

AEREO, THE PUBLIC PERFORMANCE RIGHT, AND THE FUTURE OF BROADCASTING

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ABSTRACT

Kevin W. Delaney: Aereo, the Public Performance Right, and the Future of Broadcasting
(Under the Direction of Cathy Packer)

In March of 2012, a company named Aereo began offering a service that provided consumers with an inexpensive way to watch broadcast television programming.

Although many consumers embraced Aereo's service, the nation's broadcasters saw Aereo as a threat to their revenue stream. Seeking to put Aereo out of business, the broadcasters filed a copyright infringement suit against Aereo, claiming that Aereo violated their exclusive right to perform copyrighted works publicly. The broadcaster's case eventually made its way to the Supreme Court. The Court, in issuing one of the most covered and debated intellectual property law cases to date, ruled that Aereo violated copyright law. This thesis explains and evaluates the Court's decision and assesses the impact of the decision on the future of copyright law and broadcasting.

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“Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.”

—Justice Joseph Story, *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)

CHAPTER I: AN INTRODUCTION TO AEREO

At the National Association of Broadcasters’ annual convention in April of 2013, Chase Carey, the COO of 21st Century Fox, threatened to turn the Fox Network into a pay-television channel.¹ Carey’s comment surprised many. It’s hard to imagine the network that forever changed television with hits like *The Simpsons*, *The X-Files*, *Family Guy*, and *American Idol*, and made billions doing so, would cease to exist as one of America’s broadcast networks. Carey, nevertheless, said the step might be necessary to protect 21st Century Fox’s “product and revenue stream.”²

What would cause Carey to consider such a monumental shift? The answer: Aereo—a company that retransmitted, without a license, broadcast content over the Internet to paying subscribers.

Although many were quick to decry Carey’s comment as saber rattling,³ the remark displays the fear many in the television industry had of Aereo. Aereo, after all,

¹ David S. Cohen, *News Corp. Threatens to Make Fox Cable-Only Amid Aereo Dispute*, VARIETY, Apr. 8, 2013, <http://variety.com/2013/digital/news/chase-carey-threatens-to-yank-fox-from-broadcast-tv-over-aereo-1200334235/>.

² *Id.*

³ The Fox Network provides much-needed programming to the stations owned by and affiliated with 21st Century Fox. In the United States, 21st Century Fox owns 28 broadcast stations and has 187 affiliated

stood to hinder the ability of the television networks and television broadcasters to earn revenue from retransmission consent agreements, agreements in which cable and satellite providers compensate broadcasters for the right to retransmit their signals.

Retransmission consent agreements provide the television industry with an important source of income, and a loss of revenue from them would unquestionably alter the television landscape.

Aereo's low subscription costs added to fears. Aereo's basic service, which provided subscribers with access to the broadcast networks and 20 hours of DVR space, cost just \$8 per month. The cost of the average monthly cable TV bill, in contrast, will soon hit \$123.⁴

Not surprisingly, a group of television producers, marketers, distributors, and broadcasters sued to stop Aereo—claiming the company's conduct violated copyright law.⁵ The broadcasters' legal action ultimately went to the Supreme Court and, in the process, became one of the most important copyright cases in recent memory.

I. How Aereo Worked

Streaming content created by others over the Internet without a license typically constitutes copyright infringement.⁶ Yet, Aereo contended that it designed a system,

broadcast stations. Twenty-First Century Fox, Inc., Annual Report (Form 10-K), at 8, 10 (Aug. 19, 2013). Because these broadcast stations generate billions in revenue for 21st Century Fox, *see e.g., id.* at 48, it's unlikely the company would deprive them of programming by turning the Fox Network into a pay television channel.

⁴ Donna Rosato, *How to Break Up with Your Cable Company*, TIME, July 15, 2014, <http://time.com/money/2987833/comcast-cancel-ryan-block-time-warner-att-directv-cable-bill-save/>.

⁵ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014). Throughout this paper, the plaintiffs will be collectively referred to as "broadcasters."

⁶ *See Warner Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (holding defendant violated copyright law by streaming content from DVD players over the Internet to paying

which employed “servers, transcoders, and thousands of dime-sized antennas,” that adhered to copyright law.⁷ Specifically, Aereo asserted that its system complied with the law as dictated by the United States Court of Appeals for the Second Circuit in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,⁸ a case commonly referred to as *Cablevision*.⁹

From the subscribers’ perspective, Aereo’s system was simple to operate. Subscribers logged in to Aereo using an Internet-enabled television, computer, or mobile device.¹⁰ Once logged in, subscribers were shown a programming guide that displayed the local broadcast content currently airing and the content that would air in the future.¹¹ For programming currently airing, subscribers could select “Watch” or “Record.”¹² Selecting “Watch” allowed subscribers to view programming “nearly live,” meaning Aereo would stream the selected program with a six-to-seven second delay to enable pausing and rewinding.¹³ For content airing in the future, subscribers could only select

subscribers); *see also* WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d Cir. 2012) (enjoining defendant from streaming broadcast television content over the Internet to paying subscribers).

⁷ Am. Broad. Cos., Inc., 134 S. Ct. at 2503 (2014).

⁸ 536 F.3d 121 (2d Cir. 2008).

⁹ *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 694 (2d Cir. 2013) (writing that Aereo designed a system “based on *Cablevision*’s holding”); *see also* Cmty. Television of Utah, LLC v. Aereo, Inc., No. 2:13CV910DAK, 2014 WL 642828 at *5 (D. Utah Feb. 19, 2014) (“Aereo’s response to Plaintiffs’ claims of copyright infringement is that it designed its system specifically to avoid the application of the Transmit Clause and in accordance with the Second Circuit’s decision in *Cartoon Network LP v. CSC Holdings, Inc.*”).

¹⁰ Am. Broad. Cos., 134 S. Ct. at 2503; WNET, Thirteen, 712 F.3d at 681.

¹¹ *Id.*

¹² WNET, Thirteen, 712 F.3d at 681.

¹³ *Id.* One complaint about Aereo’s service was that, unlike with traditional broadcast television, when one program finished another did not automatically begin. After a program concluded, Aereo’s system returned subscribers to the programming guide where, if desired, he or she could select to watch or record additional programs. David Talbot, *Aereo’s Achilles’ Heel: Delivering Real-Time TV*, MIT TECHNOLOGY REVIEW, Aug. 16, 2013, <http://www.technologyreview.com/view/518411/aereos-achilles-heel-delivering-real-time-tv/>.

“Record.”

From Aereo’s perspective, the content-delivery process was far more complex. Although highly technical, this system can be boiled down to four steps. First, when a subscriber selected to “Watch” or “Record” a program, one of Aereo’s dime-sized antennas tuned to the frequency of the program’s over-the-air broadcast.¹⁴ Second, as the antenna received the program’s signals, one of Aereo’s transcoders translated those signals into data capable of being streamed over the Internet.¹⁵ Third, a unique copy of the data that composed the program was then saved in the subscriber’s personal directory on one of Aereo’s servers.¹⁶ Finally, if a subscriber selected “Watch,” Aereo streamed the unique copy of the program to the subscriber six or seven seconds after the program began airing.¹⁷ If a subscriber chose “Record,” Aereo streamed the unique copy to the subscriber at his or her request.¹⁸

Three aspects of Aereo’s system should be stressed. First, Aereo’s dime-sized antennas were dynamic, meaning that no two users shared an antenna at a given time.¹⁹ Second, as noted, Aereo made unique copies of programs, meaning that no two subscribers shared copies of programs.²⁰ And third, the transmissions Aereo sent to

¹⁴ Am. Broad. Cos., 134 S. Ct. at 2503; WNET, Thirteen, 712 F.3d at 682.

¹⁵ Am. Broad. Cos., 134 S. Ct. at 2503.

¹⁶ *Id.*; WNET, Thirteen, 712 F.3d at 683.

¹⁷ Am. Broad. Cos., 134 S. Ct. at 2503; WNET, Thirteen, 712 F.3d at 682.

¹⁸ WNET, Thirteen, 712 F.3d at 682.

¹⁹ Am. Broad. Cos., 134 S. Ct. at 2503; WNET, Thirteen, 712 F.3d at 683.

²⁰ *Id.*

subscribers were generated from each subscriber's unique copy, meaning that no two subscribers ever received the same transmission.²¹

II. An Introduction to the Litigation Surrounding Aereo

In *WNET, Thirteen v. Aereo, Inc.* (“*Aereo II*”),²² the broadcasters challenged Aereo's system, claiming Aereo violated their exclusive right under the Copyright Act to perform copyrighted works publicly.²³ Setting up the Supreme Court showdown, the Second Circuit held the broadcasters failed to show a likelihood of success on the merits and refused to grant their request for a preliminary injunction.

Looking for a reprieve from the Second Circuit's ruling, the broadcasters appealed to the Supreme Court. In their petition for writ of certiorari, the broadcasters asked the Supreme Court to determine “whether a company ‘publicly performs’ a copyrighted television program when it retransmits a [nearly live] broadcast of that program to thousands of paid subscribers over the Internet.”²⁴ The broadcasters limited their petition to this inquiry even though they believed Aereo's transmission of recorded programs also violated the public performance right and that Aereo's system infringed

²¹ *Id.*

²² 712 F.3d 676 (2d Cir. 2013).

²³ The right to perform works publicly is one of the six exclusive rights granted to copyright holders under the Copyright Act of 1976 (“Copyright Act”). Precisely, the exclusive rights granted to copyright holders are (1) the right “to reproduce copyrighted works in copies or phonorecords”; (2) the right “to prepare derivative works based upon the copyrighted work”; (3) the right “to distribute copies or phonorecords of the copyright work to the public”; (4) the right “to perform the copyrighted work publicly”; (5) the right “to display the copyrighted work publicly”; and (6) the right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” Copyright Act of 1976, 17 U.S.C. § 106 (2012).

²⁴ Petition for Writ of Certiorari at 1, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461).

“other exclusive rights granted by the Copyright Act, such as the reproduction right.”²⁵

In granting the broadcasters’ Petition, the Supreme Court thus agreed to address the narrow issue of whether Aereo infringed the public performance right “by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air.”²⁶

The broadcasters cited as a justification for their legal action a portion of the Copyright Act known as the Transmit Clause,²⁷ which they said made clear that Aereo violated the public performance right.²⁸ The Transmit Clause is one of two sections included within the Copyright Act that define what it means to perform a work publicly.²⁹ For its part, Aereo contended that, because only a single subscriber could receive one of its transmissions, it merely transmitted non-actionable private performances.³⁰ Aereo also put forth a policy argument, asserting that a ruling against its cause would endanger the future of the cloud computing industry.³¹

²⁵ WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 686 n.9 (2d Cir. 2013); *see also* Am. Broad. Cos., 134 S. Ct. at 2511-12 (Scalia, J., dissenting) (“The Networks sued Aereo for several forms of copyright infringement, but we are here concerned with a single claim: that Aereo violates the Networks’ ‘exclusive righ[t]’ to ‘perform’ their programs ‘publicly.’”) (internal citations omitted).

²⁶ Am. Broad. Cos., 134 S. Ct. at 2503.

²⁷ 17 U.S.C. § 101.

²⁸ *See, e.g.*, Brief for Petitioners at 23-38, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

²⁹ 17 U.S.C. § 101.

³⁰ *See, e.g.*, Brief for Respondent at 17-22, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

³¹ *Id.* at 2.

In *American Broadcasting Cos. v. Aereo, Inc.* (“*Aereo III*”),³² the Court issued a highly functionalistic six-to-three decision in the broadcasters’ favor.³³ In holding that Aereo performed the broadcasters’ works publicly and thus committed copyright infringement, the majority opinion drew parallels between Aereo’s system and the cable systems Congress, in writing the Copyright Act, “sought to bring within the scope” of copyright law.³⁴ Although the nation’s high court purported to issue a “limited holding,” reverberations from the case will be felt for years to come.³⁵

The primary purpose of this thesis is twofold: (1) to explain and critically examine the Supreme Court’s decision in *Aereo III* and (2) to evaluate how the Court’s decision stands to impact the future of broadcasting. A secondary, minor, purpose of this thesis is to analyze how the Court’s decision impacts the cloud-computing industry. This thesis takes on added importance considering that *Aereo III* has not been extensively discussed in academic journals. While a few scholars have indirectly discussed the Supreme Court’s holding in *Aereo III*,³⁶ none have significantly examined the case.

³² 134 S. Ct. 2498 (2014).

³³ Judges are often defined as formalists or functionalists. Formalists are known for their strict adherence to the wording of constitutions, statutes, and precedent. Accordingly, they advocate for the use of bright-line rules that provide future courts with clear guidance. Functionalists take a far more flexible approach, viewing legislative texts and court decisions as breathing documents capable of adapting to changing times. Not surprisingly, functionalists advocate for the use of balancing tests that provide courts with broad standards. See generally *Copyright Act of 1976—Transmit Clause—ABC, Inc. v. Aereo, Inc.*, 128 HARV. L. REV. 371 (2014); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21 (1998); Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

³⁴ *Am. Broad. Cos.*, 134 S. Ct. at 2511.

³⁵ *Id.* at 2510.

³⁶ See Dan L. Burk, *Inventing Around Copyright*, 109 NW. U.L. REV. ONLINE 64 (2014); Kimberlianne Podlas, *Applying Aereo to the Internet: Understanding Volitional Links to Leaked Films, Television Episodes, and Scripts As Copyright Infringement*, 18 J. INTERNET L. 1 (2014).

Additionally, no scholar has significantly discussed Aereo's impact on broadcasters' ability to earn revenue from retransmission consent agreements.

Chase Carey's comments, which opened this work, demonstrate this thesis's importance. For now, the broadcast industry as we know it will remain fundamentally unchanged. But, had the Court ruled otherwise, the future of broadcasting may have hung in the balance.

III. Research Questions

This thesis will address the following research questions:

- (1) What is the basic structure of the broadcast television and cable industries in the United States? What business model do broadcasters use to generate revenue? How did Aereo stand to impact that business model? This research question is answered in Chapter II: How Aereo Stood to Disrupt the Broadcast Business Model.
- (2) In *Aereo III*, the Supreme Court addressed whether Aereo performed the broadcasters' works. How did the majority and dissent frame their inquiries into this question? How did the majority and dissent decide whether Aereo performed the broadcasters' works? How will lower courts interpret the majority's resolution of this question? How should the Court have decided whether Aereo performed? This research question is answered in Chapter III: Did Aereo Perform the Broadcasters' Works and Chapter VI: Conclusion.
- (3) Also relevant to the Supreme Court's analysis of Aereo's system was the question of whether Aereo performed works publicly. How did the majority frame this question? How did it decide whether Aereo performed the broadcasters' works publicly? How will lower courts interpret the majority's resolution of this question? How should the

Court have decided whether Aereo performed works publicly? This research question is answered in Chapter IV: Did Aereo Perform the Broadcasters' Works Publicly and Chapter VI: Conclusion.

(4) What impact, if any, will the Supreme Court's ruling in *Aereo III* have on the cloud computing industry? This research question is answered in Chapter V: The Impact on the Cloud.

IV. Methodology

To identify the cases, statutes, and legislative history used in this thesis, the author referenced numerous secondary sources. The author began by reading applicable chapters in three influential legal treatises. Those treatises were:

- MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT (2014). In this work, the author read § 8.14: "The Performance Right" and § 12.04: "Secondary Liability of Related Defendants."
- WILLIAM F. PATRY, PATRY ON COPYRIGHT (2014). In this work, the author read Chapter Fourteen: "The Right to Publicly Perform the Work" and Chapter 21: "Parties." Despite its name, chapter 21 contains information on secondary liability and when works are performed.
- HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW (2nd ed. 1999). In this work, the author read Chapter Thirteen: "Regulation of Cable Television" and Chapter Fourteen: "Regulation of Broadcasting."

After consulting the legal treatises, the author read relevant legal journal articles written by leaders within the industry. To locate the journal articles, the author performed various keyword searches in WestlawNext. Words included in the keyword

searches were “Aereo,” “Cablevision,” “retransmission consent agreements,” “public performance right,” “secondary copyright liability,” and “volitional-conduct requirement.” The author found especially helpful the following journal articles:

- Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363 (2006).
- Carrie Bodner, *Master Copies, Unique Copies and Volitional Conduct: Cartoon Network's Implications for the Liability of Cyber Lockers*, 36 COLUM. J.L. & ARTS 497 (2013).
- Jane C. Ginsburg, *Recent Developments in US Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?* 26 (Columbia Pub. Law & Legal Theory Working Papers 2008).
- Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. S 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 102 (1996).
- *Copyright Act of 1976—Transmit Clause—ABC, Inc. v. Aereo, Inc.*, 128 HARV. L. REV. 371 (2014).
- Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505 (2010).³⁷

To locate the briefs referenced throughout this thesis, the author selected the hyperlink for *American Broadcasting Cos, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) in

³⁷ Before the Supreme Court issued its decision in *Aereo III*, a number of student notes were published addressing the legal implications of Aereo’s system. As the Supreme Court’s decision in *Aereo III* serves as this thesis’s primary focus, these notes were not cited due to lack of relevance.

WestlawNext. The author then selected the filings tab, which revealed all briefs filed in the case.

V. Limitations

The reality that the litigation surrounding Aereo remains ongoing serves as this thesis's primary limitation. Although the Supreme Court has issued its decision, the parties continue to haggle with one another in the lower courts and before administrative agencies. As a result, some factual details regarding Aereo may change after the date of this thesis's publication. To avoid this limitation, the primary focus of this thesis is placed on the Supreme Court's decision in *Aereo III* and how that decision impacts the future of broadcasting.

CHAPTER II: HOW AEREO STOOD TO DISRUPT THE BROADCAST BUSINESS MODEL

Regularly generating profit margins of 20 to 40 percent, newspapers in the United States once served as a beacon of economic prosperity.³⁸ Things changed, however, when craigslist.com arrived on the scene. Newspapers, which historically generated 40 percent of their total revenue from classified ads, lost billions as consumers chose to place ads on craigslist instead of in their local newspapers.³⁹ As of this writing, the newspaper industry continues to struggle in its effort to regain past economic prosperity.⁴⁰

As Aereo arrived on the scene, the memory of craigslist's impact remained fresh in the minds of many broadcasters. Would Aereo disrupt the broadcast industry as craigslist disrupted the newspaper industry? To answer this question, it is necessary to understand the basics of the broadcasting and cable industries and the business model broadcasters use to generate revenue.

³⁸ PHILIP MEYER, *THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE* 39 (2nd 2009).

³⁹ Robert Seamans & Feng Zhu, *Responses to Entry in Multi-Sided Markets: The Impact of Craigslist on Local Newspapers*, 60 MGMT. SCI. 476, 490 (2014). Seamans and Zhu found that, for newspapers, craigslist's entry into a market "leads to a decrease of 20.7% in classified-ad rates, an increase of 3.3% in subscription prices, a decrease of 4.4% in circulation, an increase of 16.5% in differentiation, and a decrease of 3.1% in display-ad rates." *Id.* Additionally, the authors reported that, from 2000 to 2007, classified-ad buyers saved \$5 billion in revenue by advertising on craigslist instead of in newspapers. *Id.*

⁴⁰ Some experts believe newspapers should abandon their effort to regain 20 to 40 percent profit margins and adopt business models that ensure profit margins of six to seven percent. *See Meyer, supra* note 38, at 43.

I. The Basics of Broadcasting

A. The Development of the Broadcast Industry

In order to meet a demand for national sources of programming, the first commercial radio networks, NBC and CBS, were formed in the mid-1920s.⁴¹ The networks were thus created to serve as content creators—capable of generating programs for local stations across the nation to broadcast. In some instances, the networks owned and operated the local stations to which they provided programming.⁴² In others, independent third parties owned the stations, and the stations were merely affiliated with a network.⁴³

When television burst onto the landscape, the networks were ready to exploit the new medium. Like in the past, the networks continued to serve as content creators. In many instances, they simply transitioned their popular radio programs, such as *The Jack Benny Show*, *Guiding Light*, and *Amos 'n' Andy*, to television.⁴⁴ In others, existing radio formats, such as the situation comedy, were transitioned to television.

Today, the arrangement between local broadcasters and the networks remains largely unchanged. Local broadcast stations continue to receive a portion of their content

⁴¹ Dominick et al. cited three reasons for the networks' development, all of which relate to the desire for national sources of programming. See DOMINICK ET AL., BROADCASTING, CABLE, THE INTERNET, AND BEYOND 11 (6th ed. 2008). First, the networks developed because radio executives realized that it "was less expensive for one station to produce a program and to have it broadcast simultaneously on three or four stations than it was for each station to produce its own program." *Id.* Second, audiences began to demand higher quality programming: the type of programming that could only be generated in large cities and that could attract big-name talent. *Id.* Finally, advertisers wanted to reach larger audiences and believed they could by attaching their products to national broadcasts. *Id.*

⁴² MICHELE HILMES, NETWORK NATIONS: A TRANSNATIONAL HISTORY OF BRITISH AND AMERICAN BROADCASTING 68 (2012).

⁴³ *Id.*

⁴⁴ DOMINICK ET AL., *supra* note 41, at 16.

from the network they are either owned by or affiliated with.⁴⁵ Although the networks no longer command the viewership they once did,⁴⁶ large numbers of Americans continue to watch network programming. The four major television networks—ABC, CBS, FOX, and NBC—attract roughly 45 percent of the viewing audience at a given moment and regularly produce the 10 highest rated shows in a given week.⁴⁷ Considering their position in the marketplace, it is not surprising that the four major networks served as joint plaintiffs in the suit against Aereo.

B. The Public Interest Standard

In the early days of radio, interference became the bane of broadcasters' existence. Because the electromagnetic spectrum (which broadcasters use to transmit their signals) is a finite resource,⁴⁸ the number of broadcasters quickly exceeded the number of available frequencies. Although the Radio Act of 1912 required stations to have a license to operate, no governmental agency had the authority to assign frequencies.⁴⁹ As a result, multiple broadcasters would broadcast on the same frequency, causing listeners to receive signals that were routinely interrupted.⁵⁰

⁴⁵ *Id.* at 107.

⁴⁶ See JAMES L. BAUGHMAN, *THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILMMAKING, AND BROADCASTING IN AMERICA SINCE 1941* 143 (3rd ed. 2006) (describing how during the late 1970s—in spite of new competition from “individual stations, public broadcasting, and cable systems”—“90 percent of those homes watching television viewed a network program.”).

⁴⁷ DOMINICK et al., *supra* note 41, at 105; see e.g., NIELSEN: TOP TENS & TRENDS, <http://www.nielsen.com/us/en/top10s.html> (last visited Aug. 29, 2014).

⁴⁸ See *Nat'l Broad. Co. v. FCC*, 319 U.S. 190, 213 (1943) (“[T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.”).

⁴⁹ EDWARD BLISS, JR., *NOW THE NEWS: THE STORY OF BROADCAST JOURNALISM* 10 (1991).

⁵⁰ *Id.*

When the broadcasters called on the government to solve the interference problem, Congress passed the Federal Radio Act of 1927 (“Radio Act”).⁵¹ The Radio Act stipulated that the public owned the electromagnetic spectrum and that private entities could be licensed to use, but could never own, a broadcast frequency.⁵² The Radio Act also created the Federal Radio Commission (“FRC”), which was tasked with “assign[ing] bands of frequencies . . . for each individual station and determin[ing] the power which each station shall use and the time during which it may operate.”⁵³ The Radio Act specified, however, that the FRC could grant a license only if doing so would be in the “public convenience, interest, or necessity”⁵⁴

Seeking to centralize the regulation of the telecommunications industry in a single federal agency,⁵⁵ Congress repealed the Radio Act and, in its place, passed the Communications Act of 1934 (“Communications Act”).⁵⁶ The Communications Act, which remains valid law despite various amendments, vested the power to regulate the telecommunications industry in the newly formed Federal Communications Commission (“FCC”).⁵⁷ Title III of the Communications Act, which governs broadcasting, left in place the key provisions of the Radio Act. As with the FRC, the FCC has the power to

⁵¹ 47 U.S.C. §§ 81-119 (1925-1926) (repealed 1934).

⁵² *Id.* § 81.

⁵³ *Id.* § 84(c).

⁵⁴ *Id.* § 89; *see also id.* § 91.

⁵⁵ G. Hamilton Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate*, 1 DUKE L.J. 1, 22 (1978).

⁵⁶ *See* 47 U.S.C. § 151 et seq. (2006); Bliss, *supra* note 49, at 11.

⁵⁷ 47 U.S.C. § 151 (1940).

assign frequencies but can grant licenses only if the “public convenience, interest, or necessity will be served thereby”⁵⁸

The Communications Act, like the Radio Act, did not define the phrase “public convenience, interest, or necessity.” The phrase’s definition, nevertheless, has come to stand for the idea that broadcasters must serve as trustees of the electromagnetic spectrum.⁵⁹ In other words, because the electromagnetic spectrum is a limited resource owned by the public, those fortunate enough to receive licenses to broadcast must act in ways that benefit the public.

As part of their public interest requirements, broadcasters must transmit their signals over-the-air to the viewing public and cannot charge the viewing public for receiving those signals.⁶⁰ Through this requirement, Congress has sought to ensure that citizens receive diverse sources of local programming,⁶¹ a goal the Supreme Court has referred to as a “governmental purpose of the highest order, for it promotes values central to the First Amendment.”⁶²

⁵⁸ See *Id.* §307(a).

⁵⁹ The Supreme Court wrote in *National Broadcasting Co. v. FCC*, 319 U.S. 190, 216 (1943) (quoting Communications Act of 1934, 47 U.S.C. § 303(g)), “The ‘public interest’ to be served under the Communications Act is . . . the interest of the listening public in ‘the larger and more effective use of radio.’” The Court added in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969): “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” See CONSTANCE LEDOUX BOOK, DIGITAL TELEVISION: DTV AND THE CONSUMER 69 (2004) (“The public trustee model maintains that the airwaves are a limited resource belonging to the public, and only those most capable of serving the public interest are entrusted to use them.”).

⁶⁰ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“In the Communications Act of 1934, Congress created a system of free broadcast service”).

⁶¹ See S. REP. NO. 102-92, p. 58 (1991); H.R. REP. NO. 102-628, p. 63 (1992).

⁶² *Turner Broad. Sys., Inc.*, 512 U.S. at 663.

II. The Basics of Cable

A. The Development of the Cable Industry

In the early 1950s cable television systems, back then referred to as community antenna TV (“CATV”), began to sprout up across the country—providing Americans with an alternative delivery system through which to receive television programming. Cable television derived from necessity. Many Americans lived in locations too remote to receive broadcast signals. To get around this limitation, mom-and-pop operations began placing antennas in locations (usually on hilltops) capable of receiving broadcast signals.⁶³ Once received, signals were amplified and then, using coaxial cables strung to utility poles, transmitted into subscribers’ homes.⁶⁴

Because cable systems charged subscribers installation and subscription fees,⁶⁵ what started as a novel idea quickly transformed into a business. By the mid-1960s the cable industry had exploded, and broadcasters began viewing the nascent industry as a threat.⁶⁶ Although broadcasters appreciated the greater audience reach cable television provided,⁶⁷ cable systems did not pay broadcasters for the right to distribute their signals. Moreover, in addition to providing subscribers with access to signals from local

⁶³ See SUSAN CRAWFORD, CAPTIVE AUDIENCE 35 (2013); see also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968).

⁶⁴ *Fortnightly*, 392 U.S. at 392 (1968); *United States v. Sw. Cable Co.*, 392 U.S. 157, 162 (1968).

⁶⁵ *Sw. Cable Co.*, 392 U.S. at 162.

⁶⁶ CRAWFORD, *supra* note 63, at 35-36. The Supreme Court wrote in 1968, “It has been more recently estimated that ‘new [cable] systems are being founded at the rate of more than one per day, and . . . subscribers . . . signed on at the rate of 15,000 per month.’” *Sw. Cable Co.*, 392 U.S. at 162 (quoting Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366, 368 (1965-1966)).

⁶⁷ See BOOK, *supra* note 59, 148.

broadcast stations, cable companies began transmitting signals from distant stations.⁶⁸ Then, in the 1970s, cable systems also began offering cable-only channels like HBO, Showtime, CNN, and ESPN. Thus, instead of serving as a way for those in hilly terrains to receive local broadcast signals, cable systems began offering enhancements, in the form of additional channels, to subscribers' viewing experiences.

B. Legal Challenges to CATV Systems

Faced with the explosive growth of cable, content creators used the court system to bring legal challenges. In *Fortnightly Corp. v. United Artists Television, Inc.*,⁶⁹ United Artists Television challenged a CATV's practice of distributing copyrighted content without a license. United Artists owned the copyrights in numerous films broadcast on channels the cable system, Fortnightly, retransmitted to its subscribers.⁷⁰ Although the local broadcast stations that initially aired United's works possessed licenses, Fortnightly did not possess a license authorizing it to retransmit the works.⁷¹

The question thus became whether Fortnightly infringed upon United Artist's exclusive right under the Copyright Act of 1909 to perform copyrighted works publicly.⁷² Siding with the defendant, the Supreme Court held in 1968 that no such infringement occurred based on its conclusion that CATV systems do not "perform" when retransmitting broadcast content to subscribers.⁷³

⁶⁸ *Sw. Cable Co.*, 392 U.S. at 163.

⁶⁹ 392 U.S. 390 (1968).

⁷⁰ *Id.* at 391-92.

⁷¹ *Id.* at 393.

⁷² *Id.* at 395.

⁷³ *Id.*

The Court started with the premise that broadcasters perform when they transmit content over-the-air and that viewers, by receiving those signals, do not perform.⁷⁴ The Court thus treated viewers as passive beneficiaries even though viewers provided the equipment (that is, the television set and antenna) to “convert electronic signals into audible sound and visible images.”⁷⁵ The Court then wrote that *Fortnightly* was more like a viewer than a broadcaster because, even though “a CATV system plays an ‘active’ role in making reception possible in a given area . . . so do ordinary television sets and antennas.”⁷⁶ It added:

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. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.⁷⁷

Consistent with its holding in *Fortnightly*, the Supreme Court in *Teleprompter Corp. v. Columbia Broadcasting System*⁷⁸ held in 1974 that a cable system does not perform when it imports broadcast signals from locales far more distant than the ones at issue in *Fortnightly*. It wrote, “[A] CATV system does not lose its status as a

⁷⁴ *Id.* at 398.

⁷⁵ *Id.*

⁷⁶ *Id.* at 399.

⁷⁷ *Id.* at 400.

⁷⁸ 415 U.S. 394 (1974).

nonbroadcaster, and thus a ‘non-performer’ for copyright purposes, when the signals it carries are from distant rather than local sources.”⁷⁹

C. The Statutory and Administrative Regulation of Cable

Under the Court’s holdings in *Fortnightly* and *Teleprompter*, cable systems could retransmit broadcast content without consent and escape copyright liability. Viewing this as a problem, Congress wrote the Copyright Act of 1976 to, in part, overrule the Court’s holdings in those cases⁸⁰ and bring cable systems within the scope of copyright law.⁸¹

Congress achieved this goal in three ways.⁸² First, in what according to the Copyright Act’s legislative history was an explicit rejection of the holdings in *Fortnightly* and *Teleprompter*, the Court changed what it means to “perform” a motion picture or television program.⁸³ Now, to “perform” a motion picture or television program means “to show its images in any sequence or to make the sounds accompanying it audible.”⁸⁴

As the Court correctly noted in *Aereo III*, “Under this new language, *both* the

⁷⁹ *Id.* at 409. In *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), the Supreme Court reaffirmed the rulings in *Fortnightly* and *Teleprompter*. In *Aiken*, the Court faced the question of whether the defendant infringed the plaintiffs’ right to perform works publicly for profit when he used a radio to receive broadcast signals and then amplified those signals to customers in his restaurant. *Id.* at 152-53. The Court sided with the defendant, writing that “this Court has in two recent decisions explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance, when the broadcaster himself is licensed to perform the copyrighted material that he broadcasts.” *Id.* at 160-61. Instrumental to the Court’s decision was its view of the theoretical justification of copyright law. In line with the utilitarian conception of copyright law, the Court wrote: “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” *Id.* at 156.

⁸⁰ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505 (2014).

⁸¹ *Id.* at 2506.

⁸² *Id.*

⁸³ *Id.* at 2505-06. The Copyright Act’s legislative history states that the Supreme Court’s “narrow construction of the word ‘perform’” under the Copyright Act of 1909 has been “completely overturned by the present bill and its broad definition of ‘perform’ in section 101.” H.R. REP. NO. 94-1476, at 86-87 (1976).

⁸⁴ Copyright Act of 1976, 17 U.S.C. § 101 (2012).

broadcaster *and* the viewer ‘perform,’ because they both show a television program’s images and make audible the program’s sounds.”⁸⁵

Second, Congress included the Transmit Clause in the Copyright Act. Under the Transmit Clause, cable systems (along with a host of other services) perform works *publicly* when they transmit those works to the public.⁸⁶ The Copyright Act’s legislative history, in fact, explicitly states that “a cable television system is performing when it retransmits . . . [a] broadcast to its subscribers”⁸⁷

Finally, Congress added § 111 to the Copyright Act, which established a compulsory licensing system that automatically permits cable systems to transmit the programs that comprise a broadcaster’s signal so long as the cable system pays the compulsory fee established by the statute.⁸⁸ In other words, if the compulsory license is complied with, a cable system can retransmit a copyrighted program without receiving the express permission of the individual or entity that holds the copyright in the program.⁸⁹

⁸⁵ Am. Broad. Cos., 134 S. Ct. at 2506 (emphasis in original) (citing H.R. REP. at 63).

⁸⁶ *Id.* at 2506; 17 U.S.C. § 101.

⁸⁷ H.R. REP., at 63.

⁸⁸ Am. Broad. Cos., 134 S. Ct. at 2506; 17 U.S.C. § 111.

Under the Copyright Act, a “cable system” is defined as

a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

⁸⁹ CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE, AND THE INTERNET § 7.20[1] (2014).

Subsequent to the Copyright Act, the FCC and Congress regularly took action to regulate (or, at times, deregulate) the growing cable industry.⁹⁰ These efforts culminated in the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”),⁹¹ which remains good law.

At the time of the Cable Act’s passage, Congress believed the future of free local broadcast television to be in jeopardy.⁹² Congress offered numerous reasons for this conclusion. First, Congress believed that cable systems, in order to generate more advertising revenue for their own content, possessed an economic incentive not to carry broadcasters’ signals.⁹³ Second, cable had drastically expanded from its humble beginnings. By the 1990s, cable had penetrated “over 60 percent of households with televisions” and, consequently, become “a dominant nationwide video medium.”⁹⁴ Third, at the time, nothing required cable systems to transmit broadcasters’ signals.⁹⁵

⁹⁰ See, e.g., FIRST REPORT AND ORDER, 38 F.C.C. 683 (1965); SECOND ORDER AND REPORT, 2 F.C.C. 2d 725 (1966); Cable Communications Policy Act of 1984, codified at 47 U.S.C. §§ 601-639 (2012).

⁹¹ Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C. (2006)).

⁹² 47 U.S.C. § 521(a)(16).

⁹³ *Id.* § 521(a)(15).

⁹⁴ *Id.* § 521(a)(3).

⁹⁵ *Id.* § 521(a)(16). On two previous occasions, the FCC created rules requiring cable systems to transmit local broadcasters’ signals. Thomas W. Hazlett, *Digitizing Must-Carry Under Turner Broadcasting v. FCC* (1997), 8 SUP. CT. ECON. REV., 141, 143 (2000). On both occasions, the U.S. District Court for the District of Columbia held the rules violated the First Amendment. In *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), for instance, the court deemed the FCC’s rules a content-neutral regulation but, *inter alia*, found the FCC could not show the rules promoted a substantial government interest. The court wrote, “After the passage of nearly two decades, and despite its demonstrated capacity to do so, the Commission has failed entirely to determine whether the evil the rules seek to correct ‘is a real or merely a fanciful threat.’” *Id.* (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977)). See also *Century Comm. Corp. v. FCC*, 835 F.2d (D.C. Cir. 1987).

Thus, in the Cable Act, Congress included a provision stating, “No cable system . . . shall retransmit the *signal* of a broadcasting station, or any part thereof” unless (1) the cable system receives the station’s “retransmission consent” or (2) the station enforces its rights under the Act’s must-carry rules.⁹⁶ In other words, the Cable Act created a scheme that cable systems must comply with before transmitting all or part of a broadcaster’s signal. This scheme differs from § 111 of the Copyright Act, which created a compulsory license for the individual programs that comprise broadcasters’ signals. As Charles Lubinsky wrote, “While rebroadcast of programs is governed by section 111 of the 1976 Copyright Act, retransmission of signals is governed by . . . [the Cable Act].”⁹⁷

⁹⁶ 47 U.S.C. § 325(b) (emphasis added).

Under the Cable Act, a cable system is defined as

A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

- (1) A facility that services only to retransmit the television signals of one or more television broadcast stations;
- (2) A facility that serves subscribers without using any public right-of-way;
- (3) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;
- (4) An open video system that complies with Section 653 of the Communications Act; or
- (5) Any facilities of any electric utility used solely for operating its electric utility systems.

47 C.F.R. § 76.5 (2014). Also included in the definition of a cable system is “any multichannel program video distributor.” As of this writing, a multichannel video program distributor is defined as “an entity such as . . . a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, or a video dialtone program service provider, who makes available for purchase, by subscribers or customers, multiple channels of video programming, whether or not a licensee.” *Id.* § 76.71.

⁹⁷ Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. S 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 102 (1996).

The Cable Act’s “must-carry” rules require cable systems to transmit the signals of local broadcasters that request carriage.⁹⁸ In other words, if a broadcaster enforces its rights under the must-carry rules, the applicable cable system(s) must transmit that broadcaster’s signals. By forcing cable systems to retransmit broadcasters’ signals, Congress enabled broadcasters to maintain advertising revenue in the face of the ever-expanding cable industry. Nevertheless, the rules come with a catch: broadcasters that invoke their rights under the must-carry rules are prohibited from receiving any form of compensation from cable systems.⁹⁹

If a broadcaster does not enforce its rights under the must-carry rules, as noted, cable systems must receive the broadcaster’s “retransmission consent” before retransmitting its signals. In exchange for a broadcaster’s retransmission consent, cable systems usually provide broadcasters with monetary compensation.¹⁰⁰ Thus, for broadcasters looking to increase revenue, entering into retransmission consent negotiations serves as an attractive alternative to the Cable Act’s must-carry rules. It

⁹⁸ Ferris & Lloyd, *supra* note 89, § 7.15[2][a]; *see also* 47 U.S.C. § 534; *see also* BOOK, *supra* note 59, at 151 (“The administrative basis for providing the must carry legislation was to ensure the viability of a free over-the-air broadcast system.”).

⁹⁹ 47 U.S.C. § 534(b)(10). The Cable Act’s must-carry rules were challenged in *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994). The Supreme Court found the rules burdened free speech because they “interfere[d] with cable operators’ editorial discretion by compelling them to offer carriage to . . . broadcast stations.” *Id.* at 643-64. However, because the rules did not target the content of cable systems’ speech and only “incidentally” burdened free expression, the Court held the must-carry rules were content neutral. *Id.* Accordingly, as a content-neutral restriction, the Court wrote the rules should be subject to intermediate scrutiny and not the more demanding strict scrutiny standard. *Id.* at 642. Thus, the rules “would be sustained under the First Amendment if . . . [they] advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). In *Turner II*, the Court held the rules met this burden because they advanced the important government interests of “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.” *Id.* at 189 (citing *Turner I*, 512 U.S. at 662).

¹⁰⁰ 47 U.S.C. § 325(b); *see also* CRAWFORD, *supra* note 63, at 133-34.

should be noted that, when negotiating for retransmission consent, broadcasters are required “to negotiate in good faith.”¹⁰¹ This means, among other things, that broadcasters cannot refuse to enter into a retransmission consent negotiation.¹⁰²

If an agreement over retransmission consent cannot be reached, the cable system is prohibited from retransmitting the broadcaster’s signals.¹⁰³ This scenario was seen in August of 2013 when Time Warner Cable temporarily failed to reach a retransmission consent agreement with CBS.¹⁰⁴ As a result of the impasse, Time Warner Cable subscribers were deprived of CBS programming in eight of the nation’s largest markets, including New York and Los Angeles, for a month.¹⁰⁵

Today, the Cable Act’s must-carry rules remain an attractive option for small broadcasters that want to ensure carriage but lack the bargaining power to enter into lucrative retransmission consent agreements with cable systems.¹⁰⁶ Broadcasters who select to pursue the retransmission consent option cannot then invoke their rights under the Cable Act’s must-carry rules if retransmission consent negotiations fail. After a broadcaster selects either must-carry or retransmission consent, it cannot pursue the

¹⁰¹ *Id.* § 325(b)(3)(C)(ii).

¹⁰² 47 C.F.R. § 76.65(b)(1) (2014).

¹⁰³ Note, *Tilling the Vast Wasteland: The Case for Reviving Localism in Public Interest Obligations for Cable Television*, 126 HARV. L. REV. 1034, 1041 (2013).

¹⁰⁴ Roger Yu, *CBS, Time Warner Cable reach agreement, end blackout*, USA TODAY, Sept. 3, 2012, <http://www.usatoday.com/story/money/business/2013/09/02/cbs-time-warner-cable-agreement/2755953/>.

¹⁰⁵ *Id.*

¹⁰⁶ See generally Kevin Goldberg, *Contemplating Life Without Compulsory Licenses: At Congress’s Direction, Copyright Office Opens Inquiry on Alternative on Compulsory Licenses*, COMMLAWBLOG, Mar. 13, 2011, <http://www.commlawblog.com/2011/03/articles/broadcast/contemplating-life-without-compulsory-licenses/print.html>.

alternate option for a three-year period.¹⁰⁷ Despite the danger of not receiving carriage, in an effort to increase revenue, more and more broadcasters are entering into retransmission consent negotiations with cable systems. According to the FCC's most recent data on the subject, only 37 percent of broadcasters rely on the Cable Act's must-carry rules while the rest pursue the retransmission consent option.¹⁰⁸

III. The Broadcasting Business Model

In the early days, radio and television manufacturers created broadcast content to bolster the sales of radio and television sets.¹⁰⁹ It did not take long, however, for broadcasters to develop ways to monetize the content they used to sell those sets. The original, and still most common, way broadcasters make money is through advertising. Recently, however, broadcasters have begun using retransmission consent agreements, a direct result of the Cable Act, to generate revenue. Today, broadcasters primarily generate money using a dual-revenue stream composed of (1) advertising and (2) retransmission consent agreements. To a lesser extent, broadcasters also earn revenue by licensing their content to online distributors like Hulu and Netflix and from § 111's compulsory license.

¹⁰⁷ 47 U.S.C. § 325(b)(3)(B).

¹⁰⁸ In the Matter of Amendment of the Commissions Rules Related to Retransmission Consent, 26 F.C.C. Rcd. 2718, 2746 n. 13 (2011).

It should be noted that the Satellite Home Viewer Improvement Act of 1999 established a similar system for satellite systems. See 47 U.S.C. § 338 (2012). Under it, satellite systems (like the DISH Network) are subject to must-carry rules and, if the broadcaster does not select must-carry, are required to receive retransmission consent before retransmitting the broadcaster's signal. Rob Frieden, *Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 MEDIA L. & POL'Y 230, 241 (2006).

¹⁰⁹ CRAWFORD, *supra* note 63, at 129.

A. The First Prong of the Dual-Revenue Stream: Advertising

Advertising has served as the primary source of revenue for broadcasters since the 1920s.¹¹⁰ For decades, broadcasters were content with the money they derived from that single revenue stream.¹¹¹ After all, as a result of the lack of competition in the marketplace, advertisers flocked to broadcasters and were willing to purchase billions of dollars in advertising from them.¹¹²

Things have changed, however. As a result of the drastic expansion of the cable and satellite industries described above, the average U.S. home with a television set now receives more than 100 channels.¹¹³ The increase in marketplace competition caused by the greater number of channels available has caused broadcasters to lose advertising revenue. For instance, in 1998, cable channels received 24 percent of the revenue derived from television advertising.¹¹⁴ A decade later, that number had increased to 39 percent.¹¹⁵ In fact, “except for political ads and prescription drugs, spending on

¹¹⁰ By 1929, companies were spending more than \$20 million on radio advertisements per year. DOMINICK ET AL., *supra* note 41, at 11. Today, it is common for local broadcasters to generate roughly \$20 billion in advertising revenue per year. See THE PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2013, <http://stateofthemedias.org/2013/local-tv-audience-declines-as-revenue-bounces-back/6-local-broadcast-tv-advertising-revenue-grew-in-2012/> (last visited Aug. 29, 2014).

¹¹¹ CRAWFORD, *supra* note 63, at 131; See Brian Stelter, *TV Circling The Wagons Over Aereo*, N.Y. TIMES, Apr. 10, 2013, at B1.

¹¹² CRAWFORD, *supra* note 63, at 131-32.

¹¹³ NIELSEN: AVERAGE U.S. HOME NOW RECEIVES A RECORD 118.6 TV CHANNELS, ACCORDING TO NIELSEN, http://www.nielsen.com/us/en/press-room/2008/average_u_s_home.html (last visited Dec. 8, 2013).

¹¹⁴ CRAWFORD, *supra* note 63, at 132 (citing *Is Free TV Coming to and End?* CBSNEWS, Dec. 29, 2009, http://www.cbsnews.com/2100-207_162-6032487.html).

¹¹⁵ *Id.*

broadcast-television advertising has markedly and steadily decreased.”¹¹⁶ The recession has also taken its toll on broadcasters. Before the recession hit in 2006, local broadcasters generated \$22.8 billion in advertising revenue.¹¹⁷ In 2009, during the recession’s peak, that same number dropped to \$15.8 billion.¹¹⁸

B. The Second Prong of the Dual-Revenue Stream: Retransmission Consent Agreements

To ameliorate the harms caused by losses in advertising revenue, broadcasters have sought compensation from retransmission consent agreements. In the early 2000s, broadcasters generated little revenue from these agreements. In 2001, for instance, broadcasters generated only \$11 million from retransmission consent.¹¹⁹ This may be because, when initially engaging in retransmission consent negotiations, broadcasters routinely asked cable providers for compensation in the form of space in the cable provider’s lineup.¹²⁰ In fact, “[i]n the 1990s, ABC used retransmission consent to get ESPN2 carried, NBC used it to get America’s Talking (now on MSNBC) carried, and Fox used it to get cable operators to carry FX.”¹²¹

¹¹⁶ *Id.*

¹¹⁷ THE PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2013, <http://stateofthemedias.org/2013/local-tv-audience-declines-as-revenue-bounces-back/6-local-broadcast-tv-advertising-revenue-grew-in-2012/> (last visited Aug. 29, 2014).

¹¹⁸ *Id.*

¹¹⁹ Katerina Eva Matsa, *Time Warner vs. CBS: The High Stakes of their Fight Over Fees*, PEWRESEARCHCENTER, Aug. 21, 2013, <http://www.pewresearch.org/fact-tank/2013/08/21/time-warner-vs-cbs-the-high-stakes-of-their-fight-over-fees/>.

¹²⁰ CRAWFORD, *supra* note 63, at 134.

¹²¹ *Id.*

Today, however, broadcasters are increasingly asking for and receiving monetary compensation when negotiating for retransmission consent. In 2014, broadcasters are expected to generate \$2.8 billion in revenue from retransmission consent,¹²² a number that is predicted to climb to \$7.6 billion by 2019.¹²³ As an additional example, consider Nexstar Broadcasting Group, a company that owns or provides services to 72 broadcast stations.¹²⁴ In 2008, 4.5 percent of Nexstar Broadcasting's revenue derived from retransmission consent agreements.¹²⁵ Just four years later, in 2012, retransmission consent agreements generated 14.5 percent of the company's revenue.¹²⁶

Retransmission consent agreements are appealing to broadcasters because the agreements enable broadcasters to mimic the business model used by cable channels. Historically, cable channels have generated revenue not only from advertising but also from the subscriber fees they collect from cable and satellite systems. While broadcasters have struggled recently, cable channels have taken advantage of their dual-revenue stream and have been "flush[ed] with cash for the past twenty-five years."¹²⁷

¹²² Matsa, *supra* note 119.

¹²³ SNL Kagan Releases Updated Industry Retransmission Fee Projections, PRWEB, Mar. 12, 2014, <http://www.prweb.com/releases/2013/11/prweb11360552.htm>.

¹²⁴ Nexstar Broadcasting Group to Acquire Seven Television Stations in Four Markets for \$87.5 Million in Accretive Transaction, THE NY TIMES, Nov. 6, 2013, http://markets.on.nytimes.com/research/stocks/news/press_release.asp?docTag=201311061615BIZWIRE_USPRX____BW6639&feedID=600&press_symbol=219642.

¹²⁵ Yu, *supra* note 104.

¹²⁶ *Id.*

¹²⁷ Ken Auletta, *CBS, Time Warner Cable, and the Disruption of TV*, THE NEW YORKER, Aug. 19, 2013, <http://www.newyorker.com/online/blogs/currency/2013/08/cbs-time-warner-cable-and-the-disruption-of-tv.html>. Consider that in the fourth quarter of 2012, 57 percent of Disney's total operating income derived from its cable channels. See Ken Badenhausen, *Why ESPN Is Worth \$40 Billion As The World's Most Valuable Media Property*, FORBES, Nov. 9, 2012, <http://www.forbes.com/sites/kurtbadenhausen/2012/11/09/why-espn-is-the-worlds-most-valuable-media-property-and-worth-40-billion>. As another example, reflect on the extent to which ESPN's revenue has increased in recent years. In 2009, ESPN generated \$6.3

Reflecting on broadcasters' use of the dual-revenue stream, Chase Carey said:

It is clear that the broadcast business needs a dual revenue stream from both ad and subscription to be viable We simply cannot provide the type of quality sports, news, and entertainment content that we do from an ad-supported-only business model. We have no choice but to develop business solutions that ensure we continue to remain in the driver's seat of our own destiny.¹²⁸

Perhaps no group benefits more from the fees derived from retransmission consent agreements than the networks. In addition to owning many local broadcast stations throughout the country, the networks have begun soliciting portions of the revenue their affiliated stations receive from retransmission consent agreements.¹²⁹ SNL Kagan reports that “[f]or major networks, sharing in affiliates’ retrans revenue stream is now a given,” with the networks taking at least half of the income affiliated stations derive from them.¹³⁰

It should be noted, however, that money generated from retransmission consent agreements continues to pale in comparison to the money generated from traditional advertising. Roughly 88 percent of broadcast revenue continues to come from

billion in revenue. Just a decade earlier, it generated \$1.8 billion. *See Is Free TV Coming to and End?* CBS NEWS, Dec. 29, 2009, http://www.cbsnews.com/2100-207_162-6032487.html.

¹²⁸ Dan Mitchell, *Aereo could bring down broadcast TV*, CNNMONEY, Apr. 9, 2013, <http://tech.fortune.cnn.com/2013/04/09/aereo-could-bring-down-broadcast-tv/>.

¹²⁹ Jon Lafayette, *Networks’ Reverse Comp Take to Hit \$1B in 2014*, BROADCASTING & CABLE, Nov. 1, 2011, <http://www.broadcastingcable.com/news/advertising-and-marketing/networks-reverse-comp-take-hit-1b-2014/52745?rssid=20065>.

¹³⁰ *Id.*

advertising¹³¹ and, in 2013, broadcasters generated \$16 billion more in advertising revenue than in revenue derived from retransmission consent agreements.¹³²

IV. Discussion

Aereo threatened to disrupt the broadcast business model by impacting the retransmission consent prong of the broadcasters' dual-revenue stream. The advertising prong, in contrast, would have remained unharmed.

Ratings determine the amount companies pay for advertisements. If Aereo's subscribers were not included in rating computations, broadcasters would have experienced decreases in revenue derived from advertising.¹³³ In 2013, however, Nielson obviated this fear when it pledged to count individuals who view television content using Internet-based services like Aereo.¹³⁴ As a result, the advertising prong of the

¹³¹ Brief of the National Association of Broadcasters et al. as Amici Curiae in Support of Petitioners at 20, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461).

¹³² See THE PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2013, <http://stateofthemediamedia.org/2013/local-tv-audience-declines-as-revenue-bounces-back/6-local-broadcast-tv-advertising-revenue-grew-in-2012/> (last visited Mar. 12, 2014); see also *SNL Kagan Releases Updated Industry Retransmission Fee Projections*, PRWEB, Mar. 12, 2014, <http://www.prweb.com/releases/2013/11/prweb11360552.htm>.

¹³³ As the U.S. District Court for the Southern District of New York wrote, "Aereo will damage Plaintiffs' [the broadcasters'] ability to negotiate with advertisers by siphoning viewers from traditional distribution channels, in which viewership is measured by Nielsen ratings, into Aereo's service which is not measured by Nielsen, artificially lowering these ratings." *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 397 (S.D.N.Y. 2012); see also Brief of the National Association of Broadcasters et al. as Amici Curiae in Support of Petitioners at 20, *American Broadcasting Cos., Inc.*, 134 S. Ct. 2498 (No. 13-461).

¹³⁴ Brian Stelter, *Nielsen Adjusts its Ratings to Add Web-Linked TVs*, N.Y. TIMES, Feb. 21, 2013, http://mediadecoder.blogs.nytimes.com/2013/02/21/tvs-connected-to-the-internet-to-be-counted-by-nielsen/?_php=true&_type=blogs&_r=0.

broadcasters' dual-revenue stream should have remained unaffected by Aereo's service.¹³⁵

Aereo stood to impact the retransmission consent prong in two ways. First, because Aereo contended it was not a cable system, it claimed it did not have to obtain broadcasters' retransmission consent before retransmitting their signals.¹³⁶ Thus, while cable and satellite systems must haggle with broadcasters over retransmission consent, Aereo claimed it could retransmit broadcasters' signals without providing any form of compensation.¹³⁷

Second, if Aereo's service had become popular, fewer individuals would have used cable and satellite to watch broadcast content. Consequently, cable and satellite systems would have deemed broadcast content less valuable and provided the broadcasters with less compensation when negotiating for retransmission consent.¹³⁸ As the U.S. District Court for the Southern District of New York put it, "[T]he evidence shows that by poaching viewers from cable or other companies that license Plaintiff's content, Aereo's activities will damage Plaintiffs' ability to negotiate retransmission

¹³⁵ *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 41 (D. Mass. 2013) (ruling that a broadcaster failed to make a convincing showing that Aereo would irreparably harm its ability to generate advertising revenue.)

¹³⁶ *See* Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385 § 4 (codified as amended in scattered sections of 47 U.S.C. (2012)); Satellite Home Viewer Improvement Act of 1999, 47 U.S.C. § 338 (2012); *see also* Brief of the National Association of Broadcasters et al. as Amici Curiae in Support of Petitioners at 21, *Am. Broad. Cos.*, 134 S. Ct. 2498 (No. 13-461).

¹³⁷ Stelter, *supra* note 111.

¹³⁸ *See* *Fox Television Stations, Inc. v. BarryDriller Content Sys.*, 915 F.Supp.2d 1138, 1147 (C.D. Cal. 2012).

agreements, as these companies will demand concessions from Plaintiffs to make up for this decrease in viewership.”¹³⁹

Moreover, the harm to broadcasters would have increased exponentially if other companies mimicked Aereo’s system or partnered with Aereo. Before the Supreme Court’s ruling in *Aereo III*, numerous companies, including AT&T and the DISH Network, approached Aereo about entering into partnerships.¹⁴⁰ Such partnerships could have harmed broadcasters because the partnerships could have enabled pay-television providers to reduce, or potentially avoid altogether, retransmission consent fees.

¹³⁹ Am. Broad. Cos., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 398 (S.D.N.Y. 2012).

¹⁴⁰ Shalini Ramachandran, *TV Service Providers Held Talks With Aereo*, THE WALL STREET JOURNAL, Mar. 31, 2013, <http://online.wsj.com/news/articles/SB10001424127887323501004578391023454905916>.

CHAPTER III: DID AEREO PERFORM THE BROADCASTERS' WORKS?

The broadcasters, recognizing the harm Aereo posed to their dual-revenue stream, attempted to put Aereo out of business by proving it infringed upon their copyrights by publicly performing works without a license. Before it could decide whether Aereo performed works *publicly*, however, the majority of the justices in *Aereo III* wrote that it had to determine whether Aereo *performed* at all.¹⁴¹ It is noteworthy, to say the least, that the majority opinion would begin its inquiry in this manner. None of the lower courts felt the need to address whether Aereo performed—operating under the assumption that it did.

The lower courts' reluctance to address the issue can be attributed to how the case was litigated. At the lower court level, Aereo primarily limited itself to arguing that its transmissions were not “to the public.”¹⁴² When the case reached the Supreme Court, however, Aereo expanded its argument by asserting that its users, not Aereo itself, were the ones who performed the broadcasters' works.¹⁴³

Had the Court ruled that Aereo did not perform, the broadcasters' suit would have

¹⁴¹ Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2504 (2014).

¹⁴² See, e.g., Consolidated Brief of Defendant-Counter-Claimant at 4, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (No. 12-2786).

¹⁴³ Brief of Respondent at 40-47, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

failed.¹⁴⁴ The broadcasters limited their claim to arguing that Aereo was directly, and not also secondarily, liable for copyright infringement. To win a suit for the direct infringement of the public performance right, the plaintiff must establish that the defendant performed the copyrighted works at issue. Thus, if the Court had ruled that Aereo did not perform the broadcasters' works, Aereo could not have been held directly liable.

I. Statutory Text

The Copyright Act states that to “perform” a motion picture or other audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible.”¹⁴⁵ Under this broad definition, broadcasters and cable systems perform when they transmit television programs, and viewers perform when they use a television set to receive those programs.¹⁴⁶

II. The Difference Between Direct and Secondary Copyright Liability

The broadcasters' decision to limit their claim against Aereo to one of direct liability has been criticized by many commentators and the dissent in *Aereo III*, all of whom believed Aereo was also liable for secondary copyright infringement.¹⁴⁷ To understand this argument, and the role secondary liability played in the case, it is necessary to comprehend the difference between direct and secondary copyright infringement.

¹⁴⁴ Am. Broad. Cos., 134 S. Ct. at 2512 (Scalia, J., dissenting).

¹⁴⁵ Copyright Act of 1976, 17 U.S.C. § 101 (2012).

¹⁴⁶ Am. Broad. Cos., 134 S. Ct. at 2506 (citing H.R. Rep., at 63).

¹⁴⁷ See, e.g., Brief of 36 Intellectual Property and Copyright Law Professors as Amici Curiae in Support of Respondent, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461); Am. Broad. Cos., 134 S. Ct. (Scalia, J., dissenting).

There are two forms of copyright infringement: direct copyright infringement and secondary copyright infringement.¹⁴⁸ A defendant becomes directly liable for copyright infringement when he “violates any of the exclusive rights of the copyright owner provided by sections 106 through 122 [of the Copyright Act]”¹⁴⁹ For example, an individual would become a direct infringer if he, barring some sort of defense, infringed the reproduction right by photocopying a work, infringed the public performance right by performing a work in a place open to the public, or infringed the public display right by displaying a work for all to see.

One becomes secondarily liable for copyright infringement when he assists others in committing direct copyright infringement.¹⁵⁰ Over the years, the courts have recognized two types of secondary liability: (1) vicarious liability and (2) contributory

¹⁴⁸ Am. Broad. Cos., 134 S. Ct. at 2512 (Scalia, J., dissenting).

¹⁴⁹ 17 U.S.C. § 501.

¹⁵⁰ See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 435 (1984); see also Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1366 (2006).

Although the Copyright Act does not expressly permit courts to “impose liability on anyone other than direct infringers,” *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996), the power to impose liability on secondary infringers has been inferred through the Copyright Act’s use of the wording “to do and to authorize” in § 106. See 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 21:43 (2014) (citing *Gener-Villar v. Adcom Group, Inc.*, 2007 WL 2597106, at * 7 (D.P.R., Aug. 24, 2007)). The Copyright Act’s legislative history also supports the proposition that the courts have the power to impose liability on secondary infringers. There, Congress wrote:

Use of the phrase “to authorize” is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

H.R. REP. 94-1476, at 61.

infringement. An act of direct infringement serves as a prerequisite for both vicarious liability and contributory infringement.¹⁵¹

Vicarious liability is “an outgrowth of the agency principle of *respondeat superior*,”¹⁵² the tort law doctrine stating that an employer or principle can be held liable for the actions taken by his employees and agents.¹⁵³ One will be deemed vicariously liable “if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”¹⁵⁴

Contributory infringement, which also has origins in tort law, “stems from the notion that one who directly contributes to another’s infringement should be held accountable.”¹⁵⁵ One will be deemed a contributory infringer if he, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”¹⁵⁶ A major difference between vicarious liability and contributory infringement is the presence of knowledge. Whereas contributory infringement requires knowledge, a defendant can be deemed vicariously liable even if he has no knowledge of the underlying act of direct infringement.

The Supreme Court most famously addressed contributory liability in 1984 in *Sony Corp. of America v. Universal City Studios, Inc.*¹⁵⁷ There, the Court evaluated

¹⁵¹ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001); see also *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F.Supp. 1361, 1371 (N.D.Cal.1995).

¹⁵² *Fonovisa, Inc.*, 76 F.3d at 262 (9th Cir. 1996).

¹⁵³ BLACK’S LAW DICTIONARY 1462 (9TH ED. 2009).

¹⁵⁴ *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

¹⁵⁵ *Fonovisa*, 76 F.3d at 264.

¹⁵⁶ *Gershwin Pub. Corp.*, 443 F.2d at 1162.

¹⁵⁷ 464 U.S. 417 (1984).

whether Sony's sale of the Betamax VTR ("VTR") violated copyright law.¹⁵⁸ The most common use of the VTR, according to the Court was "time-shifting," "the practice of recording a program to view it once at a later time, and thereafter erasing it."¹⁵⁹ The plaintiffs, a group of content creators that held the copyrights in various television programs,¹⁶⁰ argued that Sony's sale of the VTR constituted contributory infringement because the VTR enabled consumers to reproduce others' copyrighted works without permission.¹⁶¹ The Court disagreed.

In reaching its decision, the Court imported from patent law the staple article of commerce doctrine. The staple article of commerce doctrine, as applied to copyright law, holds that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."¹⁶² And to be "used for legitimate, unobjectionable purposes," the product merely needs to "be capable of substantial noninfringing uses," or, as the Court put it later in the opinion, "commercially significant noninfringing uses."¹⁶³

Although it declined to quantify what exactly constitutes "commercially significant noninfringing uses," the Court found that the VTR met this burden for two independent reasons. First, the Court found that there was a "significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free

¹⁵⁸ *Id.* at 419.

¹⁵⁹ *Id.* at 423.

¹⁶⁰ *Id.* at 419-20.

¹⁶¹ *Id.* at 428, 436.

¹⁶² *Id.* at 789.

¹⁶³ *Id.*

television would not object to having their broadcasts time-shifted by private viewers.”¹⁶⁴

Second, the Court held that time shifting constituted a legitimate fair use because, among other reasons, the plaintiffs failed to demonstrate that Sony’s sale of the VTR would cause “*some* meaningful likelihood of future harm”¹⁶⁵ to the potential market for their copyrighted works.¹⁶⁶

III. The Volitional-Conduct Requirement

By the 1990s, the doctrines of direct and secondary liability were firmly established within copyright law. Courts, nevertheless, struggled to differentiate between direct and secondary infringers. The Supreme Court’s decision in *Sony* provided little guidance in this area. Although the Court evaluated the VTR within the context of secondary liability, it offered little justification for why it chose to do so. Instead, it simply acknowledged that “the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn”¹⁶⁷

The discussion over how to differentiate between direct and secondary infringers reached a boiling point in *Religious Technology Center v. Netcom On-Line*

¹⁶⁴ *Id.* at 456.

¹⁶⁵ *Id.* at 451 (emphasis in original).

¹⁶⁶ *Id.* at 456. Fair use is one of the many affirmative defenses permitted in copyright law. Under the doctrine of fair use, one is permitted to use copyrighted material for “criticism, comment, news reporting, teaching . . . scholarship, or research” if the following factors, when weighed in light of the purposes of copyright law, favor of the use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” Copyright Act of 1976, 17 U.S.C. § 101 (2012); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994); BLACK’S LAW DICTIONARY 676 (9TH ED. 2009).

¹⁶⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 435 n.17 (1984) (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 457 (C.D. Cal. 1979)).

*Communication Services, Inc.*¹⁶⁸ *Netcom* arose after Dennis Erlich, a critic of the Church of Scientology, posted works written by the church's founder, L. Ron Hubbard, to an online newsgroup.¹⁶⁹ Unsurprisingly, the organization that owned the copyrights in Hubbard's works, the Religious Technology Center ("Center"), brought a direct infringement claim against Erlich. Less predictably, however, the Center also brought a direct infringement claim against Netcom—the ISP that enabled Erlich to access the newsgroup.¹⁷⁰ As a basis for this claim, the Center asserted that Netcom violated the reproduction right when its computers automatically made copies of the works Erlich uploaded.¹⁷¹

In granting summary judgment in 1995 for Netcom on the direct liability claim, the Northern District of California defined when one becomes a direct infringer. While the court acknowledged that copyright infringement is a strict liability tort, meaning "[d]irect infringement does not require intent or any particular state of mind,"¹⁷² it wrote "there should still be some element of *volition or causation* which is lacking where a defendant's system is merely used to create a copy by a third party."¹⁷³ It added:

Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet The court does not find workable a theory of

¹⁶⁸ 907 F. Supp. 1361 (N.D. Cal. 1995).

¹⁶⁹ *Id.* at 1365-66.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1368.

¹⁷² *Id.* at 1367.

¹⁷³ *Id.* at 1370 (emphasis added).

infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred.¹⁷⁴

In other words, before a defendant can be held directly liable, he must engage in some type of volitional conduct that violates the Copyright Act.¹⁷⁵ Because Netcom passively took commands from its users, it failed to meet this standard and thus escaped liability for direct copyright infringement.

Subsequent to *Netcom*, numerous federal Courts of Appeals and District Courts adopted the standard that direct liability requires volitional conduct.¹⁷⁶ In doing so, these courts protected a variety of automated systems that operate pursuant to user commands from a range of copyright infringement suits.¹⁷⁷ Congress also took part in the action,

¹⁷⁴ *Id.* at 1372.

¹⁷⁵ See *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512, (2014) (Scalia, J., dissenting) (citing 3 PATRY ON COPYRIGHT § 9:5.50 (2014)).

¹⁷⁶ For example, in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the court held that a website that permitted users to upload photos did not commit direct copyright infringement. The court reached this conclusion even though the site's employees "cursorily reviewed" the photographs before the final upload "to identify any obvious evidence . . . that the photograph[s] may have been copyrighted by another." *Id.* at 547. Expressing approval of *Netcom*, the court wrote:

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

Id. at 550. See also *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060 (9th Cir. 2014) (holding the plaintiff failed to show a likelihood of success on its direct infringement claim because it could not be established that the defendant exercised volitional conduct when operating a system that permitted users to record prime-time television lineups); *Parker v. Google, Inc.*, 242 F. App'x 833 (3d Cir. 2007) (dismissing a direct infringement claim against Google because Google failed to exercise volitional conduct when its search engine automatically made a copy of a website that contained the plaintiff's copyrighted material).

¹⁷⁷ Even though *Netcom* involved a reproduction right case in the context of the Internet, by the time the Supreme Court evaluated the legality of Aereo's system, many agreed that the volitional conduct requirement "extended to direct infringement claims of all exclusive rights under the Copyright Act" and applied to all forms of automated systems. 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, 497 (2013) (citing *Perfect 10, Inc. v. Megaupload Ltd.*, 11CV0191-IEG BLM, 2011 WL 3203117 at *4).

codifying many of the protections offered by *Netcom* in the Digital Millennium Copyright Act.¹⁷⁸

Cablevision, a 2008 case highly relevant to the litigation surrounding Aereo, illustrates the development of the volitional-conduct requirement. There, the United States Court of Appeals for the Second Circuit evaluated, among other things, whether Cablevision could be held directly liable for violating the reproduction right after its Remote Storage DVR System (“RS-DVR”) produced copies of copyrighted television programs.¹⁷⁹ The RS-DVR enabled customers who did not “have a stand-alone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a ‘remote’ location.”¹⁸⁰

Adopting *Netcom*’s volitional-conduct requirement, the Second Circuit wrote that the outcome of the direct infringement claim turned on who made the copies of the television programs.¹⁸¹ According to the court, the direct infringement claim would fail if Cablevision’s customers, who selected the programs they wanted to record, were deemed to have made the copies.¹⁸² In contrast, the direct infringement claim would

(S.D. Cal. July 27, 2011); *Arista Records LLC v. Usenet*, 633 F. Supp. 2d 124, 147 (S.D.N.Y. 2009); 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08[C] (2014).

¹⁷⁸ See *CoStar Group, Inc.*, 373 F.3d at 552. Under one section of the DMCA, service providers that meet specified requirements are not “liable . . . for infringement of copyright by reason of the storage *at the direction of a user* of material that resides on a system or network controlled or operated by or for the service provider” Copyright Act of 1976, 17 U.S.C. § 512(c) (2012) (emphasis added).

¹⁷⁹ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008).

¹⁸⁰ *Id.* at 124.

¹⁸¹ *Id.* at 130.

¹⁸² *Id.*

succeed if Cablevision itself—through its design, housing, and maintenance of the RS-DVR—was deemed to have done so.¹⁸³

The Second Circuit ruled the copies were made by Cablevision’s customers and dismissed the direct infringement claim. In reaching this holding, the court drew parallels with the Supreme Court’s decision in *Sony*. “In the case of a VCR, it seems clear . . . that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine,” the court wrote.¹⁸⁴ “We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.”¹⁸⁵ Thus, under *Cablevision*, the volitional conduct necessary for direct liability exists when a party *commands* an automated system to make a copy. In other words, the question of volition comes down to a determination of which party pushes the record button.¹⁸⁶

Although the volitional-conduct requirement has been widely accepted, some courts have interpreted it narrowly—choosing to impose direct liability upon automated services that act as something more than a passive provider.¹⁸⁷ *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*,¹⁸⁸ serves as an excellent example of this principle. In that

¹⁸³ *Id.* at 130, 131.

¹⁸⁴ *Id.* at 131.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 4 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.0.2 (3rd. ed. 2013).

¹⁸⁸ 982 F. Supp. 503 (N.D. Ohio 1997).

1997 case, the U.S. District Court for the Northern District of Ohio, in spite of adhering to the volitional-conduct requirement, deemed the operator of an online Bulletin Board Service (“BBS”) liable for direct copyright infringement after its users uploaded copyrighted images to the service. Central to the court’s ruling were the facts that the BBS created an incentive program for users to upload copyrighted images and that its employees screened all files before making them available to customers.¹⁸⁹ As the court put it, “These two facts transform Defendants from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement.”¹⁹⁰ Thus, under *Russ Hardenburgh*, those who create and maintain automated systems that operate pursuant to user commands can become direct infringers if those automated systems cross the line between passive provider and active participant.¹⁹¹

Numerous District Courts have reached similar conclusions.¹⁹² Even the Second Circuit in *Cablevision*, which took an expansive view of the volitional-conduct requirement, seemed impacted by *Russ Hardenburgh*. The Second Circuit wrote, “We need not decide today whether one’s contribution to the creation of an infringing copy

¹⁸⁹ *Id.* at 509, 513.

¹⁹⁰ *Id.* at 513.

¹⁹¹ *But see* Disney Enters., Inc. v. Hotfile Corp., 798 F. Supp. 2d 1303, 1308 (S.D. Fla. 2011) (rejecting the plaintiff’s direct infringement claim because a website that enabled users to upload and download copyrighted material did not engage in volitional conduct even though the site “allegedly encourage[d] . . . massive infringement.”).

¹⁹² *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013); Perfect 10, Inc. v. Mega Upload, No. 11cv0191-IEG (BLM), 2011 WL 3203117 (S.D.Cal. July 26, 2011); Arista Records LLC v. Usenet.com, Inc., 633 F.Supp.2d 124 (S.D.N.Y.2009); Capitol Records, Inc. v. MP3tunes, LLC, No. 07 Civ. 9931(WHP), 2009 WL 3364036 (S.D.N.Y.2009).

may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy.”¹⁹³

In addition to the courts that have taken a narrow view of the volitional-conduct requirement, some have rejected the doctrine outright. In 2011, in *Arista Records LLC v. Myxer Inc.*,¹⁹⁴ the U.S. District Court for the Central District of California refused to adopt the volitional-conduct requirement because it believed the requirement would add an element of intent to the strict liability tort of copyright infringement. This decision, however, has been criticized.¹⁹⁵ In 2013, the court in *Perfect 10, Inc. v. Giganews*¹⁹⁶ said the volitional-conduct requirement should be “equate[d] with the requirement of causation, not intent.” Thus, instead of turning a strict liability tort into one that requires intent, the volitional-conduct requirement simply determines “whether the defendant directly caused the infringement to take place.”¹⁹⁷

¹⁹³ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (citing *Playboy Enters. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503, 513 (N.D. Ohio 1997)).

¹⁹⁴ No. 08-03935 GAF JCX, 2011 WL 11660773 at *13-14 (C.D. Cal. Apr. 1, 2011); *see also* *Warner Bros. Entm’t v. WTV Sys.*, 824 F.Supp. 2d 1003, 1011 n.7 (C.D. Cal. 2011) (citing the decision in *Arista Records LLC v. Myxer Inc.* with approval).

¹⁹⁵ *See Perfect 10, Inc. v. Giganews*, No. CV11–07098 AHM (SHx), 2013 WL 2109963 (C.D. Cal. Mar. 8, 2013).

¹⁹⁶ *Id.* at *6.

¹⁹⁷ *Id.* at *7 (emphasis in original); *see also* Patry, *supra* note 175, at § 9:5.50 (“The requirement of volitional conduct does not undermine the strict liability nature of copyright, but rather serves to ensure that there is a causal connection between the conduct in question and the person alleged to have violated the copyright owners’ Section 106 rights: where direct infringement is alleged.”).

IV. The Supreme Court Determines Whether Aereo Performed

A. The Majority Opinion: Arguing Aereo Performs Because it Resembles a Cable System

To determine whether Aereo performed, the majority had to establish which party, Aereo or its subscribers, transmitted the broadcasters' works.¹⁹⁸ A conclusion that Aereo transmitted the works—through the creation, operation, and maintenance of its system—would mean Aereo performed. Conversely, a conclusion that Aereo's subscribers transmitted the works—through their selection of which programs to watch—would mean the subscribers performed.

In arguing that it did not perform, Aereo referenced numerous lower court opinions supporting “the sound principle that direct liability is inappropriate where a defendant programs equipment to respond ‘automatically’ to a user command that results in alleged infringement.”¹⁹⁹ Because it did no more than supply equipment that users commanded, Aereo contended that it did not perform for the reason that it did not transmit the broadcasters' works.²⁰⁰

The majority disagreed. In an opinion that failed to directly reference the volitional-conduct requirement, the majority concluded that Aereo performed because it resembled the CATV systems at issue in *Fortnightly* and *Teleprompter*—the ones that, according to the Copyright Act's legislative history, Congress intended to bring within

¹⁹⁸ Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2504 (2014).

¹⁹⁹ Brief for Respondent at 22, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) (citing *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *Cartoon Network LP, LLLP*, 536 F.3d at 131-32; *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1309-10 (S.D. Fla. 2010)).

²⁰⁰ Am. Broad. Cos., 134 S. Ct. at 2504.

the scope of copyright law.²⁰¹ As the majority put it: “[T]he language of the [Copyright] Act does not clearly indicate when an entity “perform[s]” . . . and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo’s performs.”²⁰² The fact that “Aereo may . . . emulate equipment a viewer could use at home” had little impact on the majority because, as it wrote, the same could have been said of the services offered by the CATV systems in *Fortnightly* and *Teleprompter*.²⁰³

To support its decision, the majority referenced a definition of cable systems included in the Copyright Act’s legislative history. According to the legislative history, “cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs.”²⁰⁴ To the majority, Aereo fell within this definition because it “sells a service that allows subscribers to watch television programs, many of which are copyrighted, virtually as they are being broadcast.”²⁰⁵

Interestingly, however, the majority did not apply the definition for cable systems included within the text of the Copyright Act, which states:

A “cable system” is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast

²⁰¹ *Id.* at 2501, 2504, 2506.

²⁰² *Id.* at 2504.

²⁰³ *Id.* at 2507-08.

²⁰⁴ H.R. REP. NO. 94-1476, at 89 (1976).

²⁰⁵ *Am. Broad. Cos.*, 134 S. Ct. at 2501.

stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service²⁰⁶

The majority's decision not to reference the Copyright Act's definition may surprise some, as Justice Sotomayor expressed the opinion during oral arguments that Aereo's service fell within the definition's scope.²⁰⁷ Perhaps the majority's reluctance to apply the definition can be attributed to the basic tenants of administrative law. When reviewing a federal agency's construction of a statute, courts are usually required to afford the agency's interpretation with deference. Typically, courts will apply *Chevron* deference, a two-step test for determining when an agency's interpretation of a statute should be upheld. Under the test, a court will uphold an agency's construction of a statute if (1) "the statute is silent or ambiguous with respect to the specific issue" and (2) the agency's interpretation of the ambiguous issue is based on a permissible or reasonable construction of the statute.²⁰⁸

Prior to the decision in *Aereo III*, the Copyright Office, a federal agency, had decided not to classify Internet retransmission services as cable systems under the Copyright Act.²⁰⁹ Had the majority deemed Aereo a cable system under the Copyright Act, it would have overruled the Copyright Office's construction of the statute. Such a ruling, however, could have been made only after affording the Copyright Office with

²⁰⁶ The Copyright Act of 1976, 17 U.S.C. § 111(f)(3) (2012).

²⁰⁷ Transcript of Oral Argument at 4-7, *Am. Broad. Cos.*, 134 S. Ct. 2498 (No. 13-461).

²⁰⁸ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also* BLACK'S LAW DICTIONARY 270 (9TH ED. 2009).

²⁰⁹ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 283 (2d Cir. 2012).

Chevron deference and deeming the Copyright Office’s construction of the statute unreasonable—an action the majority would have likely been unwilling to take.²¹⁰

B. The Dissenting Opinion: Arguing the Majority’s Rationale was Flawed and Offering Support for the Volitional-Conduct Requirement

In a dissenting opinion joined by Justices Thomas and Alito, Justice Scalia wrote the majority’s opinion suffered from a number of deficiencies.²¹¹ For one, Justice Scalia scolded the majority for its extensive reliance on legislative history. He wrote:

Perceiving the text to be ambiguous . . . the Court reaches out to decide the case based on a few isolated snippets of legislative history The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress.²¹²

Justice Scalia’s critique should hardly be surprising; he has long asserted that legislative history fails to serve as a valid indicator of Congressional intent.²¹³ By

²¹⁰ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012), displays many of these principles. In *WPIX*, the owners of copyrighted television programs sued ivi, a for-profit company that streamed live television programming over the Internet, for copyright infringement. *Id.* at 277. ivi defended its actions by asserting it was a cable system and thus entitled to § 111’s compulsory license. *Id.* at 277-78. ivi made this argument even though “[t]he Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for § 111 compulsory licenses.” *Id.* at 283. Applying *Chevron* deference, the Second Circuit upheld the Copyright Office’s interpretation of § 111 and ruled that ivi was not a cable system under the Copyright Act. *Id.* at 276. At *Chevron* step one, the Second Circuit ruled that “the statutory text is ambiguous as to whether ivi . . . is entitled to a compulsory license.” *Id.* at 284. Specifically, the Second Circuit wrote that § 111 is unclear as to whether a company that transmits content over the Internet can be considered to have a “facility.” *Id.* at 280. At *Chevron* step two, the Second Circuit deemed the Copyright Office’s interpretation of § 111 reasonable. *Id.* at 284-85. To reach this conclusion, the Second Circuit cited how Congress, in composing § 111, intended to support systems that provided localized, not nationwide, programming. *Id.* at 282 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627-28 (1994)). ivi’s service exceeded this intent because, through its retransmissions over the Internet, it provided a nationwide service. *Id.*

²¹¹ *Am. Broad. Cos.*, 134 S. Ct. at 2515 (Scalia, J., dissenting).

²¹² *Id.* (internal citations omitted).

²¹³ Justice Scalia believes the only true way to determine Congressional intent is to evaluate the statutory text passed by Congress and signed into law by the president. For more on Justice Scalia’s views on the use of legislative history, see *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The

applying a test that determines whether one performs by asking whether he, she, or it “looks like” a CATV system, Justice Scalia said, the majority ran the risk of adopting “a two-tier version of the Copyright Act, one part of which applies to ‘cable companies and their equivalents’ while the other governs everyone else.”²¹⁴

Additionally, Justice Scalia wrote that the majority failed to apply its “looks like cable TV” standard correctly. According to Justice Scalia, “material differences” existed between Aereo and the CATV systems in *Fortnightly* and *Teleprompter*, differences that should have precluded a finding that Aereo resembled those systems.²¹⁵ Perhaps the biggest difference, Justice Scalia wrote, was that the CATV systems in *Fortnightly* and *Teleprompter* “captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmit[ed] only specific programs selected by the user, at specific times selected by the user.”²¹⁶

As a final critique, Justice Scalia predicted that future courts would have great difficulty determining whether an entity performs because of its resemblance to cable

greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”); *see also* *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”); *see also* *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176-77 (2014) (emphasis in original) (“Reliance on legislative history rests upon several frail premises. First, and most important: That the statute means what Congress intended. It does not. Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law *says*. Second: That there *was* a congressional ‘intent’ apart from that reflected in the enacted text. On most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever on how the issues should be resolved—indeed, were unaware of the issues entirely. Third: That the views expressed in a committee report or a floor statement represent those of all the Members of that House. Many of them almost certainly did not read the report or hear the statement, much less agree with it—not to mention the Members of the other House and the President who signed the bill.”).

²¹⁴ *Am. Broad. Cos.*, 134 S. Ct. at 2515 (Scalia, J., dissenting).

²¹⁵ *Id.*

²¹⁶ *Id.*

systems.²¹⁷ The majority, after all, provided little guidance in regard to how such assessments should be made.²¹⁸ Specifically, Justice Scalia questioned whether an entity that solely transmitted previously recorded programs could resemble a cable system.²¹⁹ In his opinion, such entities could not because “cable companies did not offer remote recording and playback services when Congress amended the Copyright Act in 1976.”²²⁰

To Justice Scalia, the determination of whether Aereo performed should have been made through the application of the volitional-conduct requirement. Although Justice Scalia acknowledged the Supreme Court has never expressly endorsed the requirement, he described it as being “ground[ed] in the [Copyright] Act’s text, which defines ‘perform’ in active, affirmative terms”²²¹ In other words, because the Copyright Act defines to “perform” an audiovisual work as “‘show[ing] its images in any sequence’ or ‘mak[ing] the sounds accompanying it audible,’” the text implies that direct infringers must make some sort of affirmative, volitional act.²²² Thus, in adopting the view that “[a] defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act,” Justice Scalia described the question presented by Aereo’s service as “*who* does the performing.”²²³

²¹⁷ *Id.* at 2516.

²¹⁸ See generally *Copyright Act of 1976—Transmit Clause—ABC, Inc. v. Aereo, Inc.*, *supra* note 33, at 379; Amanda Asaro, Note, *Stay Tuned: Whether Cloud-Based Service Providers Can Have Their Copyrighted Cake and Eat It Too*, 83 FORDHAM L. REV. 1107, 1136 (2014).

²¹⁹ Am. Broad. Cos., 134 S. Ct. at 2516 (Scalia, J., dissenting).

²²⁰ *Id.* at 2517.

²²¹ *Id.* at 2512.

²²² *Id.* (citing Copyright Act of 1976, 17 U.S.C. § 101 (2012)).

²²³ *Id.* at 2513.

The question presented by Justice Scalia in *Aereo III* is the public performance right equivalent of the question presented by the Second Circuit in *Cablevision*. There, as noted, the Second Circuit sought to identify the direct infringer by determining “who made . . . [the] copy?”²²⁴ Although Justice Scalia and the Second Circuit asked similar questions, their answers differed dramatically. To the Second Circuit, the person that pushes the record button supplies the necessary level of volitional conduct.²²⁵ If Justice Scalia had followed the Second Circuit’s logic, the answer to his question should have been the person who uses Aereo’s system to push the Watch button. Justice Scalia, however, chose to take a different path. Justice Scalia wrote that, in the majority of instances, the person or entity that engages in the volitional conduct necessary for direct liability will be the one that selects and arranges the copyright content.²²⁶

Justice Scalia provided two examples to explain his reasoning. First, he discussed a “copy shop [that] rents out photo-copiers on a per-use basis.”²²⁷ Under Justice Scalia’s reasoning, the shop would not be directly liable for copyright infringement if a patron used one of the shop’s machines to “duplicate a famous artist’s copyrighted photographs”²²⁸ Why? Because the copy shop did not select the copyrighted content.²²⁹ As a second example, he discussed video-on-demand services like Netflix. Similar to *Cablevision*’s RS-DVR, video-on-demand services are automated systems that operate

²²⁴ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008).

²²⁵ *Id.* at 131.

²²⁶ *Am. Broad. Cos.*, 134 S. Ct. at 2513 (Scalia, J., dissenting).

²²⁷ *Id.* at 2513.

²²⁸ *Id.*

²²⁹ *Id.*

pursuant to user commands. However, under Justice Scalia’s rationale, video-on-demand services can be held directly liable due to their selection of content. In other words, Netflix’s act of selecting and arranging content for their subscribers to watch serves as a volitional act sufficient for the imposition of direct liability.²³⁰

Applying this standard, Justice Scalia concluded that Aereo was closer to a copy shop than a video-on-demand service. “Aereo does not provide a prearranged assortment of movies and television shows,” Justice Scalia wrote.²³¹ “Rather, it assigns each subscriber an antenna that . . . can be used to obtain whatever broadcasts are freely available.”²³² Thus, “for the sole and simple reason that it does not make the choice of content,” Justice Scalia ruled that Aereo does not “perform” and could not be held liable for directly infringing upon the broadcasters’ right to perform their works publicly.²³³

Although Justice Scalia did not believe Aereo performed the broadcasters’ works, his dissent should not be equated with a belief that Aereo ought to escape liability. Indeed, Justice Scalia wrote that the lower courts should decide whether Aereo is secondarily liable for assisting its subscribers in infringing a completely different right—the reproduction right.²³⁴ Under Justice Scalia’s view, because Aereo’s service makes copies of works each time one of its subscribers selects to Watch or Record a program, the broadcasters could have challenged Aereo’s subscribers for infringing upon their exclusive right to reproduce copyrighted works.

²³⁰ *Id.*

²³¹ *Id.* at 2514.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 2514-15.

For its part, the majority asserted that Justice Scalia’s selection-of-content argument made “too much out of too little.”²³⁵ According to the majority, when Aereo’s system is viewed in light of the purpose of the Copyright Act, the fact that Aereo’s users may select content should not be afforded dispositive weight. After all, whether they or some other entity selects the content “means nothing to the subscriber” as it does little to enhance the viewing experience.²³⁶

V. Discussion

Future courts will undoubtedly struggle when applying the majority’s holding to the question of whether an entity performs. Those courts will know that an entity performs if the entity resembles the CATV systems at issue in *Fortnightly* and *Teleprompter*. They will not know, however, how to make the determination that such a resemblance exists. As Justice Scalia astutely commented, “[The majority] provides no criteria for determining when its cable-TV-lookalike rule applies.”²³⁷

Problems will surely arise if a court is called upon to assess Aereo’s recorded transmissions. For instance, imagine a scenario where Aereo decides to adapt its business model to one in which it solely transmits recorded versions of television programs. That is, Aereo delays all transmissions of a particular program until the program has finished airing. Would Aereo be deemed to have performed under that scenario? Justice Scalia, most likely correct, believes the answer is no because the CATV systems at issue in *Fortnightly* and *Teleprompter* did not transmit recorded

²³⁵ *Id.* at 2507.

²³⁶ *Id.*

²³⁷ *Id.* at 2516 (Scalia, J., dissenting).

programs to subscribers.²³⁸ But reasonable minds could differ. In concluding that Aereo performed, the majority referenced a definition of cable systems included within the Copyright Act’s legislative history. This definition, “cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material,” would appear to encompass Aereo’s recorded transmissions.²³⁹ Consequently, if a future court were to apply that definition in an attempt to clarify what resembles an early CATV system, contrary to Justice Scalia’s belief, entities that solely transmit recorded versions of programs will be deemed to have performed those programs.

Perhaps, then, Justice Scalia was correct in his advocacy of the volitional-conduct requirement. Although the requirement has been criticized for being arbitrary,²⁴⁰ a means must exist to differentiate between direct and secondary liability.²⁴¹ Put differently, if every potential infringer could be treated as a direct infringer, there would be no reason for secondary liability to exist. Although the volitional-conduct requirement may not be perfect, it provides courts with a bright-line test to apply when identifying direct infringers.

²³⁸ *Id.* at 2517.

²³⁹ H.R. REP. NO. 94-1476, at 89 (1976).

²⁴⁰ *See, e.g.*, 4 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.0.2 (3rd. ed. 2013) (“Certainly, the economic injury to the copyright owner is the same, whether inflicted by man or machine; the fact that an algorithm was the culprit offers neither solace to the copyright owner nor incentives to the continued creation of literary and artistic works.”).

²⁴¹ *See* Am. Broad. Cos., 134 S. Ct. at 2514 (Scalia, J., dissenting) (emphasis in original) (“The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act.”); *see also* Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997) (“There would be no reason to bifurcate copyright liability into the separate categories of direct and contributory if any remote causal connection to copyright infringement could be analyzed under theories of direct infringement.”).

The volitional-conduct requirement, furthermore, is consistent with the Copyright Act's text. Under the Copyright Act, the owner of a copyright is granted six exclusive rights, each of which provides the copyright holder with an affirmative power to take a particular action. For example, a copyright holder has (among other rights) the right to *reproduce* a copyrighted work or *perform* a copyrighted work publicly.²⁴² As a result of this wording, it necessarily follows that one must make an affirmative, volitional act to directly infringe upon another's copyright.²⁴³ The volitional-conduct requirement, moreover, does not add an element of intent to the strict-liability tort of copyright infringement. The requirement compels courts to determine the direct cause of the plaintiff's injury; it does not compel them to determine whether a defendant possessed a particular state of mind when infringing upon another's copyright.²⁴⁴

Additionally, Justice Scalia's approach to the volitional-conduct requirement is a reasoned one. In *Aereo III*, Justice Scalia recognized, as the Northern District of Ohio did in *Russ Hardenburgh*, that even automated systems can cross the line between passive provider and active participant. Thus, under his view of the volitional-conduct requirement, those automated systems that select content will be treated as direct infringers. Because it permits courts to classify automated systems as direct infringers, Justice Scalia's approach furthers the aim of the volitional-conduct requirement by providing courts with some leeway in identifying the direct cause of the plaintiff's injury.

²⁴² See Copyright Act of 1976, 17 U.S.C. § 101 (2012).

²⁴³ See *Playboy Enterprises*, 982 F. Supp. at 512.

²⁴⁴ See *Perfect 10, Inc. v. Giganews, Inc.*, No. CV11-07098 AHM (SHx), 2013 WL 2109963 at *6 (C.D. Cal. Mar. 8, 2013).

For the reasons mentioned above, Justice Scalia was right to believe that the majority should have applied the volitional-conduct requirement and that—because Aereo’s users selected the content—Aereo did not perform. Thus, the question presented should have been whether Aereo was secondarily liable for copyright infringement.

Had the Court engaged in a secondary liability analysis, the broadcasters would have argued that Aereo’s subscribers directly infringed the reproduction right when using the Watch feature to view content. The subscribers, for their part, would have used *Sony* to argue that fair use protected their conduct.

How the Court would have ultimately resolved the fair use inquiry is an open question. In his dissent, which was joined by Justices Thomas and Alito, Justice Scalia wrote, “I share the Court’s evident feeling that what Aereo is doing (or enabling to be done) to the Networks’ copyrighted programming ought not to be allowed.”²⁴⁵ This statement implies that the three dissenters would have ruled against fair use. Whether two additional justices would have joined the dissenters is unclear. Fair use, after all, is a balancing test that has been described as “the most enigmatic doctrine in U.S. copyright law.”²⁴⁶

It should be noted that, even if the Court had deemed Aereo secondarily liable for the operation of its Watch feature, it does not follow that Aereo would have also been deemed secondarily liable for the operation of its Record feature. Aereo’s Record feature is nothing more than a VCR within “the cloud.” Because the Court found no secondary liability when such devices are used in the home, it would have been illogical for the

²⁴⁵ Am. Broad. Cos., 134 S. Ct. at 2517 (Scalia, J., dissenting).

²⁴⁶ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008).

Court to conclude that secondary liability attaches when essentially the same device is used in the cloud.

CHAPTER IV: DID AEREO PERFORM THE BROADCASTERS' WORKS PUBLICLY?

After it concluded that Aereo performed the broadcasters' works, the question for the Court became whether Aereo performed those works publicly. Although appearing to be a simple question, courts have consistently struggled in defining when an entity or individual publicly performs a work.

I. Statutory Text

Two clauses in § 101 of the Copyright Act define when a work is performed publicly. Under § 101, “[t]o perform a work ‘publicly’ means”:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁴⁷

Under clause (1), a work is performed publicly in one of two situations. The first situation occurs when a work is performed in a place open to the public. For instance, one would engage in a public performance if he were to act out a play in a public park because the park is open to all. The number of people in the park is of no relevance; a

²⁴⁷ Copyright Act of 1976, 17 U.S.C. § 101 (2012).

public performance occurs if the performers have no audience.²⁴⁸

The second situation occurs when a work is performed in a place that is not open to the public but in which a “substantial number” of people outside a normal circle of family or friends have gathered. Here, to determine if a work has been performed publicly, courts evaluate the “size and composition” of the audience.²⁴⁹ Thus, performances that occur in “places such as clubs, lodges, factories, summer camps, and schools” can be considered public performances.²⁵⁰

Clause (1) had no relevance to the litigation surrounding Aereo. Aereo did not perform works in places open to the public or in “places that, although not open to the public at large, are accessible to a significant number of people.”²⁵¹ Consequently, the Supreme Court addressed whether Aereo publicly performed copyrighted works under clause (2).

Clause (2) is referred to as the “Transmit Clause.” It states that to perform a work “publicly” means to “transmit . . . a performance . . . of the work . . . to the public” through use of any device or process, regardless of whether the members of the public capable of receiving the performance are geographically or chronologically dispersed.²⁵² To “‘transmit’ a performance,” in turn, means “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are

²⁴⁸ See *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986) (“[The Copyright Act] does not require that the public place be actually crowded with people. A telephone booth, a taxi cab, and even a pay toilet are commonly regarded as ‘open to the public,’ even though they are usually occupied only by one party at a time.”).

²⁴⁹ *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984).

²⁵⁰ H.R. REP. NO. 94-1476, at 64 (1976).

²⁵¹ *Redd Horne, Inc.*, 749 F.2d at 158.

²⁵² 17 U.S.C. § 101.

sent.”²⁵³ Although the Copyright Act defines the verb “perform,”²⁵⁴ it fails to define the noun “performance” and the phrase “to the public.”²⁵⁵

Courts have had difficulty applying the Transmit Clause—often reaching opposite conclusions when faced with the same question.²⁵⁶ One area of difficulty has been the Transmit Clause’s closing phrase, “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.”²⁵⁷ Another area of difficulty, and one that played a major role in the litigation surrounding Aereo, has been defining “performance” under the Transmit Clause.

II. Applying the Transmit Clause: Relevant Decisions Prior to Aereo

One of the first cases to implicate the Transmit Clause was *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*²⁵⁸ There, in 1984, the Third Circuit Court of Appeals evaluated whether Maxwell’s Video Showcase, a video rental store chain, violated the public performance right by renting to paying customers “small, private booths” in which to watch video cassettes selected from Maxwell’s catalogue.²⁵⁹ The rented booths

²⁵³ *Id.*

²⁵⁴ “To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101.

²⁵⁵ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir. 2008).

²⁵⁶ *Compare* *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *with* *Fox Television Stations, Inc. v. FilmOn X*, No. 13-785, 2013 WL 4763414 (D.C. Cir. Sept. 5, 2013), *and* *Fox Television Stations, Inc. v. BarryDriller Content Sys.*, 915 F.Supp.2d 1138 (C.D. Cal. 2012).

²⁵⁷ 17 U.S.C. § 101 (emphasis added).

²⁵⁸ 749 F.2d 154 (3d Cir. 1984).

²⁵⁹ *Id.* at 156-57.

contained television sets but were not equipped with VCRs.²⁶⁰ For a motion picture to be played in the booth, a Maxwell's employee placed the video cassette selected by the customer into a VCR at the front of the store. The pictures and sounds accompanying the motion picture were then transmitted from the VCR to the television in the booth.²⁶¹

The Third Circuit held that Maxwell's system violated the public performance right because, through operating a store in which "[a]ny member of the public can view a motion picture by paying the appropriate fee," Maxwell's was open to the public.²⁶² The fact that customers viewed cassettes in private "did not mitigate the essential fact that Maxwell's" was open to all.²⁶³

Although it used clause (1) to settle the case, the Third Circuit wrote, in dicta, that its conclusion was "fully supported" by the Transmit Clause.²⁶⁴ In reaching this conclusion, the court looked to the work of famed copyright professor Melville Nimmer. In *Nimmer on Copyright*, Nimmer discussed the Transmit Clause in detail and attempted to provide meaning to the Clause's closing phrase: "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."²⁶⁵

This phrase states that the public capable of receiving the performance can be "(1) in the same place at the same time, (2) in separate places at the same time, (3) in the same

²⁶⁰ *Id.* at 157.

²⁶¹ *Id.*

²⁶² *Id.* at 159.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ 2-8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 814[C][2] (2014); Copyright Act of 1976, 17 U.S.C. § 101 (2012).

place at different times, or (4) in separate places at different times.”²⁶⁶ Although examples of options one and two are readily apparent,²⁶⁷ Congress’ intent in writing options three and four confused Nimmer. Both of these options require the audience to be chronologically dispersed and, according to Nimmer, if taken literally, would turn all transmissions into public performances.²⁶⁸ Nimmer wrote:

The Senate and House Reports offer no explanation of this latter phrase [“at the same time or at different times”], and it is difficult to believe that it was intended literally. It would mean, for example, that the performance of music on a commercial phonograph record in the privacy of one’s home constitutes a public performance because other members of the public will be playing duplicates of the same recorded performance at “different times.”²⁶⁹

Nimmer concluded that options three and four would make sense only “if the same copy (or phonorecord) of a given work is repeatedly played (i.e., ‘performed’) by different members of the public, albeit at different times”²⁷⁰

Adopting this approach, the Third Circuit explained why Maxwell’s system publicly performed works under the Transmit Clause. It wrote, “Although Maxwell’s has only one copy of each film, it shows each copy repeatedly to different members of the public. This constitutes a public performance.”²⁷¹

²⁶⁶ Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505, 514 (2010).

²⁶⁷ According to Malkan, an example of option one occurs when “[e]veryone is gathered in a theater to watch a concert or sporting event that is televised by a closed-circuit TV transmission.” *Id.* at 514-15. An example of option two occurs when “[e]veryone watches the televised event on his or her TVs at home.” *Id.* at 515.

²⁶⁸ NIMMER & NIMMER, *supra* note 265, at § 8.14[C][2]; *see also*, Malkan, *supra* note 266, at 516.

²⁶⁹ NIMMER & NIMMER, *supra* note 265, at § 8.14[C][2].

²⁷⁰ *Id.*; *see also*, Malkan, *supra* note 266, at 516.

²⁷¹ *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984). Yet, Nimmer’s explanation of the Transmit Clause can be criticized. In the example he provided (that of the commercial

The Transmit Clause was next implicated in 1991 in *On Command Video Corp. v. Columbia Pictures Industries*.²⁷² In *On Command*, the U.S. District Court for the Northern District of California evaluated whether On Command’s “system for the electronic delivery of movie video tapes” to hotel rooms infringed upon the plaintiffs’ right to publicly perform their copyrighted works.²⁷³ To use the system, a hotel guest would access a computer program embedded in the television set in his hotel room to select the movie he wanted to watch.²⁷⁴ The movie was then automatically transmitted to the guest’s room from a video cassette player centrally located in the hotel equipment room.²⁷⁵

Without referencing Nimmer’s same copy idea, the Northern District of California held that On Command publicly performed works because it transmitted works

phonograph record being played in the privacy of one’s home), no performance is being transmitted. Thus, the Transmit Clause should not be implicated. Many courts, moreover, avoid the fear Nimmer spoke of (that is, his fear that a literal reading of the Transmit Clause would turn all performances into public performances) by resetting the analysis of whether a work is performed publicly each time the identity of the transmitter changes. *See generally* *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 136 (2d Cir. 2008); *FilmOn X*, No. 13-785, 2013 WL 4763414 at * 13; Malkan, *supra* note 265, at 529. For instance, by focusing on the identity of the transmitter, a work would be performed publicly when a CBS affiliate broadcasts an episode of *The Big Bang Theory*. A work would not be performed publicly, however, when an individual transmits that same episode from one room in his house to another. Under that scenario, the transmission is not being sent to the public because it is only made available to the individual and, perhaps, the members of his family.

For a more recent adoption of Professor Nimmer’s “same copy” idea, *see* *Warner Bros. Entm’t Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1011 n.7 (C.D. Cal. 2011) (ruling the defendant violated the public performance right when it streamed content from DVDs to subscribers because “the same DVD . . . [was] used over and over again to transmit performances of Plaintiffs’ Copyrighted Works.”)

²⁷² 777 F. Supp. 787 (N.D. Cal. 1991).

²⁷³ *Id.* at 788.

²⁷⁴ *Id.* at 778.

²⁷⁵ *Id.*

to the public.²⁷⁶ It wrote, “[W]hether 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.”²⁷⁷ In hindsight, the decision in *On Command* is a straightforward application of the Transmit Clause.²⁷⁸ What remains controversial about the decision, however, was the Northern District of California’s classification of what makes someone a member of “the public.” The court wrote that the hotel guests were 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”²⁷⁹ In other words, we become members of the public when we have a commercial relationship with the transmitter.²⁸⁰

²⁷⁶ *Id.* at 789-90.

²⁷⁷ *Id.*

²⁷⁸ For an additional basic application of the Transmit Clause, see *Entertainment and Sports Programming Network, Inc. v. Edinburg Cmty. Hotel*, 735 F. Supp. 1334 (S.D. Tex. 1986) (holding that a motor hotel infringed upon the plaintiffs’ copyrights when it intercepted and then transmitted ESPN and HBO’s signals).

²⁷⁹ *Id.*

²⁸⁰ The Northern District cites no references for its assertion that the relationship between the transmitter and receiver dictates whether one is a member of the public. The court’s rationale, moreover, has been criticized. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008), the Second Circuit Court of Appeals described the Northern District’s interpretation as “untenable.” It wrote:

If Congress had wished to make all commercial transmissions public performances, the transmit clause would read: “to perform a work publicly means . . . to transmit a performance for commercial purposes.” In addition, this interpretation overlooks, as Congress did not, the possibility that even non-commercial transmissions to the public may diminish the value of a copyright.

Id. For additional cases that implicate the public performance right from this era, see *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988). There, the Southern District of New York determined whether Showtime/The Movie Channel (“SMC”) infringed the public performance right when it transmitted works to cable system operators who, in turn, transmitted those works to the public. *Id.* at 758. Although acknowledging that “Congress . . . did not anticipate the eventual proliferation of organizations . . . who ‘broadcast’ their programs to the

The last relevant case to implicate the Transmit Clause was *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (“*Cablevision*”) in 2008.²⁸¹ There, in addition to determining whether Cablevision or its subscribers engaged in volitional conduct, the Court of Appeals for the Second Circuit addressed whether Cablevision’s RS-DVR violated “the Copyright Act by engaging in unauthorized public performances”²⁸² As noted, Cablevision’s RS-DVR permitted customers who did not “have a stand-alone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a ‘remote’ location.”²⁸³ Recordings made with the RS-DVR were unique,

public indirectly,” the Southern District nevertheless held that SMC’s transmissions to cable systems constituted public performances. *Id.* at 759. It wrote:

[I]t seems apparent from the scope of the examples provided in the legislative history that Congress intended the definitions of “public” and “performance” to encompass each step in the process by which a protected work wends its way to its audience. Moreover, it would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public. *Id.*

For cases reaching similar holdings, see *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 11-12 (2d Cir. 2000) (citing *David* with approval and holding that PrimeTime performed works publicly by transmitting NFL footage from the United States to a single satellite even though the footage was eventually transmitted to subscribers in Canada, “a foreign country where the Copyright Act does not apply.”); *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) (finding that an intermediate carrier that captured broadcast signals and then retransmitted them to cable systems was not immune from copyright liability because “the Copyright Act defines ‘perform or display . . . publicly’ broadly enough to encompass indirect transmission to the ultimate public”); but see *Allarcom Pay Television v. General Instrument Corp.*, F.3d. 381, 387 (9th Cir. 1995) (writing that for “U.S. copyright law to apply, at least one alleged infringement must be completed entirely within the United States,” meaning the public performance right cannot be infringed until a work is performed in a place open to the public or transmitted to the public).

²⁸¹ 536 F.3d 121 (2008).

²⁸² *Id.* at 134.

²⁸³ *Id.* at 124. Cablevision viewed its RS-DVR as a technological step forward that would eliminate many of the inefficiencies associated with traditional DVRs. “Set-top DVRs . . . have shortcomings—Cablevision must install an individual unit with an expensive hard drive in each home, and repairs or upgrades require disruptive house calls.” AEREO AND THE PUBLIC PERFORMANCE RIGHT 7 (Cablevision White Paper Dec. 2013). “Centralized storage and processing allows technology providers to offer services more efficiently and conveniently.” *Id.* at 8.

meaning that subscribers did not share copies of recordings.²⁸⁴ When a subscriber selected a program for playback using the RS-DVR, the transmission sent to that subscriber was generated from the subscriber's unique copy and could only be received by that single subscriber.²⁸⁵ Interpreting the Copyright Act, the Second Circuit held that Cablevision's RS-DVR did not infringe the public performance right "[b]ecause the RS-DVR system, as designed, only makes transmissions to one subscriber" and not to the public.²⁸⁶

Although difficult to comprehend, the Second Circuit's approach to the Transmit Clause can be explained. As noted, the Transmit Clause states that to perform a work "publicly" means "to transmit . . . a *performance* . . . of the work . . . to the public . . . whether the members of the public capable of receiving the *performance* . . . receive it in the same place or in separate places and at the same time or at different times."²⁸⁷ Unfortunately, the Copyright Act does not define the word "performance."²⁸⁸ One can assume, however, the word "performance" refers to the performance of a copyrighted work (for example, the performance of an episode of *The Big Bang Theory*). While acknowledging this type of performance, the Second Circuit recognized an additional type of performance. According to the Second Circuit, the "*transmission* of a performance is . . . [also] a performance."²⁸⁹ Under this rationale, a performance occurs

²⁸⁴ Cartoon Network LP, LLLP, 536 F.3d at 135.

²⁸⁵ WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 689 (2d Cir. 2013).

²⁸⁶ Cartoon Network LP, LLLP, 536 F.3d at 137.

²⁸⁷ Copyright Act of 1976, 17 U.S.C. § 101 (2012) (emphasis added).

²⁸⁸ Cartoon Network LP, LLLP, 536 F.3d at 134 (emphasis added).

²⁸⁹ *Id.*

when a cable system *transmits* a television program from its headend into one of its subscriber's homes. Importantly, the Second Circuit said the Transmit Clause should be applied by determining whether the public is capable of receiving the performance that constitutes the transmission.²⁹⁰

The key to comprehending the opinion in *Cablevision* is to understand that a work is performed publicly when a transmission containing a performance of the work (because a transmission is a performance) is communicated to the public. Thus, under the Second Circuit's approach, a public performance would not occur if a cable system made 15,000 discrete transmissions of the same episode of *The Big Bang Theory* to single subscribers. Why? Because each transmission is going to a single subscriber and not to the public. In contrast, if a cable system were to send a single transmission of an episode of *The Big Bang Theory* to 15,000 subscribers, a public performance would occur. Why? Because the single transmission is going to 15,000 subscribers, a number that clearly constitutes "the public."

III. Applying the Transmit Clause: The Lower Courts Determine Whether Aereo and FilmOn Performed the Broadcasters' Works Publicly

Before the Supreme Court heard *Aereo III*, numerous lower courts evaluated whether Aereo and FilmOn, a substantially similar system, performed works publicly.²⁹¹

²⁹⁰ *Id.*

²⁹¹ See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (holding that Aereo did not perform works publicly and denying broadcasters' request for a preliminary injunction); *Cnty. Television of Utah, LLC v. Aereo, Inc.*, No. 2:13CV910DAK, 2014 WL 642828 (D. Utah Feb. 19, 2014) (holding that Aereo performed works publicly and granting the broadcasters' request for a preliminary injunction); *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32 (D. Mass. 2013) (holding that Aereo did not perform works publicly and denying Hearst's request for a preliminary injunction); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 46 (D.D.C. 2013) (holding that FilmOn performed works publicly and granting the broadcasters' request for a preliminary injunction); *Fox Television Stations, Inc. v.*

As a result of these divergent holdings, a split over how to interpret the Transmit Clause developed amongst the courts.

At the heart of the split was a disagreement over what constitutes a “performance” under the Transmit Clause. Writing in 2013 that it was bound by the decision in *Cablevision*, the Second Circuit Court of Appeals in *Aereo II*²⁹² took the approach that the Transmit Clause’s use of the word “performance” “refers not to the performance of the underlying [copyrighted] work but rather to the transmission itself”²⁹³ Working off this premise, the Second Circuit in *Aereo II* ruled that Aereo did not publicly perform works because “the potential audience of each Aereo transmission” is a single user.²⁹⁴ Vital to the court’s ruling was its finding that two essential features of Cablevision’s RS-DVR were also present in Aereo’s system.²⁹⁵ Those features were that (1) Aereo created unique copies of programs and (2) only one Aereo subscriber could view the transmission created by that unique copy.²⁹⁶

Not bound by the Second Circuit’s ruling in *Cablevision*, in 2012, the U.S. District Court for the Central District of California in *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*²⁹⁷ took an alternate approach. Under its approach, the word “performance” in the Transmit Clause refers to the performance of the

BarryDriller Content Sys., 915 F.Supp.2d 1138, 1141 (C.D. Cal. 2012) (holding that FilmOn performed works publicly and granting the broadcasters’ request for a preliminary injunction).

²⁹² WNET, Thirteen, 712 F.3d 676.

²⁹³ *Id.* at 694.

²⁹⁴ *Id.* at 690.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 689.

²⁹⁷ 915 F.Supp.2d 1138 (C.D. Cal. 2012).

copyrighted work. Thus, the Central District of California said the Transmit Clause should be applied by determining whether copyrighted works (e.g., episodes of *The Big Bang Theory*) are transmitted to the public.²⁹⁸ It wrote:

[The Copyright Act's] concern is with the performance of the copyrighted work Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the work. And it is the public performance of the copyrighted work with which the Copyright Act, by its express language, is concerned.²⁹⁹

Applying this standard, the Central District of California held that FilmOn performed works publicly because, regardless of whether only single subscribers could receive the transmissions it sent, FilmOn transmitted copyrighted works to the public.³⁰⁰ Under this interpretation of the Transmit Clause, an entity's discrete transmissions of the same copyrighted work are aggregated to determine if the public is capable of receiving that copyrighted work.³⁰¹

To explain the Central District of California's rationale, consider the example discussed above of the cable system that makes 15,000 discrete transmissions of the same episode of *The Big Bang Theory* to single subscribers. Under the Central District's approach, the cable system's discrete transmissions are aggregated to see if, in the aggregate, a copyrighted work is being sent to the public. Here, the cable system would

²⁹⁸ *Id.* at 1144.

²⁹⁹ *Id.* (emphasis in original).

³⁰⁰ *Id.* at 1143.

³⁰¹ The U.S. District Court for the District of Columbia adopted the same approach to the Transmit Clause. Ruling that FilmOn publicly performed works, the District of Columbia wrote, "By making available Plaintiffs' copyrighted performances to any member of the public who accesses the FilmOn X service, FilmOn X performs the copyrighted work publicly as defined by the Transmit Clause: Film On X 'transmit[s] ... a performance ... of the work ... to the public, by means of any device or process.'" *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 46 (D.D.C. 2013) (citing 17 U.S.C. § 101).

be deemed to have performed works publicly because a copyrighted work (an episode of *The Big Bang Theory*) is being sent to the public. The fact that 15,000 discrete transmissions are made is of no relevance. Each transmission is added together to see if, overall, the public is capable of receiving the copyrighted work.

The lower courts also addressed whether Aereo resembled a traditional cable system. One court, the U.S. District Court for the District of Utah, ruled in 2014 that Aereo's system was "indistinguishable" from that of a cable system and thus "falls squarely within the language of the Transmit Clause."³⁰² In contrast, the Second Circuit in *Aereo II* disregarded the broadcasters' assertions that Aereo resembled a cable system, writing that such an argument failed to provide a valid reason for why the holding in *Cablevision* should not apply.³⁰³

IV. The Supreme Court Determines Whether Aereo Performed the Broadcasters' Works Publicly

The majority of justices in *Aereo III* began their discussion by noting the competing interpretations of the Transmit Clause.³⁰⁴ Considering that this dispute caused a split among the lower courts, one would have expected the nation's highest court to explicitly clarify the law. It did not. The Court felt it unnecessary to choose an

³⁰² Cmty. Television of Utah, LLC v. Aereo, Inc., No. 2:13CV910DAK, 2014 WL 642828 at *5 (D. Utah Feb. 19, 2014).

³⁰³ WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 694-95 (2d Cir. 2013).

³⁰⁴ Am. Broad. Cos., 134 S. Ct. at 2508; *see* Brief for Petitioners at 20, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461) ("The . . . [Second Circuit's] myopic focus on the potential recipients of distinct transmissions is contradicted by the text of the statute, which asks whether an alleged infringer is transmitting a performance to the public, not whether multiple people are capable of receiving each transmission."); *see also* Brief for Respondent at 22, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) ("The Second Circuit correctly concluded that, to determine whether an accused infringer *publicly* performs by means of a transmission, the relevant performance is the transmission itself."); *see also* Am. Broad. Cos., 134 S. Ct. at 2508.

interpretation because, regardless of the interpretation it adopted, it said Aereo would still be deemed to have performed the broadcasters' works publicly.³⁰⁵

A. The Majority's Primary Rationale: Aereo (Again) Resembles a Cable System

Central to the majority's holding was its conclusion that Aereo resembled cable systems, "which do perform 'publicly.'"³⁰⁶ Although it acknowledged that, unlike cable systems, Aereo's transmissions derived from unique copies and were sent to single subscribers, it deemed these differences inconsequential, writing:

Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made?³⁰⁷

Under the majority's view, Aereo performed works publicly because its system was indistinguishable from the CATV systems Congress intended "to bring . . . within the Copyright Act's scope."³⁰⁸ As the majority put it, "Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies."³⁰⁹

³⁰⁵ Am. Broad. Cos., 134 S. Ct. at 2508.

³⁰⁶ *Id.* at 2509.

³⁰⁷ *Id.* at 2508-09.

³⁰⁸ *Id.* at 2501.

³⁰⁹ *Id.* at 2509.

B. The Majority's Secondary Rationale: The Text of the Transmit Clause

Supports the Finding that Aereo Performed the Broadcasters' Works Publicly

The majority in dicta engaged in a textual analysis to bolster its conclusion that Aereo publicly performed works.³¹⁰ To show that Aereo's defense would fail regardless of the interpretation of the Transmit Clause it applied, the majority adopted a qualified version of Aereo's interpretation.³¹¹ Instead of agreeing that the "performance" Aereo transmits "is the . . . performance created by . . . [the] act of transmitting," the Court wrote that to "transmit a performance of . . . an audiovisual work means to communicate *contemporaneously* visible images and *contemporaneously* audible sounds of the work."³¹²

Under the majority's adopted interpretation, the heart of *Cablevision's* treatment of the Transmit Clause remains. A work is still performed publicly if a transmission containing that work is sent to the public. However, the majority identified an exception to this general principle. Under the majority's approach, a work is only performed publicly under the Transmit Clause if the public is capable of receiving a *contemporaneously perceptible transmission* containing the performance. What does contemporaneously perceptible mean? It means that the public must be capable of seeing and hearing the transmissions' images and sounds at the same time it receives the

³¹⁰ "[Dicta] refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule A dictum is any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277, 917 N.E.2d 899, 907 (2009) (internal citations and quotations omitted).

³¹¹ *Id.* at 2508.

³¹² *Id.*

transmission. Thus, a company that permits individuals to download works from the Internet cannot be deemed to perform works publicly under the Transmit Clause. One downloads the program from the Internet and then, at a later time, watches the program. Contemporaneous perceptibility does not exist. However, a company like Aereo that streams works over the Internet can be deemed to perform works publicly. Why? Because the public can see and hear the transmission's images and sounds at the same time it receives those transmissions.³¹³ In other words, contemporaneous perceptibility exists.

With contemporaneous perceptibility existing, the majority proceeded to rule that Aereo publicly performed works because “the [Transmit] Clause suggests that an entity may transmit a performance through multiple, discrete transmissions.”³¹⁴ The majority wrote:

[O]ne can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once *By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.*³¹⁵

³¹³ The “contemporaneous” aspects of the Court’s definition of “to transmit a performance” derive from the Second Circuit’s holding in *United States v. Am. Society of Composers, Authors, and Publishers*, 627 F.3d 64 (2d Cir. 2010). In that case, the Second Circuit held that Internet companies do not publicly perform works when they “offer their customers the ability to download musical works over the Internet.” *Id.* at 71. To reach this holding, the Second Circuit evaluated the Copyright Act’s definition of “perform,” which states (among other things) “that ‘[t]o ‘perform’ . . . a motion picture or other audiovisual work . . . [is] to show its images in any sequence or to make the sounds accompanying it audible.”” *Id.* at 73 (quoting 17 U.S.C. §101). An inherent aspect of this definition, the Second Circuit wrote, is “contemporaneous perceptibility.” *Id.* In other words, for a work to be performed, the audience must perceive the work at the time of the performance (that is, in the Second Circuit’s view, transmission). Thus, a performance occurs when an Internet company streams a musical work because “the song is perceived simultaneously with the transmission.” *Id.* at 74. But this is not the case when a musical work is made available for download. “Unlike musical works played during radio broadcasts and stream transmissions, downloaded musical works are transmitted at one point in time and performed at another.” *Id.* at 74.

³¹⁴ Am. Broad. Cos., 134 S. Ct. at 2509.

³¹⁵ *Id.* (emphasis added).

Thus, even if the relevant performance is considered the “transmission of the performance,” the majority found that Aereo performs works publicly because its discrete transmissions of a given work constitute a singular performance that the public is capable of receiving.³¹⁶ Accordingly, the majority wrote, “[T]he fact that Aereo transmits via personal copies of programs” has no impact on whether it performs works publicly.³¹⁷ This conclusion, which rejects Professor Nimmer’s “same copy” idea, is so because regardless of whether “the same or separate copies” are used, a performance is ultimately transmitted to the public.

An example may clarify the majority’s rationale. Imagine that 15,000 Aereo subscribers use Aereo’s Watch feature to view a particular episode of *The Big Bang Theory* airing on CBS at 8:00 p.m. To serve its subscribers, Aereo would have made 15,000 discrete transmissions of the episode. Under the majority’s approach, and unlike the holdings in *Cablevision* and *Aereo II*, those discrete transmissions are not considered separate performances. Rather, those 15,000 transmissions are considered individual parts of the same performance. Because 15,000 subscribers clearly constitute “the public,” Aereo is deemed to have transmitted a performance to the public and violated CBS’s right to publicly perform its copyrighted work.³¹⁸

³¹⁶ See generally Kimberlianne Podlas, *Applying Aereo to the Internet: Understanding Volitional Links to Leaked Films, Television Episodes, and Scripts As Copyright Infringement*, 18 J. INTERNET L. 1, 16 (2014).

³¹⁷ Am. Broad. Cos., 134 S. Ct. at 2509.

³¹⁸ Mitch Stoltz, a staff attorney at the Electronic Frontier Foundation, criticized the majority’s textual analysis—stating that it was driven by the Court’s desire to classify Aereo as a cable system. Mitch Stoltz, *Symposium: Aereo Decision Injects Uncertainty into Copyright*, SCOTUSBLOG, June 27, 2014, <http://www.scotusblog.com/2014/06/symposium-aereo-decision-injects-uncertainty-into-copyright/>. Stoltz’s assessment of the majority’s textual analysis as “outcome driven” is correct. The majority, after all, began its textual analysis by writing, “The text of the Clause effectuates Congress’ intent.” Am. Broad. Cos., 134 S. Ct. at 2509.

In addition to adding a dimension to the meaning of “performance,” the majority defined what constitutes “the public.” Evaluating the text of the Transmit Clause, which states that a work is performed publicly when transmitted “to a place specified by *clause (1)* or to the public,”³¹⁹ the majority said “the public” must consist “of a large group of people outside of a family and friends.”³²⁰ The majority, nonetheless, placed a caveat on this definition. Drawing parallels with the decision in *On Command*,³²¹ the majority wrote that whether a group of people “constitute ‘the public’ often depends upon their relationship with the underlying work.”³²² According to the majority, that relationship is dictated by ownership. It wrote, “[A]n entity that transmits a performance to individuals in their capacities as owners or possessors [of content] does not perform to ‘the public,’ whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.”³²³

C. Justice Scalia’s Dissent

Justice Scalia felt it unnecessary to address whether Aereo performed publicly due to his conclusion that Aereo “[did] not perform at all”³²⁴

V. Discussion

As with the question of whether an entity performs, future courts will struggle in applying the majority’s holding to the inquiry of whether one does so publicly. Here

³¹⁹ Copyright Act of 1976, 17 U.S.C. § 101 (2012) (emphasis added).

³²⁰ *Am. Broad. Cos.*, 134 S. Ct. at 2510.

³²¹ 777 F. Supp. 787 (N.D. Cal. 1991).

³²² *Am. Broad. Cos.*, 134 S. Ct. at 2510.

³²³ *Id.*

³²⁴ *Id.* at 2514 n.3 (Scalia, J., dissenting).

again, the majority provided little guidance on how to determine whether an entity resembles an early CATV system. Although the majority engaged in a textual analysis of the Transmit Clause, this analysis also stands to produce confusion.

At the outset of its discussion of whether Aereo performed publicly, the majority wrote that it was adopting, for the sake of the argument, an interpretation of the Transmit Clause under which “to transmit a performance of . . . an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work.”³²⁵ But at later points in the opinion, the majority confusingly appeared to adopt this interpretation, one that was only supposed to be adopted for the sake of the argument, as a new standard. For example, toward the end of the textual analysis the majority wrote: “Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.”³²⁶

How should future courts deal with the majority’s puzzling treatment of the Transmit Clause? One would assume that future courts should be free to ignore the majority’s textual analysis of the Transmit Clause. It constitutes dicta and, after all, was adopted for the sake of the argument. Nevertheless, the majority’s lack of precision in this area will surely produce confusion in the lower courts for years to come.

Even more troubling is the fact that the majority’s adopted standard, which could possibly be interpreted as a new standard, treats the transmission as the relevant

³²⁵ *Id.* at 2508.

³²⁶ *Id.* at 2509; *see also id.* at 2510 (“[A]n entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work.”).

performance. This is troubling because, unlike the Second Circuit in *Cablevision*, the majority made no attempt to identify support for such an interpretation within the text or legislative history of the Copyright Act.

New business models could result if the majority's adopted standard is, in fact, a new standard. If "to transmit a performance of . . . an audiovisual work means to communicate *contemporaneously* visible images and *contemporaneously* audible sounds of the work," a future company should be free to transmit audiovisual works to subscribers without violating the public performance right so long as it does not transmit those performances contemporaneously. Put differently, Aereo could change its business model to one in which it makes performances available for download because a work that must be downloaded cannot be communicated contemporaneously.

To provide maximum clarity for future courts, the majority should have expressly interpreted the meaning of the Transmit Clause. That interpretation, as the U.S. District Court for the Central District of California advocated for in *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*,³²⁷ should have included a conclusion that the word "performance" refers to the performance of the copyrighted work—not to the transmission of the performance. When Congress wrote the Transmit Clause, it said that to perform a work "publicly" means "to transmit . . . a *performance* . . . to the public" and referred to "the public capable of receiving the *performance*"³²⁸ Congress did not

³²⁷ 915 F.Supp.2d 1138 (C.D. Cal. 2012).

³²⁸ Copyright Act of 1976, 17 U.S.C. § 101 (2012) (emphasis added).

say that to perform a work “publicly” means “to transmit . . . a *transmission* . . . to the public” or refer to “the public capable of receiving the *transmission*”³²⁹

The Second Circuit in *Cablevision* violated the tenants of statutory construction when it deemed the transmission of a performance as the relevant performance. When interpreting a statute, one must give the words included within it their “ordinary meaning.”³³⁰ Defining “performance” to mean the transmission of a performance frustrates this basic principle. As the Eleventh Circuit wrote, “The rule is that ‘we must presume that Congress said what it meant and meant what it said.’”³³¹

With the emphasis placed on the performance of the copyrighted work, the majority should have then, quite simply, asked whether Aereo transmitted copyrighted works to the public. In making this determination, the majority should have been mindful to aggregate Aereo’s discrete transmissions of the same copyrighted work. Doing so would have permitted the majority to see that, regardless of whether only a single subscriber could receive one of its transmissions, Aereo nevertheless transmitted works to the public.

Additionally, deeming the relevant performance under the Transmit Clause as the copyrighted work would not have led to the fear identified by Professor Nimmer. As noted, Professor Nimmer expressed the concern that particular interpretations of the

³²⁹ See generally Krista Consiglio, Note, *Aereo and Filmon: Technology's Latest Copyright War and Why Aereo Should Survive*, 71 WASH. & LEE L. REV. 2557, 2595 (2014) (“The fact that the transmit clause says “capable of receiving the performance” indicates that the Act concerns the underlying performance and not the individual transmission.”).

³³⁰ See *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

³³¹ *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (quoting *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc)).

Transmit Clause could turn all transmissions into public performances³³²—a concern that led to the “same copy” idea, which the majority rejected in *Aereo III*.

The majority could have eliminated this fear by resetting the public performance right analysis each time the identity of the transmitter changed. For instance, imagine that Aereo uses its system to transmit 15,000 unique copies of an episode of *The Big Bang Theory* to single subscribers. Under that scenario, Aereo is the transmitter and the performance is the episode of *The Big Bang Theory*. Aggregating the discrete transmissions, one can easily see that Aereo has publicly performed a copyrighted work. Aereo, after all, is transmitting an episode of *The Big Bang Theory* to 15,000 subscribers, a number that clearly constitutes the public.

Now, imagine that an individual uses an antenna on his roof to transmit the same episode of *The Big Bang Theory* into his home. Under this scenario, with the analysis being reset due to a change in the identity of the transmitter, the transmitter is the individual and the performance is, again, the episode of *The Big Bang Theory*. Because the individual has transmitted *The Big Bang Theory* to only himself (and perhaps his family), the public performance right is not violated because the individual’s transmission has not gone to the public. In other words, the individual has engaged in a private transmission because the transmission has not been sent to “a large group of people outside . . . [one’s] family and friends.”³³³

³³² See NIMMER & NIMMER, *supra* note 265, at § 8.14[C][2].

³³³ Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2510 (2014).

CHAPTER V: THE IMPACT ON THE CLOUD

In the not so distant past, consumers and companies were forced to store data on hard drives located within one's computer or on a server located on-site. Although local storage and computing provided users with quick access to data, it led to inefficiencies.³³⁴ Physical hard drives and servers, at the end of the day, come with finite amounts of space and are expensive to purchase and maintain.³³⁵

Today, consumers and companies have the option of storing data within "the cloud." Cloud computing "refers to the practice of using a network of remote servers hosted on the Internet to store, manage, and process data."³³⁶ For instance, a consumer can store a digital music file or PDF on Google Drive or in Apple's iTunes in the Cloud. Companies, for their part, can rent virtual servers from entities like Amazon to run applications central to their businesses.³³⁷

³³⁴ See Eric Griffith, *What Is Cloud Computing?* PC MAG., MAR. 13, 2013, <http://www.pcmag.com/article2/0%2c2817%2c2372163%2c00.asp>; Brief of BSA | The Software Alliance as Amicus Curiae in Support of Neither Party, Am. Broad. Cos., 134 S. Ct. 2498 at 2 (No. 13-461).

³³⁵ Brief of Computer & Communications Industry Association and Mozilla Corporation as Amici Curiae in Support of Respondent at 5, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

³³⁶ Brief of Amici Curiae of the Computer & Communications Industry Association and the Internet Association in Support of Affirmance at 5, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

³³⁷ See AMAZON WEB SERVICES: AMAZON ELASTIC COMPUTE CLOUD (EC2), <http://aws.amazon.com/ec2/> (last visited Aug. 17, 2014).

Although cloud computing has been criticized as an unsecure way to store data,³³⁸ many consider the cloud to be “the future of information technology.”³³⁹ Regardless of its future, no one can question the impact it has on today’s economy—generating billions in revenue each year.³⁴⁰

I. Aereo Argues Policy

In its brief, Aereo argued that if the Supreme Court adopted an interpretation of the Transmit Clause under which the relevant performance is considered the copyrighted work, the future of cloud computing would be in jeopardy. According to Aereo, such an interpretation would force courts to aggregate an entity’s discrete transmissions of a given work when determining if the public is capable of receiving that work.³⁴¹ As a result of such aggregation, cloud-based services would infringe the public performance right each time they transmitted copyrighted works to multiple customers. Aereo explained, “[W]henver two users of a cloud-based ‘virtual locker’ service—such as Google Drive—separately play a song stored on the provider’s servers, the provider is publicly performing by transmitting the same ‘underlying’ performance to multiple members of the public.”³⁴²

³³⁸ See Griffith, *supra* note 334; see also Sumit Passary, *Cloud Computing is the Future but not if Security Problems Persist*, TECH TIMES, JUNE 15, 2014, <http://www.techtimes.com/articles/8449/20140615/cloud-computing-is-the-future-but-not-if-security-problems-persist.htm>.

³³⁹ Brief of BSA | The Software Alliance as Amicus Curiae in Support of Neither Party, Am. Broad. Cos., 134 S. Ct. 2498 at 2, 5, 11 (No. 13-461).

³⁴⁰ An estimated \$47.4 billion was spent on public cloud-computing services in 2013. *Id.* at 11 (citing Int’l Data Corp., IDC Forecasts Worldwide Public IT Cloud Services Spending (Sept. 3, 2012)).

³⁴¹ Brief for Respondent at 17-18, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

³⁴² *Id.* at 49; see also AEREO AND THE PUBLIC PERFORMANCE RIGHT 15 (Cablevision White Paper Dec. 2013) (using similar examples to make the same argument).

Numerous *amici* supported this argument,³⁴³ which should hardly be surprising. Many tech companies viewed “*Cablevision* as an authoritative interpretation of the Transmit Clause,”³⁴⁴ and research has found that the decision in *Cablevision* served as a major boon to the cloud-computing industry.³⁴⁵

II. The Majority Distinguishes Aereo from “Different Kinds of Technologies”

Although none of the lower courts that evaluated Aereo and FilmOn’s systems discussed in detail the impact its rulings could have on the cloud, the majority of justices seemed genuinely concerned about “impos[ing] copyright liability on other technologies, including new technologies”³⁴⁶ The majority of justices, nevertheless, believed it could issue a “limited holding” in the broadcasters’ favor without impacting the

³⁴³ See, e.g., Brief of Computer & Communications Industry Association and Mozilla Corporation as Amici Curiae in Support of Respondent at 3, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) (“Adoption of petitioners’ position would threaten one of the most important emerging industries in the U.S. economy: cloud computing.”); Brief of FilmOn X, LLC et al. as Amici Curiae in Support of Affirmance at 27, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) (“Arguing that the Networks have failed to sensibly distinguish Aereo from ‘other cloud-based services’ and writing that “[u]nder the Networks’ construction of the Transmit Clause, countless cloud technologies would potentially enable improper public transmissions of copyrighted work in the same way as Aereo.”); Brief of Center for Democracy & Technology et al. as Amici Curiae in Support of Neither Party at 6, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) (Writing that the broadcasters’ approach to the Transmit Clause “could overturn or subvert” the “principles upon which cloud computing relies.”); Brief of Cablevision Systems Corporation as Amicus Curiae in Support of Petitioners at 2-3, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) (“[P]etitioners advance expansive arguments that needlessly cast doubt on other technologies, including both the RS-DVR and a vast array of other cloud-based services that consumers use to store and play back lawful recordings.”); Brief of BSA | The Software Alliance as Amicus Curiae in Support of Neither Party at 2, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461) (“This case, which requires the Court to construe the Copyright Act’s Transmit Clause, could have very significant repercussions for the future of cloud computing.”).

³⁴⁴ WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 696 n.19 (2d Cir. 2013).

³⁴⁵ A study out of Harvard Business School suggested “that the *Cablevision* decision led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the two-and-a-half years after the decision.” Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*, at 1 (2011), available at <http://tiny.cc/9dxldx>.

³⁴⁶ Am. Broad. Cos., 134 S. Ct. at 2510; see also Transcript of Oral Argument at 7, 8, 12-13, 15, 17-19, 44-51, Am. Broad. Cos., 134 S. Ct. 2498 (No. 13-461).

development of “different kinds of technologies,” an ambiguous term that would seemingly include cloud-computing services.³⁴⁷ The majority offered four reasons why.

First, in wording that resonated with the heart of the Court’s holding, the majority wrote that technologies different from Aereo could be distinguished from early CATV systems.³⁴⁸ In other words, the fact that Aereo resembled a cable system does not mean that all other cloud-computing services do so. The majority wrote, “[T]he history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo ‘perform[s]’ but it does not determine whether different kinds of providers in different contexts also ‘perform.’”³⁴⁹

Second, the majority found protections for developing technologies in its definition of “performance,” repeating that “an entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work.”³⁵⁰ Under this definition, Apple’s iTunes would not transmit a performance when a user purchases a song.³⁵¹ Why? When a user purchases a song from iTunes, Apple typically transmits the song to the hard drive located on the user’s computer or phone, and the user subsequently plays the song at his or her convenience. Thus, the sounds that accompany the song are not played at a time contemporaneously perceptible with the transmission.³⁵² Because

³⁴⁷ *Am. Broad. Cos.*, 134 S. Ct. at 2510.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* Although the majority initially wrote it adopted this definition of “to transmit a performance” for the sake of the argument, here again, it appears as if the majority has adopted a new standard.

³⁵¹ *See United States v. Am. Society of Composers, Authors, and Publishers*, 627 F.3d 64 (2d Cir. 2010).

³⁵² *Id.*

contemporaneous perceptibility does not exist, Apple has not transmitted a performance under the Transmit Clause.

Third, the majority referenced the commercial aspects of its definition of “the public.” Stating that “the public” applies “to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs,” it noted that this definition “does not extend to those who act as owners or possessors of the relevant product.”³⁵³

Finally, the Court wrote, “[T]he doctrine of ‘fair use’ can help to prevent inappropriate or inequitable applications of the Clause.”³⁵⁴ Although the majority did not elaborate on this sentence, a general sense of its meaning can be extrapolated. Fair use serves as an exception to the traditional laws of copyright, “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”³⁵⁵ In other words, copyright liability will not be imposed when a use is fair and reasonable, as would most likely be deemed the case when a cloud-computing service transmits a work lawfully owned by one of its customers.

III. Justice Scalia’s Dissent

In critiquing the vagueness of the majority’s “looks like cable TV” standard, Justice Scalia briefly mentioned the cloud. Acknowledging the majority’s belief that its

³⁵³ Am. Broad. Cos. 134 S. Ct. at 2510.

³⁵⁴ *Id.* at 2511 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

³⁵⁵ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985) (quoting H. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

holding would not adversely impact the cloud, he nevertheless wrote that such a promise could not be guaranteed “given the imprecision of its result-driven rule.”³⁵⁶

IV. Discussion

Aereo’s policy argument clearly impacted the majority, as evident from the numerous ways it attempted to distinguish Aereo’s system. For the majority, the key was to deem Aereo an infringer while not jeopardizing the cloud in the process. The majority will likely succeed in this endeavor.

Under the majority’s new definition of “the public,” cloud-based systems like Google Drive, iTunes in the Cloud, and Sony’s UltraViolet will not infringe the public performance right when they transmit works their customers own. Accordingly, the Court’s bright-line definition of “the public” should serve as a guiding principle for the growing cloud-computing industry—protecting cloud-computing companies from the fear they may inadvertently infringe another’s copyright.

Although some courts have criticized the notion of adding a commercial element to the definition of “the public,”³⁵⁷ such an interpretation is consistent with the Copyright Act. Congress failed to define “the public,” leaving it to the courts to interpret. In *Aereo III*, the majority found that whether a set of people constitutes the public “often depends upon their relationship with the underlying work.”³⁵⁸ Such an interpretation is correct. When an individual asks a cloud-based system to playback a song he owns and stored in

³⁵⁶ Am. Broad. Cos. 134 S. Ct. at 2517 (Scalia, J. dissenting).

³⁵⁷ See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008) (“If Congress had wished to make all commercial transmissions public performances, the transmit clause would read: ‘to perform a work publicly means . . . to transmit a performance for commercial purposes.’ In addition, this interpretation overlooks, as Congress did not, the possibility that even non-commercial transmissions to the public may diminish the value of a copyright.”).

³⁵⁸ Am. Broad. Cos., 134 S. Ct. at 2510.

the cloud, an act he could have done on his local hard drive, the resulting performance is a private one. This is so because the cloud-based system is, in a sense, returning the song to its lawful owner—not transmitting it to the public. As the majority put it: “When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars ‘to the public.’ We would say that it provides the cars to their owners.”³⁵⁹

Unfortunately, the cloud-computing industry may not be able to receive guidance on whether its actions violate the Transmit Clause from the majority’s assertion that “an entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work.”³⁶⁰ This standard may have been applied only for the sake of the argument and, at this point, should not serve as a guidepost for the cloud-computing industry.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

CHAPTER VI: CONCLUSION

I. Reflections on *Aereo III*

The Supreme Court's ruling in *Aereo III* means that, for now, the broadcast business model will remain in tact. Broadcasters will continue to earn billions of dollars in revenue from advertising and retransmission consent agreements. Far from having a similar impact to that of craigslist on the newspaper industry, Aereo will be treated as a minor event in the successful story of broadcast television. The ruling in *Aereo III*, as described, should also have little to no impact on the development of the burgeoning cloud-computing industry.

Despite these certainties, how lower courts will interpret the Supreme Court's treatment of the public performance right remains an open question. It's clear that, when faced with the question of whether an entity publicly performs a work, a court must first ask whether the entity's system resembles an early CATV system. Courts, as noted, may have difficulty making this decision, as the Supreme Court offered little guidance in this regard. Nevertheless, if a court finds an entity's system resembles an early CATV system, the entity will be deemed to have publicly performed works and the analysis should end.

But what happens if the applicable court does not find the entity's system resembles an early CATV system? Under this scenario, how should a court determine whether an entity performs a work? How should it determine whether it does so publicly? This thesis has argued that, when determining if an entity performs a work, courts should apply the volitional-conduct requirement. Although not perfect, the

volitional-conduct requirement is a reasoned and logical way to differentiate between direct and secondary infringers. Additionally, although the majority chose not to apply the volitional-conduct requirement, no wording in its opinion exists that would preclude a court from doing so. The dissenting opinion, in fact, should offer significant support to any court that pursues such a path.

If, after applying the volitional-conduct requirement, a court determines an entity does not perform, the analysis should stop and no liability should be imposed upon the entity. If, however, the volitional-conduct requirement reveals an entity does perform, the applicable court should proceed to analyze whether the entity performs works publicly.

When determining if an entity's system performs works publicly, this thesis has argued that courts should classify the relevant performance under the Transmit Clause as the copyrighted work (e.g., a performance of an episode of *The Big Bang Theory*). Courts, being mindful to reset the analysis each time the identity of the transmitter changes, should then determine whether that performance is transmitted to the public. It is true that the majority, at times in the opinion, engaged in a textual analysis of the Transmit Clause under which the transmission of the performance is considered the relevant performance. Courts, in this regard, should ignore the majority's analysis. The majority prefaced its textual analysis by stating the analysis was being engaged in *arguendo* (that is, for the sake of the argument). Because it is more consistent with the Copyright Act to treat the copyrighted work as the relevant performance, courts should not hesitate to do so when determining whether an entity performs works publicly.

Notwithstanding the efforts of this thesis to clarify the decision in *Aereo III*,

courts and scholars may struggle with the Supreme Court’s lack of precision. The Court had the opportunity to clarify both the volitional-conduct requirement and the Transmit Clause. It did neither. Instead, the Court issued a functionalistic holding under which future courts must first ask if one thing resembles another. Reaching legal conclusion through analogy is a maligned practice. As famed law professor Ronald Dworkin said: “[A]nalogy without theory is blind. An analogy is a way of stating a conclusion, not a way of reaching one”³⁶¹ A Harvard Law Review article that summarized the opinion in *Aereo III* added:

[The majority’s] functionalist approach was useful in limiting the Court’s holding to systems that are analogous to cable television, but introduced unpredictability into the law by ignoring doctrinal distinctions and adopting an approach that lacks a clear focus and scope. The Court could have achieved the same result without resorting to this reasoning by analogy or could have reached the opposite outcome and let Congress correct the result if it had meant to bar Aereo’s existence—either of which would have provided clearer guidance for future courts and innovators.³⁶²

Despite these critiques, Aereo and the Supreme Court decision it produced will remain important chapters in the histories of broadcasting and copyright law.

II. An Epilogue to *Aereo III*

After issuing its decision in *Aereo III*, the Supreme Court remanded the case for further proceedings. Following the remand, the United States District Court for the Southern District of New York issued a nationwide preliminary injunction barring Aereo from retransmitting nearly live versions of broadcasters’ programs.³⁶³ As a result, Aereo

³⁶¹ Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 371 (1997); *see also* Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”).

³⁶² *Copyright Act of 1976—Transmit Clause—ABC, Inc. v. Aereo, Inc.*, *supra* note 33, at 378.

³⁶³ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).

is now prevented from retransmitting nearly live content in the one area of the country it once could: the Second Circuit. Nevertheless, because the broadcasters did not challenge Aereo's retransmissions of recorded programs, the District Court's injunction does not extend to the retransmission of broadcast programs that have completed airing.³⁶⁴

Despite the potential to engage in business models under which it retransmits recorded or non-contemporaneous versions of broadcast programs, following the issuance of the preliminary injunction, Aereo filed for Chapter 11 bankruptcy protection.³⁶⁵ Although Aereo's future does not look bright—Aereo always contended it possessed “no Plan B” if it lost the battle in *Aereo III*—all may not be lost.³⁶⁶ Even while in bankruptcy, Aereo's executives have maneuvered to preserve the company's future.

As of this writing, Aereo is seeking to be classified as the thing it always claimed it was not: a cable system.³⁶⁷ Aereo's arguments have not fallen on deaf ears, as the FCC has issued a Notice of Proposed Rulemaking that would change the definition of cable systems (specifically the definition of Multichannel Video Programming Distributors) to include companies that distribute television signals over the Internet.³⁶⁸

As a cable system, Aereo would be able to take advantage of §111's inexpensive

³⁶⁴ *Id.* at 9.

³⁶⁵ Amy Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES, Nov. 21, 2014, http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0.

³⁶⁶ *Id.*

³⁶⁷ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867 at *2 (S.D.N.Y. Oct. 23, 2014); *see also* Keith M. Stolte, *Is Cheap Internet TV Dead? Duck Hunting Season Comes Early to the Supreme Court*, 26 INTEL. PROP. & TECH. L. J., at *7 (2014).

³⁶⁸ Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services (proposed Dec. 19, 2014).

compulsory license. Nonetheless, it would be subject to the Cable Act's provisions regarding retransmission consent. In accordance with the retransmission consent rules, the broadcasters would be required to operate in "good faith" when negotiating with Aereo. The broadcasters, however, would likely force Aereo to pay the same high-cost retransmission consent fees as the cable systems. As a result, Aereo would no longer be able to offer customers a low-cost way of viewing broadcast television content.

In the end, if Aereo succeeds in being classified as a cable system, the broadcasters would likely view Aereo as nothing more than an additional avenue to earn revenue from retransmission consent agreements. Such a perspective would be a far cry from the broadcasters' original fear of Aereo—that is, the fear of a disruptive technology capable of forever altering the medium's future.

III. Suggestions for Future Research

Legal scholars should steadfastly watch how the lower courts interpret *Aereo III*. Emphasis should be placed on two specific areas. First, legal scholars should evaluate whether the decision in *Aereo III* impacts the development of the volitional-conduct requirement. Although the majority in *Aereo III* declined to endorse the requirement, the dissent did. Because of the dissent's endorsement, will future courts be more likely to embrace the concept when deciding if an individual or entity performs?

Second, scholars should evaluate how future courts interpret the Transmit Clause in light of the decision in *Aereo III*. One question that must be answered is how future courts will determine whether an entity resembles an early CATV system. Additionally, scholars should evaluate how future courts classify the relevant performance under the Transmit Clause. Do they consider it to be the performance of the copyrighted work or

the transmission of the performance? Because the Supreme Court's treatment of this issue in *Aereo III* was highly confusing, this area remains ripe for additional legal scholarship.

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