

Private Performances for the Public Good: Aereo and the Battle for Broadcast’s Soul

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TABLE OF CONTENTS

I.	INTRODUCTION.....	59
II.	BACKGROUND.....	61
	A. <i>The Interested Parties</i>	61
	1. Broadcasters.....	61
	2. Online Broadcast Video Providers.....	62
	3. Cable Television Providers and other MVPDs.....	63
	B. <i>The Public Performance Right</i>	63
	C. <i>Retransmission Consent</i>	64
	D. <i>The Issue Before the Supreme Court</i>	65
	E. <i>The Supreme Court Opinion</i>	67
III.	ANALYSIS.....	68
	A. <i>The Statutory Language and Legislative Intent Support a Different Interpretation</i>	68
	B. <i>Prohibiting Aereo Leads to “Surprising Consequences”</i>	69
	C. <i>Aereo’s Innovation Promotes the Progress of the Arts and Sciences</i>	71
	D. <i>Holding Aereo Noninfringing Promises Significant Industry Benefits</i>	74
	1. Broadcasters.....	74
	a. <i>Access to Affiliated Networks</i>	75

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<i>b.</i>	<i>Alternative Network Structures</i>	76
<i>c.</i>	<i>Viewership</i>	77
<i>d.</i>	<i>Spectrum Auction</i>	78
2.	Multichannel Video Programming Distributors	79
<i>a.</i>	<i>Integration</i>	79
<i>b.</i>	<i>Supplemental Programming</i>	80
3.	Consumers	81
<i>E.</i>	<i>Congress and the FCC Are Better Equipped Than the Court to Handle Such an Issue</i>	81
1.	Congress Could Legislate to Bring Aereo Within the Scope of the Copyright Act	82
2.	Congress Could Reconcile the Retransmission Consent and the Compulsory License System	84
3.	The FCC Should Consider Aereo’s Effect on the MVPD Market	85
<i>F.</i>	<i>The Public Performance Right Is the Wrong Theory of Liability</i>	87
1.	The Reproduction Right	87
2.	Secondary Liability	88
IV.	CONCLUSION	89

I. INTRODUCTION

In 2013, the average price for a cable television subscription was \$64.41, 5 percent higher than it was in 2012 and nearly three times the average price in 1995.¹ They say that the best solution to high prices is competition, and the advent of services offering television and other media via the Internet may present an attractive alternative to conventional cable bundle subscriptions.²

One such service is Aereo, the brainchild of Chaitanya “Chet” Kanojia.³ Kanojia founded Navic Networks, whose technology allows cable and broadcast providers to measure audience demographics and place advertisements accordingly in real time.⁴ Finding that, at any given moment, approximately half of pay TV subscribers were watching free, over-the-air broadcast channels, Kanojia engineered Aereo as a means of separating the two, enabling consumers to view broadcast television without the added cost of an antenna or cable or satellite subscription.⁵ In order to protect their current business model, which depends in large part on retransmission fees, broadcast networks brought copyright infringement claims against Aereo and similar services that allow users to stream broadcast channels via the Internet to various devices.⁶

The Copyright Act grants a copyright owner several exclusive rights, including the right to publicly perform her copyrighted work.⁷ Broadcasters

1. Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, *Report on Cable Industry Prices*, DA 14-672, MM Docket No. 92-266, para. 3, Table 3 (rel. May 16, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0516/DA-14-672A1.pdf.

2. See, e.g., Dorothy Pomerantz, *How Much Are You Willing to Pay to Cut the Cord?*, FORBES (Feb. 29, 2012, 1:49 PM), www.forbes.com/sites/dorothypomerantz/2012/02/29/how-much-are-you-willing-to-pay-to-cut-the-cord/; Gerry Smith, *My Year Using Aereo: How a Dime-Sized Antenna Met My TV Needs*, HUFFINGTON POST (Aug. 12, 2013, 3:33 PM), www.huffingtonpost.com/gerry-smith/my-year-using-aereo_b_3745981.html; Brian Stelter, *Cable Is Holding Web TV at Bay, Earnings Show*, N.Y. TIMES, Oct. 31, 2011, at B4, available at <http://www.nytimes.com/2011/10/31/business/media/cable-tv-holding-web-rivals-at-bay-earnings-show.html?pagewanted=1&r=0> (explaining that cord-cutting losses have adversely affected distributors, but have been largely offset by increases in broadband subscriptions and business services).

3. Jon Healey, *Bamboom Takes Over-the-Air TV Over the Top*, L.A. TIMES (Apr. 5, 2014, 3:15 pm), <http://latimesblogs.latimes.com/technology/2011/04/bamboom-takes-over-the-air-tv-over-the-top.html>.

4. *Id.*

5. See *id.*

6. Compare *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013), *rev'd sub nom.*, *Am. Broad. Cos. v. Aereo, Inc.* 134 S. Ct. 2498 (2014), with *Fox Television Stations, Inc. v. Barrydriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1140-41 (C.D. Cal. 2012).

7. See 17 U.S.C. § 106(4) (2012).

alleged that Aereo, in retransmitting their signals to the public without authorization, violated this exclusive right.⁸ Aereo, used thousands of dime-sized antennas to retransmit broadcasters' signals on a "one-to-one" basis—assigning each user her own particular antenna and remote DVR, with which only the assigned user could record and access content. It argued that this individualized form of retransmission made its performances private, not public.⁹ Federal courts across the country disagreed whether Aereo's conduct violated broadcasters' exclusive rights under the Copyright Act.¹⁰ After previously declining to directly address the public performance right in this context,¹¹ the Supreme Court finally addressed the issue in June 2014, holding that Aereo publicly performed broadcasters' copyrighted works, in violation of their exclusive rights under the Copyright Act.¹²

This Note argues that the Supreme Court erred in its holding and that Aereo's retransmission was not a public performance, based on several important considerations. Congress intended that the public performance inquiry take into account the nature and medium of the performance, and the plain language of the Copyright Act reflects as much.¹³ Consequently, the unique, one-to-one manner in which Aereo transmitted its performances distinguishes it from other cable and satellite operators who publicly perform copyrighted works. Furthermore, the Court should strive to interpret the law in a manner that promotes both predictability and consistency. This includes construing the law in such a way as to avoid "surprising consequences,"¹⁴ such as prohibiting intuitively innocent behavior. Aereo's technology, like the legally legitimate Sony Betamax and Cablevision RS-DVR before it, functionally mimicked currently available home-use technology.¹⁵ Additionally, Aereo represented an innovative technology that improved accessibility for the public and streamlined the dissemination of creative content and information. The Court's holding that Aereo infringed on the public performance right runs afoul of the principal purpose of U.S. copyright law, to "promote the Progress of Science and the useful Arts,"¹⁶ and the Communication Act's principal objective, to "make available, so far as possible, to all the people of the United States, without discrimination . . .

8. See *WNET*, 712 F.3d at 686.

9. Brief for Respondent at 2–3, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2013) (No. 13-461).

10. See *id.* at 3.

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

12. See *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (holding that Aereo publicly performed within the meaning of the Copyright Act).

13. See *infra* Part III.A.1.

14. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1362 (2013).

15. In this case, Aereo purports to mimic a conventional antenna (and DVR), which allows a consumer to receive over-the-air broadcast signals for free. See *infra* Part III.B.

16. U.S. CONST. art. I, § 8, cl. 8.

, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”¹⁷

Furthermore, Aereo’s technology promises a significant positive impact for the entire industry, including broadcasters shifting to alternative network structures and potential implementation of Aereo-like technology by multichannel video programming distributors. Finally, even if Aereo ought to be subject to certain copyright restrictions as a matter of good policy, the Court improperly stretched the public performance right in order to reach Aereo’s conduct. Rather than engaging in results-oriented judicial rulemaking, the Court should have examined Aereo’s service under an alternative theory of liability or left the task to Congress to form a more elegant and comprehensive legislative solution.

II. BACKGROUND

A. *The Interested Parties*

Whether Aereo’s retransmission is public or private has many potential effects on the entire broadcasting industry, implicating the interests of many different parties. Included among the various players are the broadcasters who own the content, the multichannel video programming distributors (“MVPDs”) who partner with broadcasters to provide the content to consumers, and the IP broadcast video providers who seek to provide the content without broadcaster consent.

1. Broadcasters

On one side of the debate are broadcast television networks who, in conjunction with local broadcast affiliates, create, assemble, and distribute television programming free over-the-air to the American public. Broadcast networks and stations hold copyrights in the content they produce and distribute via over-the-air broadcast signals, and therefore are entitled to certain protections and exclusive rights under U.S. copyright law.¹⁸ For television broadcasters, this includes the right “to perform the copyrighted work publicly.”¹⁹ Thus, any party seeking to transmit such copyrighted programming to the public must first obtain a license or otherwise receive the consent of the broadcaster.²⁰

Most broadcasters also partner with MVPDs to transmit their programming to paying cable and satellite subscribers. Under the Cable

17. Communications Act of 1934, ch. 652, § 151, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (2012)).

18. See 17 U.S.C. § 106 (2012).

19. *Id.* § 106(4).

20. See *id.*

Television Protection and Competition Act of 1992 (the “Cable Act”), if an MVPD wishes to carry a broadcaster’s signal, the MVPD must first obtain the station’s consent.²¹ MVPDs thus engage in private negotiations with broadcasters (under certain FCC guidelines), and frequently offer them monetary compensation (known as “retransmission fees”) or other forms of consideration in exchange for their consent, without which MVPDs would be prohibited from transmitting said channels to their subscribers.²²

2. Online Broadcast Video Providers

Opposite the broadcasters are providers such as Aereo and FilmOn X, who offer a fee service that enables subscribers to stream free, over-the-air broadcast television via the Internet.²³ Users can either watch a program almost contemporaneously with the over-the-air broadcast²⁴ or record a program for later viewing.²⁵

Aereo housed and managed an antenna farm comprised of thousands of antennas.²⁶ Each user was assigned a tiny individual antenna and remote DVR that they controlled via Internet-connected device.²⁷ When a user selected a program to watch or record, the server tuned the individual’s antenna to the broadcast frequency of the channel showing the desired program.²⁸ A unique copy of the program was saved to a portion of a hard drive reserved for the particular user.²⁹ The user could play back only the copies that she created.³⁰ Throughout the entirety of this process, each antenna, data stream, and digital recording was segregated by user, and even if two users chose to view the same television program at the same time, they never shared an antenna or viewed the same data stream or digital recording containing the copyrighted content.³¹ Furthermore, this process could only be initiated by the user and did not run independently of user direction.³² Most notably, Aereo did not obtain a statutory license or pay any

21. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482; *see also Retransmission Consent*, FCC (Apr. 6, 2014, 6:37 PM), <http://www.fcc.gov/encyclopedia/retransmission-consent>.

22. *Retransmission Consent*, *supra* note 21.

23. *See, e.g.*, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

24. *Id.* There is at least a six second delay, if not longer. Brief for Respondent, *supra* note 9 at 4.

25. *See, e.g.*, *Aereo*, 134 S. Ct. at 2503.

26. *Id.* *See also* Jeff John Roberts, *Aereo CEO: Our Cheap TV Wouldn't Exist Without Cloud Computing*, GIGAOM (Dec. 5, 2012, 12:31 PM), <http://gigaom.com/2012/12/05/aereo-ceo-our-cheap-tv-wouldnt-exist-without-cloud-computing>.

27. *Aereo*, 134 S. Ct. at 2503; Brief for Respondent, *supra* note 9, at 3.

28. *Aereo*, 134 S. Ct. at 2503.

29. *Id.*

30. *Id.*

31. *Id.* *See also* *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 683 (2d Cir. 2013).

32. Brief for Respondent, *supra* note 9, at 47.

retransmission fees, or otherwise obtain consent from broadcasters in order to retransmit broadcasters' over-the-air signal.³³

3. Cable Television Providers and other MVPDs

Under the Cable Act, an MVPD is “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.”³⁴ Commonly, MVPDs are television cable or satellite operators such as Comcast or DirecTV, who offer broadcast and cable television programming to subscribers. The Cable Act requires MVPDs to obtain retransmission consent from broadcasters in order to carry their broadcast signal,³⁵ which often results in the payment of retransmission fees to broadcasters.³⁶

B. The Public Performance Right

The 1976 Copyright Act (the “Copyright Act”) sets forth a list of exclusive rights afforded to copyright owners.³⁷ In the case of “motion pictures and other audiovisual works,” these enumerated rights include the right “to perform the copyrighted work publicly.”³⁸ According to the Copyright Act, to perform or display a work ‘publicly’ means:

to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.³⁹

The crux of the issue is whether Aereo’s unauthorized transmissions to its subscribers are transmissions to the “public” within the scope of this clause. If so, Aereo’s conduct constitutes a “public performance” and therefore infringes broadcast program owners’ exclusive right to publicly perform their own copyrighted works. Although federal courts disagreed on how to determine whether a transmission is made to the public or not,⁴⁰ the

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

34. 47 U.S.C. § 522(13) (2012).

35. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482 (amending 47 U.S.C. § 325).

36. *Retransmission Consent*, *supra* note 21.

37. Pub. L. No. 94-553, § 106, 90 Stat. 2541 (1976) (codified at 17 U.S.C. § 106 (2012)).

38. 17 U.S.C. § 106(4) (2012).

39. *Id.* § 101.

40. While the Second Circuit held that the relevant inquiry is the particular audience of a particular transmission, a California district court maintained that the focus should be

Supreme Court ultimately held that the relevant inquiry was whether the “same contemporaneously perceptible images and sounds” were transmitted to “a large number of people who are unrelated and unknown to each other.”⁴¹

In *Twentieth Century Music Corp. v. Aiken*, the Supreme Court held that receiving and playing a radio broadcast of copyrighted material in a public establishment did not constitute a “public performance” within the meaning of the Copyright Act.⁴² Therefore, business establishments only needed to obtain copyright licenses to receive and retransmit broadcasts to its patrons if the broadcast being retransmitted was itself unlicensed.⁴³ The Court based its decision, in part, on the “practical unenforceability” of requiring every radio listener to obtain a license for each broadcast he receives, noting that such a ruling would be highly inequitable.⁴⁴ Justice Blackmun, in his concurrence, acknowledged the inadequacy of the existing legal framework used to justify the majority’s opinion, instead urging “resolution of these difficult problems and the fashioning of a more modern statute . . . from the Congress.”⁴⁵

C. Retransmission Consent

Anticipating future issues with cable television operators and their retransmission of copyrighted works, Congress amended the Copyright Act in response to the Supreme Court’s decision in *Aiken*, introducing a compulsory licensing system for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to FCC rules and regulations.⁴⁶ Some years later, after the Cable Act of 1992 was enacted, the FCC promulgated regulations requiring that MVPDs seeking to retransmit the signal of any commercial broadcasting station first obtain the station’s express retransmission consent.⁴⁷ As part of any such retransmission consent agreement, broadcast stations and MVPDs may negotiate money or other consideration, often resulting in MVPDs paying retransmission fees to stations in exchange for permission to carry their signals.⁴⁸

Aereo and other similar internet broadcasting services do not fall under the FCC’s definition of an MVPD, which currently only includes

on who is capable of receiving the underlying work. *Compare* WNET, Thirteen v. Aereo Inc., 712 F.3d 676, 680 (2d Cir. 2013) *with* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1143–46 (C.D. Cal. 2012).

41. See *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014).

42. See 422 U.S. 151 (1975).

43. H.R. REP. NO. 94-1476, at 86–87 (1976).

44. *Aiken*, 422 U.S. at 162.

45. *Id.* at 166 (Blackmun, J., concurring).

46. H.R. REP. NO. 94-1476 at 88–89 (1976).

47. 47 C.F.R. § 76.64(a) (2014).

48. *Retransmission Consent*, *supra* note 21.

certain video programming distributors as provided for by statute and regulation.⁴⁹ Consequently, Aereo and the like have so far operated outside the existing retransmission consent framework, intercepting and retransmitting over-the-air broadcast signals without negotiating retransmission consent agreements or paying retransmission fees to those broadcast stations.⁵⁰ Were Aereo permitted to continue operating without first obtaining consent from broadcasters or paying retransmission fees, MVPDs might either refuse to continue paying retransmission fees—thus ceasing carriage of many broadcast stations—or adapt their own Aereo-like technology. Although such a change would deprive broadcasters of a portion of their revenue stream and bargaining power with MVPDs, it could also revolutionize the current creation, retransmission, and distribution models of broadcast television,⁵¹ leading to a more efficient, competition-driven market and greater consumer choice and accessibility.⁵²

D. The Issue Before the Supreme Court

On October 11, 2013, the broadcasters in *WNET, Thirteen* filed a petition for a writ of certiorari.⁵³ The petitioners included sixteen broadcasting companies, including ABC, Disney, CBS, NBC, Fox, Telemundo, PBS, and others.⁵⁴ The question presented was “whether a company ‘publicly performs’ a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.”⁵⁵

The broadcasters challenged the Second Circuit’s analysis of the Transmit Clause in *WNET, Thirteen* as “fundamentally flawed.”⁵⁶ They argued that the Second Circuit conflated transmission and performance.⁵⁷

49. Michael Grotticelli, *FCC Considers a Change of Definition That Could Shake Up Broadcast Business*, BROADCAST ENGINEERING (June 10, 2013), <http://broadcastengineering.com/business-announcements/fcc-considers-change-definition-could-shake-broadcast-business>; see 47 C.F.R. § 76 (2014); see also Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs., *Notice of Proposed Rulemaking*, FCC 14-210, MB Docket No. 14-261, paras. 6–8 (2014).

50. E.g., Luis Nunez, *The Aereo Victory and the End of Broadcast Television*, BLP CLINIC (Apr. 3, 2013), www.blipclinic.org/2013/04/the-aereo-victory-and-the-end-of-broadcast-television.

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

52. See Brief for Consumer Federation of America & Consumers Union as Amici Curiae Supporting Appellees at 13–15, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2012) (No. 12-2786).

53. Order Granting Certiorari, *Am. Broad. Cos. v. Aereo, Inc.*, No. 13-461 (U.S. Jan. 10, 2014).

54. Petition for Writ of Certiorari, *Am. Broad. Cos. v. Aereo, Inc.*, No. 13-461 (U.S. Oct. 11, 2013).

55. *Id.* at i.

56. *Id.* at 25.

57. *Id.* at 26.

The Copyright Act asks whether the public is capable of receiving a particular *performance*, not whether it is capable of receiving a particular *transmission*.⁵⁸ Thus, the broadcasters argued, the Second Circuit's focus on the individual nature of Aereo's antennas and the limited audience of a particular *transmission* was a misguided, erroneous interpretation of the statute.⁵⁹ To support their interpretation, the petitioners pointed to the statutory language clarifying that a performance is public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."⁶⁰ Thus, whether a retransmission service makes one transmission or ten thousand does not change the basic reality that a service transmitting the same underlying broadcast of a program to ten thousand strangers is "transmit[ing] . . . a performance to the public, by means of a[] device or process."⁶¹ Therefore, for the sake of determining whether a performance is public, Aereo's thousands of simultaneous but distinct transmissions should be viewed in the aggregate, treated the same as a single transmission to ten thousand households.⁶² Aereo's system of individual dime-sized antennas and digital copies is merely another "device or process" for transmitting a performance "to the public."⁶³

Aereo also urged the Supreme Court to grant certiorari despite the company's victory before the Second Circuit,⁶⁴ arguing that the appeals court's interpretation of the Act was correct.⁶⁵ Under Aereo's preferred interpretation, when only one member of the public is capable of receiving a particular transmission, the transmission is private and therefore beyond the scope of the Copyright Act.⁶⁶ Therefore, because each unique copy of the performance of a work was created at the direction of a particular user and because each transmission could go only to that particular user, Aereo's retransmissions did not violate broadcasters' exclusive rights to publicly perform their copyrighted works.⁶⁷ Additionally, Aereo argued that even assuming its transmissions were public performances, it was not directly liable for infringement because each user controlled the individual antenna

58. *Id.*

59. *Id.* at 11–12.

60. *Id.* at 27 (quoting 17 U.S.C. § 101) (internal quotation marks omitted).

61. *Id.* at 21 (quoting 17 U.S.C. § 101).

62. *See id.* at 22.

63. *See id.* at 25 (quoting 17 U.S.C. § 101).

64. Brief for Respondent at 18, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461) [*hereinafter* Cert. Brief] ("The decision below is correct, and no court of appeals has ruled to the contrary. For four reasons, however, Aereo nonetheless believes that the Court should grant the petition to resolve the important issue of federal law at issue in this case.").

65. *Id.* at 12.

66. *Id.* at 15.

67. *Id.* at 15–16.

and DVR that enabled her to receive and copy programming.⁶⁸ Therefore, like a library that makes a copier machine available for public use, Aereo should not be held liable for direct infringement.⁶⁹

E. *The Supreme Court Opinion*

The Supreme Court ultimately ruled for the broadcasters, finding that Aereo publicly performed broadcasters' copyrighted content within the meaning of the Copyright Act.⁷⁰ The Court first rejected Aereo's argument that it was a merely an equipment supplier, instead finding that Aereo "performs" the works that it transmits.⁷¹ The Court likened Aereo to the CATV (cable television) defendants in *Teleprompter*⁷² and *Fortnightly*,⁷³ which Congress sought to bring under the public performance right with its 1976 overhaul of the Copyright Act.⁷⁴ Due to the similarities between Aereo and CATV providers, the Court concluded that the 1976 Act that brought CATV systems within the public performance right also evinced a legislative intent to include Aereo under such copyright regime.⁷⁵ Furthermore, the Court clarified that the transmission of a performance constitutes the communication of "contemporaneously visible images and contemporaneously audible sounds of the work."⁷⁶ Therefore, a provider publicly performs when it distributes an audiovisual work to a number of people, regardless of the number of discrete communications.

However, acknowledging the far-reaching, potential implications of such a holding, the Court limited its decision in two ways. First, the Court adopted the Second Circuit's holding in *United States v. ASCAP* that the work must be contemporaneously perceptible with its transmission in order to implicate the performance right.⁷⁷ Therefore, a host that makes available a file for download would not perform the contents of the file, even if the downloader plays the file after downloading. Second, intending to exclude cloud services that host user-owned content, the Court determined that the term "public" does not extend to "those who act as owners or possessors of the relevant product."⁷⁸

68. *Id.* at 17–18.

69. *See id.* at 18.

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

71. *Id.* at 2504.

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

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

74. *Aereo*, 134 S. Ct. at 2504–07.

75. *Id.* at 2507–11.

76. *Id.* at 2509.

77. *Id.* at 2508 (citing *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 73 (2d Cir. 2010)).

78. *Id.* at 2510–11.

III. ANALYSIS

A. *The Statutory Language and Legislative Intent Support a Different Interpretation*

In the Copyright Act, Congress distinguishes between persons who “perform” a work” and those who “perform or display a work ‘publicly.’”⁷⁹ Specifically, “public performance” in this context means “to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”⁸⁰ The Court held that this plain language encompasses Aereo’s conduct.⁸¹ Specifically, the majority maintained that because a performance may be public “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times,” the individualized nature of Aereo’s retransmissions to persons in the privacy of their own homes was not enough to render them private performances.⁸²

In citing this particular passage, however, the majority succumbed to a red herring and missed the true crux of the dispute. The fundamental issue under consideration is not *where* or *when* a performance is received, but *who* may receive it. As such, the portion of the Transmit Clause under scrutiny should be the first half, which defines what constitutes a “performance or display of the work . . . to the public.”⁸³

Because Aereo transmits *one* performance to *one person*, it is not “a performance” to “the public,” but rather a series of private performances to individual persons.⁸⁴ The Transmit Clause prohibits the transmission of “a performance . . . to the public”⁸⁵, indicating that the restriction applies only where one, *single* performance is transmitted to many different persons. Consequently, because Aereo does not transmit any one performance to more than one person, its retransmissions fall outside the purview of the Transmit Clause and therefore should be considered private performances.

The Court rejected such an argument, noting that “an entity may transmit a performance through one or several transmissions, where the performance is of the same work.”⁸⁶ However, this presupposes the Ninth Circuit’s assumption that the relevant “performance” inquiry involves the potential audience of the underlying work, not the potential audience of a

79. See 17 U.S.C. § 101 (2012).

80. *Id.* This portion of the statute is known colloquially as the “Transmit Clause.”

81. *Am. Broad. Cos. v. Aereo*, 134 S. Ct. 2498, 2509-10 (2014).

82. *Id.*

83. See 17 U.S.C. § 101.

84. Brief for Respondent, *supra* note 9 at 1.

85. 17 U.S.C. § 101 (emphasis added).

86. *Aereo*, 134 S. Ct. at 2509.

particular transmission.⁸⁷ Congress, however, has made clear that, in defining a particular performance, courts should focus on the actual process by which the content is *created, stored, and shown*, and not the underlying content itself:⁸⁸

The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the ‘motion picture or other audiovisual work’; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.⁸⁹

Although in both examples the content of the underlying work would be the same, only where the audio track has been created and stored concurrently and inseparably with the visual track is the performance of the audio track a performance of the “motion picture or other audiovisual work” as well. Where the track has been reproduced on a separate phonorecord, a performance of the phonorecord is its *own performance*, separate from a performance of the underlying work. This means that each time Aereo creates and transmits an individual program for a particular user, Aereo creates a new, separate *performance*, distinct from the one transmitted by broadcasters. Therefore, rather than one performance being transmitted to the public, each user is receiving her own distinct performance. Such individualized conduct falls outside the Transmit Clause.

B. Prohibiting Aereo Leads to “Surprising Consequences”

In *Kirtsaeng v. John Wiley & Sons*, the Supreme Court declined to adopt a particular statutory interpretation of the Copyright Act, noting that such an interpretation would produce “surprising consequences.”⁹⁰ The Second Circuit used similar reasoning to justify its decision in *Cablevision*. It concluded that holding Cablevision’s RS-DVR infringing could lead to the unintuitive result that “a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work because some other party had once transmitted the same underlying performance to the public.”⁹¹ Likewise, finding Aereo infringing produces an equally counterintuitive result, holding

87. See, e.g., *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012).

88. H.R. REP. NO. 94-1476, at 63–64 (1976).

89. *Id.*

90. *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1362 (2013).

91. *Cablevision*, 536 F.3d 121, 136 (2d Cir. 2008).

illegal a practice that is unquestionably legitimate when implemented by private individuals.

Functionally, Aereo's technology is nearly identical to equipment easily obtained for private consumer use.⁹² Justice Scalia, in his dissent, likens the Aereo system to "a copy shop that provides its patrons with a library card."⁹³ "The owner of a copier available for public use . . . [is not] liable for direct infringement when a customer uses the copier to reproduce a copy of a popular book," merely because he "maintains the copier, provides electric power for its operation and instructions on the copier's use, and charges a per-page fee for making the copies."⁹⁴ Similarly, the owner of an antenna available for public use (Aereo) should not be directly liable for infringement when a customer uses the antenna to receive free, publicly available broadcast signals. Would it be impermissible for a person to pay a professional to come to her house and install an antenna so that she might be able to receive broadcast programming? Similarly, would it be impermissible for a person to pay a professional to come to her house to set her DVR to record a particular show? Why does someone offering services to the public for a fee that would otherwise be indisputably legal if executed by a private person (e.g., Geek Squad) suddenly violate content holders' rights?

The Court's attempt to distinguish Aereo's service from a consumer's own operation of similar equipment is tenuous at best. The Court claims that merely because Aereo resembles a cable system in certain aspects, it must perform unlawfully.⁹⁵ Congress has made it clear in the Transmit Clause that the time and location of the performance does not determine whether it is public or not.⁹⁶ Furthermore, unlike cable systems, Aereo does not constantly transmit. Rather, it only begins to transmit at the direct instruction of the user. As such, Aereo much more represents an assistive technology for the consumer rather than a cable service provider. Merely because Aereo provides for the upkeep and maintenance of the necessary equipment should not subject it to liability for behavior that is otherwise permissible.

Despite the Court's proclamations to the contrary,⁹⁷ such a holding also has far-reaching repercussions outside the broadcast television industry, potentially reaching digital "cloud" storage systems like Google Drive, Amazon Cloud Player, Imgur, Dropbox, etc. These services allow users to

92. See Cert. Brief, *supra* note 64, at 3–5.

93. *Am. Broad. Cos. v. Aereo*, 134 S. Ct. 2498, 2514 (2014) (Scalia, J., dissenting).

94. See Cert. Brief, *supra* note 64, at 18.

95. *Aereo*, 134 S. Ct. at 2507, 2511.

96. See 17 U.S.C. § 101 (2012) ("To perform or display a work 'publicly' means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public . . . whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places.").

97. *Aereo*, 134 S. Ct. at 2510–11.

upload and store their digital data and media on a remote server, from which they can then access, view, or play back said files contemporaneously with the transmission.⁹⁸ Similar to Aereo's individually assigned antennas, digital platforms like Amazon Cloud Player assign a user a personal allocation of memory, which he, and only he, can upload to and access.⁹⁹ For example, for each person that uploads a personal copy of "Hey Jude," there exists one corresponding digital audio file on Amazon's servers.¹⁰⁰ Due to the Supreme Court's holding that Aereo's individualized transmissions constitute public performances, digital cloud-based distribution and consumption lockers must too be deemed public performers.¹⁰¹ Although the Court attempts to exclude such services from its decision, claiming that it "[has] not considered whether public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works,"¹⁰² it is difficult to see how something as immaterial and irrelevant to the actual performance as the consumer's primary intent in purchasing the service could distinguish such virtually-identical services. A user's primary purpose in purchasing storage space on Google Drive does not change the nature of the transmission when she is streaming a video, nor is it a sufficiently concrete factor upon which to differentiate such transmissions.

C. Aereo's Innovation Promotes the Progress of the Arts and Sciences

Aereo represents a conceptual and technological innovation that increases content owners' available exposure while also creating greater public accessibility to creative works and information. Rejecting Aereo artificially deters future technological innovation and denies consumers access to (what is essentially) a public good. Such an action directly contravenes the Copyright Clause's congressional mandate "to promote the Progress of Science and the useful Arts."¹⁰³

The Copyright Clause of the Constitution empowers Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

98. Cullen Kiker, *Amazon Cloud Player: The Latest Front in the Copyright Cold War*, 17 J. TECH. L. & POL'Y 235, 239-44 (2012).

99. *Id.* at 244.

100. *See id.*

101. It is unclear whether such cloud storage services would be immunized from liability under the DMCA safe harbor protection at 17 U.S.C. § 512. However, the safe harbor does not apply to any service that "receive[s] a financial benefit directly attributable to the infringing activity." 17 U.S.C. § 512 (2012). Additionally, while the safe harbor might protect mere file storage systems, it is unlikely to extend to more comprehensive services like Amazon's Cloud Player—which allows a user to upload her own music to the cloud and then play it back online from anywhere. *See* Kiker, *supra* note 98, at 243-44.

102. *Aereo*, 134 S. Ct. at 2511.

103. U.S. CONST. art. I, § 8, cl. 8.

Writings and Discoveries.”¹⁰⁴ The Supreme Court previously noted in *Sony Corp. of America v. Universal City Studios* that the fundamental aim of statutory copyright protection is to serve the important public purpose of “motiv[at]ing the creative activity of authors and inventors by the provision of a special reward, and [] allow[ing] the public access to the products of their genius.”¹⁰⁵ Consequently, copyright statutes should be drafted by Congress and interpreted by courts to give effect to this public policy: broad enough to induce creativity but limited enough to give the public appropriate access to their work product.¹⁰⁶ As the Court noted in *Aiken*:

The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, *but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.*

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. The sole interest of the United States and the primary object in conferring the monopoly, this Court has said, lie in the general benefits derived by the public from the labors of authors. *When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.*¹⁰⁷

As such, the Transmit Clause should be construed to promote the broadest public availability of literature, music, and other arts. Aereo’s technology serves this basic purpose by giving the public greater, more expansive access to creative works—allowing consumers, who might not otherwise be able to receive broadcast television—for example, because they live in an apartment complex where they are unable to install a roof-top television antenna—to receive free, over-the-air broadcast programming. Even in situations where Aereo’s service is borne more out of a desire for convenience rather than necessity—for example, because a consumer prefers to watch television on his smartphone rather than on his home television¹⁰⁸—it helps eliminate

104. *Id.*

105. 464 U.S. 417, 429 (1984).

106. *Id.*

107. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (emphasis added) (internal quotations and citations omitted).

108. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 288 (2d Cir. 2012) (explaining that “there is a delicate distinction between enabling broad public access and enabling ease of access to copyrighted works” and that, even if an injunction is granted, “the service provided by ivi is targeted more toward convenience than access, and the public will still be able to access

barriers to access by providing an alternative means of receiving creative content to which the public is already entitled.¹⁰⁹

Broadcasters, nonetheless, maintain that Aereo may cause them to lose retransmission fees and remove the “fair return” sought by copyright holders in order to incentivize the continued creation of artistic works.¹¹⁰ However, merely because Aereo may weaken broadcasters’ existing revenue model does not mean that Aereo necessarily threatens the creation and availability of literature, music, and other arts. Aereo can best be thought of as what Tim Wu describes as a “disruptive innovation.”¹¹¹ Like the invention of the automobile, which replaced the horse and buggy before it, disruptive innovations threaten the market position of firms reliant on existing technology.¹¹² Historically, copyright holders have sought to block or slow the dissemination of copyright and communications technologies despite their potentially positive social value, merely because such inventions pose a threat to their existing market positions.¹¹³ Broadcasters similarly attacked the legality of the Sony Betamax and Cablevision RS-DVR technologies when they were introduced, both of which were held to be noninfringing.¹¹⁴ Thus, it comes as no surprise that broadcasters and MVPDs alike oppose Aereo’s technology.¹¹⁵ Although an invention may injure the rights holder, often the positive public externalities will outweigh the potential harm.¹¹⁶ Despite only providing access to content to which viewers are already legally entitled, Aereo offers significant social efficiencies, such as allowing distribution of creative content across a wider variety of platforms and audiences and providing consumers a convenient alternative to view broadcast television “without the cost and inconvenience of purchasing and

plaintiffs’ programs through means other than ivi’s Internet service, including cable television.”).

109. The public is already entitled to receive broadcast television in their area by virtue of the signal being free and over-the-air. Additionally, FCC regulations require that broadcast television licensees make their signals available over-the-air to viewers at no charge. See 47 C.F.R. § 73.624(b) (2014).

110. Brief for Petitioner, *supra* note 9, at 38–39 (citation omitted).

111. Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 140 (2006).

112. *Id.*

113. *Id.* at 139.

114. See generally *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984) (holding that the sale of timeshifting equipment did not constitute contributory infringement); *Cablevision*, 536 F.3d 121 (2d Cir. 2008) (holding that RS-DVR playback transmissions did not infringe on public performance right).

115. See, e.g., Brief of the National Ass’n of Broadcasters et al. as Amici Curiae in Support of Petitioners and Reversal, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461) (urging the Court to hold Aereo’s service infringing); Brief of Cablevision Systems Corp. as Amicus Curiae in Support of Petitioners, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461) (urging the Court to hold Aereo’s service infringing on narrower grounds so as not to disturb the Second Circuit’s holding in *Cablevision*).

116. Wu, *supra* note 111, at 139. Wu discusses this balance of interests in the context of broad licensing, but I believe it is applicable to the Aereo context as well.

installing television sets, digital antennas, and DVRs.”¹¹⁷ Television broadcasters similarly opposed cable television when it was first introduced,¹¹⁸ which led to Congressional intervention in 1976 and 1992. However, such statutory and regulatory overprotection of the dominant rightsholder can often lead to industry stagnation—making such decentralizing, competitive forces all the more critical.¹¹⁹

D. Holding Aereo Noninfringing Promises Significant Industry Benefits

Had the Supreme Court instead held that Aereo does not publicly perform the works it transmits, interested parties could have turned such a decision into respective gains in many ways. Broadcasters, despite losing out on potential retransmission fees, have multiple means for retaining leverage in retransmission consent disputes and could even benefit from the increased viewership. MVPDs that currently negotiate for retransmission consent could use Aereo either as a supplement to their own programming or implement similar technology themselves. The FCC could take this opportunity to revise its retransmission consent rules in order to more effectively carry out Chairman Wheeler’s declared mission of reducing collusion in retransmission negotiations¹²⁰ and retransmission consent blackouts.¹²¹ Furthermore, aside from the obvious benefit of broader accessibility to broadcast television, consumers may face greater marketplace competition among television providers, leading to greater consumer choice and lower prices.

1. Broadcasters

Validation of Aereo’s model presents a serious threat to broadcasters’ current revenue structure.¹²² Networks have come to rely on a combination of advertising fees, retransmission fees, and statutory licensing royalties for revenue; if Aereo and MVPDs develop a way to integrate the widespread adoption of Aereo-like systems and technologies that allow for the

117. Cert. Brief, *supra* note 64, at 16 n.6.

118. *Id.*

119. *See id.* at 140.

120. *See* Tom Wheeler, *Protecting Television Consumers by Protecting Competition*, FCC BLOG (Mar. 6, 2014), <http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>.

121. *See* Doug Halonen, *Retrans Reform Heats Up in Washington*, TVNEWSCHECK (Jan. 14, 2014, 5:49 AM), <http://www.tvnewscheck.com/article/73261/retrans-reform-heats-up-in-washington>.

122. *See, e.g.*, Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. TIMES, Apr. 10, 2013, at B1, *available at* <http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html>.

retransmission without the associated fees, this could signify a possible return to the singular, ad-based revenue stream of the past.¹²³ Even if overall viewership does increase due to the addition of Aereo subscribers, advertising revenues from online outlets often do not match off-line advertising revenues.¹²⁴ Thus, a shift of viewers from traditional TV to web-based sources could still ultimately hurt ad revenues.¹²⁵

However, although Aereo threatens their collection of retransmission fees for over-the-air broadcast signals, broadcasters still have a number of means for controlling and profiting from the distribution of their content. Even if MVPDs or customers can gain access to their free, over-the-air channels, many larger broadcasters can still use their affiliated pay channels as bargaining chips in negotiations with MVPDs. Additionally, broadcasters could consider alternative network structures, either switching completely to pay channels or offering tiered packages.

a. *Access to Affiliated Networks*

Even if Aereo technology were upheld as legitimate under the Copyright Act, larger broadcasters would still wield a powerful weapon to defend against MVPDs considering going the Aereo route. Many over-the-air broadcasters also own popular cable networks, which can be used as bargaining chips in retransmission consent negotiations.¹²⁶ For example, Fox could threaten to withhold its pay channels like Fox News or FX from cable operators who opt to intercept Fox's signal instead of paying retransmission fees to carry Fox.¹²⁷ Thus, MVPDs looking to avoid paying retransmission fees would be faced with a choice: continue to negotiate retransmission consent and pay the agreed-upon fees or lose out on popular cable channels such as ESPN (owned by Disney, which also owns ABC) and Bravo (owned by NBC).¹²⁸ Due to the massive popularity of many of these pay channels, this may not be a risk many cable and satellite operators would be willing to

123. *See id.* See analysis *infra* Part III for further discussion and explanation.

124. Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by Web*, WALL ST. J., Feb. 21, 2012, available at <http://online.wsj.com/news/articles/SB10001424052970204059804577229451364593094>.

125. *Id.*

126. Joe Flint, *Having an Aereo Service Won't Necessarily Solve Retransmission Dilemma*, L.A. TIMES, Oct. 25, 2013, available at <http://articles.latimes.com/2013/oct/25/entertainment/la-et-ct-directv-aereo-charter-time-warner-cable-20131025>.

127. *Id.*

128. *See id.*; David Lieberman, *Aereo CEO: Fight with Broadcasters Is About the Pay TV Bundle, Not Retransmission Consent*, DEADLINE HOLLYWOOD (Jan. 8, 2014, 11:04 AM), <http://www.deadline.com/2014/01/aereo-ceo-fight-with-broadcasters-is-about-the-pay-tv-bundle-not-retransmission-consent>.

take, even if it means paying for content that they would otherwise be able to obtain for free.

b. *Alternative Network Structures*

Had the Supreme Court affirmed the Second Circuit's holding that Aereo's retransmission of over-the-air broadcast signals does not constitute a "public performance," broadcast channels might turn to alternative network structures in order to preserve the dual-revenue stream from both ad and retransmission income.

First, many channels have threatened to convert from broadcast to pay-only channels, thus moving exclusively onto cable/satellite where their signals are protected from interception by Aereo's antennae.¹²⁹ Such a move would make it impossible for Aereo to intercept their channels, presumably protecting retransmission fees by forcing those consumers interested in receiving those channels to subscribe to conventional MVPDs in order to gain access. However, with the recent cord-cutting phenomenon,¹³⁰ consumers may opt not to follow these channels back to cable operators, threatening both MVPDs and broadcast stations by driving down viewership—and, consequently, ad revenue).¹³¹

Alternatively, networks might implement a two-tiered system, in which its stations would broadcast "a light version over the airwaves that would be without hit sports and entertainment programming, and a fuller version for subscribers to cable and satellite providers that pay the necessary fees."¹³² Such a model more closely represents that of Internet media content services like Hulu and Spotify, which both offer an option between free, more limited programming and paid, premium services (Hulu Plus and Spotify Premium).¹³³ Such services have seen relative success in their

129. See *id.*; Adam Liptak, *Justices Take Case on Free TV Streaming*, N.Y. TIMES, Jan. 11, 2014, at B1, available at http://www.nytimes.com/2014/01/11/business/media/supreme-court-to-hear-case-on-retransmission-of-tv-signals-by-aereo.html?_r=0.

130. See generally Dorothy Pomerantz, *How Much Are You Willing to Pay to Cut the Cord?*, FORBES (Feb. 29, 2012, 1:45 PM), <http://www.forbes.com/sites/dorothypomerantz/2012/02/29/how-much-are-you-willing-to-pay-to-cut-the-cord/>; Gerry Smith, *My Year Using Aereo: How A Dime-Sized Antenna Met My TV Needs*, HUFFINGTON POST (Aug. 13, 2013, 3:33 PM), http://www.huffingtonpost.com/gerry-smith/my-year-using-aereo_b_3745981.html; Stelter, *supra* note 2.

131. See David Lieberman, *Aereo's Victory Could Eventually Upend Retransmission Consent, Analysts Warn*, DEADLINE HOLLYWOOD (July 12, 2012, 6:10 AM), <http://deadline.com/2012/07/aereo-lawsuit-local-tv-lawsuit-retransmission-consent-299265/> (estimating that MVPDs could lose about 10% of the viewer population that depend on free, over-the-air TV by becoming exclusively cable channels).

132. Stelter, *supra* note 2.

133. Hulu Plus Overview, HULU.COM, <http://www.hulu.com/support/forum/184226> (last visited Jan. 14, 2014); Jake Smith, *Spotify Free vs Spotify Premium: What's the*

respective markets, both in terms of growing subscriber bases¹³⁴ and profit-per-subscriber.¹³⁵ The two-tiered model could present a win-win for both cable operators and their customers, increasing operator profits via increased viewership and value while simultaneously offering greater choice to consumers.¹³⁶

c. Viewership

While services like Aereo threaten retransmission fees, they may also have a beneficial effect on viewership by giving content creators and broadcasters new outlets to reach consumers. AMC's show *Breaking Bad* enjoyed only modest ratings in its first five years, but enjoyed a meteoric rise in viewership in its final season.¹³⁷ A popular explanation for the show's sudden increase in popularity is that viewers who had previously missed out on the critically-acclaimed series were able to catch-up before the final season by watching the show on Netflix.¹³⁸ Changing the available mediums of access can directly affect consumers' television viewing habits;¹³⁹ in the case of *Breaking Bad*, Netflix allowed viewers to come around to the show

Difference?, POCKET-LINT (Dec. 12, 2013), <http://www.pocket-lint.com/news/125771-spotify-free-vs-spotify-premium-what-s-the-difference>.

134. Maggie McGrath, *Amazon and Hulu Could Slow Netflix Growth in 2014*, Morgan Stanley Says, FORBES (Jan. 7, 2014, 11:33 AM), <http://www.forbes.com/sites/maggiemcgrath/2014/01/07/amazon-and-hulu-could-slow-netflix-growth-in-2014-morgan-stanley-says>.

135. Jay Frank, *Why Music Streaming Is More Lucrative for Labels*, HYPEBOT.COM (Jan. 6, 2014), <http://www.hypebot.com/hypebot/2014/01/why-music-streaming-is-more-lucrative-for-labels.html> (finding that "[t]he average 'premium' subscription customer in the U.S. was worth about \$16 a year to [a major record label], while the average buyer of digital downloads or physical music was worth about \$14.>").

136. Although this would result in less content or higher costs to those who currently rely solely on antennae to receive over-the-air broadcast television, the relatively low number of persons who rely solely on an antenna for over-the-air television, compared with the growing numbers of persons receiving television over the Internet, suggest that this may be a reasonable tradeoff. See Press Release, Consumer Electronics Ass'n, Only Seven Percent of TV Households Rely on Over-the-Air Signals, According to CEA Study (July 30, 2013) [hereinafter CEA Study], available at <http://www.ce.org/News/News-Releases/Press-Releases/2013-Press-Releases/Only-Seven-Percent-of-TV-Households-Rely-on-Over-t.aspx> (finding that only 7% of American TV households rely solely on an antenna for television programming, whereas 28% of American TV households receive programming on their TVs through the Internet).

137. Merrill Barr, *Three Shows That Changed the Way Networks Think About Viewership*, FORBES (Nov. 4, 2013, 10:30 AM), <http://www.forbes.com/sites/merrillbarr/2013/11/04/three-shows-that-changed-the-way-networks-think-about-viewership>.

138. *Id.*

139. See *id.*; see also Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by Web*, WALL ST. J., Feb. 21, 2012, available at <http://online.wsj.com/news/articles/SB10001424052970204059804577229451364593094>.

outside the conventional channels of viewership.¹⁴⁰ Like Netflix, Aereo helped deliver content to an entirely new audience who might not otherwise receive it. Content creators and broadcast networks who are able to change their business models to embrace and integrate these new possibilities can expand their audiences, generating increased ratings, and even venture into new and riskier programming frontiers.¹⁴¹

d. *Spectrum Auction*

The FCC's upcoming incentive auction presents an option that would allow broadcast networks to deny Aereo access to their programming while simultaneously raising a large amount of capital.¹⁴² The incentive auction gives television broadcasters a voluntary, opt-in opportunity to sell spectrum in exchange for cash.¹⁴³ Broadcast networks that choose to become cable channels could submit their now unused spectrum licenses to the auction, removing Aereo's source of programming and receiving billions of dollars in the process.¹⁴⁴ Although such a move might negatively impact a network's total viewership,¹⁴⁵ selling spectrum could be a viable way for broadcasters and their affiliates to "stick" it to Aereo—denying Aereo a source of content, regaining full control over the distribution of its content—while making significant profit from the proceeds of the sale. Furthermore, from a public policy perspective, such a move could help reallocate valuable spectrum to more productive or efficient uses—infusing broadcast stations with needed capital and furthering the spectrum priorities established by Congress¹⁴⁶ and the FCC.¹⁴⁷

140. *Id.*

141. *See* Barr, *supra* note 137; Stewart, *supra* note 139.

142. Kevin Eck, *Broadcast Networks May Use the FCC to Beat Aereo and Make Billions Doing It*, TVSPY (May 7, 2013, 11:24 AM), <http://www.adweek.com/tvspy/broadcast-networks-may-use-the-fcc-to-beat-aereo-and-make-billions-doing-it/90545>.

143. Chris Ziegler, *Crazy Like a Fox: How Broadcast Networks Could Rake in Billions by Going Cable-Only*, THE VERGE (May 6, 2013, 5:14 PM), <http://www.theverge.com/2013/5/6/4305688/crazy-like-a-fox-how-broadcast-networks-could-rake-in-billions-by-going-cable-only>.

144. *Id.*

145. An estimated 7% of American households rely solely on over-the-air television. CEA Study, *supra* note 136. Thus, if a network moves exclusively to a pay channel, it risks losing that portion of its viewership that does not pay for subscription television.

146. *See, e.g.*, Middle Class Tax Relief & Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6401-6414, 126 Stat. 155 (codified at 47 U.S.C. §§ 1451-1457).

147. *See, e.g.*, Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, FCC 14-50, 29 FCC Rcd. 6567 (2014).

2. Multichannel Video Programming Distributors

a. *Integration*

Had the Supreme Court affirmed the Second Circuit's holding that Aereo's retransmission of over-the-air broadcast signals does not constitute a "public performance," MVPDs might seek to implement Aereo-like structures to reduce costs and supplement their own programming.

Using conventional retransmission technology, cable and satellite providers incur billions of dollars in retransmission fees in order to carry broadcast networks such as NBC, ABC, and CBS.¹⁴⁸ Aereo, on the other hand, was not subject to the same regulations regarding retransmission consent, and therefore did not pay such fees.¹⁴⁹ Although some saw Aereo as a threat to the longtime MVPD industry business model,¹⁵⁰ others suggested that cable companies could adopt similar systems and technologies as a way to reduce costs by avoiding billions of dollars in broadcast retransmission fees and copyright liability.¹⁵¹ For example, Verizon could drop NBC from its FiOS television package and instead offer NBC via a separate online broadcast video service that mimics Aereo's technology.¹⁵² Television providers like DirecTV, Time Warner Cable, and Charter Communications have considered implementing Aereo-like methods for capturing free broadcast-TV signals or even buying Aereo outright.¹⁵³ Furthermore, removing costs related to retransmission fees could also benefit consumers by presenting a way for MVPD operators to reduce rising bills.¹⁵⁴

148. Gerry Smith, *Aereo Wins Another Court Battle Against Big TV*, HUFFINGTON POST (Oct. 10, 2013, 1:49 PM), http://www.huffingtonpost.com/2013/10/10/aereo-lawsuit_n_4078740.html.

149. *Id.*

150. *Id.*

151. David Carr, *VCR's Past is Guiding Television's Future*, N.Y. TIMES, July 29, 2013, at B1, available at <http://www.nytimes.com/2013/07/29/business/media/vcrs-past-is-guiding-televisions-future.html>.

152. As an MVPD, Verizon would still be subject to retransmission consent requirements. However, it is unclear whether a stand-alone Aereo-like service offered by Verizon would be subject to the same retransmission consent rules. Thus, presumably Verizon could continue to provide its traditional cable service (sans NBC) while offering a supplementary, Aereo-like service carrying NBC, without paying retransmission fees.

153. Andy Fixmer, Alex Sherman & Jonathon Erlichman, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, BLOOMBERG (Oct. 26, 2013), <http://www.bloomberg.com/news/print/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html>.

154. John McDuling, *Aereo: The Cloud Based Content Upstart That Could Upend the TV Industry*, QUARTZ (Oct. 15, 2013), <http://qz.com/135136/aereo-the-cloud-based-content-upstart-that-could-upend-the-tv-industry>.

b. *Supplemental Programming*

Additionally, MVPDs mired in retransmission consent disputes might use Aereo to supplement programming that would otherwise be subject to blackout.¹⁵⁵ Disputes over retransmission agreements and related fees are resulting in an ever-increasing number of programming blackouts.¹⁵⁶ According to the American Television Alliance, blackouts have grown more common over the last four years, from twelve in 2010 to over 114 in 2013.¹⁵⁷ Since his appointment, FCC Chairman Tom Wheeler has declared it a priority to prevent “consumers [from being] held hostage over corporate disputes” and losing access to broadcast signals during retransmission consent blackouts.¹⁵⁸ Aereo might have provided a potential solution, allowing consumers access to broadcasting programming during such a blackout.¹⁵⁹ In the event of a retransmission impasse, cable and satellite companies could adopt Aereo-like technology themselves¹⁶⁰ or even recommend Aereo to their subscribers in order to allow them uninterrupted access to the blacked-out programming.¹⁶¹ Were Aereo an alternate source of programming during blackouts, some of the bargaining power would shift away from broadcasters in negotiating retransmission agreements by removing the leverage granted by the threat of a channel blackout.¹⁶²

155. See Brian Stelter, *Aereo as Bargaining Chip in Broadcast Fees Battle*, N.Y. TIMES, July 22, 2013, at B5, available at <http://http://www.nytimes.com/2013/07/22/business/media/with-prospect-of-cbs-blackout-time-warner-cable-to-suggest-aereo-as-alternative.html>.

156. Halonen, *supra* note 121.

157. *TV Blackouts Hit All-Time High*, AMERICAN TELEVISION ALLIANCE, http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA_FactSheet_Blackout_Map_v10.pdf (last visited Jan. 27, 2014).

158. Halonen, *supra* note 121.

159. See *id.*; see also Stelter, *supra* note 122.

160. David Lieberman, *Aereo's Victory Could Eventually Upend Retransmission Consent, Analysts Warn*, DEADLINE HOLLYWOOD (July 12, 2012, 6:10 AM), <http://deadline.com/2012/07/aereo-lawsuit-local-tv-lawsuit-retransmission-consent-299265/>.

161. Stelter, *supra* note 155 Time Warner Cable said it would recommend Aereo to its New York subscribers if its retransmission dispute with CBS was not resolved before the blackout deadline. Time Warner Cable and CBS eventually came to an agreement without ever resorting to any further Aereo involvement.

162. See *id.*; Halonen, *supra* note 121; cf. Joe Flint, *Having an Aereo Service Won't Necessarily Solve Retransmission Dilemma*, L.A. TIMES, Oct. 25, 2013, available at <http://articles.latimes.com/2013/oct/25/entertainment/la-et-ct-directv-aereo-charter-time-warner-cable-20131025> (explaining that broadcasters with additional cable properties could possibly maintain leverage in retransmission negotiations by virtue of their other properties, while those without cable properties to tie into distribution deals could be harmed by cable and satellite companies building their own version of Aereo).

3. Consumers

Beyond the primary advantage of greater accessibility to creative content, legitimizing Aereo also has the potential to benefit consumers in a number of other ways. The introduction of Internet television providers introduces competition in a marketplace where there is currently very little: lowering the cost of television programming to consumers and increasing consumer choice, both in terms of *who* provides the content and *what* content the consumer receives.

Giving the public multiple avenues for viewing broadcast television promotes competition—and where programming distributors compete, consumers win.¹⁶³ Competition between Internet streaming services and conventional cable/satellite operators can lead to lower prices and greater consumer choice.¹⁶⁴ While normal cable customers pay a subscription fee that goes to both cable operators and broadcast stations (via retransmission fees), the subscription fee paid by Aereo subscribers ended at Aereo (who was not liable to broadcast stations for retransmission payments). Because many cable operators recoup the cost of paying transmission fees by passing such costs onto customers,¹⁶⁵ consumers may actually see lower costs by choosing Internet broadcasting services like Aereo, which have no retransmission fees to pass on to customers. Furthermore, if the Commission declines to treat Aereo as an MVPD, subscribers would have the opportunity to “unbundle,” allowing viewers to obtain broadcast programming without the added burden of a 500-channel cable subscription.¹⁶⁶ In short, Aereo could mean consumers paying less to get less of what they do not want.

E. Congress and the FCC Are Better Equipped Than the Court to Handle Such an Issue

In his dissent from *International News Service*, Justice Brandeis famously warned against the dangers of judicial rulemaking:

163. See, e.g., Wheeler, *supra* note 120.

164. See Carr, *supra* note 151.

165. Bob Fernandez, *Fight Continues over Cable Retransmission Fees*, PHILA. INQUIRER, Jan. 6, 2014, available at http://articles.philly.com/2014-01-06/business/45885511_1_retransmission-fees-tv-stations-similar-fees.

166. See Lieberman, *supra* note 160. Aereo is currently not subject to the same MVPD-specific regulations, including Must-Carry and public, educational, and governmental access, and therefore does not need to accept bundled channels in exchange for retransmission consent. Consequently, consumers only interested in receiving broadcast programming can do so without the added burden of additional, required channels. See also Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Notice of Proposed Rulemaking*, FCC 14-210, MB Docket No. 14-261 (2014) [hereinafter *MVPD NPRM*], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1_Rcd.pdf

[T]he creation or recognition by courts of a new private right may work serious injury to the general public unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment, and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.¹⁶⁷

Consequently, even if prudential and policy concerns mandate that Aereo's service be brought within the constraints of the Copyright Act, "the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave Congress the task of deciding whether the Copyright Act needs an upgrade."¹⁶⁸ Thus, where the statutory language compels a particular result, rather than risk engaging in results-oriented judicial rulemaking, the Court should allow the proper legislative bodies to inform any change of direction.

1. Congress Could Legislate to Bring Aereo Within the Scope of the Copyright Act

In 1976, Congress amended the Copyright Act in response to prior decisions by the Supreme Court in *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, where the Court narrowly construed the definition of a "performance" in the Copyright Act.¹⁶⁹ The Court in *Fortnightly* held that community antenna television systems, in receiving, reproducing, and transmitting television programs received from television stations, did not "perform" said programs and therefore did not infringe on the exclusive rights of the television stations.¹⁷⁰ Similarly, the Court in *Teleprompter* held that the importation of "distant signals" from one community to another does not

167. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 262–63 (1918) (Brandeis, J., dissenting).

168. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2518 (2014) (Scalia, J., dissenting); *see also Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984) ("It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed."); *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.").

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

170. *Fortnightly Corp.*, 392 U.S. at 395.

constitute a “performance” under the Copyright Act, thus allowing a community antenna television system to maintain its “nonbroadcaster” status and continue carrying signals from distant sources without violating copyright holders’ rights.¹⁷¹ Acknowledging its narrow reading of “performance,” the Court maintained that its job was to interpret statutory language, and that where new technologies emerged that made such language outdated or ambiguous, the responsibility fell on Congress—not the courts—to address such policy and regulatory questions:

These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.¹⁷²

As a result, Congress revised the Copyright Act to clarify the intended retransmission relationship between television stations and cable television providers by redefining what constitutes a performance and inserting the Transmit Clause.¹⁷³ While cable operators were previously able to retransmit distant broadcast signals without permission because such retransmissions were not “performances” under the 1909 Act, the 1976 Copyright Act now deemed such retransmissions “performances,” and therefore required cable operators to pay statutory royalties to the owners of copyrighted programs retransmitted by their systems, or otherwise infringe on broadcasters’ exclusive rights.¹⁷⁴ In addition, Congress passed the 1992 Cable Act, implementing, among other things, the must carry and retransmission consent schemes that governed the basic relationships between broadcast stations and MVPDs.¹⁷⁵

If Congress does in fact wish for Aereo to be governed by the current retransmission consent structure, rather than having the Supreme Court stretch the meaning of the Transmit Clause to reach activity outside its statutory language, Congress should simply amend the Copyright Act to bring Aereo within its scope. Aereo, once again, threatens a shift in the current business and commercial relationships of the communications

171. *Teleprompter Corp.*, 415 U.S. at 408–09.

172. *Id.* at 414 (citation omitted).

173. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; H.R. REP. NO. 94-1476, at 88–89 (1976).

174. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984).

175. *Cable Television Consumer Protection & Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460.

industry, and should therefore not “be controlled by means of litigation based on copyright legislation enacted [almost] half a century ago.”¹⁷⁶ Instead, regulation of the industry should fall to Congress, which can impose its will simply and unambiguously via legislation.

2. Congress Could Reconcile the Retransmission Consent and the Compulsory License System

Currently, the United States Copyright Office has concluded that Internet retransmission systems, such as Aereo, are not cable systems and therefore do not qualify for section 111 compulsory licenses under the Copyright Act.¹⁷⁷ Furthermore, the legislative history indicates that if Congress had intended to extend section 111 to Internet retransmissions, it would have done so expressly—either through the explicit language of section 111 as it did for microwave retransmissions, or by codifying separate statutory provisions as it did for satellite carriers.¹⁷⁸ Given Aereo’s placement outside the retransmission consent scheme of the Cable Act, Congress has an opportunity to not only regulate Aereo, but also develop a regulatory framework that better reconciles the competing principles behind retransmission consent provisions and the MVPD compulsory licenses.

The retransmission consent provisions of the Cable Act come into direct conflict with the MVPD compulsory licensing scheme.¹⁷⁹ While compulsory licenses enabled cable systems to bypass the transaction costs and impracticalities of negotiating individual licenses with dozens of copyright owners while simultaneously ensuring that copyright owners were compensated,¹⁸⁰ retransmission consent has effectively reimplemented many of those transaction costs by once again promoting copyright exclusivity.¹⁸¹ While the compulsory license provides cable operators with the right of retransmission under the Copyright Act upon payment of the statutory royalty fee, retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator.¹⁸²

Although, as a matter of general policy and equity, it is unlikely that Congress would eliminate retransmission consent requirements entirely,¹⁸³

176. *Teleprompter Corp.*, 415 U.S. at 414.

177. *See* WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 283 (2d Cir. 2012); *see also* Letter from Jacqueline C. Charlesworth, Gen. Counsel & Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Aereo, Inc. (July 16, 2014), *available at* <http://www.scribd.com/doc/234281034/071614-Aereo-Copyright-Office-Letter>.

178. *Id.* at 282; *see also* 17 U.S.C. §§ 119, 122.

179. RALPH OMAN, REGISTER OF COPYRIGHTS, THE CABLE AND SATELLITE COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS at xviii (1992) [hereinafter *Copyright Report*].

180. *ivi, Inc.*, 691 F.3d at 281.

181. *Copyright Report*, *supra* note 179, at 143.

182. *Id.* at 148.

183. The Register of Copyrights offered eliminating retransmission consent as one possible option for reconciling the 1992 Act and the Copyright Act. *Id.* at 151.

Congress could amend both the Copyright Act and the Communications Act to allow Internet retransmission services such as Aereo to operate outside retransmission consent but still require them to obtain compulsory licenses—similar to those granted to other MVPDs. Given Aereo’s more limited scope, both in terms of audience and content offerings, it makes little sense to regulate it identically to large MVPDs like Comcast or Time Warner Cable. Unlike traditional MVPDs that also carry channels that are not available over-the-air, Aereo offers little value beyond what subscribers could accomplish themselves with their own equipment and a few lines of code. As such, Aereo obtaining retransmission consent seems largely symbolic, and there is little threat of Aereo significantly undermining broadcasters’ revenue stream simply by failing to obtain retransmission consent. Furthermore, the requirement that Aereo-style services obtain compulsory licenses and pay statutory royalties alleviates any moral ambiguities from retransmitting broadcasters’ content without express authorization while also lending financial support and incentive to broadcasters to continue producing creative works.

3. The FCC Should Consider Aereo’s Effect on the MVPD Market

The Communications Act defines an MVPD as:

[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.¹⁸⁴

In December 2014, the FCC issued a Notice of Proposed Rulemaking seeking to reinterpret this statutory definition to classify online video distributors—such as Aereo—as MVPDs if they offer multiple, linear channels of video programming.¹⁸⁵ If the FCC determines that such services constitute MVPDs, they would be subject to the same regulatory privileges and obligations as other MVPDs, specifically subject to the FCC’s program access, program carriage, and retransmission consent rules.¹⁸⁶

Since his appointment, FCC Chairman Wheeler has expressed concerns about pay-television subscribers losing access to broadcast signals during retransmission consent blackouts, and has made it a priority to address corporate disputes that result in consumers being held hostage.¹⁸⁷ Aereo

184. 47 U.S.C. § 552(3).

185. *MVPD NPRM*, *supra* note 166.

186. *See id.*; *see also* 47 C.F.R. §§ 76.1001, 76.1002, 76.1301, 76.65 (2014).

187. Halonen, *supra* note 121.

retransmitted broadcast signals without needing to obtain retransmission consent,¹⁸⁸ and therefore offered a means for viewers to continue receiving their broadcast channels during retransmission consent blackouts.¹⁸⁹ For Wheeler and the Commission, Aereo could play a role in protecting consumers from corporate collateral damage, ensuring they do not suffer from a lack of service during retransmission impasses. Consequently, if Wheeler is truly trying to safeguard consumer interests in light of retransmission blackouts, ensuring that Aereo can continue to retransmit blacked out broadcast channels may be a viable means of doing so.¹⁹⁰

If the FCC does expand the definition of MVPD to include Internet-based video distribution platforms, the number of distributors may increase significantly.¹⁹¹ An influx of new distribution platforms into the market would inevitably create a surplus of distributors and reduce the ability of current MVPDs to put downward pressure on carriage fees.¹⁹² Such a shift would give broadcasters even greater leverage in retransmission consent disputes, perhaps encouraging even more blackouts and driving up retransmission fees (and potentially consumer cable prices). There are many competing interests in discerning the definition of an MVPD, but if the FCC truly cares about preserving consumer television access, it should continue to define MVPDs to exclude services like Aereo.

Nonetheless, even if the FCC classifies online video distributors resembling Aereo as MVPDs, consumers may still see a boon in the form of greater competition in the MVPD marketplace. Despite the increased regulatory burden, MVPD status would allow Aereo to take advantage of certain MVPD-specific privileges as well, including the FCC's program access rules¹⁹³ and good faith obligations regarding retransmission consent,¹⁹⁴ allowing Aereo to compete more effectively in the provision of video programming. Where there is increased competition, expanded consumer choice and lower prices typically follow.

188. See, e.g., Nunez, *supra* note 50.

189. Stelter, *supra* note 155.

190. Aereo is not currently considered a cable system or MVPD, and therefore is not subjected to 47 U.S.C. § 325(b)(1)(A). However, this may change depending on the outcome of the FCC's rulemaking regarding the interpretation of the MVPD classification. See *MVPD NPRM*, *supra* note 166.

191. Nunez, *supra* note 50.

192. *Id.*

193. 47 C.F.R. §§ 76.1001, 76.1002 (2014).

194. 47 C.F.R. § 76.65 (2014).

F. The Public Performance Right is the Wrong Theory of Liability

As suggested by Justice Scalia¹⁹⁵ and various law professor amici,¹⁹⁶ infringement of the public performance right is an inapt theory of liability for attacking Aereo's conduct. Rather than stretching the public performance right to reach Aereo, the Court should have waited to invalidate Aereo's service on the basis of broadcasters' reproduction right or a theory of secondary liability.

1. The Reproduction Right

In addition to the right to publicly perform their works, the Copyright Act also bestows upon copyright owners the exclusive right "to reproduce the[ir] copyrighted work."¹⁹⁷ Thus, when a customer presses record and Aereo creates a copy of the broadcast programming, it potentially infringes on broadcasters' exclusive right to reproduce their copyrighted content. Not only is this a much more elegant and straightforward solution than pursuing a contorted version of the public performance right, it also avoids disrupting the intricate system of rights established by Congress in the Copyright Act. As explained in the Law Professors' Brief:

The rights must be read in concert, rather than in isolation, and the system's integrity depends crucially on distinguishing among them Often, what appears to be a gap in a right is simply the boundary where it abuts another Blurring or eliminating lines between the rights creates uncertainty, frustrating development of healthy licensing markets.¹⁹⁸

Applying the wrong rights framework threatens to upend the carefully constructed balance between rights holders and the public. For example, the first sale doctrine, which allows someone who has purchased a copy of a copyrighted work to sell her copy without the permission of the copyright owner,¹⁹⁹ is an affirmative defense to claims involving infringement of the distribution right—not the reproduction right. Thus, while the first sale doctrine allows a student to resell his copy of a textbook, it does not permit him to print and sell new copies. Just as conflating the reproduction and distribution rights in the first sale context leads to nonsensical results, so too

195. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512–14 (2014).

196. See Brief for 36 Intellectual Property & Copyright Law Professors as Amici Curiae in Support of Respondent at 5, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461) [hereinafter Law Professors' Brief].

197. 17 U.S.C. § 106(1) (2012).

198. Law Professors' Brief, *supra* note 196, at 9–10.

199. See 17 U.S.C. § 109 (2012).

does holding Aereo infringing under the performance right rather than the reproduction right.

2. Secondary Liability

The doctrine of secondary liability allows a copyright owner to litigate against a defendant for infringement by third parties where the defendant himself has not directly engaged in infringing activity.²⁰⁰ As Justice Scalia pointed out, “[m]ost suits against equipment manufacturers and service providers involve secondary-liability claims,” citing suits against Sony and Grokster for their respective provision of VCR and peer-to-peer technologies.²⁰¹ In those cases, rather than holding the individual defendants directly liable, the Supreme Court pronounced that Sony and Grokster could be liable even without actually infringing any copyrights themselves. In *Sony*, the Court held that an equipment manufacturer might be liable if the device was incapable of “significant noninfringing uses,”²⁰² and the Court in *Grokster* held that a defendant who induced its users to infringe could be liable as a matter of contributory infringement.²⁰³

Given the clear, established secondary liability framework and Aereo’s acknowledged resemblance to Sony’s Betamax, it makes very little sense that the Court opted to find Aereo to be a direct infringer, rather than force the broadcasters to proceed on their secondary liability claims. As the dissent noted, the Court’s “cable-TV-lookalike” test is significantly less straightforward than the jurisprudence surrounding secondary liability, and offers little guidance to Aereo, broadcasters, or other technology-forward innovators and services.²⁰⁴ Rather, by trying to shoehorn Aereo under the public performance right, the Court has unnecessarily muddled the waters regarding the legality of both future and existing services.²⁰⁵

200. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 435 (1984).

201. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting) (citing *Sony*, 464 U.S. at 433; *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)).

202. *See Sony*, 464 U.S. at 442.

203. *See Grokster*, 545 U.S. at 935.

204. *See Aereo*, 134 S. Ct. at 2516–18 (Scalia, J., dissenting).

205. *Id.* at 2517 (Scalia, J., dissenting).

It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances.) The Court vows that its ruling will not affect cloud-storage providers and cable-television systems . . . but it cannot deliver on that promise given the imprecision of its result-driven rule. *Id.*

IV. CONCLUSION

In order to be consistent with principles of statutory interpretation, promote predictability and consistency, and further the purposes of the Copyright Act, the Supreme Court erred in reversing the Second Circuit's holding in *American Broadcasting Cos. v. Aereo, Inc.*. Attempting to constrain Aereo under the public performance right is forced at best, and there are many more effective, legally defensible alternatives for regulating such Internet video services. Especially given the guiding purpose of copyright protection, to promote the progress of the useful arts and sciences, the Court should not be straying from the letter of the law in order to discourage innovation merely because of its potentially disruptive consequences for contemporary industry structures and relationships. Instead, as technology evolves and causes industry-wide changes, it should be the responsibility Congress, administrative agencies, and market competitors to adapt and respond accordingly.

