, the courts have had “little tolerance for business models premised on the unauthorized exploitation of the copyrights

274 U.S. CONST. art. I, § 8, cl. 8.

275 WALTERSCHEID, supra note 112, at 90–91.

276 Id. at 219.

277 Petition, supra note 105, at 32.
Thus, it is well established that the policy protecting copyright holders favors incentive and control of one’s creative endeavors.

If Aereo were found to be legal, however, it would seriously undermine the purpose of the copyright policy. Broadcasters raise concerns in their Supreme Court brief: “[Aereo’s success] also would fundamentally undermine copyright protection, by depriving copyright holders of their core right to decide if, when, and how to make their works available to the public.” Copyright law conveys exclusive rights to the owners of the works; if that exclusivity is undermined, the value held in such works is undermined as well. Furthermore, if Aereo were found to be legal, it could send the message that every time a new technology emerges, the copyright law must change as well. Such inflexibility creates instability in the law and offers little guidance and assurances as to how courts may apply copyright law in the future.

The Structure of the Television Model

Over the later half of the past century, television has evolved through advancements in technology, distribution, and standards of quality and quantity—so much so, that it is almost unrecognizable from what it was even sixty years ago. As the market adapted over time—transitioning from broadcast to cable to satellite and beyond—statutory protections emerged to

278 Id.


280 Id. at 38 (“In seeking to wrest from copyright holders control of one of the core exclusive rights the law secures, Aereo threatens to chill the very innovation copyright protection is meant to foster.”).

281 Throughout this section, when I refer to cable television, I am referring to franchised based, multi-channel video program distributors (MVPDs) which include distribution by traditional coaxial cable (e.g. cable), fiber-optic cable (e.g. Verizon FiOS), Internet Protocol (IPTV) systems (e.g. AT&T U-Verse), and satellite (e.g. Dish and DirecTV).
preserve the delicate balance between the traditional broadcast media and contemporary distribution systems of cable and satellite.\textsuperscript{282} The broadcast medium, which utilizes licenses issued from the public spectrum, at its core operates on behalf of the public interest. This public interest in the dissemination of news and information at the local level has, since the creation of broadcast radio and television, fueled many initiatives to promote and preserve local access to information. Through the Communications Act of 1934, Congress drafted the licensing system for the electromagnetic spectrum to favor localism and broadcasting in the public interest.\textsuperscript{283} Following the 1976 revision to the Copyright Act, Congress statutorily imposed protections to broadcast content retransmitted and redistributed through cable systems.\textsuperscript{284} In addition to the actions by the legislature, the U.S. Supreme Court “has repeatedly recognized the strong public interest in preserving over-the-air broadcast television.”\textsuperscript{285} These repeated measures, whether taken by the legislature, the courts, or regulatory bodies, have reinforced the strong support of protecting the balance between traditional broadcast and progressive cable and satellite television.

One of the most fragile relationships in the broadcast and cable television models is the issue of retransmission consent and licensing fees. Section 111 of the 1976 Copyright Act statutorily requires cable companies to pay a fee for the license to retransmit broadcast


programming to their subscribers.286 Broadcasters recognize the importance of the licensing system: “Although advertising revenue has traditionally been their most important source of income, ‘television broadcasters have come to rely more heavily on retransmission fees, rather than advertising revenue, to make their free public broadcasts profitable.’”287 As the traditional model of broadcast television comes under threat as new competitors emerge in cable and Internet distribution, broadcasters depend upon the payments they receive from the retransmission of their copyrighted signals.288 Unauthorized retransmissions like those in Aereo’s model, where broadcasters receive no licensing fees for their content, threaten this fragile system and—if found legal—could bring the entire licensing model toppling down.289

The feud over the statutorily imposed retransmission consent fee system is a heated one between broadcasters and cable providers. If Aereo proves to be a legal system, it would present a legal way for cable companies to bypass paying licensing fees to broadcasters.290 Even the potential legality of Aereo has become a bargaining tool in retransmission consent fee

---


287 Petition, supra note 105, at 32–33 (quoting WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 503 (2d. Cir. 2013) (reh’g en banc denied) (Chin, J., dissenting)).

288 For example, “retransmission fees in the U.S. are expected to double to $6.1 billion in 2018 from $3.01 billion this year, according to research firm SNL Kagan.” Andy Fixmer, Alex Sherman, and Jonathan Erlichman, DirectTV, Time Warner Cable Are Said to Weigh Aereo-Type Services, BLOOMBERG (Oct. 25, 2013, 11:00 PM), http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html.

289 See Petition, supra note 105, at 33 (“Aereo is a direct assault on that well-established and statutorily protected model [of retransmission consent fees].”).

290 Id. at 33–34 (referencing Time Warner Cable’s threat to develop its own Aereo-like model).
negotiations between broadcasters and cable providers.\textsuperscript{291} To highlight the harm to the negotiation process with cable providers, broadcasters featured media executives as experts in the trial court, testifying about the economic harm Aereo’s system causes to the retransmission fee negotiation process. A Fox executive “testified that based on her many years experience, cable companies will demand such concessions or refuse to pay retransmission fees based on Aereo’s refusal to do so.”\textsuperscript{292} A CBS executive “further testified that cable companies were concerned about free-riders such as Aereo and suggested they would be unwilling to pay ‘when other people can take the exact same product for free.’”\textsuperscript{293} Yet whether Aereo or systems like it can “free-ride” off of the broadcasters’ signals may further jeopardize the delicate balance between broadcasters and cable.

Another implication if the U.S. Supreme Court finds Aereo to be legal is the development of copycat systems built by cable operators to bypass secondary transmission licensing fees. Many cable providers have already explored options to develop their own, Aereo-like systems.\textsuperscript{294} Time Warner Cable, a cable company often locked in long battles with broadcasters over retransmission consent fees, has threatened to develop its own Aereo-like model to purposefully

\begin{flushright}
\textsuperscript{291} Brian Stelter, \textit{Aereo as Bargaining Chip in Broadcast Fees Battle}, \textsc{The New York Times} (July 21, 2013) \url{http://www.nytimes.com/2013/07/22/business/media/with-prospect-of-cbs-blackout-time-warner-cable-to-suggest-aereo-as-alternative.html?r=0}; \textit{see Brief for Petitioners, supra} note 285, at 40 (“[T]he ink on the Second Circuit’s decision was barely dry when proposals for exploiting [Aereo-like systems] began to surface.”).


\textsuperscript{293} \textit{Id.} at 398–99.

\textsuperscript{294} Fixmer, Sherman, and Erlichman, \textit{supra} note 288.
\end{flushright}
avoid paying fees to broadcasters.\textsuperscript{295} Time Warner Cable is only one of many cable providers who have looked into developing systems similar to Aereo’s.\textsuperscript{296} In fact, “Dish Network, a satellite provider, also reportedly has engaged in talks about acquiring Aereo.”\textsuperscript{297} The eagerness with which cable providers are investigating acquiring systems similar to Aereo—even at the first inkling of legality—is remarkable; if Aereo proves to be legal, there is no doubt that cable companies will do their best to copy Aereo’s model as a means to avoid retransmission consent.

Perhaps the most drastic threat to the future of broadcast television in the wake of a favorable U.S. Supreme Court decision for Aereo is that broadcasters will cease broadcasting free, over-the-air signals. Broadcasters such as Fox, Univision, and CBS have threatened to essentially “pull the plug” on their signals and distribute content solely via cable\textsuperscript{298} or the Internet.\textsuperscript{299} Network executives have gone so far as to talk with cable operators about the logistics of switching their programming from over-the-air to cable-only.\textsuperscript{300} If broadcasters were to pull their signals, the seven percent of Americans who receive broadcast content exclusively


\textsuperscript{296} Fixmer, Sherman, and Erlichman, \textit{supra} note 288.

\textsuperscript{297} Petition, \textit{supra} note 105, at 34.

\textsuperscript{298} WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 502 (2d. Cir. 2013) (reh’g en banc denied) (Chin, J., dissenting).


over the airwaves would be without television.\textsuperscript{301} While that number has decreased significantly in the last decade, it is still a considerable number—and a number that, because of the public interest in over-the-air information, is not easily ignored.\textsuperscript{302} Government policies in recent years have actively sought to keep these homes connected to the airwaves, in light of the fact that—due to the digital divide—so many would be unable to access information as easily as they do through their broadcast televisions.\textsuperscript{303} The odds that broadcasters would voluntarily switch their programming from over-the-air to exclusively cable is rare, but not one that should be overlooked; operating as a local broadcaster, though beneficial to the public interest, is first and foremost a business. Without additional protections put in place by Congress, like the secondary transmission licensing requirements before, broadcasters may very well find it economically unfeasible to remain on-the-air as freeloaders such as Aereo reap the benefits.

Another potential threat to the television structure is that if Aereo is legal, there will be a decrease in the quality of programming. Broadcasters argue that if their revenues drop, viewers will feel the pinch: “[Broadcasters] may be forced to reconsider whether they can afford to continue making the same quantity and quality of programming available to the public for free in the first place.”\textsuperscript{304} Some see the change in programming as a plus; if broadcasters were to move their content exclusively to cable, the FCC’s indecency rules would no longer govern and

\textsuperscript{301} Sean Patterson, \textit{Cable Households Dropping, Over-The-Air Households Down to 7\\%}, \textsc{WebProNews} (July 30, 2013) http://www.webpronews.com/cable-households-dropping-over-the-air-households-down-to-7-2013-07.

\textsuperscript{302} \textit{Id.}

\textsuperscript{303} For example, the Federal Communications Commission took years and millions of dollars when switching broadcast signals from analog to digital to ensure that homes that only received over-the-air television on antiquated television sets were properly equipped to receive the altered transmissions.

\textsuperscript{304} \textit{Brief for Petitioners, supra} note 279, at 41.
programming would no longer be restricted in what you can and cannot say on broadcast TV.\textsuperscript{305}

Nevertheless, the loss of the local broadcaster (as we know it today) as a source for local news and current events for so many Americans would have radical implications.

The broadcasting system, which utilizes the public spectrum in the public interest, has become an invaluable resource in spreading news and information and, essentially, bettering our democracy. If the licensing system were to lose its value as a business model due to competition from Aereo and FilmOn X, the harm to local communities who rely upon their local broadcaster for coverage of news and current affairs could be irreparable. The historical emphasis on broadcasting highlights how society values this medium;\textsuperscript{306} it is unlikely that the U.S. government would allow it to diminish.

**Effect on Innovation**

While there have been many positive advancements in technology that have allowed content providers to place their programming online, Aereo’s model is not innovative. Rather, as Aereo attempts to utilize a copyright loophole in order to provide access to broadcast programming online, it undermines other lawful and innovative content distribution systems. To best encourage growth and expression, our laws must be construed in a way that fosters an environment of creativity, rather than one that overly burdens copyright creators or disincentivizes creativity. Many platforms, both online or in the cloud, strike the proper balance


\textsuperscript{306} For example, an entire governmental agency, the Federal Communications Commission, is dedicated to the regulation of the electromagnetic spectrum.
between innovation and copyright protection, yet if the court upholds models such as Aereo’s, those lawful platforms may suffer.

As exemplified in Cablevision and the RS-DVR system, many innovative models in data storage are shifting toward remote “lockers” which offer customers greater space to store files than might be physically available on a hard drive. These cloud computing models allow consumers to access files on a number of devices and in almost any location with an Internet connection. An example of cloud technology and media distribution is the concept of TV Everywhere, a growing trend which allows consumers to lawfully access content from one source on a multitude of platforms (i.e. television, mobile, or computer) rather than multiple copies of the same programming for each platform. Aereo argues that if the Court finds their service to be infringing, it “would pervasively threaten the use of cloud technologies to store and access copyrighted content.”

According to Aereo, the broadcasters’ proposed interpretation of “performance” under the Transmit Clause would encompass the act of accessing and transmitting data stored in the cloud to an individual’s device. This conclusion is incorrect; cloud technologies must still comply with copyright laws so that the content stored and accessed by an individual must be individually owned by or licensed to that person. A finding by the Court that Aereo is infringing would not threaten the future of cloud computing but reassure developers that—as long as

---

307 Brief for Petitioners, supra note 279, at 42 (“[T]he technological advancements of the Internet age are fully capable of furthering the interests of both the public and the copyright holder….”).


309 Id. at 49.
content is lawfully there—the cloud will continue to be a viable resource in the future of data storage.

The proliferation of broadcasters’ content online evinces an eagerness to embrace online platforms—as long as the content is lawfully there. As broadcasters acknowledge in their brief, “copyright protection need not fall by the wayside for innovation to continue.”

Licensing agreements offer the best and most practical way to satisfy both the copyright owner’s interests and the public’s interest in accessing content online. As an example, broadcasters point to litigation emanating from online music infringement platforms to showcase how successful licensing agreements can be for lawfully distributing copyrighted material online. With regard to television content, broadcasters have licensing agreements with over-the-top platforms such as Netflix, Amazon Prime, Hulu, and Watch ABC. Again, as these existing arrangements indicate, broadcasters may in fact be eager to offer their content online; they would just rather the content get there in a lawful manner.

As with any struggle between the old and the new, the legal system must protect certain rights while simultaneously supporting innovation. The broadcasters recognize the need for this balance and encourage the Court to consider it as well: “The real choice is between incentivizing the development of technology that more efficiently transmits, performs, or displays content while respecting copyrights, or incentivizing technology that offers no real advances, but simply

310 Brief for Petitioners, supra note 279, at 43.
311 Id. at 42.
312 Id. at 43.
313 Id.
provides a superficial basis for eluding copyright liability.” 314 The market indicates that broadcasters have—and will continue to—lawfully grant access to their copyrighted material online. Considering this market, as well as the policy behind copyright law and the statutory balance between broadcast and cable television, the Court should not support the development of more loophole-based infringers like Aereo by granting Aereo a favorable decision. The impact on our existing copyright regime and on the current television structure would much more drastic than any innovation Aereo may purport to offer.

314 Id.
CHAPTER 7. CONCLUSION

Whether the U.S. Supreme Court ultimately finds Aereo and services comparable to it infringing under the Transmit Clause or not, the issues in copyright law and the balance of our copyright system as a whole cannot continue unaddressed. The gravitas of the players involved—media, Congress, and the judiciary—only heightens the need for swift resolution. Ideally, resolution will come this summer with a ruling from the Supreme Court; yet, ultimately, Congress has the last word. As with *Fortnightly* and *Teleprompter*, and as a result of the separation of powers in government, if Congress disagrees with how the Court applies a law, it may adopt legislation that will offer more guidance or revise completely how that law will be applied in future cases.

If the Court finds that Aereo is not infringing upon the broadcasters’ copyrights, thus prompting Congress to consider revising the public performance right to include services like Aereo as infringing, the concern becomes that Congress may draft the law in such a way that is too restrictive and opens another avenue for “loophole” infringers. Copyright law is sensitive and must be carefully drafted to encompass the principles behind what constitutes infringement rather than the specific actions so that they may grow and expand as technology does. The goal with drafting law is to not have to revise it often; a broader public performance right that evinces the congressional intent of what constitutes infringement is ideal to allow for both protection of the copyright and innovation in non-infringing technology. Therefore, the best resolution in Aereo and FilmOn X’s litigation should come from the court’s application of the current Transmit Clause in such a way that does not require congressional intervention.

---

315 See supra Chapter 3.
As this thesis concludes, based upon the Second Circuit’s incorrect interpretation of the Transmit Clause, Aereo’s service infringes upon the broadcasters’ copyright under the public performance right. Whether or not Cablevision will be overturned or simply distinguished from Aereo, it is clear that, from the plain language, legislative history, and prior case law of the Transmit Clause, Aereo cannot continue to operate in such an infringing manner. The next step in resolving the infringement issue will come with the Supreme Court’s ruling this summer; if, as this thesis suggests, the Court finds Aereo to be infringing, then the legal battle will subside, yet the impact on the media market may only just begin. Nevertheless, the issues surrounding the future interpretation and application of the Transmit Clause in the courts depend upon a Supreme Court ruling that Aereo’s service infringes the public performance right.
REFERENCES

Act of July 1, 1909 at § 1, 35 Stat. 1075.


Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986).

Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989).


4 Patry on Copyright (2014).


STANLEY ROTHEMBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC (1954).


United States v. Am. Soc’y of Composers, 627 F.3d 64 (2d Cir. 2010).

U.S. CONST. art. I, § 8, cl. 8.


WNET, Thirteen v. Aereo, Inc., 722 F.3d 500 (2d Cir. 2013).

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

Elizabeth Cuttner was born and raised in Norwalk, Connecticut. She graduated from the University of Georgia in Athens, Georgia with a Bachelor of Arts in International Affairs. Elizabeth enrolled in the master’s program at the Manship School of Mass Communication at Louisiana State University in 2010 and the following year enrolled at the Paul M. Hebert Law Center at LSU. She is the first graduate of LSU’s dual degree program, receiving both her Master’s in Mass Communication and J.D. in May of 2014.

Elizabeth has previously worked at Turner Entertainment Networks, the Federal Communications Commission, and the National Association of Broadcasters. Her professional interests include communications policy and regulation, media law, and intellectual property law. Upon graduation, she plans to work in communications law and policy in Washington, D.C.