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

Elizabeth Cuttner

Louisiana State University and Agricultural and Mechanical College

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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

Theanship School of Mass Communication

by
Elizabeth Cuttner
B.A., University of Georgia, 2010
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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,

¹ *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

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 Aereo³ 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.

² *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009) (*Cablevision*).

³ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *cert. granted*, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 896 (2014) (*Aereo*).

⁴ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 896 (2014).

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.

⁶ *American Broadcasting Companies, Inc. v. Aereo, Inc.*, SCOTUSBLOG (last visited Mar. 10, 2014), <http://www.scotusblog.com/case-files/cases/american-broadcasting-companies-inc-v-aereo-inc/>.

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

⁷ Brian Stelter, *New Service Will Stream Local TV Stations in New York*, NEW YORK TIMES (February 14, 2012, 11:40 AM) http://mediadecoder.blogs.nytimes.com/2012/02/14/new-service-will-stream-local-tv-stations-in-new-york/?smid=tw-nytimestv&seid=auto&_r=0.

⁸ Fox Television Stations, Inc. v. FilmOn X LLC, ___ F. Supp. 2d ___, 2013 U.S. Dist. LEXIS 126543, *8–9 (D.D.C. 2013).

⁹ *Id.* at *8.

¹⁰ WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680–81 (2d Cir. 2013) (*Aereo*); *see also* Am. Broad. Cos., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 376–77 (S.D.N.Y. 2012) (*ABC aff'd*, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013), *cert. granted*, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 896 (2014); Consolidated Brief of Defendant-Counter-Claimant-Appellee Aereo, Inc. at 17–18, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013)

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.¹¹ Thus, “Aereo’s system . . . provides the functionality of three devices: a standard TV antenna, a DVR, and a Slingbox-like device” in one.¹²

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.¹³ Once logged in, the subscriber will have the option to either watch or record broadcast channels available in her market.¹⁴ 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.¹⁵

(Nos. 12-2786-cv, 12-2807-cv), 2012 WL 5303659 (C.A.2) [hereinafter *Aereo Second Circuit Brief*].

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.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.¹⁷ The antenna server assigns the subscriber’s request to one, individual antenna,¹⁸ as an important feature, “under no circumstance . . . is an antenna ever used by more than one consumer at any given time.”¹⁹ The assigned antenna tunes to the channel airing the requested content and begins receiving the over-the-air signal.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.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.”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

¹⁶ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 377–78.

¹⁷ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 379.

¹⁸ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 377–78.

¹⁹ *Aereo Second Circuit Brief*, *supra* note 10, at 23; *see also Aereo*, 712 F.3d at 682–83.

²⁰ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 378.

²¹ *Id.*

²² *Aereo Second Circuit Brief*, *supra* note 10, at 23; *see also Aereo*, 712 F.3d at 683.

through Aereo’s website.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.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.²⁵ Thus, the subscriber is watching a near-contemporaneous copy of content available through the over-the-air signal.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.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.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.²⁹ If the subscriber does not select “record,” she will not be able to access a copy of the program in the future.³⁰

²³ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 377–79.

²⁴ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 378.

²⁵ *Aereo*, 712 F.3d at 681.

²⁶ *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.” *Id.* at 682. *See also ABC*, 874 F. Supp. 2d at 377.

²⁷ *Aereo*, 712 F.3d at 681; *see also ABC*, 874 F. Supp. 2d at 377.

²⁸ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 378.

²⁹ *Aereo*, 712 F.3d at 682; *see also ABC*, 874 F. Supp. 2d at 377.

³⁰ *Aereo*, 712 F.3d at 681; *see also ABC*, 874 F. Supp. 2d at 377.

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 16th 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

³¹ AEREO, <https://aereo.com/coverage> (last visited Mar. 12, 2014).

³² Gina Hall, *FilmOn X expanding despite court rulings and feud with Aereo*, L.A. BIZ (Sept. 23, 2013, 11:22 AM PDT) <http://www.bizjournals.com/losangeles/news/2013/09/25/filmon-x-expanding-despite-court.html>.

³³ *See* WNET, Thirteen v. Aereo, Inc., 871 F. Supp. 2d 281 (S.D.N.Y. 2012) (decision on state law unfair competition claim and preemption under 17 U.S.C. § 301 (2012)); Am. Broad. Cos., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (decision on the merits of Aereo’s copyright infringement). The *WNET* suit was consolidated into the *ABC* suit prior to the appellate court decision. *See also Aereo Second Circuit Brief*, *supra* note 10, at 15–17; Brief for Plaintiffs-Counter-Defendants-Appellants at 7–8, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 4338880 (C.A.2) [hereinafter *Broadcasters Second Circuit Brief*].

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.”³⁶

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.³⁷ 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.”³⁸ 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.³⁹ 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.⁴⁰

³⁶ WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013), *cert. granted*, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 896 (2014); *see also* ABC, 874 F. Supp. 2d at 376.

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.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.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.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.⁴⁴ Due to the unreliability of Dr. Volakis’s testing and the fact that criticisms of his conclusions went un rebutted at the hearing, coupled with the weight granted to Aereo’s expert testimony, the

⁴¹ *Id.*

⁴² *Id.* (internal citations omitted).

⁴³ *Id.* at 380.

⁴⁴ *Id.* at 380–81.

district court concluded that Aereo’s antennas function independently, and thus constitute private performances, when receiving the over-the-air broadcast signal.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

[t]o perform or display a work “publicly” 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.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 *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.⁴⁷ In *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;”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.”⁴⁹

Applying those premises, the Second Circuit determined that because each subscriber’s RS-DVR

⁴⁵ *Id.*

⁴⁶ Copyright Act of 1976, 17 U.S.C. § 101 (2012).

⁴⁷ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008), *cert. denied*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

⁴⁸ *ABC*, 874 F. Supp. 2d at 383 (internal citations omitted).

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.⁵⁰

With *Cablevision* as precedent, the district court concluded that “Aereo’s system is materially identical to that in *Cablevision*,” and therefore its decision should align with the rationale of the previous case.⁵¹ The district court found that “[t]he overall factual similarity of Aereo’s service to *Cablevision* on these points suggests that Aereo’s service falls within the core of what *Cablevision* held lawful”⁵² and, after dismissing each of the plaintiff’s arguments in turn, concluded that they were unlikely to succeed on the merits.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 *Cablevision* and the denial of the preliminary injunction.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.”⁵⁵ Upon review of the district court’s application of *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

⁵⁰ *Id.* (citing *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)).

⁵¹ *Id.* at 386.

⁵² *Id.*

⁵³ *Id.* at 396.

⁵⁴ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *cert. granted*, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 896 (2014). Plaintiffs did not appeal the district court’s factual finding that Aereo’s antennas function independently. *Id.* at 680.

⁵⁵ *Id.* at 684 (internal citations omitted).

of discretion from the district court and upheld the denial of the motion for preliminary injunction.⁵⁶

Of the three judges on the panel, one dissented.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."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.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.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.⁶¹

⁵⁶ *Id.* at 696.

⁵⁷ *Id.* (Chin, J., dissenting).

⁵⁸ *Id.* at 699 (Chin, J., dissenting).

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).

⁶⁰ *Id.* at 702–03 (Chin, J., dissenting).

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.⁶² Lacking a majority in favor of an *en banc* review, the rehearing was denied.⁶³ Judge Chin again dissented, this time joined by one other judge.⁶⁴ 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.⁶⁵

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.⁶⁶

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.⁶⁷ 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).

⁶⁶ See Eriq Gardner, *New York Judge in Aereo Lawsuit Won't Crown Winner (Not Yet, Anyway)*, THE HOLLYWOOD REPORTER (Jan. 13, 2014) <http://www.hollywoodreporter.com/thr-esq/new-york-judge-aereo-lawsuit-670653>.

⁶⁷ *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

local affiliates.⁶⁸ Similar to the Second Circuit *Aereo* case, plaintiffs “accuse[d] defendants of offering their copyrighted content through internet and mobile device streaming.”⁶⁹ 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.⁷⁰

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.⁷¹ 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.⁷² The court acknowledged: “Assuming that defendants accurately describe[d] their technology ... Second Circuit law would support defendants’ position,” referencing the *Cablevision* decision.⁷³ 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.”⁷⁴ 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.⁷⁵

Upon concluding that the *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 *Cablevision*. While the Second Circuit’s decision in *Cablevision* centered on the *transmission* in determining public performance under the Transmit Clause, the California district court, in line with Ninth Circuit precedent, focused on the *performance* of the work and the potential audience for that performance, regardless of the uniqueness of the transmission.⁷⁶ Without the rationale in *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.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.⁷⁸ Furthermore, when considering the scope of the preliminary injunction, the district court limited

⁷⁵ *Id.*

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

⁷⁷ *BarryDriller*, 915 F. Supp. 2d at 1146.

⁷⁸ *Id.* at 1147–48.

the remedy only to the geographic scope of the Ninth Circuit, which spans a vast majority of the western states.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.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.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.⁸² Yet, the court stated that it “is tasked with making a legal judgment” and conducted its own analysis of the Transmit Clause.⁸³ Following a thorough outline of the Second Circuit cases, *Cablevision* and *Aereo*, and

⁷⁹ *Id.* at 1148.

⁸⁰ Joshua Williams, *Oral Arguments Tee Up Widely Anticipated 9th Circuit Decision in ‘Aereokiller’ Case*, INSIDE TECH MEDIA (August 30, 2013) <http://www.insidetechnia.com/2013/08/30/oral-arguments-tee-up-widely-anticipated-9th-circuit-decision-in-aereokiller-case/>.

⁸¹ *Fox Television Stations, Inc. v. FilmOn X LLC*, ___ F. Supp. 2d ___, 2013 U.S. Dist. LEXIS 126543 (D.D.C. 2013).

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.

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.⁸⁴

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.⁸⁵ When a court interprets a statute, the court may not expound its interpretation beyond the statutory text when the language is clear and unambiguous.⁸⁶ 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.⁸⁷ Therefore, the court found that the broadcasters satisfied the first element for preliminary injunction and showed a likelihood of success on the merits.⁸⁸

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.⁸⁹ However, unlike the *BarryDriller* court, which reached a similar conclusion, the district court granted the plaintiffs'

⁸⁴ *Id.* at *16–32.

⁸⁵ *Id.* at *36–41.

⁸⁶ *Id.* at *41–42.

⁸⁷ *Id.* at *42–43.

⁸⁸ *Id.* at *44.

⁸⁹ *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.⁹⁰

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.⁹¹ The district court, located in the U.S. Court of Appeals for the First Circuit, denied the plaintiff's motion for preliminary injunction.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.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.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

⁹⁰ *Id.* at *59.

⁹¹ *Hearst Stations Inc. v. Aereo, Inc.*, ___ F. Supp. 2d ___, 2013 U.S. Dist. LEXIS 146825 (D. Mass. 2013).

⁹² *Id.* at *2.

⁹³ *Id.* at *9.

⁹⁴ *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; *see id.* at *15–19.

absence of a preliminary injunction, it was not sufficient enough to enjoin Aereo.⁹⁵ The court determined that neither the balance of hardships nor the consideration of public interest factors favor one side over the other.⁹⁶ Nevertheless, the district court denied the plaintiff's motion for preliminary injunction, essentially granting Aereo a "win" in yet another district.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.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.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.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

⁹⁵ *Id.* at *18.

⁹⁶ *Id.* at *21–22.

⁹⁷ *Id.* at *22.

⁹⁸ *Cnty. Television of Utah, LLC v. Aereo, Inc.*, ___ F. Supp. 2d ___, 2014 U.S. Dist. LEXIS 21434, *5 (D. Utah 2014).

⁹⁹ *Id.* at *41.

¹⁰⁰ *Id.* at *23.

persuasive.¹⁰¹ 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.¹⁰² The district court limited its injunction to the Tenth Circuit.¹⁰³

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.¹⁰⁴ 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.”¹⁰⁵ 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.¹⁰⁶ On January 10, 2014, the Supreme Court granted the petition and, interestingly, adopted the issue as presented by the broadcasters.¹⁰⁷ Justice Alito recused himself from the conference.¹⁰⁸ FilmOn X moved to

¹⁰¹ *Id.* at *10.

¹⁰² *Id.* at *8–23.

¹⁰³ *Id.* at *28–29.

¹⁰⁴ *American Broadcasting Companies, Inc. v. Aereo, Inc.*, *supra* note 6.

¹⁰⁵ Petition for Writ of Certiorari at i, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (U.S. *petition for cert. filed* Oct. 11, 2013) [hereinafter *Petition*].

¹⁰⁶ Brief for Respondent at i, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (U.S. *filed* Dec. 12, 2013) [hereinafter *Petition Brief for Respondent*].

¹⁰⁷ *American Broadcasting Companies, Inc. v. Aereo, Inc.*, *supra* note 6.

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.*

¹¹⁰ Harry Cole, *Utah Judge to Aereo: Not in this Circuit!*, COMMLAWBLOG (Feb. 19, 2014) <http://www.commlawblog.com/2014/02/articles/broadcast/utah-judge-to-aereo-not-in-this-circuit/>.

¹¹¹ *American Broadcasting Companies, Inc. v. Aereo, Inc.*, *supra* note 6.

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.

¹¹² See generally EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 59–77 (2002).

¹¹³ U.S. CONST. art. I, § 8, cl. 8.

¹¹⁴ WALTERSCHEID, *supra* note 112, at 219.

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].”¹¹⁵ This list of exclusive rights was first expanded in 1870 and again more substantially in 1909 to include a performance right.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;”¹¹⁷ subsection (d) included the right “to perform or represent [a dramatic work] publicly;”¹¹⁸ and subsection (e) included the right “to perform [a musical composition] publicly for profit.”¹¹⁹ Together, these three subsections comprised the public performance right from 1909 until the revision in 1976.¹²⁰

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.”¹²¹ Furthermore, the Act neglected to define important terms such as “performance” and “public performance,” leaving courts with no guidance in defining and

¹¹⁵ *Id.* at 259 (citing Act of May 31, 1790 at § 1, 1 Stat. 124).

¹¹⁶ *Id.*

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.*

¹¹⁸ *Id.* § 1(d).

¹¹⁹ *Id.* § 1(e).

¹²⁰ *See* H.R. Rep. 94-1476, 47 (1976) (“The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.”); S. Rep. 94-473, 61 (1975) (“The present Copyright Law of the United States is essentially that enacted by Congress in 1909.”).

¹²¹ H.R. Rep. 94-1476, 47.

applying those concepts.¹²² Although 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 1909.¹²³ In fact, as a prime example, “the [1909] Act ... does not mention the right of broadcasting”¹²⁴ nor did the public performance right expand to motion pictures.¹²⁵ 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.¹²⁶

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

¹²² 4 Patry on Copyright § 14:5 (2014).

¹²³ Act of July 1, 1909 at § 1(c), (d), (e), 35 Stat. 1075; *see* *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

¹²⁴ STANLEY ROTHENBERG, *COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC* 24 (1954).

¹²⁵ 4 Patry on Copyright § 14:4.

¹²⁶ *Jerome H. Remick & Co. v. American Automobile Accessories, Co.*, 5 F.2d 411, 412 (6th Cir. 1925).

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

¹²⁷ See H.R. Rep. 94-1476, 47 (1976); S. Rep. 94-473, 61 (1975).

¹²⁸ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

¹²⁹ *Id.* at 392.

¹³⁰ *Id.* at 391–92.

¹³¹ *Id.*

the roof of their home.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.¹³³

Respondent, United Artists Television, brought suit against Fortnightly for copyright infringement.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.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.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.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.¹³⁸ Almost immediately into its analysis, the Court concluded that Fortnightly's CATV system did not

¹³² *Id.* at 392.

¹³³ *Id.*

¹³⁴ *Id.* at 393.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 393–94.

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.”¹³⁹ 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.¹⁴⁰ Specifically, the Court inquired as to “the function that CATV plays in the total process of television broadcasting and reception.”¹⁴¹

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.¹⁴² 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.”¹⁴³ With regard to the copyrighted work, “broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience.”¹⁴⁴

¹³⁹ *Id.* at 395.

¹⁴⁰ *Id.* at 396–97.

¹⁴¹ *Id.* at 397.

¹⁴² *Id.*

¹⁴³ *Id.* at 397–98.

¹⁴⁴ *Id.* at 398.

Through this framework, the Court concluded that CATV systems should be classified as viewers, not performers of the work.¹⁴⁵ 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.”¹⁴⁶ 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.”¹⁴⁷ 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.¹⁴⁸

Following *Fortnightly*, copyright owners brought suit against another CATV operator, Teleprompter, for copyright infringement.¹⁴⁹ 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.¹⁵⁰ Building off of the Supreme Court’s analysis in *Fortnightly*,

¹⁴⁵ *Id.* at 399.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 400.

¹⁴⁸ *Id.* at 400–01.

¹⁴⁹ *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

¹⁵⁰ *Id.* at 398–400.

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.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.”¹⁵⁷ Therefore, Teleprompter was not a performer of the broadcast signals, according to *Fortnightly*’s classification of the CATV function, and was not engaging in copyright infringement.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.”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.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.”¹⁶¹ Therefore, adhering to the “broadcasters perform, viewers do not perform”

¹⁵⁶ *Id.* at 403–04.

¹⁵⁷ *Id.* at 405.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 409.

¹⁶⁰ *Id.* at 408–09.

¹⁶¹ *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.

¹⁶⁶ H.R. Rep. 94-1476, 47–50 (1976); S. Rep. 94-473, 61–63 (1975).

Congress proposed and eventually passed the overhauled Copyright Act of 1976.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹

Under the 1909 copyright law, a performance was infringing if it was public and for profit.¹⁷⁰ As illustrated by the Supreme Court decisions in *Fortnightly* and *Teleprompter*, the understanding of “public” did not encompass transmissions made to the public.¹⁷¹ 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.¹⁷²

¹⁶⁷ See Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012); see H.R. Rep. 94-1476; S. Rep. 94-473.

¹⁶⁸ See H.R. Rep. 94-1476, 47–50; S. Rep. 94-473, 61–63.

¹⁶⁹ 17 U.S.C. § 101.

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

¹⁷¹ See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

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.¹⁷³ 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.¹⁷⁴ Before the bill reached the House for the vote, the Senate judiciary committee issued its report regarding the bill.¹⁷⁵ The House judiciary committee then submitted its report, which for portions relevant to this thesis reiterated the Senate’s report.¹⁷⁶

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.”¹⁷⁷ 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

¹⁷³ See H.R. Rep. 94-1476; S. Rep. 94-473.

¹⁷⁴ H.R. Rep. 94-1476, 47–50; S. Rep. 94-473, 61–63.

¹⁷⁵ See S. Rep. 94-473.

¹⁷⁶ H.R. Rep. 94-1476.

¹⁷⁷ S. Rep. 94-473, 70; H.R. Rep. 94-1476, 63.

sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.”¹⁷⁸ 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].¹⁷⁹

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.”¹⁸⁰ 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.’”¹⁸¹ 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.

¹⁷⁸ S. Rep. 94-473, 71; H.R. Rep. 94-1476, 63.

¹⁷⁹ S. Rep. 94-473, 71; H.R. Rep. 94-1476, 64 (emphasis added).

¹⁸⁰ S. Rep. 94-473, 71–72; H.R. Rep. 94-1476, 64–65.

¹⁸¹ S. Rep. 94-473, 72; H.R. Rep. 94-1476, 65.

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 performance¹⁸³ 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

¹⁸² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

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.”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.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.¹⁸⁸ While the district court did not find that the transmission constituted a public performance under the Public Place clause,¹⁸⁹ the court concluded that On Command’s system did publicly perform the defendants’ movies under the Transmit Clause.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.”¹⁹¹ Finding support in the

¹⁸⁶ S. Rep. 94-473, 71–72 (1975); H.R. Rep. 94-1476, 64–65 (1976).

¹⁸⁷ *On Command Video Corp. v. Columbia Picture Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991).

¹⁸⁸ *Id.* at 788.

¹⁸⁹ *Id.* at 789.

¹⁹⁰ *Id.* at 790.

¹⁹¹ *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.*

¹⁹³ *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 11 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

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.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.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."¹⁹⁹

The next year, in *Aveco*, the U.S. District Court for the Middle District of Pennsylvania dealt with a similar business as that in *Redd Horne*.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.²⁰¹ The case was not very factually distinguishable from *Redd Horne*: both were public places with rental services for both the videos and viewing rooms.²⁰² Thus, the court upheld *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

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

¹⁹⁸ *Id.* at 159.

¹⁹⁹ *Id.*

²⁰⁰ *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 612 F. Supp. 315 (M.D. Pa. 1985), *aff'd* 800 F.2d 59 (3d Cir. 1986).

²⁰¹ *Id.* at 316.

²⁰² *Id.*

cassettes are therefore publicly performed.... By enabling its customers to perform the cassettes, [Aveco] infringe[s] the Plaintiffs' exclusive [public performance] right.”²⁰³

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.”²⁰⁴ 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.²⁰⁵ 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.”²⁰⁶ 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).²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ 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.²¹¹

²⁰⁷ *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 609 (S.D.N.Y. 2007), *rev’d*, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

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.”²¹⁹ 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.”²²⁰ 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.²²¹ The district court found support for this interpretation in both the legislative history behind the Transmit Clause and case law, citing *On Command* and *Redd Horne* as authoritative cases.²²² 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.’”²²³ 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.²²⁴

²¹⁹ *Id.* at 622–23.

²²⁰ *Id.* (quoting Copyright Act of 1976, 17 U.S.C. § 101 (2012)).

²²¹ *Id.* at 623.

²²² *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)).

²²³ *Id.* (citing *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991)).

²²⁴ *Id.* at 624.

Cablevision appealed the district court's decision to the U.S. Court of Appeals for the Second Circuit.²²⁵ 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.²²⁶ 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.²²⁷ Additionally, the copy created through the recording of a work to the RS-DVR did not expose Cablevision to direct liability.²²⁸ 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."²²⁹

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.²³⁰ First, the circuit court looked at the statutory language of the Transmit Clause:

²²⁵ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009) (*Cablevision*).

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.²³¹

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*.²³² 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.”²³³ 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.²³⁴

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.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.”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,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.”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

²³⁵ *Cable News Network, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

²³⁶ *Cablevision*, 536 F.3d at 139.

²³⁷ *Cable News Network*, 557 U.S. 946.

²³⁸ Copyright Act of 1976, 17 U.S.C. § 101 (2012).

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).

²⁴⁰ Daniel Brenner, “*Gently Down the Stream*”: *When Is an Online Performance Public Under Copyright?*, 28 BERKELEY TECH. L.J. 1167, 1184 (Fall, 2013).

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.”²⁴¹ If the statute had intended the performance created by the act of transmission as the infringing action, the results would be absurd.²⁴² 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

²⁴¹ Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, 26 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 08-192, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305270.

²⁴² “Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*.” *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012).

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.

²⁴⁵ Copyright Act of 1976, 17 U.S.C. § 101 (2012).

different times.”²⁴⁶ As Ginsburg concludes, “the court’s interpretation thus reads non simultaneous receipt out of the statute.”²⁴⁷

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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ 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).

²⁴⁷ Ginsburg, *supra* note 241, at 26.

²⁴⁸ Marc Miller, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 54 N.Y. L. SCH. L. REV. 585, 588 (2009–2010).

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]henver 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.”).

²⁵⁰ S. Rep. 94-473, 71 (1975); H.R. Rep. 94-1476, 64 (1976).

consideration encompassed in the broad language of the statute.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 *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.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 *Aereo* decision puts it succinctly:

[T]he *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.²⁵³

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

²⁵¹ “If Congress had intended the definition to turn on whether a unique copy was used, it knew how to say so.” *WNET, Thirteen*, 722 F.3d at 509 (reh’g en banc denied) (Chin, J., dissenting).

²⁵² See Jeffrey Malkan, *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.’”).

²⁵³ *Cnty. Television of Utah, LLC v. Aereo, Inc.*, ___ F. Supp. 2d ___, 2014 U.S. Dist. LEXIS 21434, *15–16 (D. Utah 2014).

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.”²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ 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.”).

²⁵⁶ See *On Command Video Corp. v. Columbia Picture Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991); *Columbia Pictures Indus. v. Redd Horne*, 749 F.2d 154 (3d Cir. 1984); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 612 F. Supp. 315 (M.D. Pa. 1985), *aff’d* 800 F.2d 59 (3d Cir. 1986).

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

²⁵⁷ See Miller, *supra* note 248, at 593 (“It is puzzling that the *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

²⁵⁸ WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013), *cert. granted*, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S.Ct. 896 (2014).

²⁵⁹ *Id.* at 695.

²⁶⁰ Brief for Cablevision Systems Corporation as Amici Curiae in Support of Reversal, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (No. 12-2786) [hereinafter *Cablevision Amicus Brief*].

transmission to its cable subscribers.²⁶¹ The law required Cablevision, as a cable company, to pay licensing and retransmission consent fees for the right to retransmit copyrighted works to subscribers.²⁶² 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.²⁶³ While the issue in *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 *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 *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

²⁶¹ *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.*, consolidated in *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (No. 12-2786) [hereinafter *Paramount Amicus Brief*] (“Aereo’s and Cablevision’s services are *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.”).

²⁶² *Aereo*, 712 F.3d at 697 (Chin, J., dissenting).

²⁶³ Miller, *supra* note 248, at 588.

complies with the Second Circuit’s decision in *Cablevision*.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.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.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,

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.”).

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).

²⁶⁶ See *supra* pp.9–11; *ABC*, 874 F. Supp. 2d at 380–81.

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.’”²⁶⁷

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,²⁶⁸ 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.

²⁶⁹ S. Rep. 94-473, 71 (1975); H.R. Rep. 94-1476, 64 (1976) (emphasis added).

²⁷⁰ *Fox Television Stations, Inc. v. FilmOn X LLC*, ___ F. Supp. 2d ___, 2013 U.S. Dist. LEXIS 126543, *48–49 (D.D.C. 2013).

²⁷¹ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

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.

of others.”²⁷⁸ 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.”²⁷⁹ 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.²⁸⁰ 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 beyond²⁸¹—statutory protections emerged to

²⁷⁸ *Id.*

²⁷⁹ Brief for Petitioners at 21–22, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (U.S. filed Feb. 24, 2014).

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.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.²⁸³ Following the 1976 revision to the Copyright Act, Congress statutorily imposed protections to broadcast content retransmitted and redistributed through cable systems.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.”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

²⁸² See Copyright Act of 1976, 17 U.S.C. § 111 (2012) (imposing secondary transmission fee requirements for cable retransmission of copyrighted content).

²⁸³ Communications Act of 1934, 47 U.S.C. § 151 (2012).

²⁸⁴ See 17 U.S.C. § 111; H.R. Rep. 94-1476 (1976); S. Rep. 94-473 (1975).

²⁸⁵ *Brief for Petitioners*, *supra* note 279, at 35 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997), *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), and *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968)).

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

²⁸⁶ 17 U.S.C. § 111.

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.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."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.'"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.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

²⁹¹ Brian Stelter, *Aereo as Bargaining Chip in Broadcast Fees Battle*, THE NEW YORK TIMES (July 21, 2013) http://www.nytimes.com/2013/07/22/business/media/with-prospect-of-cbs-blackout-time-warner-cable-to-suggest-aereo-as-alternative.html?_r=0; 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.").

²⁹² *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 398 (S.D.N.Y. 2012), *aff'd*, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *cert. granted*, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 896 (2014).

²⁹³ *Id.* at 398–99.

²⁹⁴ Fixmer, Sherman, and Erlichman, *supra* note 288.

avoid paying fees to broadcasters.²⁹⁵ Time Warner Cable is only one of many cable providers who have looked into developing systems similar to Aereo's.²⁹⁶ In fact, "Dish Network, a satellite provider, also reportedly has engaged in talks about acquiring Aereo."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 cable²⁹⁸ or the Internet.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.³⁰⁰ If broadcasters were to pull their signals, the seven percent of Americans who receive broadcast content exclusively

²⁹⁵ Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FIERCECABLE (Apr. 26, 2012) <http://www.fiercecable.com/story/britt-aereo-could-help-time-warner-cable-stop-paying-retransmission-consent/2012-04-26>.

²⁹⁶ Fixmer, Sherman, and Erlichman, *supra* note 288.

²⁹⁷ *Petition*, *supra* note 105, at 34.

²⁹⁸ WNET, *Thirteen v. Aereo, Inc.*, 722 F.3d 500, 502 (2d. Cir. 2013) (reh'g en banc denied) (Chin, J., dissenting).

²⁹⁹ Joan E. Solsman, *CBS Chief Says Network Could Go All-Internet if Aereo Wins*, CNET (March 11, 2014, 6:26 AM) http://news.cnet.com/8301-1023_3-57620164-93/cbs-chief-says-network-could-go-all-internet-if-aereo-wins/.

³⁰⁰ Jeff Blagdon, *CBS CEO the Latest to Threaten Dropping Broadcast TV in Response to Aereo*, THE VERGE (April 9, 2013, 10:52 PM) <http://www.theverge.com/2013/4/9/4207516/cbs-ceo-threatens-dropping-broadcast-tv-in-response-to-aereo>.

over the airwaves would be without television.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.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.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.”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

³⁰¹ Sean Patterson, *Cable Households Dropping, Over-The-Air Households Down to 7%*, WEBPRONews (July 30, 2013) <http://www.webpronews.com/cable-households-dropping-over-the-air-households-down-to-7-2013-07>.

³⁰² *Id.*

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.

³⁰⁴ *Brief for Petitioners*, *supra* note 279, at 41.

programming would no longer be restricted in what you can and cannot say on broadcast TV.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,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

³⁰⁵ See Charles Warner, *If Aereo Wins, Here Come the Seven Dirty Words*, FORBES (Jan. 16, 2014, 2:59 PM) <http://www.forbes.com/sites/charleswarner/2014/01/16/if-aereo-wins-here-come-the-seven-dirty-words-2/>.

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,³⁰⁷ 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.”³⁰⁸

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.³⁰⁹ 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....”).

³⁰⁸ Brief for Respondents at 49, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 13-461 (U.S. filed Mar. 26, 2014).

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.”³¹⁰ 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.³¹¹ 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.³¹² With regard to television content, broadcasters have licensing agreements with over-the-top platforms such as Netflix, Amazon Prime, Hulu, and Watch ABC.³¹³ 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 be 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*,³¹⁵ 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.

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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.