

AEREO AND *CABLEVISION*: HOW COURTS ARE STRUGGLING
TO HARMONIZE THE PUBLIC PERFORMANCE RIGHT WITH
ONLINE RETRANSMISSION OF BROADCAST TELEVISION

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ABSTRACT

Americans increasingly turn to the computer instead of the television to gain access to their favorite shows. With this in mind, Aereo allows its subscribers to stream broadcast television content to their computers, but does not compensate the broadcasters for these retransmissions. The broadcasters argue this violates their public performance right under the Copyright Act's Transmit Clause, but because of Aereo's curious technology platform, in which thousands of tiny antennas are each assigned to a unique subscriber, infringement is uncertain. The Supreme Court will soon hear American Broadcasting Companies, Inc. v. Aereo, Inc., arising out of the Second Circuit, and decide whether Aereo's retransmissions on the Internet constitute public performances. This Article argues that Aereo is infringing the broadcasters' public performance right and that by expanding on the earlier decision Cartoon Network LP, LLLP v. CSC Holdings, Inc., the Second Circuit misinterpreted the text and the spirit of the Copyright Act.

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INTRODUCTION

In early 2012, a new technology company called Aereo sprouted in New York City amid much controversy.¹ Its content distribution model was novel. For a monthly membership fee, Aereo subscribers are assigned one of thousands of tiny antennae that can receive broadcast television airwaves.² Via these antennae, Aereo streams television content to subscribers over the Internet.³ Aereo also allows subscribers to copy these streams for later viewing with the use of remote hard drives. Aereo does not have any authorization from broadcast television providers to do so, and it does not provide any compensation to broadcasters for these transmissions. As a result, many major broadcasters brought suit, arguing that Aereo was liable for infringing their rights to public

¹ Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. TIMES, Apr. 9, 2009, <http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html>.

² *Frequently Asked Questions*, AEREO, <https://aereo.com/faqs> (last visited Mar. 31, 2014).

³ *Id.*

performance and retransmission.⁴ In April 2013, the United States Court of Appeals for the Second Circuit in *WNET, Thirteen v. Aereo, Inc. (Aereo)* affirmed the district court's denial of the plaintiffs' motion for a preliminary injunction⁵ and subsequently denied en banc review.⁶ In the wake of that denial Aereo has rapidly expanded beyond New York City.⁷ The *Aereo* court's reasoning indicated that had it not been for an earlier Second Circuit decision, *Cartoon Network LP, LLLP v. CSC Holdings, Inc. ("Cablevision")*,⁸ Aereo would have been liable.⁹

Aereo convinced the Second Circuit that because it was assigning a unique antenna to each subscriber and transmitting the broadcast directly to that subscriber's home, no public performance occurred for purposes of the exclusive rights granted under the Copyright Act.¹⁰ The plaintiffs appealed the case to the United States Supreme Court, which recently granted certiorari.¹¹ The Court's eventual decision has the potential to change our conception of what it means to publicly perform. Specifically, the Court must address what constitutes an online public performance.

⁴ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) *cert. granted*, 134 S. Ct. 896, 187 L. Ed. 2d 702 (2014).

⁵ *Id.* at 696 ("Moreover, we find no abuse of discretion in the district court's determination that the balance of hardships does not tip decidedly in the Plaintiffs' favor. The district court reached this decision based on its conclusions (1) that the Plaintiffs were likely to suffer irreparable harm in the absence of an injunction and (2) that Aereo would suffer significant hardship if an injunction should issue, since this would likely be the end of its business.").

⁶ *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013).

⁷ *Where Can I Get Aereo?*, AEREO, <https://aereo.com/coverage> (last visited Mar. 31, 2014).

⁸ *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008).

⁹ *Aereo*, 712 F.3d at 695 ("Though presented as efforts to distinguish *Cablevision*, many of Plaintiffs' arguments really urge us to overrule *Cablevision*. One panel of this Court, however, ' . . . cannot overrule a prior decision of another panel.' . . . Plaintiffs have provided us with no adequate basis to distinguish *Cablevision* from the *Aereo* system. We therefore see no error in the district court's conclusion that Plaintiffs are unlikely to prevail on the merits.") (citing *Union of Needletrades, Indus. & Textile Employees, AFL-CIO, CLC v. U.S. I.N.S.*, 336 F.3d 200, 220 (2d Cir. 2003)).

¹⁰ *Id.* at 694.

¹¹ *Id.* at 676.

The issue has gained prominence as Aereo and similar companies have expanded across the country. Aereo faced other suits over its expansion into Salt Lake City, where it lost,¹² and Boston, where it won.¹³ Another company with a business model and technology nearly identical to Aereo's was found to be infringing by a California district court in late 2012.¹⁴ This company lost in the District of Columbia as well.¹⁵ The judicial fortunes of these companies have diverged, but the upcoming Supreme Court decision will hopefully provide much-needed guidance.

We live in a time of unprecedented technological development, enjoying convenient access to copyrighted work that our forefathers could hardly have dreamed of. When Congress enacted the current Copyright Act, most Americans consumed television content that was broadcast by the major networks. The Internet changed that. Today the Internet is ubiquitous and people can easily stream and download copyrighted content at their convenience, with or without the permission of the copyright holders. This threatens the traditional business models of aging corporations like the major broadcasters.

Can the statutory definition of public performance in the Copyright Act provide guidance in today's technological landscape, or does the law need to be revised? This Article will examine how the Second Circuit treated these issues in *Cablevision* and *Aereo* and how it answered the central question of whether the services sold by the defendants in both cases infringed the public performance copyrights of broadcasters. The Second Circuit's ruling in *Cablevision* set the stage for a ruling in *Aereo* against the broadcasters. This Article will argue because the court

¹² *Community Television of Utah v. Aereo, Inc.*, No. 2:13-cv-00910-DN, at 1 (D. Utah, Oct. 7, 2013), <http://www.scribd.com/doc/208029378/aereoutah>

¹³ *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 WL 5604284 (D. Mass. Oct. 8, 2013) (denying request for a preliminary injunction against Aereo and largely adopting the reasoning of the Second Circuit in *Aereo*).

¹⁴ *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

¹⁵ *Fox Television Stations, Inc. v. FilmOn X, LLC*, No. 13-758 (RMC), Case 1:13-cv-00758-RMC, at *1 (D. D.C. Sept. 5, 2013), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0758-33.

relied on an outdated common-law doctrine and a misreading of the Copyright Act, both *Aereo* and *Cablevision* were decided incorrectly. *Aereo*'s business of retransmitting copyrighted material to its subscribers violates the public performance right of broadcasting companies, and that the consequences of the *Aereo* decision may be further-reaching than the court intended.

This Article will proceed by analyzing *Cablevision* and earlier precedent in detail. It will then turn to *Aereo* and the expansion of *Cablevision*'s interpretation of the public performance right, followed by district courts' subsequent analyses of the issue in the Ninth and D.C. circuits. Ultimately, this Article will set the stage for the forthcoming Supreme Court review and attempt to forecast what is in store for broadcast television and the public performance right in a rapidly evolving technological landscape.

I. UNDERSTANDING STREAMING

Background on the definition of Internet "streaming" may help contextualize these cases. The Copyright Act does not define "streaming," but Webster's Dictionary defines it as "relating to or being the transfer of data (as audio or video material) in a continuous stream especially for immediate processing or playback."¹⁶ For example, when a computer user streams a television show for immediate playback on his computer, there is a continuous transfer of data between that user's computer and the video or song host. Once the streaming has finished, the data are no longer on the streamer's computer. Streaming must be distinguished from downloading, which allows the data to be stored on the computer for later access.

Internet connections can be prone to intermittence, and streaming can be easily interrupted or slowed. To counteract this and allow a person to view streamed content uninterrupted, the computer "buffers" the content. It gathers the data a few seconds ahead of time before it is shown on a screen; if the continuous stream should be interrupted, there will be a few seconds as back-

¹⁶ *Dictionary*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/streaming> (last visited Feb. 7, 2014).

up to allow the computer a chance to catch up without having to interrupt the performance. The buffer data are not stored like downloaded data, but are temporarily accessible by a streaming program.

The distinction between downloading and streaming is important in copyright law. Streaming implicates two statutory rights: the right of reproduction and the right of public performance.¹⁷ The former concerns the tangible copying of copyrighted works (such as bootlegged records or downloaded material), while the latter is concerned with the performance of copyrighted works.¹⁸ There has been much discussion about whether non-permissive streaming of copyrighted content violates one or both rights.¹⁹

While there is no statutory definition of streaming in the Copyright Act, the Act includes language defining public performance and transmission of works. The Copyright Act's definition a public performance contains what is known as the Transmit Clause, which describes when transmission of copyrighted content should be considered a public performance.²⁰ However, without further guidance from Congress or the Supreme Court, lower courts have had to construe the definition of a public performance as new technologies have challenged the boundaries of that definition.

II. SETTING THE STAGE FOR *AEREO*

In recent years, courts have considered the potential for infringement by streaming technology, paving the way for the *Aereo* decision. Much of the Second Circuit's reasoning in *Aereo* was based on the *Cablevision* court's analysis of the public performance and reproduction rights in the context of digital transmissions of copyrighted television content. The *Cablevision* decision, in turn, owed a debt to the earlier Third Circuit case

¹⁷ 17 U.S.C. §§ 106(1), (5) (2012).

¹⁸ *See id.*

¹⁹ *See, e.g.,* Mai Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

²⁰ 17 U.S.C. § 101 (2012).

Columbia Pictures Indus., Inc. v. Redd Horne, Inc., in which the court considered content performance in the pre-Internet era.

A. Cablevision and the Reproduction Right

In *Cablevision*, television content providers sued the eponymous defendant cable television company for offering its subscribers a remote-storage digital video recorder (RS-DVR) system in addition to its normal programming content.²¹ Cablevision had a license to transmit television content to its subscribers, but did not have a license to offer the RS-DVR, which created a second transmission of the same content and allowed subscribers to copy television content for later playback. Like all cable companies, Cablevision gathered television content from various broadcasters and other content providers and transmitted it to subscribers, generally in real time.²² The transmission can be thought of as traveling along a single stream: content is transmitted from broadcasters to Cablevision, which in turn transmits it to subscribers. With its RS-DVR service, Cablevision bifurcated this stream.²³ Unlike a stand-alone digital video recorder, the RS-DVR allowed subscribers to record television content on remote hard drives maintained by Cablevision.²⁴ Content was transmitted to subscribers in real time, but a second transmission was sent to Cablevision's drives. Cablevision had a license for the first stream, but not for the second stream.

The plaintiffs sued for declaratory and injunctive relief, alleging direct infringement under three theories. First, they argued Cablevision was making unauthorized copies of their content by buffering their content for use in the RS-DVR. Second, the plaintiffs argued that Cablevision was also making unauthorized copies by allowing users to copy content onto Cablevision's hard drives for later playback. Third, the plaintiffs argued that Cablevision was infringing their public performance right by allowing subscribers to play back these recordings on their

²¹ *Cablevision*, 536 F.3d at 123.

²² *Id.* at 124.

²³ *Id.*

²⁴ *See id.* at 125.

televisions. This last argument and the court's analysis of the Transmit Clause was most relevant to the *Aereo* decision, but the central issue in *Cablevision* was copying.

Ruling on the RS-DVR buffering argument, the court held the activity was not infringing the plaintiffs' right of reproduction.²⁵ Section 101 of the Copyright Act requires that for a work to be considered to have been reproduced, or copied, it must be "fixed in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be . . . reproduced . . . for a period of more than transitory duration."²⁶ The court interpreted the section as imposing two requirements for a work to have been "reproduced:" (1) it must be embodied in a medium (the embodiment requirement), and (2) it must remain embodied "for a period of more than transitory duration" (the duration requirement).²⁷

Whether an online buffer met these requirements proved complicated. The *Cablevision* court held that because a copy could potentially be extracted from the buffer, the buffer met the embodiment requirement.²⁸ However, the court believed that the buffer did not meet the duration requirement: "No bit of data remains in any buffer for more than a fleeting 1.2 seconds [E]ach bit of data here is rapidly and automatically overwritten as soon as it is processed."²⁹ Thus, unauthorized buffering by itself, and by extension streaming, was not a violation of the copyright holder's reproduction right.

In addressing the plaintiffs' second theory—whether *Cablevision* was liable for copying programs onto its hard drives via its subscribers' RS-DVRs—the court was chiefly concerned with who made the copy. In order to be liable for direct infringement, the court required volitional conduct in copying.³⁰ The court held that because it was the subscriber who ordered the

²⁵ *Id.* at 130.

²⁶ 17 U.S.C. § 101 (2012); *See Cablevision*, 536 F.3d at 127.

²⁷ *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02(B)(2) (rev. ed., 2013).

²⁸ *Cablevision*, 536 F.3d at 129.

²⁹ *Id.* at 130.

³⁰ *Id.* at 131.

system to produce the copy, the subscriber was the actor with volitional conduct, while Cablevision merely provided the hardware and capability.³¹ While the company might have been liable for contributory infringement, the plaintiffs did not make this argument, so the court felt no need to discuss the issue.³²

B. Cablevision and the Public Performance Right

The plaintiffs' third and final argument—and the most important to the later result in *Aereo*—was that Cablevision's RS-DVR service violated the plaintiff's public performance right by way of the Transmit Clause. Via the RS-DVR system, a Cablevision subscriber requests a program he has recorded, and Cablevision transmits the program from the company's hard drives to the subscriber's home.³³ The plaintiffs argued these transmissions directly infringed their right of public performance, enumerated in Sections 106 and 101 of the Copyright Act.³⁴

Section 106(4) grants copyright holders the exclusive right, “in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly.”³⁵ Section 101 further defines what is meant by performing publicly:

To perform or display 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 . . . or to the public, by means of any device or process, whether the members of the public capable

³¹ *Id.* at 132.

³² *Id.* at 133.

³³ *Id.* at 125.

³⁴ *Id.*

³⁵ 17 U.S.C. § 106(4) (2012).

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.*³⁶

There are essentially three definitions in this section, and the second two make up what is known as the Transmit Clause. This clause allows for transmissions of works to be public performances within the meaning of the statute even if they are viewed in private places such as homes.³⁷

Cablevision's RS-DVR transmits performances, so it fits within the second half of the Transmit Clause. The *Cablevision* court noted that “[n]o one disputes that the RS-DVR playback results in the transmission of a performance of a work—the transmission from [Cablevision's hard drives] to the customer's

³⁶ 17 U.S.C. § 101 (2012) (emphasis added).

³⁷ See NIMMER, *supra* note 27, at § 8.14(C)(1). Professor Nimmer wrestled with how to limit the transmit clause, because it was at risk of reading out the term “public” completely. If a television broadcast is a public performance even when people are not physically assembled, then when can there be a private performance? To elaborate on this dilemma, it is important to understand the difference between the underlying copyrighted work and the many copies of that work that people watch on their televisions. If performances can be public when they are played in private hotels or even in private homes because that same underlying work was transmitted to “separate places and at the same time or at different times,” then it is hard to imagine when copyrighted works may be transmitted privately and without violating the Copyright Act.

In order to work around this, Nimmer compromised and interpreted the Copyright Act in a way that limited this dilemma. He stated, “Upon reflection, it would seem that what must have been intended was that *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, this constitutes a ‘public’ performance.” Nimmer used an example of an old-fashioned peep show device, in which many people observed its performance but at different times. Limiting the transmit clause to single copies, while not found explicitly within the Copyright Act, did limit the elimination of private performances, because it separated the underlying work from individual performances by focusing on single copies. If a single copy was used by different people at different times, those performances could be considered public. But if a single copy was only used by a single person and watched many times, this would not be a public performance. This compromise was adopted into common law long before *Cablevision* followed it.

television set.”³⁸ But the court held Cablevision’s transmissions via the RS-DVR were not public performances, stating that the opposite holding would “render the ‘to the public’ language surplusage.”³⁹ The court felt that if it considered these RS-DVR transmissions public performances, it would “obviate[] any possibility of a purely private transmission.”⁴⁰

The court found support for its decision in the Third Circuit ruling in *Redd Horne*⁴¹ and the treatise *Nimmer on Copyright*, using what can be called the “single copy requirement.” The court held,

[T]he use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made “to the public.” . . . Given that each RS–DVR transmission is made to a given subscriber using a copy made by that subscriber, we conclude that such a transmission is not “to the public,” without analyzing the contours of that phrase in great detail.⁴²

The *Cablevision* court felt that the single copy requirement may “limit the potential audience of a transmission”⁴³ But a problem arises once making copies of performances becomes extremely cheap and distributing them to thousands of people

³⁸ *Cablevision*, 536 F.3d at 134.

³⁹ *Id.* at 135.

⁴⁰ *Id.* at 136.

⁴¹ *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984).

⁴² *Cablevision*, 536 F.3d at 138. Note the court’s first conclusion, that the use of a unique copy may limit the potential audience of a transmission. This was Nimmer’s great compromise: by limiting the potential audience to those seeing a particular copy of a work, one could avoid the dilemma of defining a public performance under the transmit clause in too broad a sense. NIMMER, *supra* note 27, at § 8.14[C][3]. That is, if the transmit clause is interpreted to mean the potential audience of the underlying work, and thus essentially the entire public (because anyone can conceivably gain access to work such as a freely available television broadcast), the “public” part of a public performance becomes essentially meaningless.

⁴³ *Id.*

individually becomes technically feasible and profitable. This is essentially what Aereo did. The *Cablevision* court's focus on whether a performance stems from a unique copy is what allowed for the distorted outcome of *Aereo*, permitting a company to take copyrighted content and distribute it to its subscribers on a mass scale without compensating the copyright holders. Although the single copy requirement, which arose out of the *Redd Horne* decision and a discussion in the Nimmer treatise, made sense at the time given the technological restrictions and cost of making copies, it is much harder to justify in today's technological landscape.

C. *Redd Horne and the Single Copy Requirement*

Entertainment content companies' inability to evolve is not unprecedented. Other emerging technologies have, in the past, upended established business models. *Redd Horne* concerned one such upending. A videotape shop, Maxwell's, rented tapes (all legitimately purchased) to customers and provided them with private screening rooms in the shop where they could watch their rentals.⁴⁴ Each room could accommodate no more than four people, and the tapes were played from a central bank of videotape machines (VCRs) behind a counter, operated by Maxwell's employees.⁴⁵ A selected movie would be transmitted from one VCR to a television in one of the private rooms.⁴⁶ A number of motion picture companies sued, arguing Maxwell's was infringing on their public performance right under the Copyright Act.⁴⁷

The court determined that viewing these tapes constituted a performance and proceeded to analyze whether these performances were public under the Transmit Clause.⁴⁸ The court held these performances to be public, finding no functional difference between Maxwell's services and those offered by movie theaters.⁴⁹ The court held that the relevant "place" within the meaning of the

⁴⁴ *Redd Horne*, 749 F.2d at 157.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 158.

⁴⁹ *Id.* at 160.

§ 101 definition was each of Maxwell's two stores, not each individual booth within each store. "Simply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's is unquestionably open to the public."⁵⁰

The *Redd Horne* court's discussion of the relevant place is particularly interesting in light of the *Cablevision* decision. The *Cablevision* court focused on each particular performance viewed by a subscriber.⁵¹ But *Redd Horne* should have guided the court to focus on whether any member of the public could pay a fee to view a performance. The court could have viewed the relevant place of performance to have been the entire Cablevision "store," or focused on the company's service as a whole rather than each individual performance. Instead, its analysis was better suited to the individual booths in Maxwell's, which were not open to the public.

But the use of individual copies was at least as important as the place of performance. In his famed treatise, Professor Nimmer presciently posed a hypothetical concerning "theaters in which patrons occupy separate screening rooms."⁵² Nimmer rightly stated that it would be absurd to expect every consumer to obtain a public performance license to play their legitimately purchased records, simply because the same copyrighted work had been played at another time.⁵³ In order to deal with this potential audience problem under the Transmit Clause, Nimmer found a creative solution that was an effective limitation to this problem—one that worked in a pre-Internet era. Nimmer stated, "what must have been intended was that 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, this constitutes a 'public' performance."⁵⁴ Finding public performances through the repeated use of a single copy by different members of the public creates legal room for private performances without having to excise the Transmit Clause's language on performances that are

⁵⁰ *Id.* at 159.

⁵¹ *Cablevision*, 536 F.3d at 135.

⁵² NIMMER, *supra* note 27, at § 8.14(C)(3).

⁵³ *Id.*

⁵⁴ *Id.*

chronologically dispersed. *Redd Horne* adopted this rationale and found Maxwell's to be infringing because it played the same copies of movies repeatedly for different customers.⁵⁵

The problem with the single copy requirement as an answer to public performances under the Transmit Clause is that it diverts the focus away from the composition of the audience and onto copies of the work, and its reasoning (while sensible for the time) cannot be found in the statute or in legislative reports. While the court in *Cablevision* agreed with and continued to use the single copy requirement, it admitted that "neither the *Redd Horne* court nor Prof. Nimmer explicitly explains *why* the use of a distinct copy affects the Transmit Clause inquiry."⁵⁶ The impracticalities of duplicate copies vanish when technology advances to a point where one could easily generate new copies at low or no cost, such as when Cablevision generates a new stream with its RS-DVR for each performance of a work requested by a subscriber, or when Aereo captures broadcasted content and transmits it to a subscriber from a single antenna.

III. AEREO

In *WNET, Thirteen v. Aereo, Inc.*, Aereo successfully contended that it was providing a "technology platform that enables consumers to use remotely-located equipment . . . to create, access and view their own unique recorded copies of free over-the-air broadcast television programming."⁵⁷ Essentially, Aereo argued that its transmissions were private performances.⁵⁸ Aereo's act of assigning an individual antenna to each subscriber

⁵⁵ *Redd Horne*, 749 F.2d at 159. This was not so explicitly stated in the Third Circuit decision, but was explained more thoroughly in the district court decision. *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 568 F. Supp. 494, 501 (1983) ("The two Maxwell's facilities each have only one copy of a given film title and, therefore, must perform the same copy of a given work repeatedly. We find that Congress intended that this portion of the definition also serve as protection for copyright owners from infringing performances such as those accomplished by Maxwell's showcasing.").

⁵⁶ *Cablevision*, 536 F.3d at 138.

⁵⁷ *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 696, 696–97 (2d Cir. 2013).

⁵⁸ *Id.*

was key to the court's belief that the individual streams created unique copies of content for that user and were private performances, thus satisfying the single copy requirement that arose out of Nimmer's treatise and *Redd Horne* and was adopted in *Cablevision*.⁵⁹

Aereo did not shed new light upon the public performance right so much as it expanded upon the conclusion in *Cablevision*. In finding that *Aereo* and its subscribers were engaging in private performances just like the parties in *Cablevision*, the court found both companies' systems shared two essential characteristics: they created a unique copy for each user and transmitted that to the associated user.⁶⁰ Because of these characteristics, the court found these transmissions to be private performances.

Though unsuccessful, two of the plaintiffs' arguments in *Aereo* are worth noting. First, they argued that because *Cablevision* had a license to transmit content in the first place, the question in that case was whether the defendants needed a second license in order to operate the RS-DVR service.⁶¹ The plaintiffs argued it was pertinent *Aereo* had no license to transmit in the first place.⁶² The court rejected this argument, finding the issue of whether *Aereo* had a license irrelevant because the main question was whether *Aereo*'s transmissions were public performances.⁶³ According to the court, "whether *Aereo* has a license is not relevant to whether its transmissions are public and therefore must be licensed."⁶⁴ The court also drew support from *Cablevision* by pointing out the court in that case was also not concerned with licensing.⁶⁵

Judge Chin, dissenting, found the licensing distinction significant:

Aereo is doing precisely what cable companies, satellite television companies, and authorized Internet streaming companies do—they capture

⁵⁹ *Id.* at 696.

⁶⁰ *Id.* at 689–90.

⁶¹ *Id.* at 690.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

over-the-air broadcasts and retransmit them to customers—except that those entities are doing it legally, pursuant to statutory or negotiated licenses, for a fee. By accepting Aereo’s argument that it may do so without authorization and without paying a fee, the majority elevates form over substance.⁶⁶

This “form over substance” point is instructive. Both *Cablevision* and *Aereo* include detailed explanations of the technology platforms, and the outcomes of the cases were largely based on how the technology was set up—what Judge Chin in referred to as the “form.” Judge Chin argued the focus should be on the “substance,” which was whether Aereo’s system fit the plain meaning of public transmission.

The plaintiffs’ other notable argument was that Aereo’s system was functionally very different from *Cablevision*’s. As the court described it, the plaintiffs analogized *Cablevision*’s RS-DVR system to a typical VCR, while Aereo’s system was more similar to a cable television provider.⁶⁷ The court responded to this argument by acknowledging that while “the *Cablevision* court did compare the RS-DVR system to the stand-alone VCR, these comparisons occur in the section of that opinion discussing *Cablevision*’s potential liability for infringing the plaintiffs’ reproduction right.”⁶⁸ Thus, “[n]o part of *Cablevision*’s analysis of the public performance right appears to have been influenced by any analogy to the stand-alone VCR.”⁶⁹

It appears the court, much like with the licensing issue, did not deny the logic of the plaintiffs’ argument but instead considered it irrelevant. The court curiously dismissed the argument by simply pointing out that the VCR analogy in *Cablevision* was drawn in the section of that opinion dealing with the reproduction right, rather than the public performance right.⁷⁰ Context matters, but given *Cablevision*’s application of the single copy requirement, which deals with the public performance right but it also concerned with

⁶⁶ *Id.* at 697.

⁶⁷ *Id.* at 691.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

reproduction, it seems strange to cordon these two rights off from each other.

In his dissent, Judge Chin felt the issue of Aereo's primary function was instructive. He argued that a service's design and use is important to the analysis of infringement.⁷¹ Judge Chin distinguished the two services and stated, "Cablevision's RS-DVR system 'exist[ed] only to produce a copy' of material that it already had a license to retransmit to its subscribers, but the Aereo system produces copies to *enable* it to transmit material to its subscribers."⁷² Judge Chin argued that the functionality and primary purpose of these services can provide guidance as to whether they infringe or not:

Aereo's use of copies is essential to its ability to retransmit broadcast television signals, while Cablevision's copies were merely an optional alternative to a set-top DVR. The core of Aereo's business is streaming broadcasts over the Internet in real-time; the addition of the record function, however, cannot legitimize the unauthorized retransmission of copyrighted content.⁷³

This argument is related to the licensing argument. Cablevision was not offering any new service for receiving content because it already provided cable television service. It had a license to provide this core service, one that subscribers paid for. The issue in *Cablevision* was the secondary transmission via the RS-DVR, which copied programs to be watched later and the primary function of which was copying already authorized transmissions, not the transmitted material in the first place. Thus *Cablevision* was about the reproduction right and not the public performance right.

But the latter was more important in *Aereo*. Aereo's primary function is live streaming, and this primary transmission (unlike the secondary one in *Cablevision*) was the one that caused the dispute. Aereo's service can be used record programs as well, as

⁷¹ *Id.* at 703.

⁷² *Id.* at 702 (citations omitted).

⁷³ *Id.*

Judge Chin noted,⁷⁴ but that should not divert the focus over its primary transmission and whether or not that transmission was authorized.

These arguments might have prevailed, and Aereo might have been liable for infringement, if not for the *Cablevision* precedent. The court invoked stare decisis, explaining that, “though presented as efforts to distinguish *Cablevision*, many of Plaintiffs’ arguments really urge us to overrule *Cablevision*.”⁷⁵ This the Second Circuit was unwilling to do. However, other courts that have considered the issues have declined to adopt the *Cablevision* rule.

IV. DIFFERING VIEWPOINTS IN OTHER CIRCUITS

While *Aereo* is currently the only circuit-level case on unlicensed single-copy Internet broadcasting, some district courts have considered similar issues. Firstly, *Aereo* was sued in the Massachusetts District Court soon after it expanded into Boston, and the court there recently denied a motion for a preliminary injunction against *Aereo*.⁷⁶ Another company has had far less judicial success than *Aereo*. The company, known variously as BarryDriller, Aereokiller, FilmOn, and FilmOn X (henceforth referred to in this Article by the latter name), also retransmits broadcast television over the Internet to paying subscribers without paying the owners of the broadcasted copyrighted content.⁷⁷ Just like *Aereo*, FilmOn X utilizes large banks of small antennas in an attempt to get around the single copy requirement.⁷⁸

The District Court for the Central District of California held in *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC* that FilmOn X was infringing the plaintiffs’ public performance right.⁷⁹ Further, in *Fox Television Stations Inc. v. FilmOn X LLC*

⁷⁴ *Id.* at 702

⁷⁵ *Id.* at 695.

⁷⁶ *Hearst Stations, Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284, at *1 (D. Mass. Oct. 8, 2013).

⁷⁷ Andrew Laughlin, *FilmOn to disrupt TV with new streaming channels*, DIGITAL SPY (Feb. 11, 2013), <http://www.digitalspy.com/media/news/a458001/film-on-to-disrupt-tv-with-new-streaming-channels.html>

⁷⁸ *Id.*

⁷⁹ *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915

the District Court for the District of Columbia granted a preliminary injunction against FilmOnX, concluding that “the Copyright Act forbids FilmOn X from retransmitting Plaintiffs’ copyrighted programs over the Internet,” and the plaintiffs were “thus likely to succeed on their claim that FilmOn X violates [their] exclusive public performance rights in their copyrighted works.”⁸⁰ FilmOn X appealed both of these cases, but the appeals have been stayed pending the Supreme Court decision.⁸¹

A. *Fox Television Stations v. BarryDriller*

In *BarryDriller*, FilmOn X argued their service was technologically analogous to Aereo’s and thus legal under *Aereo*.⁸² The plaintiffs sued for the same reasons as in *Aereo*, arguing that FilmOn X was infringing their right of public performance under the Transmit Clause.⁸³ The court held for the plaintiffs, who have appealed.⁸⁴ The *BarryDriller* court brought up *Cablevision* early in its analysis, mentioning that court’s reliance on the single copy requirement and its focus on a particular performance of a work rather than the underlying work to find that *Cablevision* and its subscribers were engaging in private performances.⁸⁵ But the *BarryDriller* court took a different approach, and held the Copyright Act in Section 101 states a performance is public when the underlying copyrighted work is performed publicly, not a particular performance of the copyrighted work.⁸⁶ According to *BarryDriller*, “The definition section sets forth what constitutes a public performance of a copyrighted work, and says that

F. Supp. 2d 1138, 1146 (C.D. Cal. 2012).

⁸⁰ Fox Television Stations, Inc. v. FilmOn X, LLC, No. 13-758 (RMC), Case 1:13-cv-00758-RMC, at *1 (D. D.C. Sept. 5, 2013).

⁸¹ Kurt Orzech, *9th Circ. Halts FilmOn Case Until Justices Rule On Aereo*, LAW360, (Jan. 29, 2014, 6:00 PM), <http://www.law360.com/articles/505263/9th-circ-halts-filmon-case-until-justices-rule-on-aereo>.

⁸² *BarryDriller*, 915 F. Supp. 2d at 1140–41.

⁸³ *Id.* at 1143.

⁸⁴ Brief for Plaintiffs-Appellees, NBCUniversal Media, LLC v. Aereokiller, LLC; 2013 WL 1888669 (9th Cir. 2013).

⁸⁵ *BarryDriller*, 915 F. Supp. 2d at 1143.

⁸⁶ *Id.* 1144.

transmitting a performance to the public is a public performance. It does not require a ‘performance’ of a performance.”⁸⁷ While this may sound confusing, this is tackling the same problem addressed in *Cablevision*. That is, when analyzing whether a performance was public, does one look at the particular performance in question, or the underlying work that was performed? The *BarryDriller* court held, in contrast to the rationale in *Cablevision* and *Aereo*, that focusing on the underlying work was the relevant approach.⁸⁸

The *BarryDriller* court held the focus should not be on a particular transmission and should instead be on the underlying copyrighted work.⁸⁹ The court refuted *Cablevision*’s embrace of the single copy requirement by holding there was no such requirement in the Copyright Act or in the legislative history.⁹⁰ The court went on:

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. Thus, *Cablevision*’s focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.⁹¹

It seems *BarryDriller* equated a transmission to “the sinusoidal waves of a television broadcast transmission” on an oscilloscope, and was not by itself a performance. *Cablevision* may not have been mistaken by stating transmissions could be performances themselves, even if its ruling as a whole was misguided. But this difference may be beside the point, because either way the

⁸⁷ *Id.*

⁸⁸ *Id.* at 1144–45 (“Precedent in the Ninth Circuit instead properly looks at public performance of the copyrighted work.”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1144.

⁹¹ *Id.* at 1144–45.

question is whether, under the Transmit Clause, we consider the audience of a particular transmission or the underlying work. *BarryDriller* held a performance should be understood as the content people watch, and that the single copy requirement was not in the statute.

Notably, the *BarryDriller* court looked to the physical distance a transmission has to travel from the antenna to the receiving device, a distinction found nowhere in *Cablevision* or *Aereo*:

Defendants . . . analogized their service to self-contained portable televisions of the kind that have been available for many years which can be used, *e.g.*, by attendees at a football game to watch another game being played at the same time. That argument ignores a key distinction. In marked contrast to Defendants' system here, such portable televisions play the broadcast signal within inches of the place the signal is received by the attached antenna, and do not 'send[] out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent.'⁹²

Under this reasoning, performances are private when the source of the transmission is very close to the person viewing the performance. In *Cablevision*, the court discussed the hypothetical "hapless customer who records a program in his den and later transmits the recording to a television in his bedroom [who] would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public."⁹³ Under *BarryDriller*, this customer could escape liability because the distance between the recording device in his den and the television in his bedroom is a matter of feet and not miles, as in the cases of *Cablevision* and *Aereo*. This physical proximity could offer a limiting factor to Transmit Clause analysis in the spirit of the single copy requirement, but without the same distorting effects.

Also pertinent in the hapless customer example is the

⁹² *Id.* at 1146 (citation omitted).

⁹³ *Cablevision*, 536 F.3d at 136.

noncommercial nature of the transmission from den to bedroom. Commerciality was relevant in *BarryDriller*, as the court distinguished between a single person making copies for himself and a commercial provider who provides this service for its subscribers.⁹⁴ Commerciality by itself would probably not be sufficient to find a performance public, but it can still lend persuasive weight.

B. Fox Television Stations v. FilmOn X

FilmOn X concerned the same company as *BarryDriller*, and the facts were nearly identical save for the location, which this time was Washington, D.C. As in *BarryDriller*, the *FilmOn X* court rejected the *Aereo* analysis and granted the plaintiffs' motion for a temporary injunction.⁹⁵ The court held the Transmit Clause should be interpreted broadly to include technologies Congress may not have anticipated, such as the one offered by FilmOn X.⁹⁶

The court also disputed whether FilmOn X's technology platform actually facilitated a one-to-one relationship between a single mini-antenna and a subscriber. The court explained:

[T]his is a charitable description of FilmOn X's arrangement; while each user may have an assigned antenna and hard-drive directory temporarily, the mini-antennas are networked together so that a single tuner server and router, video encoder, and distribution endpoint can communicate with them all. The television signal is captured by FilmOn X and passes through FilmOn X's single electronic transmission process of aggregating servers and electronic equipment. This system, through which

⁹⁴ *BarryDriller*, 915 F. Supp. 2d at 1146.

⁹⁵ *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 RMC, 2013 WL 4763414, at *1 (D.D.C. Sept. 5, 2013), *reconsideration denied*, No. 13-758 RMC, 2013 WL 4852300 (D.D.C. Sept. 12, 2013).

⁹⁶ *Id.* at *13.

any member of the public who clicks on the link for the video feed, is hardly akin to an individual user stringing up a television antenna on the roof.⁹⁷

This line of reasoning, not found in *Aereo*, points out that whether equipment is shared among users is relevant if a court is going to focus on specific technology, as the *Aereo* court did.

However, it seems dubious whether courts should really offer much weight to the specific technology of a company; the focus on technology in *Cablevision* is what gave *Aereo* the ability to operate and exploit a loophole. Focusing on technology in courts breeds loopholes, because technology can develop much faster than court reasoning can. This is not to say that how technology operates is irrelevant to a court's analysis. Technology matters. It just should not dictate how a court will rule. More important than the technology itself is how the technology affects the law and the marketplace. That said, if courts are going to focus on specific technicalities, *FilmOn X* makes a valid point to not focus purely on the mini-antennae and look at other facets of the company's technology.

In this vein, the *FilmOn X* court pointed to the commercial nature of the defendant and held that there were no meaningful differences from cable companies, which were required to obtain licenses to retransmit broadcasted content.⁹⁸ The court stated the relationship cable companies had with broadcasters was the primary motivation for the enactment of the Copyright Act in 1976.⁹⁹ The court noted:

It speaks volumes that Congress settled on a compulsory licensing regime for cable companies that wish to carry over-the-air broadcasts. Whether *FilmOn X* should be subject to a similar licensing regime is not before the Court. It suffices to say that nothing about the 1976 Act or its legislative history suggests that Congress intended a commercial entity that rebroadcasts copyright material for

⁹⁷ *Id.* at *14.

⁹⁸ *Id.*

⁹⁹ *Id.*

consumption by the public, such as FilmOn X, to avoid liability for infringement of the copyright holders' exclusive right to public performance.¹⁰⁰

The court here drew a parallel between FilmOn X's technology platform and that of cable companies, and found no meaningful difference under the Transmit Clause. This was in stark contrast to *Aereo*, which found great importance in how the defendants' technology operated. The *FilmOn X* court chose not to focus on technicalities, deciding instead to focus on the actual effect the defendants had on the marketplace and its potential to change judicial copyright analysis should they be held not liable.

Suffice it to say that there is disagreement among the federal courts at this point. Now that the Supreme Court has agreed to weigh in on the issues, we can hope for more clarity.

V. LOOKING FORWARD: LEGISLATIVE ACTION AND THE FUTURE OF TELEVISION

Where does this leave us? The litigation is still ongoing as *Aereo* expands across the country, so one can only guess as to how the Supreme Court will rule. *Aereo* shows a map on its blog of the numerous cities to which it plans to expand; unsurprisingly, all are outside of the Ninth Circuit.¹⁰¹ Much of *Aereo*'s business strategy has been built around its litigation success, and its future looks bright unless the Supreme Court decides differently.

Whatever the outcome at the Court, the time appears ripe for Congress to act, should it find the political will. Representative Bob Goodlatte, Chairman of the Committee of the Judiciary in the U.S. House of Representatives, recently announced a comprehensive review of copyright law.¹⁰² Representative

¹⁰⁰ *Id.*

¹⁰¹ *Where Can I Get Aereo?*, AEREO, <https://aereo.com/coverage> (last visited Mar. 31, 2014).

¹⁰² Casey Rae, *House Judiciary to Examine US Copyright Law*, FUTURE OF MUSIC COALITION (Apr. 25, 2013, 11:33 AM), <https://futureofmusic.org/blog/2013/04/25/house-judiciary-examine-us->

Goodlatte noted that “[f]ederal judges are forced to make decisions using laws that are difficult to apply today,” and that “[e]ven the Copyright Office itself faces challenges in meeting the growing needs of its customers—the American public.”¹⁰³

Why can’t broadcasters be required to issue a license to companies like Aereo for their copyrighted material, allowing for both sides to profit? This would parallel the legal framework set up for cable companies, and it seems strange to treat companies like Aereo differently, even though they are not technically cable companies. However, such a regime is not without drawbacks.

Section 111 of the Copyright Act addresses secondary transmissions by cable providers.¹⁰⁴ This section sets up a compulsory licensing regime that requires television broadcasters to license copyrighted material to cable providers. Companies have argued that § 111 of the Copyright Act should be construed broadly to include online streaming service providers like Aereo, requiring broadcasters to provide a compulsory license for their material,¹⁰⁵ but this argument has not yet proved successful.¹⁰⁶

The ambiguity of the statutory language is problematic. As one court stated, “[b]ased on the statutory text alone, it is simply not clear whether a service that retransmits television programming live and over the Internet constitutes a cable system under § 111.”¹⁰⁷ However, in finding that § 111 did not apply to Internet

copyright-law.

¹⁰³ *Id.*

¹⁰⁴ 17 U.S.C. § 111 (2012).

¹⁰⁵ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1585, 185 L. Ed. 2d 607 (2013).

¹⁰⁶ *Id.* at 284.

¹⁰⁷ *Id.* at 280. In the dicta of the case, the court interestingly brought up the legal issues in the 1990s with regards to the Copyright Act and satellite television broadcasts. In 1991, Congress codified in § 119 a separate compulsory license for satellite carriers, and in 1994 Congress amended § 111 to expressly include “microwave” as an acceptable communications channel for retransmissions. Regarding the Internet, the court noted, “Congress did not, however, intend for § 111’s compulsory license to extend to Internet transmissions. Indeed, the legislative history indicates that if Congress had intended to extend § 111’s compulsory license to Internet retransmissions, it would have done so expressly—either through the language of § 111 as it did for microwave retransmissions” *Id.* at 281–82.

retransmission, the court leaned on the Copyright Office's position that such services "are not cable systems and do not qualify for § 111 compulsory licenses."¹⁰⁸

The Copyright Office has expressed concern that compulsory licensing for retransmissions "would effectively wrest control away from program producers . . . and would likely undercut private negotiations, leaving content owners with relatively little bargaining power in the distribution of broadcast programming."¹⁰⁹ But the *Aereo* court has effectively subverted the Copyright Office's concern by functionally gutting the public performance rights of broadcasters. Companies like Aereo may well not be subject to § 111 licensing, but the views of the *FilmOn X* court, which issued a national injunction against FilmOn X, show that some courts may still find no meaningful difference between these new companies and cable companies. If the Copyright Office's position has merit, perhaps Congress should look to removing the existing compulsory licensing regime for cable companies. The cable industry is certainly far better established than it was in 1976, and removing these outlays would allow for more equal bargaining positions among television providers.

Whether the protection of copyrighted content is to come from Congress or the courts, *Aereo* leaves open the possibility that many content creators large and small may lose their right of public performance once their content is placed on the Internet. It is plausible to imagine Aereo's one-to-one relationship between subscribers and mini-antennae expanded to other media besides broadcast television. Music, movies or any other media could be transmitted by companies that hold large arrays of transmitters where a single one sends information to a single user and the company avoids copyright liability. The concern is not just with public performances and the broadcast industry, but our entire conception of copyright protection with regards to the Internet.

In this new environment, will the traditional television soon be obsolete? It seems the primary thing holding back a complete transformation into Internet-delivered television is the speed at

¹⁰⁸ *Id.* at 283.

¹⁰⁹ *Id.*

which people can access the Internet. But that too is changing rapidly. People will no longer be held back from streaming television and movies online, and distribution models like Aereo will present an even greater threat to established businesses. People today are simply no longer consuming content like they did in the 1950s, where tens of millions of Americans crowded around television sets nationwide to watch a program. Broadcasters—and possibly copyright law—will have to adapt to these new surroundings or they risk going the way of the VCR and rotary telephone—obsolescence.

CONCLUSION

This Article can only conclude so much, because litigation over the Aereo model continues. Broadcasters face falling revenues as the television market diversifies and splinters due to the continuing development of Internet-based distribution. *The New York Times* has reported that ratings among the Big Four broadcasters “together are dropping more precipitously than ever Advertisers are moving more cash to cable, cutting into the networks’ quarterly profits. New technologies are making it easier to skip those ads, anyway.”¹¹⁰ What is clear is that the market is changing. This Article does not advocate for one industry or company over another, but instead attempts to show how courts have struggled to harmonize the rapidly developing Internet with existing copyright law. The Copyright Act is still relevant, even in the age of the Internet, but it will require some reinterpretation with regards to public performances.

Are broadcasters merely grappling with another tough competitor, or are they actually facing an existential threat? If *Aereo* stands, there seems little stopping other companies from cannibalizing the profits of the broadcasting industry. The *Aereo* and *Cablevision* courts held that the defendants were not infringing because their technological models were set up in such a way as to

¹¹⁰ Brian Stelter, *As TV Ratings and Profits Fall, Networks Face a Cliffhanger*, N.Y. TIMES (May. 12, 2013), <http://www.nytimes.com/2013/05/13/business/media/tv-networks-face-falling-ratings-and-new-rivals.html>.

create a supposed “purely private transmission,”¹¹¹ even though these models were for-profit and based on distributing content to a potentially wide swath of the general public. Other companies in other industries may well follow this reasoning and further circumvent broadcasters’ profit avenues. As the law stands now, there is little stopping cable and satellite companies from setting up “purely private transmissions” of their own and circumventing any compensation to the broadcast industry. This could also expand to other forms of media, such as music or movies, though courts have treated them differently. Courts need not protect industries out of some sense of nostalgia. Businesses and industries evolve as technology develops. Such is the nature of capitalism. But when it comes to copyright law, courts should focus more on how a party affects a market overall, and not on how its technological minutiae may be used to exploit perceived loopholes in copyright law. If our country is to preserve its historic protections of public performance rights, digital retransmission of broadcast television content should be considered a public performance if it reaches a wide audience, whether or not tiny antennae are used in the process.

PRACTICE POINTERS

- Whether a commercial entity sends or receives a transmission can indicate that the transmission is a public performance, but this should be considered only alongside other factors.
- Physical proximity between the source of a transmission and the location at which it is viewed may be another factor in finding whether a performance is public, though this has not been adopted above the district court level.
- When examining whether a public performance right has been violated, courts may focus either on a specific copy of a performance (the single copy requirement) or the performance’s underlying work. Stay tuned for the forthcoming Supreme Court decision.

¹¹¹ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 136 (2d Cir. 2008).