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ADAPT OR DIE: AEREO, IVI, AND THE RIGHT OF CONTROL IN AN EVOLVING DIGITAL AGE

Johanna R. Alves-Parks*

Charles Darwin succinctly described the concept of natural selection in species evolution, or survival of the fittest, as an imperative process: “multiply, vary, let the strongest live and the weakest die.”¹ As technology evolves, technology-dependent industries, too, must adapt to the changes or perish. Cord-cutting, or the practice of eliminating television cable or satellite service in favor of over-the-air² or over-the-top³ program

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1. CHARLES DARWIN, *THE ORIGIN OF SPECIES* 197 (Cricket House Books, 2010) (6th ed. 1872).

2. *Over-the-Air TV Proves Cord Cutters are Not Just “Over the Top,”* ANTENNAS DIRECT, www.antennasdirect.com/blog/over-the-air-tv-proves-cord-cutters-are-not-just-over-the-top/ (last visited Apr. 7, 2014); *OTA Antenna and HD ATSC Broadcast Information*, WEAKNEES, www.weaknees.com/ota-hd.php (last visited Apr. 7, 2014) (“There are presently two types of OTA signals: digital standard-definition signals and digital high-definition signals. Analog signals are also available in Canada.”).

3. *Definition of: Over-The-Top Broadcasting*, PCMAG, www.pcmag.com/encyclopedia/term/62969/over-the-top-broadcasting (last visited Apr. 7, 2014) (where over-the-top broadcasting “[r]efers to content providers that do not directly control the transmission of their material. For example, over-the-top (OTT) providers such as Netflix and Hulu stream movies and TV shows over the Internet, which they consider an ‘unmanaged’ network. [In c]ontrast with the cable companies that transmit their own content over networks that they ‘manage.’”).

transmissions (available via antenna or Internet access⁴), is a growing concern among television studios, networks, service providers, and copyright holders.⁵ As consumers adopt new platforms and providers adapt to emerging new technologies, traditional business models must be reexamined in order to survive in this brave new digital world.⁶ Because rapid technological advances ultimately affect media transmissions, copyright law and federal regulations struggle to stay ahead of this technological wave.⁷

The advent of the Internet has had a great effect on the production, distribution, and consumption of television programming.⁸ The Supreme Court granted certiorari to *ABC, Inc. v. Aereo, Inc.* and will now review the issue of unlicensed digital distribution of copyrighted programming in its Spring 2014 term.⁹ This Comment will first briefly examine the origins

4. Cory Janssen, *Cord-Cutting*, TECHOPEDIA, <http://www.techopedia.com/definition/28547/cord-cutting> (last visited Apr. 7, 2014).

5. See generally Alexander Garcia-Tobar, *Is Cord-Cutting a Real Threat?*, CABLEFAX (Aug. 1, 2012), www.cable360.net/ct/news/ctreports/commentary/Is-Cord-Cutting-A-Real-Threat_53488.html.

6. See Peter Bart, *TV's Big Boys Get YouTube Wakeup Call*, DAILY VARIETY, Oct. 1, 2012 ("If half of all households will have wifi-enabled devices attached to their TV sets by 2016, some gurus think many users will start rebelling against costly cable subscriptions and become addicted to Web-based channels.").

7. See Lisa Shuchman, *Streaming TV Services Headed to Court Over Copyright Claims*, CORPORATE COUNSEL (Sept. 12, 2012), www.corpcounsel.com/id=1202570950417&Streaming_TV_Services_Headed_to_Court_Over_Copyright_Claims&slreturn=20121015175828.

8. See Georg Szalai, *Analyst: Online Streaming Now Hurting Some TV Networks' Ratings*, HOLLYWOOD REPORTER (June 4, 2012, 6:04 AM), <http://hollywoodreporter.com/news/analyst-netflix-tv-ratings-332622> (quoting Janney Montgomery Scott analyst Tony Wible: "[O]ver-the-top is helping consumers discover content on other TV networks and/or that over-the-top will eventually pull viewing away from the TV networks they initially helped."); Josh L. Dickey, *Pic Biz Asks: Do Digital Ads Work?*, VARIETY, Sept. 28, 2012, at 24 (quoting Sharon Ann Lee, cultural trend analyst and founder of think tank CultureBrain: "TV is still good for the widest swath of people. But for getting younger people, whose media consumption is changing, it's not as effective anymore.").

9. See Lyle Denniston, *Court Grants Eight Cases*, SCOTUSBLOG (Jan. 10, 2014, 2:48 PM), <http://www.scotusblog.com/2014/01/court-grants-eight-cases-2>; see also Dominic Patten, *It's On! Supreme Court Agrees to Hear Aereo Case*, DEADLINE (Jan. 10, 2014, 12:09 PM), <http://www.deadline.com/2014/01/supreme-court-aereo-broadcasters-barry-diller-abc-cbs-fox-nbc/>; Dominic Patten, *Aereo Supreme Court Arguments Set For Late April*, DEADLINE (Feb. 11, 2014, 11:34 AM), <http://www.deadline.com/2014/02/aereo-supreme-court-broadcasters-barry-diller-abc-nbc-cbs-fox/> (announcing that the broadcasters and Aereo are scheduled

and interconnection between television and digital media, culminating in a discussion of the repercussions of allowing unlicensed over-the-top retransmissions of network broadcast programming to continue to stream over the Internet. It will then examine the decisions in *WPIX v. IVI, Inc.*, *ABC, Inc. v. Aereo, Inc.*, and *WNET, Thirteen v. Aereo, Inc.*—cases recently decided in the Second Circuit. Each involves the topic of Internet retransmissions of copyrighted programming, but they all result in varying outcomes. Finally, this Comment will examine possible solutions to both maintain the integrity of the copyright holder’s right to control distribution and adapt to the consumer demand for Internet consumption.

I. A BRIEF HISTORY OF THE INTERNET AGE

Television cannot be succinctly defined—it encompasses broadcast networks, cable and satellite subscription services, and new technologies that expand the scope of traditional program delivery.¹⁰ It is a “medium in evolution, the basis of a related group of industries that have been steadily mutating for more than half a century.”¹¹ The concept of television first burst on to the public stage in March of 1877, when the following appeared in a letter to the editor of the *New York Sun*:¹²

An eminent scientist of this city . . . is said to be on the point of publishing a series of important discoveries, and exhibiting an instrument invented by him by means of which objects or persons standing or moving in any part of the world may be instantaneously seen anywhere and by anybody.¹³

Interestingly enough, the 1877 description above could also be used to describe television with respect to Internet streaming technology today. First discussed in terms of a “Galactic Network” concept in a paper by the Massachusetts Institute of Technology in August 1962,¹⁴ J.C.R. Licklider,

to argue the case before the Supreme Court on April 22, 2014 at 11 AM Eastern Standard Time).

10. HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* at xxiv (Bob Nirkind & Amy Dorta eds., 3rd ed. 2006).

11. *Id.*

12. ERIC BURNS, *INVASION OF THE MIND SNATCHERS: TELEVISION’S CONQUEST OF AMERICA IN THE FIFTIES* 3 (Temple Univ. Press 2010).

13. *Id.*

14. Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOCIETY, <http://www.internetsociety.org/Internet/what-internet/history-Internet/brief-history-Internet> (last visited Apr. 7, 2014).

the first head of the computer research program at the Defense Advanced Research Projects Agency, envisioned the Internet as “a globally interconnected set of computers through which everyone could quickly access data and programs from any site.”¹⁵

This technology evolved by leaps and bounds; by 1985, a community of researchers and developers were using a rudimentary version of what we now know as electronic mail (e-mail) and the Internet.¹⁶ Then, in just a decade, the Federal Networking Council coined the term the “Internet” and commercialized the concept of the Internet in 1995, converting it from a mostly private to a public platform.¹⁷

The 1990s also witnessed the emergence of the foundation for streaming content: Microsoft released ActiveMovie (a precursor to the Windows Media Player) and Apple released QuickTime, both multimedia technologies that can be used to stream videos over the Internet,¹⁸ thus establishing the Internet as an entertainment platform distributor.¹⁹ In 2005, the dawn of YouTube²⁰ heralded a new digital age by providing a global Internet platform for mass distribution of user-generated content.²¹ Today, thousands of Internet channels (based on models associated with traditional network television channels) exist,²² forcing media outlets to

15. *Id.*

16. *Id.*

17. *Id.*

18. Cory Janssen, *Active Movie*, TECHOPEDIA, <http://www.techopedia.com/definition/2472/activemovie> (last visited Apr. 7, 2014).

19. BLUMENTHAL, *supra* note 10, at 204.

20. *Definition of: YouTube*, PCMAG, <http://www.pcmag.com/encyclopedia/term/57119/youtube> (last visited Apr. 7, 2014) (where YouTube is described as “the largest video sharing site on the Web,” providing “a venue for sharing videos among friends and family as well as a showcase for new and experienced videographers”).

21. Richard Alleyne, *YouTube: Overnight Success Has Sparked a Backlash*, TELEGRAPH (Jul. 31, 2008, 10:00 PM), <http://www.telegraph.co.uk/news/uknews/2480280/YouTube-Overnight-success-has-sparked-a-backlash.html>.

22. Andrew Wallenstein, *Digital Reckoning: Biz Players Face Stiff Competish on YouTube as Funding Decisions Loom*, DAILY VARIETY, Nov. 14, 2012, at 17 (stating that ChannelMeter is providing Nielsen-like ratings/metrics for YouTube channels, and that broadcast content providers and established broadcast content creators, such as executive producers & talent, are setting up YouTube channels: producer Brian Robbins’ AwesomenessTV, Take Thrash Lab channel with programming from Ashton Kutcher’s Katalyst Media, Blackbox TV channel from CSI creator Anthony Zuiker, Geek and Sundry channel from “TV/Youtube

invent new ways to qualify and quantify²³ potential viewership and new sources of revenue.²⁴

II. THE DEVELOPMENT OF INDIVIDUALIZED PROGRAMMING AND THE DEMAND FOR À LA CARTE SERVICE

The evolution of entertainment technologies is inevitable, as is the desire for content accessibility and ownership by viewers. In this process,

[T]apes have given way to DVDs, and DVDs are now giving way to a more efficient form of direct-to-consumer distribution via broadband Internet. Many IPTV (Internet Protocol TV) services are available, both from large enterprises and from the smallest of companies operated part-time out of a home office. In other words, it is now possible to operate a video-on-demand or fully scheduled television service from a video server in one's home or office, a service that reaches viewers, subscribers, or other customers anywhere in the world.²⁵

Today, because of the rapid advancement of technology, the public need not rely on traditional means of programming distribution: anyone can become a content producer and reach multiple audiences with a click or a keystroke.

The transition from traditional primary screen viewing to the acceptance of multiple viewing platforms happened rather quickly.²⁶ The explosion in Internet programming can be traced back to 2009, when United States broadcasting converted from the receipt of exclusively

Crossover star” Felicia Day, Pet Collective channel from FremantleMedia, and BeFit from Lionsgate).

23. See Andrew Wallenstein, *Benchmarks for Buzz: Web Content Needs to Tubthump Digital Aud Metrics*, DAILY VARIETY, Oct. 15, 2012, at 11 (“At the beginning of this young century, such pioneers as Icebox and Pop.com tried to bow modest originals on a pre-broad planet ill-equipped to soak it up via dial-up. The burst of the dot-com bubble wiped them out, but a new wave of players has been clawing its way back ever since. . . . But regardless of that rationale or the lack of a standard metric for online traffic, the Web-content biz is ill-advised to go without any indicator that its programming is making an impact.”).

24. See *id.*

25. BLUMENTHAL, *supra* note 10, at 302.

26. See Wayne Friedman, *Multiscreen TV-Tablet Viewing Soars*, MEDIADAILYNEWS (Sept. 14, 2012, 11:10 AM), <http://www.mediapost.com/publications/article/183056/multiscreen-tv-tablet-viewing-soars.html#axzz2Ivm5ySg5>.

analog, over-the-air broadcast signals to digital broadcasting of free over-the-air television.²⁷ No regular, reliable digital signals with new digital TVs or amplified antenna were available in rural and urban areas.²⁸ Despite the “public interest in making television broadcasting more available,”²⁹ the transition to digital television left approximately 2.8 million viewers without access to traditional, free, over-the-air broadcast television.³⁰ Some argued that the utter lack of broadcast communication had put former television viewers in harm’s way—there was virtually no access to live news programming in order to alert viewers of national or local events or emergencies.³¹ This governmentally mandated switch to digital³² essentially forced former broadcast viewers to purchase direct or bundled cable services for minimum access to television that had formerly been free.³³ Viewers then turned to an alternate, newer technology for entertainment and news: the Internet.³⁴

The boom in alternative television watching also heralded the beginning of user-generated content and low-cost viewing experiences, which gave rise to services like YouTube.³⁵ Content distributors flocked to sites like Hulu and Netflix to cash in on the trend through low-cost

27. Kathryn E. Darden, *Analog to Digital TV Conversion: Approximately 2.8 Million Americans Now Without Television*, YAHOO! VOICES (June 26, 2009), <http://voices.yahoo.com/analog-digital-tv-conversion-approximately-28-million-3628429.html>.

28. *Id.*

29. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984).

30. Darden, *supra* note 27.

31. *Id.*

32. See *Digital Television*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.dtv.gov/whatisdtv.html> (last visited Apr. 7, 2014) (noting that “[s]ince June 13, 2009, full-power television stations nationwide have been required to broadcast exclusively in digital format. . . . In 1996, Congress authorized the distribution of an additional broadcast channel to every full-power TV station so that each station could launch a digital broadcast channel while simultaneously continuing analog broadcasting. Later, Congress set June 12, 2009 as the deadline for full power television stations to stop broadcasting analog signals.”).

33. Cynthia Littleton, *Digital Transition Leaves Some Behind*, VARIETY (July 17, 2012, 5:00 AM), www.variety.com/article/VR1118056640.

34. See Diallah Haidar, *TV Everywhere: How the Internet is Killing Cable*, WALL STREET CHEAT SHEET (Mar. 5, 2012.), <http://wallstcheatsheet.com/breaking-news/tv-everywhere-how-the-internet-is-killing-cable.html/>.

35. *Id.*

subscription or ad-supported viewing.³⁶ Several hundred Internet channels emerged to compete with traditional broadcast and cable outlets.³⁷

Important to this analysis, the television industry is, first and foremost, a business.³⁸ In the broadcast world of allegedly “free” television, studios create costly programming which is then licensed to networks.³⁹ Networks fund programming through advertiser sponsorship, which includes commercial ad sales and product integration.⁴⁰ In turn, networks license their branded blocks of programming to broadcast commercial television stations.⁴¹ The Federal Communications Commission (“FCC”) licenses these stations to “transmit a television signal within a specific Dominant Market Area (DMA), a geographic region that typically includes a city, its nearby suburbs, and some outlying areas.”⁴² These stations earn revenue by also soliciting sponsorship and advertisers for commercials during their local programming.⁴³ On all levels from network to station, ratings and viewership are key elements to determining the worth of advertising space in order to generate revenue.⁴⁴

Cable television operates in a different way, using a slightly different model for revenue.⁴⁵ The primary difference between broadcast and cable is that in addition to licensing fees from cable distributors and advertising revenue, cable operators also collect subscription fees from viewers for access to programming.⁴⁶ In either case, when the digital transition of 2009 occurred, nothing changed in these processes: the systems remained intact, though there remained no substitute for the easily accessible, formerly

36. *See id.*

37. BLUMENTHAL, *supra* note 10, at 302-03 (“Just as cable made dozens of networks available, Internet distribution will make hundreds of channels available. Some channels are already serving very small audiences, highly targeted groups of particular interest to, for example, specialty advertisers. . . . If a program is watched on a computer screen, is it a television program? There is no reason to even consider the question, as the two screens are gradually becoming one.”).

38. *See generally id.* at 3 (outlining the development and production cycle of a television show prior to licensure).

39. *See id.*

40. *See id.*

41. *Id.* at 4.

42. *Id.*

43. *See* BLUMENTHAL, *supra* note 10, at 3-4.

44. *See generally id.*

45. *Id.* at 12.

46. *Id.*

“free” broadcast television traditionally enjoyed by millions of Americans each night.⁴⁷ Free, traditional broadcast programming TV became a relic.⁴⁸

Just as the government needs tax revenues to function, those who want “free” TV programs must pay the freight, too, either by shelling out cash directly—as they do for Showtime or HBO—or enduring commercials. And while networks remain understandably fretful about “unintended consequences to messing with the TV ecosystem,” as the Los Angeles Times recently put it, “it’s only a question of what form the messing will take. . . . While TV is better situated to cash in on digital and on-demand technology, migrating consumption to the digital realm is fraught with peril as well.”⁴⁹

“Fraught with peril,”⁵⁰ indeed—but mainly for broadcast networks: the demand for live, streaming, low-to-no cost television grew.⁵¹ Social media technologies, coupled with television viewing, married the interactive Internet experience with the individualized, tailored genre-specific tastes in communal viewing.⁵² Must-see TV died, the market shifted, and consumers cried out for on-demand programming revolving around the viewers’ preferences instead of broadcaster guidance.⁵³ Digital

47. See generally Brian Lowry, *Straight talk for DVR-happy viewers*, VARIETY (Oct. 10, 2012, 5:00 AM), <http://variety.com/2012/tv/news/straight-talk-for-dvr-happy-viewers-1118060500/>.

48. See generally *id.*

49. *Id.*

50. *Id.*

51. See Amy Chozick, *NBC Unpacks Trove of Data From Olympics*, N.Y. TIMES (Sept. 28, 2012), <http://www.nytimes.com/2012/09/26/business/media/nbc-unpacks-trove-of-viewer-data-from-london-olympics.html>. In 2012, NBC Olympic data analysis demonstrated the value of live streaming sporting events; eight million free NBC streaming apps were downloaded by Olympic viewers, thus impacting the decision to stream the closing ceremonies of the 2012 London Olympics live through the NBC mobile apps and websites.

52. See Andrew Wallenstein, *Social Video Preps for Primetime*, VARIETY (Oct. 10, 2012, 5:30 AM), <http://variety.com/2012/digital/news/social-video-preps-for-primetime-1118060520/> (where social video platforms can be defined best as technologies that “straddle a line between program and audience”: “[s]ocial video can also be understood as the intersection of logical extensions to more trends than social media and webcams. Reality TV has bred the notion that everyone can be a star. YouTube and a gaggle of other sites have schooled a generation of Web users on the intricacies of uploading video, even live streaming. The Internet itself has made interactivity itself a more intuitive part of any media experience.”).

53. See AJ Marechal, *Watching Live TV Vexes the On-Demand Generation*, VARIETY (Sept. 27, 2013, 9:15 AM), <http://variety.com/2013/biz/news/watching->

timeshifting⁵⁴ recording devices, like DVRs and TiVo, and later technologies which incorporated placeshifting,⁵⁵ such as Slingbox, gained prominence.⁵⁶ This explosion of emerging technologies, coupled with the desire for low-to-no cost transmission of programming, inevitably arose and led to the 2012 and 2013 cases poised to change the definitions and legalities of Internet streaming and programming forever.

III. AEREO & IVI: THE NEW FRONTIER

From 2012 to 2013, media attention turned to New York as the most recent significant cases concerning innovations in Over-The-Top (“OTT”) transmissions were decided.⁵⁷ *Am. Broad. Co. v. Aereo, Inc.*,⁵⁸ *WNET v. Aereo, Inc.*,⁵⁹ and *WPIX, Inc. v. IVI, Inc.*⁶⁰ The United States District Court for the Southern District of New York initially decided both cases, and the Second Circuit affirmed that court’s opinions in both cases; even though both IVI, Inc. (“IVI”) and Aereo, Inc. (“Aereo”) deal with OTT transmissions, the court distinguishes their methods and day-to-day

live-tv-vexes-the on-demand-generation-1200671602/ (“The days of ‘Must See TV’ are giving way to the era of ‘Must Discuss TV.’ That is the real incentive to watch live—to remain a part of conversation with friends, co-workers and the Internet. TV, especially for younger generations, occupies two extremes on the viewing spectrum: [i]t is either incredibly personal, as you watch on your own sked, or incredibly social, with live tweets and texts fired off every few moments. The middle ground has all but crumbled.”).

54. *Definition of: Timeshifting*, PCMAG, <http://www.pcmag.com/encyclopedia/term/55795/timeshifting> (last visited Apr. 7, 2014) (describing timeshifting as “record[ing] a video or audio program when it is broadcast and watch[ing] it a later time”).

55. *Definition of: Placeshifting*, PCMAG, <http://www.pcmag.com/encyclopedia/term/55690/placeshifting> (last visited Apr. 7, 2014) (describing placeshifting as “watch[ing] or listen[ing] to a video or audio program in a different venue”).

56. See Andrew Russell, *Placeshifting, the Slingbox, and Cable Theft Statutes: Will Slingbox Use Land You in Prison?*, 81 TEMP. L. REV. 1239, 1239 (2008).

57. See Eriq Gardner, *Aereo, Ivi and the Legal Road That Will Determine the Future of TV Cord-Cutting*, HOLLYWOOD REPORTER (Feb. 15, 2012, 2:14 PM), <http://www.hollywoodreporter.com/thr-esq/aereo-ivi-tv-chord-cutting-291395>.

58. *Am. Broad. Co. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

59. *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

60. *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275 (2d Cir. 2012). Author’s note: for consistency in capitalization, IVI, Inc., (also sometimes known as ivi, Inc. and Ivi, Inc.) will be referred to as IVI, Inc. (“IVI”) throughout this Comment.

practices with a subtle, yet vital, interpretation of copyright law.⁶¹ These rulings by the Second Circuit and its interpretation of copyright and federal communications law significantly impact the future of OTT transmissions and timeshifting⁶² and placeshifting⁶³ technology in a consumer-oriented on-demand economy. Before examining the courts' analyses, it is necessary to examine the similarities and differences in the services provided by IVI and Aereo.

A. *The Origins of IVI*

On September 12, 2010, Seattle-based IVI announced the launch of a "PC-based live TV service on the web."⁶⁴ In response to consumer demand for à la carte television, IVI produced an application that redistributed live television feeds for consumers to watch major broadcast channels on their computers and mobile devices for a nominal fee (starting at \$4.99 per month after a 30 day free trial).⁶⁵ The company also made digital recordings of streamed shows available to consumers for additional fee of \$0.99 per month.⁶⁶ Touted as the "first Internet cable network"⁶⁷ due to a "'virtual' set box"⁶⁸ distributing licensed programming, IVI provided a cost-cutting alternative to consumers interested in streaming broadcast programs with virtually no geofiltering,⁶⁹ or restriction of broadcast access to a program based on the viewer's location.⁷⁰

61. *Id.* at 277.

62. *Definition of: Timeshifting*, *supra* note 54.

63. *Definition of: Placeshifting*, *supra* note 55.

64. Dean Takahashi, *Ivi Delivers What We've All Been Waiting For—Live TV on the Internet*, VENTUREBEAT (Sept. 13, 2010, 3:00 AM), <http://venturebeat.com/2010/09/13/ivi-software-delivers-live-tv-on-the-Internet>.

65. *Id.*

66. *Id.*

67. Frank Gruber, *Ivi TV Launches First Internet Cable Network*, TECH COCKTAIL (Jan. 5, 2011), <http://tech.co/ivi-tv-launches-first-Internet-cable-network-2011-01>.

68. *Id.*

69. *See* TAKAHASHI, *supra* note 64 ("You can watch local content anywhere in the world. You can view New York City broadcast channels wherever you are").

70. *Video Cloud Support: Geo-Filtering Players*, BRIGHTCOVE, <http://support.brightcove.com/en/video-cloud/docs/geo-filtering-players> (last visited Apr. 7, 2014).

B. *The Ascent of Aereo*

On March 14, 2012,⁷¹ Aereo launched a new streaming service akin to the traditional digital video recorder (“DVR”)⁷² but without the actual hardware.⁷³ Aereo assigns two tiny antennae to each of its customers, so the customer controls streaming and recording only per his preference.⁷⁴

In 2012, Aereo’s service was kept local to New York. Geofiltering⁷⁵ prevented consumers from signing up for, sampling, or receiving signals retransmitted by Aereo outside of New York City and surrounding areas;⁷⁶ geofilters also denied access to paying Aereo subscribers travelling outside of New York.⁷⁷ Pricing plans included (1) one free, continuous hour of streaming access per day for \$1; (2) one 24-hour continuous use day pass with 3 hours of DVR storage space; (3) \$8 monthly passes with up to 20 hours of DVR storage space; and (4) \$80 annual passes with 40 hours of DVR storage space.⁷⁸

71. Nathan Ingraham, *Aereo Launching Streaming Broadcast TV service in NYC on March 14th*, THE VERGE (Feb. 14, 2012, 12:24 PM), <http://www.theverge.com/2012/2/14/2797616/aereo-streaming-broadcast-tv-pilot-launch-nyc>.

72. *Definition of: DVR*, PCMAG.COM, <http://www.pcmag.com/encyclopedia/term/42147/dvr> (last visited Apr. 7, 2014) (defining DVR as “a consumer device that allows the viewer to pause and rewind any broadcast, cable or satellite TV program as well as record and play back selected programs” akin to the videocassette recorder [“VCR”] but more flexible due to its capacity for digital storage).

73. *See* AEREO, <http://aereo.com/about> (last visited Apr. 7, 2014) (“There’s no new hardware to buy or install.”).

74. Jenna Wortham, *For a Fee, Streaming Local TV*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/17/technology/aereo-distributes-local-tv-channels-via-the-internet.html?pagewanted=all>.

75. *See Video Cloud Support*, *supra* note 70 (defining geo-filtering, also known as geofiltering, as “enabl[ing] the content distributor] to restrict access to content in a [video cloud] player based on the viewer’s geographic location. For example, if a player includes content that, for legal reasons, cannot be distributed outside the U.S. and Canada, you can set geo-filtering on your player to keep viewers outside of the approved countries from accessing that content.”).

76. *See Aereo Unveils New, Flexible Pricing Structure and Aereo Try For Free—Simple, Easy Ways to Experience Aereo’s Innovative Technology*, AEREO, (Aug. 2, 2012) https://aereo.com/assets/marketing/mediakit/press_release_20120802.pdf [hereinafter *Aereo Unveils New, Flexible Pricing Structure*] (“Aereo membership is currently only available to residents of New York City and the *Aereo Try For Free* feature is only available to people physically present in New York.”).

77. *Id.*

78. *Id.*

Aereo claims that its retransmissions serve a public purpose, especially to consumers without traditional cable access or the ability to use a digital over-the-air signal.⁷⁹ Aereo states that:

[C]onsumers have a fundamental right to access over the air television that broadcasts on the public airwaves, and that enhancing and supporting public access to that local broadcast signal is important. Aereo allows consumers portable and simple access to that broadcast television signal. In times of emergencies and breaking news, access to timely, live information is crucial. Aereo can serve as another avenue for the public to access that important information.⁸⁰

In essence, Aereo has attempted to fill the gap created by the analog to digital conversion. For a nominal fee,⁸¹ it has positioned itself as the closest, low cost service mimicking free, analog broadcast television for a digital age.

C. Similar, but Not the Same: Distinguishing Aereo From IVI, in Relation to Copyright and Retransmission

At first glance, it may seem that Aereo and IVI provide similar services to consumers: Aereo and IVI both retransmit broadcast network and copyrighted television programs to consumers for a nominal fee, but they do so without licenses from the original content providers and distributors.⁸² Now the New York courts, specifically in the Second Circuit, have made a clear distinction between the legality of these services in relation to copyright law⁸³ and the FCC's definition of cable systems,⁸⁴ thereby attempting to define digital transmissions in conjunction with established copyright law. The Second Circuit Court of Appeals has affirmed the lower court's logic in both the *IVI* and *Aereo* cases, primarily due to its heavy reliance on the *Cartoon Network LP, LLLP v. CSC*

79. Wortham, *supra* note 74.

80. *Aereo Unveils New, Flexible Pricing Structure*, *supra* note 76.

81. See Jenna Wortham, *supra* note 74 (explaining that fees start as low as \$1 a day or up to \$8 to \$12 a month); see generally, *Aereo Unveils New, Flexible Pricing Structure*, *supra* note 76.

82. See *WNET*, 712 F.3d at 680; *Am. Broad. Co.*, 874 F. Supp. 2d at 375-76; *WPIX*, 691 F.3d at 277.

83. See *WNET*, 712 F.3d at 691-94; *Cartoon Network LP, LLLP v. CSC Holdings*, 536 F.3d 121, 140 (2d Cir. 2008).

84. See *WPIX*, 691 F.3d at 279-80 (citing 17 U.S.C. § 111(f)(3)).

Holdings, Inc., more familiarly known as the *Cablevision* decision.⁸⁵ These sets of cases are particularly indicative of the changing definitions of retransmission in broadcast television due to the impact of emerging technologies and economic shifts.

1. *WPIX v. IVI, Inc.*: An Internet License?

When *WPIX v. IVI, Inc.* was decided on August 27, 2012, the Second Circuit affirmed the decision of the Southern District Court of New York.⁸⁶ The plaintiffs included a range of local broadcast stations, studios, and networks (*WPIX, Inc.*, *WNET.org*, *ABC*, *Disney*, *CBS Broadcasting*, *CBS Studios*, *The CW*, *NBC Studios*, *NBC Universal*, et al.).⁸⁷ Upon discovering *IVI*'s retransmission of their original, licensed programming, these plaintiffs sent cease and desist letters to *IVI*, alleging copyright and retransmission violations, but to no avail.⁸⁸ The networks and studios sued for an injunction to stop *IVI*'s unlicensed, unpaid retransmissions.⁸⁹ *IVI* argued that it had the legitimate right to obtain an FCC cable system license.⁹⁰ Here, the lower court indicated that *IVI*'s business of retransmitting broadcast signals over the Internet did not fit under the FCC's definition of a cable system,⁹¹ and therefore did not qualify for a compulsory license under 17 U.S.C. § 111, the federal statute defining qualifications for a cable license.⁹² The injunction granted to *WPIX* by the

85. See, e.g., *WNET*, 712 F.3d at 680; *WPIX*, 691 F.3d at 277 n.2. See generally *Cartoon*, 536 F.3d at 139 (finding *Cablevision*'s playback transmissions "do not infringe any exclusive right of public performance").

86. *WPIX*, 691 F.3d at 275-76.

87. *Id.* at 275.

88. *WPIX*, 765 F. Supp. 2d at 594, *aff'd*, 691 F.3d 275 (2d Cir. 2012).

89. *WPIX*, 691 F.3d at 278.

90. *WPIX*, 765 F. Supp. 2d at 599, *aff'd*, 691 F.3d 275 (2d Cir. 2012).

91. *WPIX*, 691 F.3d at 284.

92. See 17 U.S.C. § 111(f)(3) (2006) (defining cable systems as "a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service"). For the sake of protecting the right to control public performance aspects of copyright, the Second Circuit seemed unwilling to categorize *IVI, Inc.* under the amorphous "other communications channels" subdivision of this statute, thus securing *IVI*'s illegitimacy as a cable operator.

Southern District Court was upheld,⁹³ thus terminating the first self-labeled Internet cable operator.

IVI's demise rested on two factors: the failure to adhere to the definition of a cable system⁹⁴ and the desire to maintain and preserve the copyright holder's right to control public performance.⁹⁵ IVI, Inc. may have been shortchanged by the court's interpretation of a cable system.⁹⁶ First, IVI, Inc. did not identify or claim possession of a traditional brick-and-mortar facility;⁹⁷ since it was "unclear whether the Internet itself is a facility,"⁹⁸ based on statutory text⁹⁹ and legislative intent,¹⁰⁰ the court deemed that Congress did not intend for the compulsory licenses to extend to broad internet transmissions, but stated that the Copyright Office has maintained that the compulsory license for cable systems is intended for *localized* retransmission services.¹⁰¹ It held that "under this interpretation, Internet retransmissions cannot constitute cable systems under §111 because they provide nationwide—and arguably global—services."¹⁰²

With respect to the preservation and maintenance of the content owner's copyright to control public performance, the court was correct in affirming the preliminary injunction against IVI, Inc. In addition to devaluing the original broadcaster's rights and revenue by retransmitting first-run, non-local programming without proper negotiation and licensure,¹⁰³ the copyright owner would lose control of the performance aspects on his or her own work without the benefit of renegotiation for

93. *WPIX*, 691 F.3d at 288.

94. *See id.* at 284.

95. *See id.* at 287.

96. *Id.* at 280 (admitting that it "is simply not clear whether a service that retransmits television programming live and over the internet constitutes a cable system under § 111").

97. *Id.* at 280 n.6.

98. *Id.* ("Additionally, the growth of 'cloud-based systems,' or virtual platforms where content resides remotely on a distant server, further highlights the uncertainty as to whether an Internet retransmission service is or utilizes a facility that receives and retransmits television signals.").

99. *See* 17 U.S.C. § 111(f)(3) (2006).

100. *WPIX*, 691 F.3d at 282.

101. *Id.* at 284.

102. *Id.*; *see also* Takahashi, *supra* note 64 (explaining that, with IVI, there is no apparent geofiltering: "You can watch local content anywhere in the world. You can view New York City broadcast channels wherever you are.").

103. *See WPIX*, 691 F.3d at 285-86.

recompense.¹⁰⁴ The court explained that “[the] Plaintiff’s desire to create original television programming surely would be dampened if their creative works could be copied and streamed over the Internet in the derogation of their exclusive property rights.”¹⁰⁵ Furthermore, the Court upheld the injunction because an argument for public accessibility to the copyrighted content cannot be made: there were other viable avenues to which the public had access to the nationwide bank of programming IVI provided.¹⁰⁶ The court reaffirmed its position, saying that “[p]reliminarily enjoining defendants’ streaming of plaintiffs’ television programming over the Internet, live, for profit, and without plaintiffs’ consent does not inhibit the public’s ability to access the programs.”¹⁰⁷

2. Broadcasters Versus Aereo, Inc.: The Online Antennae

On July 11, 2012, the U.S. District Court for the Southern District of New York held that Aereo’s online DVR did not violate copyright law or merit an injunction.¹⁰⁸ On April 1, 2013, while combining two cases against Aereo,¹⁰⁹ the Second Circuit affirmed this decision, continuing to hold that “transmissions of ‘live’ Internet broadcasts by [the] provider likely were not public performances; [the copyright] holders did not demonstrate sufficiently serious questions going to [the] merits of [the] claim of infringement; and [the] balance of hardships did not tip decidedly in favor of the copyright holders.”¹¹⁰ The two groups of plaintiffs once again attempted to obtain an injunction against Aereo’s services,¹¹¹ much like they succeeded in doing against IVI, Inc.¹¹² The plaintiffs alleged that Aereo’s retransmissions and live streaming of their copyrighted, licensed

104. *Id.* at 285.

105. *Id.* at 288.

106. *Id.*

107. *Id.*

108. *Am. Broad. Co.*, 874 F. Supp. 2d at 386, 405.

109. *WNET*, 712 F.3d at 680 (The two groups of broadcast network plaintiffs had each “moved for a preliminary injunction barring Aereo from transmitting programs to its subscribers while the programs are still airing, claiming that those transmissions infringe their exclusive right to publicly perform their works.” The court clarifies in Footnote 1: “the two actions, although not consolidated in the district court, proceeded in tandem and the district court’s order [denying injunction against Aereo] applied to both actions.”).

110. *Id.* at 677.

111. *Id.*; *Am. Broad. Co.*, 874 F. Supp. 2d at 375.

112. *WPIX*, 691 F.3d at 288.

content without their consent and over the Internet were a violation of copyright law.¹¹³

Both the District and the Second Circuit courts analyzed Aereo's online DVR function and broke it down as a process patented by the company.¹¹⁴ Interestingly, the Second Circuit also took the time to distinguish the issue concerning Aereo's retransmissions from the consumer's (or subscriber's) point of view and technical aspects of the service.¹¹⁵ More plainly, the Second Circuit considered its function and design.¹¹⁶ This attention to consumer interest in the technology at hand is remarkable: the Second Circuit ultimately concluded that Aereo provides three separate functions for its subscribers ("a standard TV antenna, a DVR, and a Slingbox¹¹⁷-like device"¹¹⁸), and each currently permitted by law.¹¹⁹ From a technological standpoint, both the District court and the Second Circuit deemed that Aereo creates a single, unique copy of a locally

113. *WNET*, 712 F.3d at 676; *Am. Broad. Co.*, 874 F. Supp. 2d at 376-81 (describing Aereo's antenna system and process).

114. *WNET*, 712 F.3d at 682-83; *Am. Broad. Co.*, 874 F. Supp. 2d at 386.

115. *WNET*, 712 F.3d at 680-83.

116. *Id.* at 681-83.

117. *See How Placeshifting Works*, SLINGBOX, <http://www.slingbox.com/get/placeshifting-howitworks> (last visited Apr. 7, 2014) ("A Slingbox connects to a video source, such as a set-top box, DVR, Blu-ray player, or security camera, and to a home network router. The Slingbox receives the video signal from the source, transcodes it into MPEG4, and transmits it over the network and out over the Internet.").

118. *WNET*, 712 F.3d at 682.

119. *See generally Cartoon*, 536 F.3d at 134, 139 (holding DVR transmissions did not violate the public performance clause of the Copyright Act); *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 723 F.3d 1067, 1074 (9th Cir. 2013) (affirming that "Fox was unlikely to succeed on its claim of secondary copyright infringement for the PrimeTime Anytime and AutoHop programs" and that Fox did not challenge Dish customers' ability to watch recorded content on their computers and mobile devices using the Sling Adapter); Ted Johnson, *Why Slingbox Is Finally Getting the Aereo Treatment*, VARIETY (Mar. 8, 2013, 4:00 AM), <http://variety.com/2013/digital/opinion/the-slingbox-paradox-broadcasters-dont-object-1200005356> (arguing that Slingbox's status as a niche product recording and redistributing transmissions as a "place-shifter" did not attract the same controversy as Aereo due to the timing of its technological debut); Jonathan Handel, *Aereo Counsel in NY Cites California Dish 'Hopper' Ad-Skipper Decision*, HOLLYWOOD REPORTER (Jul. 29, 2013, 5:00 AM), <http://www.hollywoodreporter.com/thr-esq/aereo-counsel-ny-cites-california-594179> (explaining that Aereo argues making any unauthorized copies of programs violating broadcasters' copyrights is "attributable to the viewer, because the Aereo equipment makes those copies only if the user clicks a button that commences playing the channel").

retransmitted program, on demand and specifically requested by that user subscribed to the service.¹²⁰ The requested copy of the program is unavailable for redistribution to any other viewer or user but the subscriber.¹²¹

In the decisions, both courts relied heavily on precedents set in the 2008 *Cablevision* decision.¹²² In that case, Cablevision Systems Corporation, a cable television systems operator, created a remote storage DVR (“RS-DVR”), where copies of programs recorded by subscribers were stored on servers in Cablevision’s different facilities.¹²³ Cablevision notified its various networks and content providers of its plans to promote this DVR, but “did not seek any license from them to operate or sell the RS-DVR.”¹²⁴ The networks and content providers sued Cablevision, claiming copyright violation in three different ways: the act of recording copyrighted content itself would infringe on the copyright holders’ exclusive right to reproduction; the act of storing the recorded programs would again infringe on the right to reproduction; and the transmission from the server to the subscriber would infringe on the copyright holder’s exclusive right to public performance,¹²⁵ as established in the 1976 Copyright Act’s “Transmit Clause.”¹²⁶

The Second Circuit Court of Appeal ruled that none of the broadcasters’ arguments were valid.¹²⁷ Instead, “because the RS-DVR

120. *WNET*, 712 F.3d at 683 (“Each copy of a program is only accessible to the user who requested that the copy be made, whether that copy is used to watch the program nearly live or hours after it has finished airing; no other Aereo user can ever view that particular copy.”); *Am. Broad. Co.*, 874 F. Supp. 2d at 386.

121. *Id.*

122. *Cartoon*, 536 F.3d at 121.

123. *Id.* at 124.

124. *Id.*

125. *Id.* at 125.

126. 17 U.S.C. § 106(4) (2006); 17 U.S.C. § 101 (2006) (explaining that “to perform or display a work publicly” refers to either the placement of the performance or display and the number of people outside the family and social circle attending, or the transmission/communication 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”); *see also* MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 4.11(B) (1978) (where “broadcasting *per se* is merely a performance and hence, not an act of publication”) and § 8.14(C)(2) (1978) (where “if a transmission is only available to one person, then it clearly fails to qualify as ‘public’”).

127. *Cartoon*, 536 F.3d at 137.

system, as designed, only [made] transmissions to one subscriber using a copy made by that subscriber, [they] believe[d] that the universe of people capable of receiving an RS-DVR transmission [was] the single subscriber whose self-made copy [was] used to create that transmission.”¹²⁸ Therefore, copies made via DVR technology made by consumers and played back to them were not considered public transmissions and did not infringe upon the copyright holder’s right to control public performance.¹²⁹

Cablevision’s holding is the direct antecedent to the holding in the more technologically advanced *Aereo*.¹³⁰ Instead of transmitting to standard television, Aereo’s services can be accessed by its individual subscribers¹³¹ via the Internet.¹³² In essence, the methodology of transmission may have modernized to accommodate the changing technology, but the result remains invariably the same.¹³³ The platform is still a remote DVR, only now it may be accessed through the Internet via computer, tablet, or even mobile device.¹³⁴ Since Aereo’s transmissions are not deemed to be public performances under the Copyright Act and *Cablevision* parameters, Aereo does not need a license to retransmit the programs recorded by its DVR-like antennae system.¹³⁵

The *Aereo* decision differs greatly from the *IVI* decision in several significant ways. First, *IVI*’s services created a bank of diverse programming in which subscribers could access live and previously recorded programming; the capture and retransmission was public, rather than private.¹³⁶ Second, though *IVI* claimed to provide cable-like system services, according to the court, it neither adhered to the federal definition

128. *Id.*

129. *Id.* at 138-40.

130. *WNET*, 712 F.3d at 689; *Am. Broad. Co.*, 874 F. Supp. 2d at 394.

131. *WNET*, 712 F.3d at 689-690 (“Thus, just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.”).

132. *See AEREO*, *supra* note 73.

133. *Am. Broad. Co.*, 874 F. Supp. 2d at 394.

134. *See AEREO*, *supra* note 73 (“Aereo works on phones, tablets, and computers. There’s no new hardware to buy or install. And if you have an AppleTV or Roku, you can watch Aereo on the big screen!”).

135. *See WNET*, 712 F.3d at 690-695 (discussing why Aereo services are not public performances).

136. *See WPIX*, 691 F.3d at 277.

of a cable system¹³⁷ nor obtained the proper licenses from the content owners and first-run distributors to disseminate copyrighted, licensed programs.¹³⁸ IVI, Inc. sought to be classified as an independent, Internet cable system, capable of accumulating programming and global broadcasting.¹³⁹ However, much like satellite systems, “[I]nternet retransmission services cannot constitute cable systems under § 111 [of the Copyright Act] because they provide nationwide—and arguably global—services.”¹⁴⁰ In addition, the court found that even though IVI could not be considered a traditional cable system, its accumulation (or bank) of retransmitted, nationwide programming accessible without geofiltering controls and available without licensure from the copyright holders caused such content owners irreparable economic injury by depriving them of revenue from the distribution of their works.¹⁴¹

Aereo’s system did not operate like a cable system, but more like an online digital recorder.¹⁴² Aereo’s subscribers could control which programs were streamed and captured into their user accounts; their online DVRs did not capture all transmissions for access—just the ones specifically requested.¹⁴³ None of the streams captured by Aereo could be shared with other users¹⁴⁴ and there was no general public bank of programming.¹⁴⁵ Additionally, geofiltering controls keep the individualized, locally recorded programs within the subscribed viewer’s

137. *See id.* at 284 (discussing the Copyright Office’s conclusion that satellite providers were not cable systems).

138. *See id.* at 283-84.

139. *See id.* at 284-85.

140. *Id.* at 284.

141. *See id.* at 287.

142. *WNET*, 712 F.3d at 695 (“New devices such as RS-DVRs and Slingboxes complicate our analysis, as the transmissions generated by these devices can be analogized to the paradigmatic example of a ‘private’ transmission: that from a personal roof-top antenna to a television set in a living room . . . [Aereo] generates transmissions that closely resemble the private transmissions from these devices.”); *Am. Broad. Co.*, 874 F. Supp. 2d at 386.

143. *WNET*, 712 F.3d at 693; *Am. Broad. Co.*, 874 F. Supp. 2d at 386.

144. *See WNET*, 712 F.3d at 687-90, 694 (The Second Circuit carefully explains the distinction in the legislative intent behind the 1976 Copyright Act with respect to public and private performances, noting that performances would not be actionable as infringement unless done “publicly”: “[i]f Congress intended all transmissions to be public performances, the Transmit Clause would not have contained the phrase ‘to the public.’”).

145. *See Am. Broad. Co.*, 874 F. Supp. 2d at 386.

area, thus avoiding the issue of systematic, nationwide or global distribution of localized, specialized programming.¹⁴⁶

In addition, the lower court in *Aereo* refused to recognize the argument that time-shifting properties are inherent in the DVR (as established by the *Cablevision* case);¹⁴⁷ the networks in *Aereo* had attempted to argue that there must be complete timeshifting in order for *Cablevision* to apply.¹⁴⁸ “[i]n order to be time-shifted, there can be no overlap between the over-the-air broadcast of the program and consumer playback of a recorded copy of that program—that any time-shifting must be ‘complete’ to turn a facilitating copy into a transmission copy.”¹⁴⁹ The court rejected this bizarre reading of the *Cablevision* opinion, which “applies controlling significance to facts on which the Second Circuit did not rely.”¹⁵⁰ If the court had accepted this argument, the strategy belying this position would have set a precedent basically and preemptively precluding possible Internet streaming of future live transmissions via independent digital antenna technologies.

IV. RAMIFICATIONS OF THE AEREO AND IVI DECISIONS

Because of the evolving nature of Internet technologies, the immediate reactions to the *Aereo* decision have taken interesting turns, with respect to the *Cablevision* precedent; new and emerging, competing technologies; and FCC consideration in revising statutes to keep up with technology.

A. *The Cablevision Backlash*

In a public statement, Cablevision denounced the court’s decision: “Cablevision has joined broadcasters in their battle against upstart Aereo, [as] a sign that the new cloud-based service is spooking others in the media biz besides the broadcasters who have sued to shut it down.”¹⁵¹

146. *WNET*, 712 F.3d at 680; *see Am. Broad. Co.*, 874 F. Supp. 2d at 400.

147. *Am. Broad. Co.*, 874 F. Supp. 2d at 394.

148. *Id.*

149. *Id.* at 387-88.

150. *Id.* at 388.

151. Jill Goldsmith, *Cablevision Slams Aereo*, DAILY VARIETY, Sept. 25, 2012, at 18; *see also Definition of: Cloud Storage*, PCMag, <http://www.pcmag.com/encyclopedia/term/60889/cloud-storage> (where cloud storage is “a backup and storage service on the Internet”) (last visited Apr. 7, 2014).

Cablevision claimed that the court was in error for relying on the case that legitimized Cablevision's own status as a broadcast retransmission service¹⁵² because the critical difference was that Cablevision paid license and retransmission fees whereas Aereo does not.¹⁵³ Cablevision also claimed that Aereo does not adhere to the private performance standard set in its own previous case, but does not explain why.¹⁵⁴

Cablevision, however, is attempting to make a distinction without merit: Cablevision provides licensed cable services with broadcast and pay channels in addition to DVR service for its subscribers.¹⁵⁵ Aereo has a completely different infrastructure: Aereo provides only online DVR services¹⁵⁶ for over-the-air broadcast programs on local network affiliates (which traditionally could have been accessed by television antennae), and does not assert claims as a cable service provider, as IVI, Inc. unsuccessfully attempted to do.¹⁵⁷ Cablevision's argument is presumably primarily economic, in that Aereo's provision of online DVR services would undercut the need for traditional cable services in rural and urban areas that are unable to receive over-the-air digital broadcast television transmissions.

B. From Sea to Shining Sea: Aereo's Expansion

Having sensed the need for an online streaming DVR service, Aereo has recently made plans to expand its business by initiating talks with broadcasters and content providers.¹⁵⁸ Aereo CEO Chet Kanojia explains:

The idea behind Aereo is that there is a place in this world for a neutral technology platform that de-couples content ownership from distribution. It's an opportunity for anyone who has product they want to market to the consumer (but) what they lack is a simple technology. . . . The thinking is, we will enable the technology in the cloud, starting with broadcast because it's

152. See Goldsmith, *supra* note 151 (discussing Cablevision's amicus brief urging the court to reverse its ruling).

153. See *id.* at 18.

154. *Id.*

155. *Id.*

156. See *Am. Broad. Co. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 385, 387-88 (S.D.N.Y. 2012).

157. See *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 286 (2d Cir. 2012).

158. See Jill Goldsmith, *Aereo in Talks with Cablers, CEO Sez*, DAILY VARIETY, Sept. 24, 2012, at 4 [hereinafter *Aereo in Talks with Cablers*].

free to air, but then we open it up to any like-minded company. There are a few of them, not a lot of them, who would like to put their product on Aereo.¹⁵⁹

Aereo's strategy mirrors that of more recent decisions by traditional pay cable systems and new platform distributors—decisions made to bolster the subscription base as well as retain current subscribers who favor the consumer trend towards à la carte services.¹⁶⁰ Because of the upward trend in online accessibility of programming,¹⁶¹ networks and studios are also beginning to take a cue from the public demand for online, nonlinear,¹⁶² direct-to-consumer programming.¹⁶³

159. *Id.*

160. See Andrew Wallenstein & Jill Goldsmith, *Nook Bows Vid Service*, VARIETY, Sept. 26, 2012, at 1, 20 (describing Barnes & Noble establishing a video service for digital content in the cloud, not a traditional VOD service); see also Andrew Wallenstein, *Content app muscles in: DWA, Technicolor Back M-Go, Which Aims to Streamline Viewing*, DAILY VARIETY, Sept. 12, 2012, at 1, 12 (describing DreamWorks' development of a content app to compete with Amazon Streaming Video, Apple iTunes, and Walmart-backed Vudu); see also Andrew Wallenstein, *Viacom, TW Cable Reach TV Everywhere Deal*, VARIETY (Sept. 10, 2012, 12:04 PM), <http://variety.com/2012/tv/news/viacom-tw-cable-reach-tv-everywhere-deal-1118059035> (“[C]able operator’s subscribers will be able to watch either live linear feeds or full episodes on demand via computers or wireless devices”); see also Andrew Wallenstein, *HBO on Nordic Track: Strategy switch pits it against Netflix*, VARIETY, Aug. 31, 2012, at 2, 11 (describing how HBO is to provide à la carte services in Scandinavia, a “market where HBO doesn’t have to protect an entrenched business model as lucrative as the one in the U.S., where a standalone product would jeopardize its deals with distributors from Comcast to DirecTV”); Nick Vivarelli, *YouTube to Charge Fee for Some Content*, VARIETY (Oct. 10, 2012, 5:00 AM), <http://variety.com/2012/digital/news/youtube-to-charge-fee-for-some-content-1118060542/> (“The move [towards monetization] sees YouTube continuing to encroach in territory traditionally occupied by broadcasters, now also adopting both their traditional content and pay TV business model.”).

161. Chenda Ngak, *NPD Study: More People Watch Internet Videos on TVs than Computers*, CBS NEWS, (Sept. 26, 2012, 4:53 PM), <http://www.cbsnews.com/news/npd-study-more-people-watch-internet-videos-on-tvs-than-computers/> (“45 percent of the people surveyed say that the TV is their ‘primary screen’ for watching paid and free videos streamed over the Internet—a rise from 33 percent last year. . . . ‘Streaming video has moved from the dorm room to the living room; and, as more households obtain and connect TVs to the Web, we predict increased trial and engagement for video distribution services,’ Russ Crupnick, NPD Group senior vice president of industry analysis, said in a press release.”).

162. Press Release, *Broadcasters Have No Cause For Panic Over Rise of Nonlinear TV*, ISUPPLI, (Aug. 2, 2011), <http://www.isuppli.com/media-research/news/pages/broadcasters-have-no-cause-for-panic-over-rise-of-nonlinear-tv.aspx> (last visited Apr. 7, 2014) (“Nonlinear television is defined as non-traditional means of viewing that enables place- and timeshifting. This contrasts

However, if Kanojia's comments are taken at face value, this "decoupl[ing]" of "content ownership from distribution"¹⁶⁴ remains a troubling concept, especially considering that sometimes the distributors and the content owners can be one and the same party.¹⁶⁵ However, this direct-to-consumer philosophy, though hardly novel, appears to have adapted itself to the Internet age.

But as Aereo expands beyond New York¹⁶⁶ and heads toward the media capitals of the West,¹⁶⁷ technical issues¹⁶⁸ and broadcast network litigation follow.¹⁶⁹ Aereo expanded its service package to Boston, Atlanta,

with traditional linear television, where viewers must watch a scheduled TV program at the time it's broadcast.").

163. Stuart Levine, *Digital Laugh Track: Comedy exec to amp nonlinear fare*, DAILY VARIETY, Jan. 23, 2013, at 6 ("[Comedy Central programming topper Kent] Alterman said the net will be more friendly to greenlighting digital-only projects now, rather than thinking mostly about digital offshoots of existing on-channel programs."); Jon Lafayette, *Turner Takes Wraps Off Live Streaming for TNT, TBS*, MULTICHANNEL NEWS (May 15, 2013, 6:02AM), <http://www.multichannel.com/content/turner-takes-wraps-live-streaming-tnt-tbs/143314> (Turner Broadcasting announced that it "[w]ill become the first national entertainment networks to stream on-air content live across multiple platforms 24/7, including through the networks' websites and a pair of newly created Watch TNT and Watch TBS apps."); see also Andrea Morabito, *ABC Sets Live Streaming Service Launch*, MULTICHANNEL NEWS (May 12, 2013, 3:52 PM), <http://www.multichannel.com/distribution/abc-sets-live-streaming-service-launch/143270> (On May 14, ABC will launch the "[W]atch ABC app to allow pay-TV subscribers access to live, linear streaming of viewers' local ABC station programming—including network, local and syndicated content—starting in the New York and Philadelphia markets . . ." and will roll out in six other markets by the end of Summer 2013.).

164. *Aereo in Talks with Cablers*, *supra* note 158, at 4.

165. See *id.* (discussing that broadcast networks who are distributors spend "[m]assive coin developing content").

166. Jeff Baumgartner, *Aereo Adds Four Cities to Launch List*, MULTICHANNEL NEWS (Sept. 24, 2013, 2:12 PM), <http://www.multichannel.com/distribution/aereo-adds-four-cities-launch-list/145664>.

167. See Baumgartner, *supra* note 166.

168. See Todd Spangler, *Aereo Delays Chicago Launch, Citing Technical Issues*, VARIETY (Sept. 27, 2013, 1:26 PM), <http://variety.com/2013/digital/news/aereo-delays-chicago-launch-citing-technical-issues-1200674332/#>.

169. See Eriq Gardner, *Aereo Hit With Second Lawsuit in Utah*, THE HOLLYWOOD REPORTER (Oct. 25, 2013, 2:41 PM), <http://www.hollywoodreporter.com/thr-esq/aereo-hit-second-lawsuit-utah-651031>; see also Dan Levine, *CORRECTED-UPDATE 1-U.S. judge gives broadcasters injunction against Aereo online TV*, REUTERS (Feb. 20, 2014, 11:40 AM).

Salt Lake City, and Miami, as part of its plans to roll out service to major cities in 26 markets¹⁷⁰ on the East coast, the West, and the Midwest.¹⁷¹ Additionally, Aereo will offer an Android application for smartphones and tablets.¹⁷² Kanojia explains the reasoning behind the expansion by continuing to argue that Aereo legally provides services that the people demand: “People are craving alternatives and more choice with how they watch television. Consumers are tired of being pawns in the tug-of-war between big businesses.”¹⁷³

And the *Aereo* controversy has indeed become symbolic of a consumer tug-of-war. What began as the birth of an alternative distribution method in a digital broadcasting space has turned into a series of litigious struggles by big broadcasters,¹⁷⁴ trying to preserve their existing business models with a single battle cry: “we’ll sue them again.”¹⁷⁵ Despite

<http://www.reuters.com/article/2014/02/20/aereo-utah-injunction-idUSL2NOLP01U20140220> (describing the latest injunction granted against Aereo, covering services in Utah, Colorado, Wyoming, New Mexico, Oklahoma, Kansas and parts of Montana and Idaho).

170. See Baumgartner, *supra* note 166.

171. See *id.* (“Other cities on tap for Aereo’s initial rollout phase include Minneapolis; Madison, Wis.; Cleveland; Providence, R.I.; Philadelphia and Pittsburgh, Pa.; Chicago; Denver; Kansas City; Baltimore; Washington, D.C.; Raleigh-Durham, N.C.; Austin, Texas; Tampa, Fla.; Birmingham, Ala.; and Detroit” in addition to the newly announced services in Cincinnati and Columbus, Ohio; Indianapolis; and San Antonio, Texas.).

172. *Aereo to Offer Android App on October 22*, DEADLINE (Oct. 10, 2013, 7:01 AM), <http://www.deadline.com/2013/10/aereo-introduces-app-for-android-devices>.

173. Baumgartner, *supra* note 166.

174. See David Lieberman, *Aereo Asks Court To Bar Broadcasters From Suing in Multiple Jurisdictions*, DEADLINE (May 6, 2013, 11:17 AM), <http://www.deadline.com/2013/05/aereo-asks-court-to-bar-broadcasters-from-suing-in-multiple-jurisdictions/>.

175. Lieberman, *supra* note 174; David Lieberman, *Les Moonves Says CBS Will Keep Suing Aereo As It Expands*, DEADLINE (May 1, 2013, 5:58 PM), <http://www.deadline.com/2013/05/les-moonves-says-cbs-will-keep-suing-aereo-as-it-expands/>; see also Ted Johnson, *Aereo Warns Utah Judge That Halting Service Will Cause It ‘Grave’ Harm*, (Feb. 20, 2014, 11:56 AM), <http://variety.com/2014/biz/news/aereo-warns-utah-judge-that-halting-service-will-cause-it-grave-harm-1201114121/#> (where Aereo argues that preliminary injunctions granted in western states before the Supreme Court ruling will “cause great and permanent harm to Aereo and to thousands of members of the public”: consumers would not have access to over-the-air broadcasting and suffer out-of-pocket costs while Aereo would continue to pay fixed costs, lose its monetary investment in new markets, and continue to accrue legal fees).

Aereo's wins in other jurisdictions beyond New York,¹⁷⁶ where Aereo's interpretation of the Transmit Clause has been upheld as "a better reading of the [copyright] statute,"¹⁷⁷ broadcasters have pushed forward to the highest court by filing a petition for writ of certiorari.¹⁷⁸ In an interesting turn of events, Cablevision, an aforementioned critic of the Second Circuit's *Aereo* decision,¹⁷⁹ recently denounced the broadcasters' continued efforts to legally pummel Aereo into submission via their narrow interpretation of the Transmit Clause:

We are dismayed by the broadcasters' brazen attempt, in a case about Aereo, to go after the legal underpinning of all cloud-based services, everything from digital lockers to Cablevision's own RS-DVR service. . . . [T]he broadcasters' approach can only be seen as a willful attempt to stifle innovation. If Aereo ends up prevailing, it will serve the broadcasters right.¹⁸⁰

C. Growth of the Unlicensed Retransmission Industry

The Aereo ruling has led to a reemergence and explosion of services and technologies banking on the ability to retransmit broadcast feeds and also market themselves as online DVRs.¹⁸¹ Most recently, Alki David, the Los Angeles-based media billionaire, reasserted his claim that his websites (FilmOn.com, Aereokiller, and BarryDriller.com) were in essence, cloud-based DVR and retransmission services akin to those provided by Aereo.¹⁸²

176. Dominic Patten, *Aereo Beats ABC Boston Affiliate Injunction Demand*, DEADLINE (Oct. 10, 2013, 8:15 AM), <http://www.deadline.com/2013/10/aereo-beats-abc-boston-affiliate-injunction-demand/>.

177. Eriq Gardner, *Broadcasters Denied Injunction Against Aereo in Massachusetts*, HOLLYWOOD REPORTER (Oct. 10, 2013, 6:06 AM), <http://www.hollywoodreporter.com/thr-esq/aereo-wins-massachusetts-broadcasters-denied-647137>.

178. Eriq Gardner, *TV Broadcasters Ask Supreme Court to Review Aereo Dispute*, HOLLYWOOD REPORTER (Oct. 11, 2013, 1:02 PM), <http://www.hollywoodreporter.com/thr-esq/tv-broadcasters-ask-supreme-court-647849>.

179. See Goldsmith, *supra* note 151; see also section IV.A above for a discussion of Cablevision's previous public statement.

180. Gardner, *supra* note 178.

181. See Eriq Gardner, *TV Broadcasters Settle Digital Lawsuit, but 'Aereo-Like' Service Won't Die*, HOLLYWOOD REPORTER (Aug. 1, 2012, 1:13 PM), <http://www.hollywoodreporter.com/thr-esq/lawsuit-alki-david-barry-diller-filmon-357288> [hereinafter *TV Broadcasters Settle Digital Lawsuit*] (discussing David's plans for FilmOn and FilmOn TV).

182. See *id.*

David continues to claim that his site, FilmOn.com, “is the world’s first and largest live TV delivery platform for the Internet offering over 260 premium live TV channels World Wide [and creating] original interactive content programming as well as delivering interactive television services over the air and to satellite.”¹⁸³

Despite the permanent injunction against FilmOn.com and penalties paid by David via a private settlement,¹⁸⁴ the site continues to operate in 2014, streaming live broadcast affiliates over the Internet.¹⁸⁵ David has publicly acknowledged the settlement,¹⁸⁶ but strangely claims that since his streaming service is just like Aereo’s service, “the settlement doesn’t preclude his FilmOn service.”¹⁸⁷ David then publicly stated his attempt to set his own prices on retransmission fees from broadcast networks, “intend[ing] to pay retransmission fees to the networks ‘despite the fact that under the current Aereo ruling we are not required to do so,’ but the fees will be guided by his view of what they are entitled to receive.”¹⁸⁸ Broadcast networks and studios, of course, cannot condone such an arrangement where unlicensed retransmission services set their own prices and rules for the retransmission:¹⁸⁹

The settlement deal gives [the broadcasters] the right to sue for breach and enforcement. Violation of the consent judgment incurs penalties and contempt of court. The settlement restrains him from ‘streaming,’ and even though David believes that’s not

183. Press Release, FilmOn, *FilmOn CEO Alki David Issues Ten Million Dollar Challenge to Donald Trump*, CISION (Oct. 26, 2012, 6:09 PM), <http://news.cision.com/filmon-live-tv/r/ilmon-ceo-alki-david-issues-ten-million-dollar-challenge-to-donald-trump,c9327306>.

184. *TV Broadcasters Settle Digital Lawsuit*, *supra* note 181.

185. See FILMON, <http://www.filmon.com> (last visited Apr. 7, 2014). As of April 7, 2014, FilmOn.Tv is still fully operational and offers DVR service; no public retraction of the permanent injunction has been issued. A FilmOn.Tv viewer can access local broadcast network affiliates from across the country, regardless of the viewer’s current geographic location.

186. *TV Broadcasters Settle Digital Lawsuit*, *supra* note 181.

187. *Id.*

188. *Id.*

189. Paul Bond, *Barry Diller on Aereo: ‘I’m Kind of Glad They Sued Us,’* HOLLYWOOD REPORTER (May 29, 2013, 3:27 PM), <http://www.hollywoodreporter.com/news/barry-diller-aereo-im-kind-559972>.

what FilmOn/Aereo *does* in the technical sense, the broadcasters likely will challenge that assessment swiftly and mercilessly.¹⁹⁰

Again, though FilmOn.com still remains operational,¹⁹¹ broadcasters have struck several blows against it and another Alki David property, Aereokiller.¹⁹² On December 27, 2012, four television producers and distributors (Fox, NBC, ABC, and CBS) succeeded in obtaining an injunction against Aereokiller's parent company, BarryDriller Content Systems, to stop the unlicensed airing of their over-the-air broadcast programs.¹⁹³ Aereokiller, an android application for mobile devices, much like the Aereo service, also retransmits broadcast programming to computers and other mobile platforms.¹⁹⁴ Here, Alki David's argument stemmed from the decision in the *Aereo* case, Aereokiller's namesake of sorts. David claimed that Aereokiller should be exempt from an injunction against its services based on the New York ruling¹⁹⁵ because it was "technologically analogous"¹⁹⁶ to the technology espoused by Aereo (portable tuners akin to antennae, whereby viewers could watch locally broadcast programming via their computers or mobile devices).¹⁹⁷

The Central District Court disagreed.¹⁹⁸ The court granted an injunction against Aereokiller's parent company, encompassing both the Aereokiller and FilmOn.Tv services.¹⁹⁹ The California court interpreted the

190. *TV Broadcasters Settle Digital Lawsuit*, *supra* note 181.

191. *See* FILMON, *supra* note 185.

192. *See* Dominic Patten, *TV Networks Get Tentative Victory in Aereokiller Streaming Case*, DEADLINE (Dec. 20, 2012, 5:57 PM), <http://www.deadline.com/print-post/?posttoprint=392946&KeepThis=true/>; *see also* Todd Spangler, *Judge Orders 'Aereokiller' to Stop Streaming Live TV: California District Court Rules Internet Service Illegally Retransmits Copyrighted Content*, MULTICHANNEL NEWS (Dec. 28, 2012, 8:00 AM), <http://www.multichannel.com/ott/judge-orders-aereokiller-stop-streaming-live-tv/140940>.

193. *Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC.*, 915 F. Supp. 2d 1138, 1140 (C.D. Cal. 2012).

194. Alexander C. Kaufman, *Networks Seek Injunction Against Aereokiller*, THE WRAP (Nov. 9, 2012, 12:40 PM), <http://www.thewrap.com/media/article/networks-seek-new-injunction-against-barry-dillers-aereo-64461>.

195. *See id.*

196. *Fox*, 915 F. Supp. 2d at 1140.

197. *Id.* at 1140-1141.

198. *Id.* at 1140.

199. Spangler, *supra* note 192.

Cablevision ruling differently than the New York court, concerning itself with control of the performance of the copyrighted work “irrespective of which copy of the work the transmission is made from.”²⁰⁰ Therefore, according to the court, it does not matter which copy is obtained, as long as there is an unregulated public performance of it.²⁰¹

The court also considered the copyright holders’ monetary loss from the unregulated, unlicensed distribution of their product.²⁰² This loss would take two forms: a loss of opportunities for licensure and the “ability to develop [copyright holders’] own distribution channels.”²⁰³ Services like AereoKiller would, in essence, destroy the licensing system.²⁰⁴

Here, AereoKiller insisted on the application of the *Aereo* decision upon its own service.²⁰⁵ However, New York law does not control in California, so the injunction granted in this case covered only a limited geographic area—the territory covering the Ninth Circuit.²⁰⁶ Though download availability of the AereoKiller application has ceased,²⁰⁷ FilmOn.tv remains in operation, airing licensed programming from broadcast networks in spite of the injunction.²⁰⁸ In granting that injunction,

200. *Fox*, 915 F. Supp. 2d at 1143-44.

201. *See id.* at 1145.

202. *See id.* at 1147 (“If Defendants [Aereokiller] can transmit Plaintiffs’ content without paying a fee, Plaintiffs’ existing and prospective licensees will demand concessions to make up the loss of viewership to non-paying alternatives, and may push additional players away from license-fee paying technologies and toward free technologies like Defendants’ [technologies.]”).

203. *Id.*

204. *See id.*

205. *See id.* at 1140-41.

206. *Fox*, 915 F. Supp. 2d at 1148 (C.D. Cal. 2012); *see also* Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 771 (2006) (“A rational resolution of the issue requires discerning the purpose of giving the owner of a copyrighted work the exclusive right to perform it. The purpose is to prevent the form of free riding that consists of waiting for someone to spend money creating a valuable expressive work and then preventing him from recouping his investment by copying the work and selling copies at a price below the price the creator of the work would have to charge to break even.”).

207. *See AereoKiller LLC*, APPSZOOM, http://www.appszoom.com/android_applications/multimedia/aereokiller-llc_cqoqi_download.html (last visited Apr. 7, 2014).

208. *See* FILMON, *supra* note 185. As of April 7, 2014, in the Los Angeles, California area, FilmOn.Tv airs programming from local affiliates KTLA 5 Los Angeles, KPBS 15 San Diego, KDOC 56.1 Los Angeles, and KPXN 30.2 Los Angeles.

the Central District Court of California, in essence, attempted to geofilter the injunction in order not to interfere with the *Aereo* decision²⁰⁹ and has set the stage for a Supreme Court ruling on the matter.²¹⁰

The U.S. District Court for the District of Columbia also granted broadcasters a nationwide injunction blocking FilmOn.tv from offering its version of a digital antenna to customers,²¹¹ but FilmOn.tv continues to air licensed, broadcast affiliate programming²¹² and also attempts to legally benefit from the court decisions favoring *Aereo*,²¹³ despite the subtle differences in the two service providers' technologies.²¹⁴

In addition to Internet rebroadcasters gone rogue, other new Internet streaming, rebroadcasting, and cloud devices have also sprung forth, incentivized by the *Aereo* ruling as to their legitimacy.²¹⁵ Unlicensed

209. See *Fox*, 915 F. Supp. 2d at 1145.

210. Don Jeffrey, *Aereo's Wins Send Networks on Hunt to Stop Streaming TV*, BLOOMBERG (Aug. 27, 2013), <http://www.bloomberg.com/news/2013-08-27/aereo-wins-send-networks-on-hunt-to-stop-streaming-tv.html>.

211. Seth A. Davidson & Arthur H. Harding, *Federal Judge Issues Nationwide Injunction Against Aereo Competitor FilmOn*, LEXOLOGY (Sept. 13, 2013), <http://lexology.com/library/detail.aspx?g=0d489c4e-0d05-4107-8622-1c23cab497f9>; see also Todd Spangler, *Broadcasters Win Preliminary Injunction Against Internet-Video Streamer FilmOn X*, VARIETY (Sept. 5, 2013, 2:01 PM), <http://variety.com/2013/biz/news/fox-wins-preliminary-injunction-against-internet-video-streamer-filmon-x-1200600254/>.

212. See FILMON, *supra* note 185. As of April 7, 2014, in addition to streaming programming from stations in Los Angeles, California, FilmOn.Tv also streams programming from local affiliates in Atlanta, Georgia; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Denver, Colorado; San Francisco, CA; New York, New York; Tampa, Florida; and Washington, D.C.

213. Dominic Patten, *FilmOn X Claims Aereo Boston Win Limits Broadcasters' Injunction*, DEADLINE (Oct. 11, 2013, 8:18 PM), <http://www.deadline.com/2013/10/filmon-x-aereo-hearst-abc-supreme-court-alki-david>.

214. Eriq Gardner, *Aereo Tells Judge Not to Mind FilmOn Injunction*, HOLLYWOOD REPORTER (Sept. 12, 2013, 2:56 PM) <http://www.hollywoodreporter.com/thr-esq/aereo-tells-judge-not-mind-628396>; see also Ted Johnson, *Aereo Tries to Distance Itself From Rival's Legal Losses*, VARIETY (Sept. 12, 2013, 5:06 PM), <http://variety.com/2013/digital/news/aereo-argues-courts-should-ignore-rival-filmon-xs-legal-setbacks-1200609498/>; see also Ted Johnson, *FilmOn X, Rival to Aereo, Argues to Appellate Court Its "Innovation" is Legal*, VARIETY (Aug. 27, 2013, 12:33 PM), <http://variety.com/2013/digital/news/aereo-rival-filmon-x-argues-to-ninth-circuit-that-its-innovation-is-legal-1200589969/>.

215. See Sam Thielman, *Send in the Cloud: Boxee TV to Store Shows...For a Fee*, ADWEEK (Oct. 22, 2012, 12:01 AM), <http://www.adweek.com/news/television/send-cloud-144673> (discussing Aereo, Dish Network's Autohopper, Roku, and Boxee services).

retransmission service providers now view over-the-top transmissions as permissible, given *Aereo*: “There is no pushback [on over-the-top] like there was from content providers over *Aereo* and *Hopper*”²¹⁶ . . . there’s room for optimism.”²¹⁷ If broadcasters are not successful in stopping the unlicensed Internet retransmission of their copyrighted works via the Internet or can work to adapt, merge, and monetize such processes into their existing infrastructure, emerging technologies will break the copyright system currently in place.

*D. Legislative Attempts to Close the Gap:
Opening the Door to À La Carte?*

Congress has not turned a blind eye to the possible legal repercussions of copyright and retransmission definitions in light of emerging technologies.²¹⁸ In addition to continuing discussions on the concept of net neutrality,²¹⁹ the House of Representatives held a hearing on June 27, 2012 entitled “The Future of Video: How Advances in Consumer Electronics, Broadcasting, Cable, Satellite, the Internet and Other Platforms are Changing How Consumers Access Video Content.”²²⁰ In this hearing, executives from production and distribution media industries discussed the effect of unlicensed Internet retransmissions and called for a reexamination of the licensing laws established nearly twenty years ago.²²¹ David Barrett,

216. *Id.* (discussing Dish Network’s Autohopper DVR service, which enables users to skip commercial breaks for an advertisement-free viewing experience).

217. *Id.*

218. See *Future of Video: How Advances in Consumer Electronics, Broad., Cable, Satellite, the Internet and Other Platforms are Changing How Consumers Access Video Content: Hearing Before the Commc’ns and Tech. Subcomm. of the House Energy and Commerce Comm.*, 112th Cong. (2012).

219. Ted Johnson, *No Neutrality on Net: Verizon Lawsuit Reopens Debate*, VARIETY (Oct. 15, 2012) available at 2012 WLNR 21875595 (discussing the concept of net neutrality, whereby the FCC had prohibited Internet providers from offering tiered speed services, which may have led to Internet and cable providers’ discrimination regarding content and Internet traffic).

220. *Future of Video*, *supra* note 218.

221. *Id.* (quoting Senator Henry Waxman: “Digital technology and broadband Internet access are dramatically altering how video content is produced, delivered and consumed, promising more choices and greater value for consumers and new avenues for the creative community to distribute its work. Our challenge is to ensure a diversity of voices, robust competition and greater access to these new platforms. The panel of witnesses before us illustrates the many ways Americans can access video programming today free over-the-air broadcasting, pay television service from cable, satellite, even traditional telephone companies or video delivered

President and CEO of Hearst Television, Inc., specifically clamored for a return to licensed programming—a plea made especially important in light of the *Aereo* decision; Barrett stated,

Our industry recognizes that consumers expect to view our programming on a variety of devices large and small. In order to make that a reality and preserve our business viability, content producers will need assurance that programming will only be transmitted with prior consent and agreed-upon compensation. In the current television context, retransmission consent allows broadcasters, and cable and satellite companies to negotiate in the free market for the value of the broadcast signal. These negotiations are successful because both side[s] of the deal have skin in the game; we have a mutuality of interests. Broadcasters benefit from the exposure that cable and satellite provides, and likewise these video operators benefit from reselling our incredibly popular content.²²²

Barrett then urged the broadcasters to take back their rights regarding retransmissions:

So, how do we ensure that our broadcast content is successful beyond these traditional platforms to the new video technologies evolving at a breakneck speed? I will observe that I think Congress got it right in 1992 when it noted that broadcasters must be allowed to control the use of their signals by anyone engaged in re-transmission by whatever means.²²³

However, with ever-changing technological landscape, this is easier said than done.

through a broadband connection. Video programming is no longer the exclusive province of the television set. Consumers can now use tablets and smartphones to watch their preferred content. Innovative products and services are increasingly putting viewers in control of what, when, where and how they watch video. Even as we marvel at the incredible advances in technology, we must be mindful that policy choices we make today will impact the video landscape we see tomorrow. We should examine whether the legal framework created 20 years ago still works for a video market filled with choices that did not even exist two or three years ago. And we should remember that old challenges can persist in the face of new opportunities. Competitors need a fair shot at gaining access to content and independent creators need rules that prevent discrimination against carriage of their programming.”).

222. *Id.* (statement of David Barrett, President & CEO, Hearst Television, Inc.).

223. *Id.*

The recent month-long fight between Time Warner Cable and CBS, a broadcast network, over cable carriage fees brought renewed attention to issue of retransmission in the digital age;²²⁴ though Aereo was not directly involved in this battle,²²⁵ the nonlinear, alternative digital distribution services provided by Aereo and other platforms gained prominence during the blackout, opening the discussion about bundled cable services to federal inquiries on the feasibility of “à la carte” cable services²²⁶ and other options for television viewing.²²⁷ Recently, Senator John McCain introduced the Television Consumer Freedom Act advocating à la carte services for cable subscribers.²²⁸

The trend favoring viewer-selected, on-demand services²²⁹ reflects the technological zeitgeist: namely, the rise of online video in response to cable’s inefficient and costly packaging system.²³⁰ This movement cements Aereo’s role as a threat to the broadcast and cable models in

224. Ted Johnson, *CBS-Time Warner Cable Blackout Spurs D.C. Action on Retrans*, VARIETY (Sept. 12, 2013, 2:25 PM), <http://variety.com/2013/biz/news/cbs-time-warner-cable-fight-moves-to-d-c-1200609334/>.

225. Todd Spangler, *Why Aereo Didn’t Try to Exploit CBS-Time Warner Cable Fight*, VARIETY (Sept. 24, 2013, 2:01 PM), <http://variety.com/2013/digital/news/why-aereo-didnt-try-to-exploit-cbs-time-warner-cable-fight-1200665325/>; see also Eriq Gardner, *Aereo CEO Chet Kanojia Says CBS-TWC Fight Means ‘Validation,’* HOLLYWOOD REPORTER (July 22, 2013, 4:38 PM), <http://www.hollywoodreporter.com/news/aereo-ceo-chet-kanojia-says-590226>.

226. Brent Lang and Tony Maglio, *Why À La Carte Cable Could Kill TV’s Golden Age*, THE WRAP (Sept. 12, 2013, 11:34 PM), <http://www.thewrap.com/why-a-la-carte-cable-could-kill-tvs-golden-age>; see also Tim Molloy, *John McCain Makes the Case of À La Carte Cable*, THE WRAP, (Sept. 12, 2013, 11:42 PM), <http://thewrap.com/qa-john-mccain-makes-the-case-for-a-la-carte-cable>.

227. *What Happens to Traditional TV When Technology Creates New Ways To Watch?*, PBS NEWSHOUR (Sept. 12, 2013), http://www.pbs.org/newshour/bb/media/july-dec13/tvfuture_09-12.html.

228. Television Consumer Freedom Act of 2013, S. 912, 113th Cong. § 2 (2013).

229. Alex Ben Block, *À La Carte Bill’s Co-Sponsor: Cable Consumers Want Freedom of Choice (Q&A)*, HOLLYWOOD REPORTER (Aug. 2, 2013, 5:00 AM), <http://www.hollywoodreporter.com/thr-esq/a-la-carte-bills-sponsor-595788>.

230. Brent Lang, *7 Takeaways from TheGrill: Here Comes À La Carte Cable, 6 Companies to Watch and Bill Maher’s Gun*, THE WRAP (Sept. 25, 2013, 4:37 PM), <http://thewrap.com/everyone-loves-breaking-bad-why-cable-unbundling-could-happen-bill-mahers-gun-take-aways-from-thegrill/>.

place;²³¹ as the television viewer becomes less dependent on linear, multichannel video provider platforms like traditional broadcast and cable, and becomes more reliant on on-demand, à la carte services such as Aereo, the distribution and retransmission systems in place must adapt to and incorporate new technologies themselves before their business models become obsolete.

V. CONCLUSION

Television, as previously stated, is first and foremost a business. Aereo, Inc. has found a loophole in the current distribution system, and now many similar technologies are poised to pounce upon the liberal interpretation of copyright law stemming from it. If retransmission and redistribution of copyrighted works by non-licensed entities can be as simple as creating an online DVR that escapes licensure and redistribution fees by not fitting in with the traditional definition of a cable system, as composed in the pre-Internet age, then legislation must be passed in order close that potential window of copyright theft and redistribution opportunity. The laws must be drafted such that copyright protections can withstand emerging technologies.

Broadcasters must also seize the opportunity to draft new licensing agreements in which digital media distribution is at the forefront. The main problems with the agreements already in place, though, are not the agreements themselves, but the lack of definition of the scope of Internet rights, coupled with the narrow reading of the definition of cable systems to exclude Internet transmission, and the lack of enforcement of preexisting copyright law in light of changing technologies. These are the two areas relegating current copyright law to a technological bygone era.

231. Lucas Shaw, *5 Things We Learned About Netflix's Future*, THE WRAP (Oct. 21, 2013, 5:39 PM), <http://www.thewrap.com/netflix-ceo-reed-hastings-dont-want-nfl-aereo-threat> (where "Aereo will condition people to watching shows on-demand"); see also Sam Gustin, *What the Aereo Supreme Court Case Means for the Future of TV*, TIME (Jan. 13, 2014), <http://business.time.com/2014/01/13/aereo-scotus/> ("If the high court rules that Aereo's service is legal, the decision could one day upend the highly lucrative broadcast TV business model, which is based on cable and satellite companies paying billions for the right to broadcast popular programming. That could prompt the broadcasters to yank their most-watched shows and sporting events from free TV and move them to pay TV channels like Showtime or ESPN. Late last year, the National Football League and Major League Baseball warned that if Aereo prevails, the leagues might move high-profile broadcasts like the Super Bowl and World Series to cable. . . . If Aereo wins, the big cable companies might develop similar services to avoid paying an estimated \$4 billion in annual 'retransmission consent' fees to the broadcasters.").

The deficiency in legal definition of free television, over-the-air transmissions in conjunction with Internet distribution does not lie in the Transmit Clause—only in the narrow interpretations benefitting archaic business models and disfavoring technological advances. In its review of the *Aereo* case, the Supreme Court should uphold the lower New York courts' rulings and allow individualized digital antennae services such as Aereo to operate under the Transmit Clause—for if modern copyright law cannot adapt itself to the changing technological environment, then Darwinian law will prevail and all possibility of retaining individual copyright holders' rights and privileges in an Internet age will go the way of the dodo.