**Aereo: Cutting the Cord or Splitting the Circuit?**

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I. INTRODUCTION

Aereo has been described as “[a] redundant offering that is borderline-superfluous,” “technological gimmickry,” and “alchemy.” Aereo is a technology company that allows consumers to view both live and time-shifted streams of over-the-air television through an Internet-connected device. Some praise Aereo for redefining the way people watch television while others criticize its blatant disregard for the laws that govern its existence. Based on a one-user, one-antenna theory, Aereo believes that it created a system to transmit broadcast content to consumers and that this system is not subject to copyright laws, because the transmissions do not constitute a “public performance.” This Note argues that Aereo’s view is incorrect and that Aereo misinterprets the holding in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* Although the Second Circuit ruled in Aereo’s favor on the plaintiffs-petitioners’ motion for a preliminary injunction, the legality of Aereo’s technology is in dispute. More

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5 Brief for Respondent at 12, American Broadcasting Companies v. Aereo, Inc., 134 S. Ct. 896 (2014) (No. 13-461), 2013 WL 6513765 at *12 (“As both courts below correctly found, a consumer using Aereo’s system captures a signal through an antenna available only to a particular user and enables that user to make an individual copy from a unique data stream that can be viewed solely by that user at the user’s direction. That technology does not cause infringement because Aereo does not engage in any performance ‘to the public.’”).

6 See generally *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) [hereinafter Cablevision].

specifically, in **Fox TV Stations, Inc. v. BarryDriller**, the Central District of California ruled in favor of the broadcasters in a case involving a rival company comprising similar facts.⁸

If Aereo’s service is found to be legal, then the broadcast industry, which earns approximately $60 billion a year, will be irreparably burdened as a result.⁹ A drop in customers means fewer retransmission fees, which in turn would cause advertising agencies to move into other more profitable markets.¹⁰ Moreover, a favorable ruling for Aereo could force broadcast companies to become cable channels in order to survive.¹¹ A switch to cable would not only harm consumers who depend on free, over-the-air broadcast television, but it would also thwart the spirit of the Communications Act of 1934 (“Communications Act”).¹² The Communications Act mandates that broadcasters take measures that would help the public, in exchange for access to free public airwaves.¹³ U.S. households are changing the way they obtain media content.¹⁴ More than 95% of Americans watch television by using traditional cable or satel-

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⁸ Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1140-41, 1143, 1149 (C.D. Cal. 2012). In **BarryDriller**, the district court observed that the defendants:

[...]


¹¹ Baker & Grover, supra note 9.

¹² See generally 47 U.S.C. § 151 (2006). Communications Act of 1934 was created:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication . . .

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lite. What has caused five million people to switch? The answer lies in the rapidly evolving technological community. While 75% of “Zero-TV” homes (i.e., homes that do not fit the traditional TV mold of a household) have televisions, 67% of those homes receive media content through computers, TV Internet, smartphones, or tablets. Nielsen recognizes the Zero-TV homes as a category of their own. According to Nielsen’s 2013 Cross Platform Report, almost half of Americans under the age of thirty-five live in these Zero-TV homes—evidencing an important change in the delivery of media. The Nielsen survey attributed this shift to viewers’ concerns about the high costs of cable television and disinterest in cable programming.

Aereo’s service would provide television programming to those mobile-device users in the Zero-TV homes. A disputed aspect of the Aereo case is the interpretation of “perform.” Aereo argued that its service is equivalent to a private performance because each of its subscribers has an individual antenna and a unique recorded copy. This argument is congruent with the Second Circuits holdings, but it should not be followed due to its reliance on antiquated statutory provisions.

This Note begins by exploring Aereo’s business model and how it proposes to function, as well as the federal law that grants broadcasters the use of free public airwaves in exchange for providing services to the public. It then delves into section 101 of the Copyright Act—a section of the law that Aereo and Cablevision misinterpreted. Furthermore, it explores the different types of infringement at issue and why Aereo should be liable for direct and indirect infringement. The Note then analyzes the technology and precedents set forth in Cablevision, Aereo, BarryDriller, FilmOnX and Sony. Next, it explains why the Second Circuit cases should not be followed. The split between the Second and Ninth Circuits will also be vetted out in order to determine that the Ninth

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16 TURRILL, supra note 14, at 5–6 (According to the Cross Platform Report, “traditional TV” is defined as “[w]atching live or timeshifted content on a television set delivered by broadcast signal or a paid TV subscription” and “Zero-TV” is defined as “[a] household that did not fit Nielsen’s traditional definition of a TV household.”).
17 Id. at 4.
18 Id. at 7.
19 Id. at 8.
20 WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 685–86 (2d Cir. 2013), rev’d and remanded by 134 S.Ct. 2498 (2014) (“Plaintiffs claim that Aereo’s transmission of broadcast television programs while the programs are airing on broadcast television . . . are analogous to the retransmissions of network programming made by cable systems, which the drafters of the 1976 Copyright Act viewed as public performances. They therefore believe that Aereo is publicly performing their copyright works without a license.”).
21 Id. at 697 (Chin, J., dissenting).
Circuit precedent is correct and should be followed because Aereo and Barry-
Driller utilize similar technology. The Note will then analyze Aereo’s indirect
benefits to the public: Aereo fills a niche for consumers who want a few chan-
nels; offers cut-rate services and a live-sports function; and frees up broad
spectrum to be utilized for technologies, including wireless technologies. By
comparing the claim with issued patents, this Note then asserts that Aereo may
not be utilizing technology the way it states. Moreover, if the technology func-
tions as it claims, then Aereo would not be profiting based on the cost of elec-
tricity. Lastly, the Note urges a reform of the Copyright Act to remain current
with new digital technology and cover infringers such as Aereo who rely on
outdated law. A reform is essential to make sure that copyright holders retain
their exclusive rights as granted under section 106 of the Copyright Act. 22

II. AEREO’S OVER-ENGINEERED TECHNOLOGY

In the age of high cable bills, Aereo entered the market touting, “Watch TV
online. Save shows for later. No cable required.”23 The company is able to do
this by converting over-the-air signals and sending them to consumers via their
own dime-sized, individualized antennas and remote DVR boxes.24 By using an
Internet-connected device to access Aereo’s website,25 users can watch live TV
on their iPads, cellphones, and tablets.26 Virginia Lam, vice president of com-
 munications and government relations at Aereo, claims Aereo’s service func-
tions as “an updated set of rabbit ears.”27

At just $8 per month,28 users can access broadcast stations and record twenty
hours of programming29—a content package that is far more dynamic than Net-
flix and at a near identical cost. If users pay an extra $4 per month, the avail-
able recording space triples and customers can record two shows at once.30 This
new way of watching TV allows consumers to watch only the shows that they
want, without having to pay the exorbitant fees associated with traditional ca-
cable for channels they never watch. While Netflix is convenient for consumers

24 Lori Rackl, New Online Service Another Disruption for Cable TV, CHI. SUN TIMES,
http://www.suntimes.com/entertainment/22379530-421/new-online-service-another-
disruption-for-cable-tv.html (last updated Sept. 9, 2013, 7:53 PM).
26 Rackl, supra note 24.
27 Id. (internal citation omitted).
2014).
30 AEREO, supra note 28.
who want to watch streaming movies and television series, it lacks Aereo’s live television capability.31

Currently, Aereo is expanding into new geographical areas.32 Aereo CEO and founder Chet Kanojia said that “Aereo has grown its subscriber base tenfold.”33 While Aereo has not released specific numbers regarding total users, the Wall Street Journal recently estimated that there are between 90,000 and 135,000 subscribers in New York alone.34

Although this new digital model appears to be an excellent alternative to paying for traditional cable, many broadcast companies complain that Aereo unfairly retransmits their media content without permission.35 Aereo has argued that its service does not infringe on the public performance rights of the broadcast companies, and that it was not obligated to pay retransmission fees; the Second Circuit agreed with Aereo.36

Section 157 of the United States Code states that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.”37 In support of this provision, in another section of the Code, Congress established a policy ensuring that over-the-air broadcasts are free to all members of the public (provided they have an antenna).38 While these two provisions appear straightforward, problems can arise when a company such as Aereo utilizes this loophole for profit. In order to show that Aereo is transmitting media content without permission, one must look at the Copyright Act.

32 AERO, supra note 23.
III. THE COPYRIGHT ACT – DEFINITIONS & INTERPRETATIONS

Copyright protection is necessary to incentivize authors and inventors to innovate. 39 James Madison and Charles Pinckney were the first to propose that Congress has power over intellectual property. 40 Article I, section 8 (“the Copyright Clause”) of the United States Constitution states that Congress shall have the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” 41 This enactment mandates a tradeoff between authors of copyrighted works and the public. The authors retain exclusive rights to their work, while expanding the public storehouse of knowledge. 42 The Copyright Clause also serves as a basis for the first federal copyright act. Today, the Copyright Act of 1976 (the “Act”), which comprehensively rewrote Title 17 and still provides the basis for current copyright law, grants exclusive rights to copyright holders. 43

When a copyright is infringed, it is reproduced, made into a derivative work, distributed, performed, or displayed without the owner’s permission. “This is known as direct infringement.” 44 To present a prima facie case of direct infringement, plaintiffs need to show they are the owners of the infringed material and that the violation is of at least one exclusive right granted to copyright holders under section 106 of the Copyright Act. 45 Also, a person might be found secondarily liable by infringing indirectly. 46 A finding of vicarious infringement will occur when the contributory infringer “was in a position to control the use of copyrighted works by others and had authorized the use...

41 U.S. CONST. art. I, § 8, cl. 8.
42 Sony Corp. of Am., 464 U.S. at 429 (“[T]he limited grant [of monopoly] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).
without permission from the copyright owner.” The third type of infringement is contributory infringement, which is defined as “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” In its reply brief to the Supreme Court, Aereo argued that its “users, not Aereo, exercise the volitional control over the system that is necessary for any finding of direct liability for copyright infringement.” Thus, the case will turn on whether or not Aereo infringed directly.

Another issue to be decided is whether, under the terms of the Copyright Act, Aereo’s performance should be considered public or private. According to a pertinent section of the Copyright Act, displaying or performing a work “publicly” means:

1. to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
2. to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Although the Copyright Act of 1976 seems to make clear what a public performance is, the Act was enacted during a time of analog transmissions. This lack of contemplation on the part of digital transmissions and public performance must be interpreted and remedied. Moreover, section 101 arguably leaves uncertainty as to how a private performance should be interpreted. A private performance, under section 106, by one party or multiple parties does not offer the owner of the copyright any protection. The Second Circuit found in Aereo’s favor based upon its reading of these antiquated statutory provisions.

IV. CASE PRECEDEMENTS

49 Id. at 487 (Blackmun, J., dissenting).
A. Cablevision – A Case of Misinterpreted Law

In finding that Aereo’s use of individualized antennas does not infringe any copyrights, the Court of Appeals for the Second Circuit relied on the holding of Cartoon Network LP, LLLP v. CSC Holdings, Inc. “Cablevision”.\(^5\) In the Cablevision case, Cablevision (a cable-television-systems operator) created a remote storage digital video recording device (RS-DVR) to record cable programming.\(^6\) Plaintiffs owned the copyrights to the television shows and movies that Cablevision was recording and charging consumers for playback.\(^7\) At issue in Cablevision were the rights “to reproduce the copyrighted work in copies,”\(^8\) and the right “to perform the copyrighted work publicly.”\(^9\) The district court held that Cablevision infringed upon plaintiffs’ rights in three ways.\(^10\) First, the district court believed that by briefly storing data during the buffering process, Cablevision was making copies of protected works, thereby directly infringing on the plaintiffs’ right of reproduction.\(^11\) Second, by transmitting the copied content onto hard disks, the defendant again directly infringed on the plaintiffs’ right of reproduction.\(^12\) Third, by transferring the data from hard disks to their RS-DVR customers for playback, Cablevision infringed on plaintiffs’ public performance right.\(^13\) In summary, the district court believed that the first two actions violated plaintiffs’ reproduction right, while the third action violated plaintiffs’ public performance right.

Cablevision appealed the case to the Second Circuit, which reversed the district court and ruled in Cablevision’s favor as to both reproduction and public performance rights.\(^14\) More specifically, the Second Circuit found that Cablevision had not violated plaintiffs’ reproduction right, because the copies made during the buffering process existed for no more than 1.2 seconds before being overwritten.\(^15\) Further, regarding the creation of playback copies for the customers, the Second Circuit analogized Cablevision’s role to that of a shopkeeper allowing customers to use the photocopier on the premises for a fee.\(^16\) Put differently, Cablevision’s recording process was automated and the cus-

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5. Id. at 680; see generally Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) [hereinafter Cablevision].
6. Cartoon Network LP, 536 F.3d at 124.
7. Id.
8. Id. at 126; see also 17 U.S.C. § 106(1) (2006).
9. Cartoon Network LP, 536 F.3d at 126; see also § 106(4).
10. Cartoon Network LP, 536 F.3d at 125.
11. Id.
12. Id.
13. Id.
14. Id. at 140.
15. Id. at 130.
16. Id. at 132.
customer stood at the helm making the requests. Finally, as to the public-performance right, the Second Circuit disagreed with the district court and plaintiffs’ focus on the potential audience of the underlying work and concluded that the focus should be on the potential audience of the given transmission. Under the Transmit Clause of the Copyright Act, the Second Circuit reasoned that it “must examine the potential audience of a given transmission by an alleged infringer to determine whether the transmission is ‘to the public.’” The Second Circuit concluded that because the transmission was “made to a single subscriber using a single unique copy produced by that subscriber,” the transmissions did not constitute a public performance. This holding should be overturned because the court misinterpreted the law. As general counsel for the Copyright Office Jacqueline C. Charlesworth stated, this interpretation is “fundamentally incorrect.” The theory that a “unique” copy constitutes a private performance does not coincide with the history of the 1976 Copyright Act. The Supreme Court has recognized a significant difference between an individual and a group of individuals raising an antenna and receiving over the air broadcasts and receiving the same broadcast by utilizing an antenna owned by a company. Cablevision should be held to the same standard as a cable provider because they arguably provide a similar service to that of a cable provider and, therefore, should be liable for retransmission fees.

67 Id. at 138. The Second Circuit summarized the district court’s test for public-performance transmission as follows:

We should consider a larger potential audience in determining whether a transmission is “to the public.” . . . In considering whether a transmission is “to the public,” we consider not the potential audience of a particular transmission, but the potential audience of the underlying work (i.e., “the program”) whose content is being transmitted. Id.

68 Id. at 137.

69 Id. at 139.


71 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400 (1968). In Fortnightly, the Supreme Court observed that:

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be “performing” the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference . . . [here] is that the antenna system is erected and owned not by its users but by an entrepreneur.

72 In the district court’s BarryDriller opinion, it noted that Congress responded to the Supreme Court’s Fortnightly decision by legislating the 1976 Copyright Act and that Congress gave significance to the distinction identified by the Supreme Court. Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1146 (C.D. Cal. 2012). See generally H.R. Rep. No. 94-1476, at 88–89 (1976).

B. *Aereo* – Reliance on “Fundamentally Incorrect” Case Law

1. *Aereo’s Position and the Majority Holding*

   In order to grasp the subsequent argument, one must first understand the technology utilized in *Aereo*. At a large warehouse type facility, Aereo houses antenna boards that are comprised of eighty dime-sized antennas; when a user chooses a program to watch, a signal is sent to an antenna and the broadcast frequency changed to match the user’s desired content.\(^{73}\) It is then transcoded, buffered, and sent to a different server where it is stored on a hard-drive for that user.\(^{74}\) The manner in which content is recorded differs slightly when a user chooses “Record” or “Watch.”\(^{75}\) If “Record” is selected, a complete copy is created, available for streaming when the user desires.\(^{76}\) If “Watch” is selected, a six to seven-second copy is saved before streaming commences.\(^{77}\) This means that the consumer is not watching directly from the antenna, but rather from a saved copy on an Aereo server.\(^{78}\) While Aereo argues that the mechanics are as they described and that each user has his own individual antenna, no one has accessed the warehouse to verify that it works as they say.\(^{79}\) Some doubt *Aereo’s* claims and argue that “[t]he close spacing of each antenna element virtually assures . . . that the individual arrays act as a larger antenna.”\(^{80}\) If this is proven true, Aereo’s claim should not hold in court. The notion that it is not similar to a television antenna will be further advanced in this Note.

   In the *Cablevision* case, the court parsed the language of the Copyright Act with regard to what constitutes a public performance and found that “[t]he statute says ‘capable of receiving the performance,’ instead of ‘capable of receiving the transmission,’ underscore[ing] the fact that a transmission of a perform-

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The FCC states:

[The Communications Act] prohibits cable operators and other multichannel video programming distributors from retransmitting commercial television, low power television and radio broadcast signals without first obtaining the broadcaster’s consent. This permission is commonly referred to as “retransmission consent” and may involve some compensation from the cable company to the broadcaster for the use of the signal.

\(^{73}\) Mann, *supra* note 70.


\(^{75}\) *Id.*

\(^{76}\) *Id.*

\(^{77}\) *Id.*

\(^{78}\) *Id.*

\(^{79}\) *Id.*

\(^{80}\) McAdams, *supra* note 3.

\(^{81}\) *Id.* (internal quotation marks omitted).
ance is itself a performance.”

From this it followed that there was no copyright infringement if the transmission was not public. The Aereo court relied heavily on the Cablevision case to reach its holding as to whether Aereo’s transmissions were public performances under the Transmit Clause. Under the Cablevision rationale, the Transmit Clause requires courts to consider only the potential audience of the individual transmission. If it is found that the transmission is given only to one subscriber, then this would be the basis for holding that it is not a public performance, but a private performance. A second rationale underlying Cablevision’s holding is that private transmissions should not be aggregated; therefore, whether the public could receive the same underlying work by “means of many transmissions” is irrelevant under the Transmit Clause. The Aereo court read Cablevision as recognizing an exception to the general rule that private transmissions should not be aggregated. Namely, when “private transmissions are generated from the same copy of the work,” they should be aggregated into a single copy for the purpose of determining whether the transmissions were public performances. Lastly, the Aereo court read the Cablevision holding as requiring courts to consider any restrictions that limit the potential audience of a transmission.

Some critics believed that the Aereo court incorrectly focused on the transmission’s nature, rather than whether it was publicly performed. The Aereo court overlooked the fact that the House Report did not distinguish which copy of a work it intended—an important factor in an infringement analysis. In BarryDriller, the district court disagreed with the holdings in Cablevision and Aereo and found that the concern should be with the performance of the work, rather than with “which copy of the work the transmission is made from.”

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82 Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 134 (2d Cir. 2008).
83 Id. at 137; see also Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012).
85 Id. at 688.
86 Id. at 689.
87 Id.
88 Id.
89 Id.
90 Id.
92 See Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012) (“But the House Report [(H.R. Rep. No. 94-1476)] did not discuss which copy of a work a transmission was made from.”).
93 Id. at 1144–55 (“Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast transmission. People are interested in watching the performance of the work. . . . Thus, Cablevision’s focus on the uniqueness of the indi-
will be explained later, the *Aereo* court’s reliance on *Cablevision* will have unintended and negative consequences on copyright holders.

2. **Opposition to Aereo’s Majority Ruling**

The dissent in *Aereo* is notable. If the majority was followed, transmissions to a large group of people could be considered private and thus bypass the protections of the Copyright Act, so long as each of those transmissions is accessible by a single recipient.94 Dissenting, Judge Chin called Aereo’s technology platform a “sham.”95 Judge Chin claimed that Aereo “over-engineered” their antennas to bypass the Copyright Act.96 Furthermore, Judge Chin believed that Cablevision was distinguishable from the case at hand, because in *Cablevision*, the cable company paid licensing and retransmission consent fees; the subscribers could watch the television programs in real-time; and the company’s digital recording service was a mere supplement.97 Judge Chin believed that the *Aereo* decision was inconsistent with the statutory text, legislative history, and the case law.98

Judge Chin also argued that transmissions of a copyrighted work, by a device or process, would be considered a public performance regardless of when or where that transmission is received by the recipients.99 Transmitting a performance means “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”100 Under Judge Chin’s analysis, Aereo’s system fit within the plain meaning of the statute.101 Regardless of the restrictions that Aereo imposed on its transmissions, if the dictionary meaning of “the public” were used, then, Judge Chin believed, “a transmission to anyone other than oneself or an intimate relation is a communication to a ‘member[] of the public,’ because it is not in any sense ‘private.’”102 Furthermore, users (who are strangers to Aereo) pay for the service,
which indicates that the transmission is to the public and is, therefore, a public performance. 103

Aereo argued to the Second Circuit that its service does something consumers can already do for themselves if they had an antenna, DVR, or Slingbox. 104 Two cases, Forthrightly Corp. v. United Artists TV, Inc., 105 and Teleprompter Corp. v. Columbia Broad. System, Inc., 106 determined that the use of community antenna television (“CATV”) did not constitute an infringement of public performance because there was “no performance.” 107 In Forthrightly Corp., the Court analogized a user erecting his own antenna and an entrepreneur doing the same thing and claimed there was no difference. 108 Congress, however, did not agree with the Supreme Court’s holding in Forthrightly and Teleprompter. 109 Citing Capital Cities Cable, Inc. v. Crisp, 110 Judge Chin also acknowledged that “transmit” should be interpreted broadly in order to encompass new technological advancements. 111 Congress further broadened the statute to recognize that public performances can occur at different times and places. 112

Lastly, Judge Chin asserted that the majority and Aereo were wrong for relying on Cablevision because the facts were dissimilar. 113 First, unlike Cablevision, Aereo did not have a license to retransmit the material. 114 The Aereo dissent argued that the core of Aereo’s business was streaming television in real-time over the Internet and that adding an option to record could not legitimize the unauthorized transmissions. 115 Congress concluded that cable operators should pay royalties to copyright owners for retransmissions of their works. 116 Aereo’s lack of a license is an attempt to bypass the retransmission fees and evade Congress’s intent. Second, in Cablevision, Cablevision’s RS-DVR was designed to allow customers the flexibility to record a show it was already enti-

103 Id. at 699–700 (Chin, J., dissenting).
104 Id. at 699 (Chin, J., dissenting).
107 Id. at 408–09; Forthrightly Corp., 392 U.S. at 400–01.
108 Forthrightly Corp., 392 U.S. at 400.
109 WNET, 712 F.3d at 700 (Chin, J., dissenting), rev’d and remanded by 134 S.Ct. 2498 (2014) (“But Congress expressly rejected outcome reached by the Supreme Court in Forthrightly and Teleprompter.”).
111 WNET, 712 F.3d at 700 (Chin, J., dissenting), rev’d and remanded by 134 S.Ct. 2498 (2014).
112 Id. (Chin, J., dissenting).
113 Id. at 701 (Chin, J., dissenting).
114 Id. at 702 (Chin, J., dissenting).
115 Id. (Chin, J., dissenting).
116 Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 709 (1984) (“Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement.”).
tled to watch as a “supplemental service” and not as a substitute.\textsuperscript{117} To conclude, Judge Chin considered Aereo’s system an “unlicensed retransmission service” that stored and streamed television programs over the Internet; Aereo’s argument (and the Second Circuit’s acceptance thereof) had elevated “form over substance” and conflicted with the laws.\textsuperscript{118}

C. The Second and Ninth Circuits’ Approaches
Conflict

In the \textit{BarryDriller} case, a district court in the Ninth Circuit considered a situation similar to that in the \textit{Aereo} case.\textsuperscript{119} In \textit{BarryDriller}, the district court noted that the Ninth Circuit, unlike the Second Circuit (whose focus is on the copy of the work from which the transmission was made), is concerned “with the performance of the copyrighted work . . . ”\textsuperscript{120} In other words, the \textit{BarryDriller} district court observed that the Ninth and Second Circuits have divergent approaches. The district court declined to follow the rationale in the \textit{Aereo} and \textit{Cablevision} cases, because those two cases focused on the copy’s unique nature and transmission to find that there was no encroachment on the copyright holders’ reproduction and performance rights.\textsuperscript{121}

In \textit{BarryDriller}, the opinion was issued in response to a request for a preliminary injunction.\textsuperscript{122} The district court identified four factors required for a preliminary injunction and ultimately found all four factors present.\textsuperscript{123} First, the district court judge disagreed with the Second Circuit’s reading of the statute, explaining that “it is the public performance of the copyrighted work with which the Copyright Act, by its express language, is concerned. Thus, Cablevision’s focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.”\textsuperscript{124} The \textit{BarryDriller} district court also disagreed with the similar-services reasoning embraced by the Second Circuit in \textit{Aereo} and \textit{Cablevision} (that the services at issue were “equivalent” to what consumers could provide themselves), because businesses were providing the services.\textsuperscript{125} The court cited to legislative history, which said that businesses functioning as cable systems “whose basic retransmission opera-

\textsuperscript{117} \textit{WNET}, 712 F.3d at 697 (Chin, J., dissenting), rev’d and remanded by 134 S.Ct. 2498 (2014).
\textsuperscript{118} \textit{Id.} (Chin, J., dissenting).
\textsuperscript{120} \textit{Id.} at 1144.
\textsuperscript{121} \textit{Id.} at 1145–46 (“The Court finds that Defendants’ unique-cony [sic] transmission argument based on Cablevision and Aereo is not binding in the Ninth Circuit.”).
\textsuperscript{122} \textit{Id.} at 1140.
\textsuperscript{123} \textit{Id.} at 1141.
\textsuperscript{124} \textit{Id.} at 1145.
\textsuperscript{125} \textit{Id.} at 1145–46.
tions are based on the carriage of copyrighted program material” should pay royalties to the copyright holders.126

Second, the district court in BarryDriller found that the Plaintiffs would suffer irreparable harm if an injunction were not issued, because existing and prospective licensees will have an upper hand in negotiating retransmission consent agreements.127 If there were other means (e.g., systems similar to Aereo’s) of obtaining a broadcast signal without having to pay a retransmission fee, then cable operators would be more likely to create a similar service or work with Aereo to avoid the fees.128 While this could mean lower subscription fees incurred by the consumer, if broadcast companies do not get paid retransmission fees, their ability to compete with cable networks will be undermined.129 The BarryDriller plaintiffs also identified that the streaming services (equivalent to Aereo’s system) would put a hardship on their plans to develop their own Internet distribution channels and it would put pressure on the plaintiffs’ licenses with entities, such as Hulu.130 Aereo-like systems pose a serious threat to advertising revenues.131 According to Bloomberg, an SNL Kagan study estimated that, in 2012, CBS generated $4.17 billion in advertising last year and Fox made $2.58 billion.132 For Comcast, the parent company of NBC/Universal, “broadcast TV revenue in 2012 was $8.154 billion, of which $5.842 billion (71.6%) came from advertising, $1.474 billion (18.1%) came from rebroadcast fees, and $0.834 billion came from disk and iTunes licensing.”133 These numbers show how crucial advertising, retransmission fees, and licensing are to the broadcast industry. Moreover, denying the injunction would destabilize revenue garnered from video-on-demand providers.134

Third, the court accepted the Plaintiffs’ claim that the Defendants should not be allowed to claim a monetary hardship if an injunction is ordered because the

126 Id. at 1146 (citing H.R. Rep. No. 94–1476, at 88–89 (1976)).
127 Id. at 1147.
128 Richmond, supra note 36.
130 BarryDriller, 915 F. Supp. 2d at 1147.
131 Sherman, supra note 35.
132 Id.
133 Hibben, supra note 10.
hardship stems from infringement.139 Fourth, the court held that upholding copyrights and “preventing the misappropriation of skills, creative energies, and resources,” would be in the best interest of the public.136 Upholding copyrights allows inventors to create new concepts without the fear of their work being stolen.

Lastly, and most importantly, the court ruled that due to principles of comity,137 the injunction against BarryDriller would only stand in the Ninth Circuit, and not in the Second Circuit.138

D. FilmOn X – A More Persuasive Case

A recent ruling in Washington, D.C. could be used to overturn Aereo,139 even though the Second Circuit has decided in Aereo’s favor so far. District Judge Collyer stated that the ruling of the Ninth Circuit in BarryDriller is more persuasive to the case at hand,140 accepting the stipulation that FilmOn X and Aereo are “similar . . . in every relevant way.”141 As a result, the Judge concluded that “the Copyright Act forbids FilmOn X from retransmitting Plaintiffs’ copyrighted programs over the Internet.”142 This could be a major blow to Aereo because the facts of the case are nearly identical, with the one exception: individual antennas are used by a new user when the first consumer is no longer watching.143

While the Second Circuit’s holding turned on who was the potential audience of a transmission,144 the reason for this court’s ruling lies in a different interpretation of the statute. In forming her decision, the Judge looked at the text of the Copyright Act and its legislative history, which was an argument presented by the Plaintiffs.145 The Plaintiffs claimed “Congress intended the

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136 Id. at 1148.
137 Id. at 1141–42.
138 Principles of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area. Courts in the Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of such sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping.

Id.
141 Id. at 34.
142 Id. at 33.
143 Id. at 34.
144 Id. at 33-34.
145 Id. at 43.
Transmit Clause to capture all possible technologies, even those not in existence when the statute was enacted.”146 Plaintiffs also stated that the Second Circuit “misconstrued” the ruling by interchanging the word ‘performance’ and ‘transmission,’ which caused a misreading of the statute.147 This coincides with the Ninth Circuit’s ruling in BarryDriller.148 At this point, it is worth noting the language of the statute of section 101 because it defines key terms and how they should be applied.149 Section 101 states that:

To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible. Furthermore, [a] ‘device,’ ‘machine,’ or ‘process’ is one now known or later developed. In addition, to ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.150

As discussed in the succeeding paragraph, the definition of these terms should be applied broadly in order to keep with the spirit and intent of the Copyright Act.

The House Report for the Copyright Act likewise shows an intent for a broad reading of what a “device or process” consists of, and includes “any other techniques and systems not yet in use or even invented.”151 Aereo and FilmOn X’s “technique” should fall under the intention of the House Report for the Copyright Act because it keeps with the objectives of lawmakers. The House Report goes on to state that “the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process.”152 The implication of this language is that consumers neither need to be in the vicinity of one another in order for the transmission to be ‘public,’ nor have to receive the transmission at the same time.153

While the legislative history suggests a facially broad interpretation, the court is quick to cite a case that states broad interpretations do not signify ambiguity.144 This broad reading is important in order to encompass the array of new technologies that are rapidly coming to fruition. Moreover, a far-reaching statute allows for the interpretation that the plain text not only covers the initial

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146 Id.
147 Id.
149 FilmOn X, LLC, 966 F. Supp. 2d 30, at 45.
150 Id. at 44-45 (citing 17 U.S.C. § 101).
151 Id. at 45.
152 Id.
153 Id. at 46.
154 Id.
rendition of the work, but also future acts that allow the rendition to be transmitted or communicated to the public.\textsuperscript{155}

The court also states that there is no difference between what FilmOn X is doing and what a traditional cable company does, except for the fact that FilmOn X uses individualized antennas.\textsuperscript{156} It would follow, therefore, that FilmOn X should be paying licensing fees for their commercial uses. In regards to irreparable harm and the public interest, the same arguments and answers as set forth in \textit{BarryDriller} are presented in \textit{FilmOn X}.

E. \textit{Sony} and Secondary Transmissions – Disincentivizing Authors and Inventors

An additional case should be reviewed to help determine the outcome of Aereo: \textit{Sony Corporation of America v. Universal City Studios, Inc.}\textsuperscript{157} In \textit{Sony}, Petitioner manufacturers created and sold video tape recorders (“VTR’s”) to consumers in order to allow them to record television shows or movies and be able to play them back at a later time that they desired.\textsuperscript{158} Respondents alleged that on account of consumers recording copyrighted materials, the manufactures should be held liable for infringement because they in essence made it possible for the consumer to infringe.\textsuperscript{159} After an initial ruling by the District Court that Sony was not liable due to the fact that “noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement,” the Court of Appeals reversed, ruling that Sony was liable for contributory infringement.\textsuperscript{160} The Supreme Court affirmed the District Court’s decision, citing two key points in its holding.\textsuperscript{161} First, Respondents failed to show that a substantial number of copyright holders would oppose having their material time-shifted by private consumers.\textsuperscript{162} Second, recording content to view at a later time does not constitute any significant harm to the copyrighted works.\textsuperscript{163}

\textsuperscript{155} \textit{Id.} at 47.
\textsuperscript{156} \textit{Id.}
\textsuperscript{158} \textit{Sony Corp. of Am. v. Universal City Studios, Inc.}, 464 U.S. 417 (1984).
\textsuperscript{159} \textit{Id.} at 434.
\textsuperscript{160} \textit{Id.} at 417.
\textsuperscript{161} \textit{Id.} at 456.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
While the majority opinion would favor Aereo, Justice Blackmun’s dissent offers a contrary and correct opinion. Citing the House Reports, “a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation.” Making one videotaped recording would meet this definition. Moreover, there was no suggestion that a single copy, as opposed to multiple copies, should be exempt for personal or private use.

The dissent also goes on to state that it appears that Congress considered and rejected an exemption for private use. Section 108 postulates specific types of public use, which include “private study, scholarship, or research.” This “fair use” provision was inserted in order to add the copyrighted information into the public storehouse of knowledge for the wellbeing of society as a whole.

Aereo’s service does not add to the public storehouse, because the information was already made public. Moreover, it does not constitute “private study, scholarship, or research.” Allowing a company like Aereo to benefit by infringing copyrights would be contrary and detrimental to the public’s interest because it would disincentivize authors from spending their time, money, and creative talent on a work.

V. AEREO DOES A DISTANCING DANCE

While courts are battling over the outcomes in each circuit, Aereo and FilmOn X are also wrapped up in a conflict amongst themselves. FilmOn X contends that their service is similar to that of their competitor, Aereo, in that they are utilizing similar technology. However, in light of the September 2013 ruling in FilmOn X, Aereo is attempting to distance itself from its competitor. In response to broadcasters’ request that a federal court in Boston should rely on the FilmOn X holding, Aereo answered the call by claiming that they utilize different technologies and that the courts in the District of Columbia

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164 Id. at 457 (Blackmun, J., dissenting).
166 Id.
167 Id.
168 Id. at 468.
169 Id. at 469.
170 Id. at 478.
“rel[y] on a misinterpretation of the Copyright Act.”\textsuperscript{174} However, Aereo does not seem to believe its own words. There is no coincidence that Aereo has stayed out of the Southern California market as it aggressively expands throughout the country.\textsuperscript{175} An injunction in one circuit could potentially be binding for Aereo in other circuits, just as it was for FilmOn X.\textsuperscript{176} On account of the circuit split, the Supreme Court recently heard the case in April and it doesn’t seem to bode well for Aereo. \textsuperscript{177} One article describes the Justices as “express[ing] skepticism” about Aereo, calling it a “technical workaround to bypass copyright laws.”\textsuperscript{178}

VI. UNLIKELY IMPLICATIONS OF AEROE’S TECHNOLOGY

A. Aereo Fills a Niche for Consumers Who Want a Few Channels

While the debate is still ongoing as to whether Aereo is infringing any copyrights, the fact remains that this company saw a niche in the market and capitalized on it. Many consumers neither have the time nor the money to watch 600 channels that come with their cable subscription.\textsuperscript{179} Aereo allows these individuals to pay only for the few channels that they want to watch and are likely to watch. Gerry Smith, Technology Reporter for The Huffington Post said it best: “We don’t want to pay an expensive monthly bill and don’t want to


\textsuperscript{176} Dominic Patten, Streaming Service FilmOn X Denied Halt To Broadcasters’ Injunction, DEADLINE (Sept. 30, 2013 8:55 AM), http://wwwdeadline.com/2013/09/streaming-service-filmon-x-denied-halt-to-broadcasters-injunction/.

\textsuperscript{177} Greg Sandoval, Variety: TV Broadcasters Will Seek a Supreme Court Ruling on Aereo, VARIETY (Oct. 10, 2013, 10:55 PM), http://www.theverge.com/2013/10/10/4822866/variety-tv-broadcasters-will-see-a-supreme-court-ruling-on-aereo/in/2779059.

\textsuperscript{178} Cecilia Kang, Aereo Presents Quandary For Court, THE WASH. POST, April, 23 2014 at A10 (Chief Justice Roberts also told Aereo’s attorney that the “technology model is based solely on circumventing legal prohibitions.”).

be tempted to watch hours of mindless television.” This demonstrates that consumers want alternatives to cable television.

Some companies, however, are wary of this new trend. Technology industry analyst Jeff Kagan says that “[i]t’s an exciting, innovative idea. For years, we’ve been complaining about the uncontrollable rising prices of cable television. Aereo represents a choice. It’s a big wake-up call to the industry.” Nevertheless, this may be falling on unyielding ears. Comcast CEO Brian Roberts stated that the company will never offer “cable channels a la carte,” even if there were-consumer interest. According to HBO CEO Jeff Bewkes, “[t]he whole idea that there’s a lot of people out there that want to drop multichannel TV, and just have a Netflix or an HBO – that’s not right.” But the numbers don’t lie. According to a Deloitte survey, “9 percent of people surveyed have cancelled their cable subscriptions within the last year.” In addition, the five million homes that Nielsen reported as being Zero-TV homes are coming from somewhere—most likely from the group of cable TV watchers. Time Warner Cable CEO Glenn Britt did not share in the same sentiment. In a Huffington Post article from 2011, Britt claimed “the effect of Internet video on the number of cable subscribers is “very, very modest;” in fact, so small that it’s hard to measure.” These numbers are only going to rise as Aereo and its competitors enter new cities and quickly catch on.

In fact, in a 2013 interview with Britt, the CEO unsurprisingly changed his tune. Claiming Aereo technology was “interesting,” Britt also stated that the company could “conceivably use similar technology” if the technology in Aereo were upheld. Remarkably, The Nielsen Cross Platform Report shows that the individuals in almost half of Zero-TV homes are under the age of 35.

180 Id.
181 Rackl, supra note 24.
184 Id.
187 Id.
189 Id.
190 THE NIELSEN CO., FREE TO MOVE BETWEEN SCREENS: THE CROSS-PLATFORM REPORT
According to a Pew Internet Survey, 90% of the individuals sampled in the age group 18 to 29 use social networking sites.\(^7\) Reviewing these two statistics together, it is apparent that there is a recipe for exponential growth of this new Internet-based technology.

While some cable networks, like HBO, do not believe technology comparable to Aereo would hurt their numbers,\(^1\) some cable providers are brainstorming ways to make this dilemma beneficial for them. Relying on Aereo winning their future cases, Time Warner Cable Inc. is considering cutting costs by implementing the same type of technology that has allowed Aereo to enter numerous markets and bypass copyright laws.\(^2\) And citing raised retransmission fees, DirecTV CEO Mike White stated that the satellite service model would not be sustainable if high costs are to persist.\(^3\) While in no rush to switch to an Aereo-type model, DirecTV has invested time researching antennas capable of obtaining free broadcast television.\(^4\)

B. Aereo and Cable’s Cost Discrepancies

One of the benefits and greatest selling points of Aereo is the low cost. At $8 per month, consumers can get their live TV fix and not worry about the extra channels they do not watch or the extra costs associated with having cable.\(^5\) While an Internet connection is still needed, $8 per month is a significant reduction in price. Cable prices in the Washington D.C. area per year are as follows: Verizon cable for $69.99 per month,\(^6\) RCN cable for $59.99 per month,\(^7\) and Comcast for $39.99 per month.\(^8\) On average, cable from one of the above providers is about 7 times the cost of Aereo. When faced with a choice as opposed to a necessity, young Americans are more likely to prefer

\(^7\) (Mar, 2013).
\(^9\) Greenfield, supra note 182.
\(^12\) Id.
\(^13\) AEREO, supra note 28.
the cheaper option. According to Michael Greason of research company The Diffusion Group, “Millennials aren’t going to accept high costs, set schedules and out-of-date technology. They’re going to find alternatives.”

1. Time Warner Backs Aereo

When CBS and NBC were having disputes with cable companies about their fees, Time Warner Cable made an interesting move. While customers were upset about their favorite shows being blacked out, Time Warner encouraged their customers to use Aereo’s service to watch their shows. It seems unlikely that a cable company would push a competitor’s product, but it may just show that Aereo is not a threat or that cable companies want to utilize this to their advantage to gain leverage in settling with them for lower retransmission fees.

2. Aereo Plays Ball Where Others Do Not

Aereo is also there to fill another gap in the market. While many consumers utilize time shifted streaming video from companies like Netflix, one thing that is lacking is the ability to watch live sports. One article touts the ability to view live sports as “The Killer App.” The author claims that “[s]ports are perhaps the biggest reason … holding people back from switching away from pay TV.” With Aereo’s demographic comprised of 65% males, this claim may check out. According to Gerry Smith, “[t]o watch most sports, I just need the major networks,” and that’s exactly what Aereo provides.

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200 Rebecca Nelson, Young Americans Won’t Pay for TV: Will They Ever?, TIME MAG. (May 9, 2013) http://business.time.com/2013/05/09/young-americans-wont-pay-for-tv-will-they-ever/ (“Paying for cable when he would only use it for sports, he says, ‘would be a waste.’” Philip McDaniel, 25.”).
201 Id.
206 Id.
207 Spangler, supra note 33.
208 Smith, supra note 179.
Rebecca Nelson, author of *Young Americans Won’t Pay for TV. Will They Ever?*, claims that sports broadcasting comprises approximately half of a monthly bill. With federal minimum wage hovering at $7.25 per hour, many people may not have a surplus of funds to spend on dispensable luxuries. For Philip McDaniel, a 25-year-old male, the ability to watch sports is not a big enough incentive to purchase cable. As Aereo CEO and Founder Chet Kanojia stated, “Cable is not a relevant decision anymore.” However, in 2013, cable users comprised nearly half of all television distribution choices, demonstrating that it will still be around for the foreseeable future.

C. The Need for More Broadband Spectrum

Another argument in favor of Aereo can be deduced from a White House memorandum. The memorandum states “[i]n order to achieve mobile wireless broadband’s full potential, we need an environment where innovation thrives, and where new capabilities also are secure, trustworthy, and provide appropriate safeguards for users’ privacy.” As of the document release date in 2010, President Obama gave a ten-year timetable for the FCC to free up a total of 500 MHz of Federal and nonfederal spectrum. Spectrum is the range of electromagnetic frequencies used to convey communications. This medium is currently being used by broadcast television and radio, mobile wireless services, and satellite services. In response to Aereo’s program, they

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209 Nelson, supra note 200.


211 Nelson, supra note 200.

212 *Id.*

213 FREE TO MOVE BETWEEN SCREENS, THE CROSS-PLATFORM REPORT, NIELSEN 16 (March 2013) (In thousands: Broadcast-only homes - 11,277; wired cable – 57,805; TeIco – 9,882; Satellite – 34,677).


215 *Id.*


218 Marx, supra note 216
could consider switching strictly to pay cable. If this occurs, the FCC could revoke their licenses, liberating the much sought-after space on the spectrum.

On May 15, 2014, the FCC adopted rules for the “first ever incentive auction” for 600 MHz spectrum which would allow the broadcast companies to provide their signals through a different frequency. The auction will comprise of a reverse and forward auction in which broadcasters can voluntarily relinquish their spectrum and wireless providers can bid on the relinquished spectrum. If large wireless companies are allowed to bid, the spectrum could be worth as much as $36 billion. This so-called “Incentive Auction” has perks for all parties involved. The benefits include “enhancing wireless Internet and mobile phone capacity, raising billions of dollars in revenue for the U.S. Treasury, and funding a dedicated public safety and first response network.” It is argued that the Incentive Auctions must raise enough money in order to compensate the broadcast companies to relinquish their spectrum, or else they may not sell. However, as of this time, it is unknown how many licenses would be given out, and whether broadcasters would be willing to make the switch to a different spectrum.

VII. TECHNOLOGICAL AND LEGAL IMPLICATIONS

If the dissent in Aereo, the holding of BarryDriller, and the recent holding of FilmOnX is any foreshadowing, Aereo will be overturned. The lan-
guage of the Aereo case even alludes to the fact that under stare decisis, the court needs to follow set precedent and not overrule a prior decision, even though “many of Plaintiffs’ arguments really urge us to overrule Cablevision.” The FilmOnX case strengthens this assertion, because, as Judge Collier indicated, Aereo will encounter trouble in other circuits that have ruled against similar companies.

While Aereo maintains that they are enabling people to do something they could already do for themselves, the process by which this is accomplished is too attenuated. If a consumer erects an antenna on his roof, for example, the transmissions are received, compressed, and sent directly to the television allowing the user to watch live broadcasts. On the other hand, Aereo receives a transmission at a distant location, and in between sending it to the consumer via the Internet, saves it on a server. This technology is in no way similar to that of a localized antenna on a consumer’s roof, because there is no way for the transmission to be truly live. With Aereo, the servers and the Internet act as an intermediary, whereas there is no intermediary in a scenario involving a user’s erected antenna on his home. Thus, in keeping with the spirit of the Communications Act of 1934, this discrepancy should be noted and reinforced to prevent unlawful use of copyrighted material.

Moreover, Aereo may not be utilizing the antennas the way they are claiming and thus would most likely be held accountable for infringement. The discrepancy arises in the functionality of the antennas. Non-theoretical physicists and engineers concur that “tiny pieces of metal separated by tiny distances act as one piece of metal” which perfectly coincides with Judge Chin’s dissent. This directly contradicts Aereo’s claim that there is one antenna for one user. Since the warehouse facility is inaccessible to those not associated with Aereo, the court, which previously relied on Aereo’s word alone, is now allowing the company’s patents to be considered. In an Order filed on Octo-

230 WNET, 712 F.3d at 695 (2d Cir. 2013), rev’d and remanded by 134 S.Ct. 2498 (2014).
233 Id.
234 Id.
235 McAdams, supra note 3.
236 WNET, 712 F.3d at 697 (Chin, J., dissenting), rev’d and remanded by 134 S.Ct. 2498 (2014) (“There is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.”); McAdams, supra note 3.
237 McAdams, supra note 3.
ber 7, 2013, Magistrate Judge Henry Pitman relates the subject matter of the patent application to the supposed system Aereo appears to be working with and states that the applications are relevant towards plaintiff’s claims of credibility and irreparable harm. The issue here is that Judge Nathan relied on Aereo’s expert witness statement that the service Aereo provided was something that could already be obtained through other means. That statement directly refutes Aereo’s patent claim. The patent claim, trying to prove novelty, stated the broadcast “content is generally only available for display on a traditional television. There is generally no simple way for a user to have this content available to their other video-capable devices.” But Aereo’s invention defies the laws of physics. One unassailable law of radio frequency (“RF”) antennas is that the size of an antenna is a function of the size of a wavelength – the larger the wavelength, the larger the antenna. To determine if Aereo’s dime-sized antennas are even capable of receiving the transmission, the RF frequency should be tested. Since experts are calling the technology akin to alchemy, the outlook for Aereo seems bleak. Furthermore, if the technology does in fact work as Aereo states, Kanojia’s company would barely turn a profit based off of electricity bills alone. Using Bloomberg’s estimated user base of 90,000 to 135,000 in New York and an estimated usage of five to six watts of power per antenna, Aereo would be paying approximately $2 million a year for 2 megawatts of power and not turning a profit or even breaking even. This model does not make sense and furthers the point that the company is not using the antenna as they claim.

Another claim by Aereo is that their technology allows the transmission of the performance to be considered private. Judge Chin’s dissent rebuts this notion, stating, “[g]iving the undefined term ‘the public’ its ordinary meaning, a transmission to anyone other than oneself or an intimate relation is a communication to a ‘member of the public,’” because it is not in any sense “private.” Even one person can be the public. Because consumers are paying

124 Id.
125 Id.
126 McAdams, supra note 3.
127 Ramachandran & Sharma, supra note 34.
129 Id. at 698.
130 Id. at 699.
for the service and can receive it anywhere and at any time, the transmissions are “public.” Thus, they should be protected under the Copyright Act and accordingly liable for retransmission fees.

If cable companies, satellite providers, and video-on-demand providers must pay retransmission consent fees, Aereo and their competitors should not be exempt. Aereo argues that it is merely providing a service that consumers could actually provide for themselves if they had an antenna. While this may be true, Aereo is taking advantage of the situation, because part of the money they are receiving should be paid as royalties to the copyright holders. Aereo CEO and Founder Kanoja said Aereo pays less than $2 per month to upkeep the systems and deliver programming to the consumer. If each customer pays $8 per month, the company is making a 300% profit. By taking away consumers (albeit only by a small amount), broadcast companies are facing irreparable harm while Aereo is unreasonably benefiting. The broadcast companies are losing money that even a lawsuit filed in hopes of recovery would not prove lucrative because of how small Aereo is as a company. Besides, as the BarryDriller case stated, “Defendants ‘cannot complain of the harm that will befall [them] when properly forced to desist from [their] infringing activities.’”

In a society dominated by the Internet, social media and electronics in general, copyright laws need to adapt as the technology evolves. Major portions of the Copyright Act were enacted to deal with analog transmissions, leaving digital transmissions virtually unregulated. The present issues with Aereo are forcing lawmakers to redefine copyright laws or else face “the collapse of broadcasting as we currently know it.” Maria Pallante, Register of Copyrights, recommends an overhaul of The Copyright Act, encouraging it to be “more forward thinking and flexible than before.”

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251 Id. at 697.
252 WPIX, Inc. v. Ivl, Inc., 691 F.3d 275, 278, 284 (2d Cir. 2012) (Ruling that internet transmission does not satisfy the definition of cable system and thus is not subject to the protection of the copyright act.); McAdams, supra note 3.
253 WNET, 712 F.3d at 699, rev’d and remanded by 134 S.Ct. 2498 (2014).
254 Id. at 699-700.
255 Spangler, supra note 33.
256 Aereo, supra note 28.
reform is Section 106 of the Copyright Act, which is prominently implicated in the Aereo line of cases.\textsuperscript{260} While many consumers have an interest in Aereo and its service, the public interest is best served reforming the laws and then up-holding these new copyrights so that fees for use are paid to the proper parties.\textsuperscript{261} If this does not occur, the door would be open for more copyright infringements under a hollow and weak law. It would also impose a great burden on the dockets.

VIII. CONCLUSION

To have a fair marketplace that lawfully promotes innovation, it is imperative that companies like Aereo are not able to bypass copyright laws. Except for exemptions in the Copyright Act, Aereo and similar companies should be subject to paying retransmission fees. While courts may believe an injunction would harm Aereo, this is not a death sentence. By simply raising its price by a slight margin and paying a minor retransmission fee, Aereo could thrive. While this would only generate a fraction of the money that cable companies generate, it would still provide some income from paying customers. A more plausible idea would be for Aereo to keep its prices the way they are and accept a smaller profit.

While broadcast companies seem reluctant to offer a la carte channels, if Aereo and its competitors were to be eliminated, it would not bode well for all parties involved. Consumers could end up pirating the content, leading to a plethora of litigation. Broadcast companies have argued their whole business model would crumble if Aereo were allowed to continue, because everyone would be switching to Aereo’s model of business.\textsuperscript{262} The solution is to make all parties work together to find common ground, in this case, settling on retransmission fees. By doing so, Aereo, the broadcast companies, and the consumers would all benefit from Aereo’s service and innovation would not be disturbed.

In light of the legislative history, statutory interpretation and case precedents, the Supreme Court should overturn Aereo. Aereo stands to make clear profit by undermining the laws while cable companies, satellite companies and the like dutifully pay retransmission fees and royalties to license the work. While consumers may be upset that they would not be able to pick and choose which programming and pricing scheme they desire, broadcast and cable com-

\textsuperscript{260} Id.


\textsuperscript{262} Sandoval, supra note 177.
panies would eventually succumb to their demands and offer a la carte pro-
gramming.