

# AEREO AND INTERNET TELEVISION: A CALL TO SAVE THE DUCKS (A LA CARTE)

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## ABSTRACT

*If it looks like a duck, swims like a duck, and quacks like a duck, it is probably a duck. The most recent U.S. Supreme Court decision regarding the Copyright Act employed this “duck test” when determining that Aereo, an Internet content-streaming company, violated the Copyright Act by infringing on the copyrights of television broadcast networks. The Supreme Court ruled that Aereo’s Internet streaming services resembled cable television transmissions too closely. Therefore, by streaming copyrighted programming to its subscribers without the cable compulsory license, Aereo violated the Transmit Clause of the 1976 Copyright Act. Subsequently, Aereo used this Supreme Court decision to obtain a compulsory license from the Copyright Office but was denied. Forced back into litigation, Aereo filed for Chapter 11 Bankruptcy*

*This Issue Brief describes Aereo’s technology, the litigation that followed, and the related precedent, and concludes that the district court should have granted Aereo a Section 111 Statutory License in line with the Supreme Court’s “duck test.” It considers the implications of the Court’s preliminary injunction against Aereo’s “a la carte” TV technology, what this means for the future of similar technological innovation, and the effects on consumers and competition.*

## INTRODUCTION

*The novelty of the use, incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools — the words of the [Copyright] Act, legislative history, and precedent — to the facts of the case is like trying to repair a television set with a mallet.*

— JUSTICE ABE FORTAS<sup>1</sup>

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As viewership of traditional television dropped nearly 4% during the third quarter of 2014, online video streaming jumped 60%.<sup>2</sup> This shift in American viewing habits signifies an important change in consumer choice: consumers are increasingly favoring media outlets that grant them more choice and control over how and when they view television. To capitalize on this new demand, companies are entering the online television market. Some, such as Hulu and Netflix, provide delayed streaming of popular television shows, while others, such as HBO Go and CBS All Access, live stream their network shows to those without cable subscriptions. Additionally, other networks provide live streams on their websites only after a customer has verified that they subscribe to a cable service that covers that network.

Aereo, an Internet television streaming company, charged subscribers a monthly fee to receive public broadcast television programming over the Internet, either in “real time”<sup>3</sup> or after the initial over-the-air broadcast through rented antennas.<sup>4</sup> The Supreme Court eventually ruled that this service infringed broadcasting companies’ copyrights because Aereo did not pay a licensing fee. Subsequently, Aereo filed a letter with a New York district court explaining that the company now saw itself as a cable provider, and would acquire the same copyright license available to other cable companies.

Subsequently, Aereo attempted to apply for a statutory license through the U.S. Copyright Office. The U.S. Copyright Office rejected Aereo’s application because “internet retransmissions of broadcast television fall outside the scope of the Section 111 license.” The New York district court issued a preliminary injunction against Aereo. A few months later, Aereo filed for bankruptcy.

Under the current legal framework, courts are challenged to correctly apply old rules to new technologies, but these rules are ill-equipped to keep pace with rapid technological changes. As a result, decisions like *Aereo* are made based on how similar or dissimilar the

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<sup>1</sup> *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390, 403 (1968) (Fortas, J., dissenting).

<sup>2</sup> Shalini Ramachandran, *TV Viewing Slips as Streaming Booms, Nielsen Report Shows*, THE WALL STREET JOURNAL (Dec. 3, 2014), <http://online.wsj.com/articles/tv-viewing-slips-as-streaming-booms-nielsen-report-shows-1417604401>.

<sup>3</sup> The broadcasts were actually delayed by around ten seconds to meet the secondary transmission requirements.

<sup>4</sup> These public programs are technically free to anyone with his or her own broadcast antenna. Aereo functioned by charging customers to “rent” out Aereo antennas.

technology is to existing technology and whether that existing technology qualifies for a statutory license. If this continues, new innovators will create technology similar to legally approved technology with the expectation that courts will find them legal as well. However, when courts temperamentally apply this framework to some cases and not others, as it did in *Aereo*, the legal uncertainty that results will deter innovation and investment into new technology.

This Issue Brief first discusses Aereo's technology—a business model that was specially created around existing laws to mirror legal technology. Second, it will explain the legal background and procedural history by tracking Aereo's journey through different courts and the resulting decisions. Third, this Issue Brief will analyze the most recent district court decision regarding Aereo's rejected application for a statutory license as a cable company. In particular, it will address how the court mistakenly applied precedent in Aereo's case and why Aereo should have qualified for a statutory license under the Copyright Act. Finally, this Issue Brief will evaluate the various policy implications of Aereo's demise and what the future holds for online television streaming. This Issue Brief concludes that the court should have granted Aereo a statutory license as a cable company, and its failure to do so has resulted in legal uncertainty that will hinder future innovation.

## I. THE TECHNOLOGY

Aereo allowed subscribers to view live and time-shifted streams of over-the-air television on Internet-connected devices. An Aereo subscriber could choose either to “Watch” or “Record” the television programs he or she would like to rebroadcast.<sup>5</sup> Once a subscriber chose the programming he or she wished to view, one of the thousands of antennas at Aereo's central warehouse received the signal and began to record the broadcast.<sup>6</sup> A specific antenna was essentially “rented” to a single subscriber, and the antenna created a unique copy of the broadcast for each subscriber who wished to view a program.<sup>7</sup> The unique copy was stored on a subscriber-specific hard drive and was transmitted only to the particular subscriber

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<sup>5</sup> Alert Letter from Gibson Dunn to Clients, U.S. Supreme Court Rules That Aereo's Streaming of Broadcast Television Programming Violates the Copyright Act 2 (June 25, 2014), <http://www.gibsondunn.com/publications/Documents/Supreme-Court-Rules-That-Aereo-Streaming-of-Broadcast-Television-Programming-Violates-the-Copyright-Act.pdf> [hereinafter Gibson Dunn].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

who requested it. If two subscribers elected to watch the exact same programming, Aereo would broadcast two different copies of the program.<sup>8</sup>

In the “Watch” function, the transmission was “briefly delayed relative to the live television broadcast” by ten seconds.<sup>9</sup> Therefore, the subscriber could not actually watch the television program live. Unless the subscriber chose to keep a copy of the programming for later viewing, the hard drive automatically deleted the programming.<sup>10</sup>

If the subscriber selected the “Watch Now” function but did not also select “Record” prior to the end of the program, the remote hard drive would not record that copy of the program.<sup>11</sup> However, if the subscriber selected the “Record” option, the remote hard drive would save a copy for later viewing.<sup>12</sup> The subscriber could also “Begin Playback” of the program while it was being recorded and choose to record programs that were being broadcast in the future.<sup>13</sup> Subscribers could watch the programs on computers, mobile device, and Internet-connected television.

Thus, the three key technical functions of Aereo’s service were: (1) each subscriber was assigned to an individual antenna; (2) the signal captured by the assigned antenna was used to create unique copies of the program, which were held in each subscriber’s personal directory; and (3) the subscriber watched his or her individual copy of the program, which was never accessible to any other Aereo subscriber.<sup>14</sup>

## II. AEREO’S LITIGATION

In 2012, broadcasting companies, producers, and distributors who owned the copyrights to the programs Aereo was transmitting sued Aereo for direct copyright infringement.<sup>15</sup> The plaintiffs also alleged that Aereo’s transmission constituted a public performance of copyrighted works under the 1976 amendment to the Copyright Act.<sup>16</sup> The 1976 amendment gives copyright owners the “exclusive” right to “perform the copyrighted work publicly.”<sup>17</sup> The Act defines this exclusive right

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<sup>8</sup> *Id.*

<sup>9</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 681 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 896 (2014) (mem.).

<sup>10</sup> *Id.*

<sup>11</sup> *Gibson Dunn*, *supra* note 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 682.

<sup>15</sup> *Gibson Dunn*, *supra* note 5; *see also* 17 U.S.C. § 106(4) (2012).

<sup>16</sup> *Id.*

<sup>17</sup> 17 U.S.C. § 106(4) (2012).

[as the right to] transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.<sup>18</sup>

On June 25, 2014, the Supreme Court of the United States ruled in *American Broadcasting Cos. v. Aereo, Inc.* that Aereo's video streaming service infringed on the exclusive right of copyright owners to publicly perform television broadcasts.<sup>19</sup> This decision reversed the Second Circuit's decision, which was based on the fact that "the potential audience of each . . . transmission is the single user who requested that a program be recorded."<sup>20</sup>

However, the Supreme Court expressly noted that its decision was "limited," and that the Copyright Act does not "discourage or control the emergence or use of different kinds of technologies."<sup>21</sup> The Court concluded that Aereo's business model was "substantially similar to those of the [community antenna television] companies that Congress amended the [Copyright] Act to reach."<sup>22</sup> This "duck test" asserted that because Aereo received and retransmitted copyrighted television broadcasts using its own antennas and equipment located outside of users' homes, it was similar to cable television. Despite Aereo's "multiple, discrete transmissions" for each subscriber, the Court concluded that these transmissions were functionally similar to CATV<sup>23</sup> services.<sup>24</sup> Therefore, these transmissions constituted a public performance because Aereo "transmit[ted] [content] to large numbers of paying subscribers who lack[ed] any prior relationship to the works."<sup>25</sup>

### III. LEGAL BACKGROUND

The relevant precedents that courts have considered during Aereo's time in court include *Fortnightly Corp. v. United Artists Television, Inc.*, *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, *WPIX, Inc. v. ivi, Inc.*, and *Cartoon Network v. CSC Holdings, Inc.* The dispute in *Fortnightly* arose out of Fortnightly's business that involved capturing the broadcasts of local TV stations and then transmitting them to customers'

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<sup>18</sup> *Id.* § 101.

<sup>19</sup> *Am. Broad. Cos. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014).

<sup>20</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 690 (2d Cir. 2013).

<sup>21</sup> *Aereo, Inc.*, 134 S.Ct. at 2506 (slip op., at 16).

<sup>22</sup> *Id.*

<sup>23</sup> CATV systems were the predecessors to cable systems.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

homes using coaxial cables.<sup>26</sup> United Artists Television, a production and distribution company, sued Fortnightly on the grounds that Fortnightly violated the 1909 Copyright Act because it was not paying royalties on the copyrighted programming it was transmitting.<sup>27</sup> However, the Supreme Court held that Fortnightly did not violate the Act because it was essentially doing the same thing that any individual could do if he put up his own antenna, strung a cable to his house, and received the programs on his television set.<sup>28</sup> On this note, the Court concluded that Fortnightly's community antenna television system "no more than enhances the viewer's capacity to receive the broadcaster's signals."<sup>29</sup>

In *Teleprompter*, the Supreme Court applied *Fortnightly* to a similar dispute and held that CATV systems did not violate copyright owners' exclusive right to "perform" or "transmit."<sup>30</sup> The Court concluded that cable television systems did not engage in the "public performance" of broadcast programming; rather, the Court held that "[b]roadcasters perform. Viewers do not perform. . . . [and a cable provider] falls on the viewer's side of the line."<sup>31</sup> CATV providers merely "enhanced the viewer's capacity to receive the broadcaster's signals."<sup>32</sup> However, the Court also recognized that CATV providers had some control over what content they transmitted to viewers.<sup>33</sup>

### 1. 1976 Copyright Act

The 1976 Act responded to the emergence of cable television systems after the *Teleprompter* and *Fortnightly* decisions in two ways. Both of these responses show that the 1976 Copyright Act was a response to rapidly changing technology and an attempt to incentivize further investment in cable system technology. First, the 1976 Copyright Act added the Transmit Clause.<sup>34</sup> The legislative history shows that the Transmit Clause was intended to repeal *Fortnightly* and *Teleprompter* "and bring a cable television system's retransmission of broadcast television programming within the scope of the public performance right."<sup>35</sup> Second,

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<sup>26</sup> *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390, 390 (1968).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Teleprompter Corp. v. Columbia Sys. Broad. Sys., Inc.*, 415 U.S. 394, 404 (1974).

<sup>31</sup> *Fortnightly Corp.*, 392 U.S. at 398.

<sup>32</sup> *Id.* at 399.

<sup>33</sup> *Teleprompter Corp.*, 415 U.S. at 408–10.

<sup>34</sup> *Id.*

<sup>35</sup> *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 685 (2d Cir. 2013) (citing H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676).

in writing the 1976 Copyright Act, Congress acknowledged that “requiring cable television systems to obtain a negotiated license from individual copyright holders may deter further investment in cable systems.”<sup>36</sup> Therefore, it created a compulsory license for retransmissions by cable systems.<sup>37</sup>

The 1976 amendments to the Copyright Act were intended to eliminate the distinction between the broadcaster and the viewer with respect to the right “to perform.”<sup>38</sup> Congress noted that both parties are “performing” a broadcast. The primary distinction between the two, however, is that the viewer is not engaging in the second requirement for copyright infringement because the viewer’s “performance” is not public.<sup>39</sup>

Congress also enacted a cable compulsory license in its 1976 amendments because it “believed that the transaction costs associated with a cable operator and copyright owners bargaining for separate licenses to all television broadcast programs retransmitted . . . were too high.”<sup>40</sup> Later Congress extended the compulsory license to satellite television providers because “the satellite business was a fledgling industry without market power [and Congress] believed [it] unlikely that satellite carriers could negotiate retransmission licenses with broadcast programming copyright owners.”<sup>41</sup> It continues to extend the cable compulsory license for satellite broadcasting in order to preserve competition in the market.<sup>42</sup> These additions essentially nullified *Fortnightly* and *Teleprompter* by broadening the definition of what it means “to perform” and requiring cable companies to get a compulsory license to transmit copyrighted programming.

## 2. The Current Statutory License Requirements under Section 111.

Section 111 of the Copyright Act of 1976 created a compulsory licensing system under which cable systems are allowed to retransmit

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See H.R. REP. NO. 94-1476, at 88–89 (1976). See also S. REP. NO. 94-473, at 60 (1975) (“Under the definitions of ‘perform,’ ‘display,’ ‘publicly,’ and ‘transmit’ in [S]ection 101 . . . a cable television system is performing when it retransmits the broadcast to its subscribers.”).

<sup>39</sup> See CABLEVISION SYSTEMS CORP., *AEREO AND THE PUBLIC PERFORMANCE RIGHT* 17 (Dec. 2013), [http://www.cablevision.com/pdf/cablevision\\_aereo\\_white\\_paper.pdf](http://www.cablevision.com/pdf/cablevision_aereo_white_paper.pdf).

<sup>40</sup> *Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 106th Cong. 26* (2000) (statement of Marybeth Peters, The Register of Copyrights, U.S. Copyright Office), at 22.

<sup>41</sup> *Id.* at 23.

<sup>42</sup> *Id.* at 28.

copyrighted works with the appropriate license.<sup>43</sup> The relevant portion of Section 111 reads:

(c) Secondary transmissions by cable systems

(1) . . . secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing upon compliance with the requirements of subsection (d) . . . .<sup>44</sup>

Further, to perform publicly within the Copyright Act:

To perform or display a work-- publicly means . . . (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.<sup>45</sup>

In *WPIX, Inc. v. ivi, Inc.*, the Second Circuit addressed whether *live* streaming copyrighted television programming over the Internet constituted a cable system under Section 111.<sup>46</sup> The Second Circuit considered Section 111's legislative history and noted:

Congress enacted [Section] 111 to enable cable systems to continue providing greater geographical access to television programming while offering some protection to broadcasters to incentivize the continued creation of broadcast television programming.<sup>47</sup>

Ultimately, the court held that *ivi*'s services constituted copyright infringement because *ivi* provided geographically unbounded transmissions.<sup>48</sup>

Finally, the last relevant case that sets the stage for Aereo technology is *Cartoon Network v. CSC Holdings, Inc.* ("*Cablevision*").

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<sup>43</sup> *Section 111 - Statutory License for Secondary Transmissions by Cable Systems*, U.S. COPYRIGHT OFFICE, [http://www.copyright.gov/licensing/sec\\_111.html](http://www.copyright.gov/licensing/sec_111.html) (last visited Dec. 27, 2015).

<sup>44</sup> 17 U.S.C. § 111(c) (2012).

<sup>45</sup> 17 U.S.C. § 101 (2012).

<sup>46</sup> *WPIX, Inc. v. ivi, Inc.*, 691 F. 3d 275, 279 (2d Cir. 2012).

<sup>47</sup> *Id.* at 281.

<sup>48</sup> *See id.* at 285.



In *Cablevision*, the U.S. Court of Appeals for the Second Circuit considered the legality of the cable company's new "Remote Storage DVR System."<sup>49</sup> The cable company, Cablevision, was offering a service run from its facilities that users could activate at home using a remote control.<sup>50</sup> Once the customer used the remote to choose to record a television show, Cablevision would record the programming at its facilities and would play it back to the customer when the customer chose to watch it.<sup>51</sup> Broadcasters sued Cablevision arguing that while Cablevision had the compulsory license to broadcast that programming on cable television, it did not have the right to broadcast recorded showings through the remotely located DVR.<sup>52</sup> Then Second Circuit held that because each DVR transmission was "made to a single subscriber using a single unique copy produced by that subscriber," Cablevision's transmissions were not performances to the public.<sup>53</sup> By siding with Cablevision, the court made no distinction as to whether a cable company provided a customer a rented remote DVR or if an individual installed a DVR at home.

#### IV. THE SUPREME COURT DECISION

Despite arguing the opposite at the beginning of the suit, Aereo argued that it really was a cable company eligible for a Section 111 statutory license.<sup>54</sup> Section 111 statutory licenses are granted regularly to cable companies so that they can broadcast copyrighted programming.<sup>55</sup> This would have allowed Aereo to continue its operations after paying the necessary license fees. Without this grant, Aereo would have been forced to individually negotiate license agreements with each copyright holder.

The compulsory license provided to cable companies under the Copyright Act would have allowed Aereo to retransmit the network broadcasters' copyrighted works for a cheap royalty fee and avoid copyright infringement. This argument came from Aereo's oral arguments before the

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<sup>49</sup> CABLEVISION SYSTEMS CORP., *supra* note 40, at 8.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 8.

<sup>53</sup> *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008).

<sup>54</sup> Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), [http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?\\_r=0](http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0).

<sup>55</sup> *See id.*

United States Supreme Court in which Justice Sotomayor questioned why Aereo was not a cable company.<sup>56</sup> She asked:

I look at the definition of a cable company, and it seems to fit. . . . [Aereo] [m]akes secondary transmissions by wires, cables, or other communication channels. It seems to me that a little antenna with a dime fits that definition. To subscribing members of the public who pay for such service. I mean, I read it and I say, why aren't they a cable company?<sup>57</sup>

The opposition counsel agreed that maybe Aereo was a cable company that could qualify for the compulsory license that is available to cable companies under Section 111 of the Copyright Act. Justice Sotomayor replied, “[w]e say they’re a [c]able company, they get the compulsory license.”<sup>58</sup> Ultimately, the Court held that “given Aereo’s overwhelming likeness to the cable companies targeted by the 1976 [Copyright Act] amendments,” Aereo was publicly performing copyrighted works.<sup>59</sup>

However, when Aereo subsequently declared itself a cable system and applied for a mandatory license under Section 111, the Copyright Office refused.<sup>60</sup> The Copyright Office provisionally accepted the license fees Aereo submitted, but it did not process the request because

In the view of the Copyright Office, [I]nternet retransmissions of broadcast television fall outside the scope of the Section 111 license. Significantly, in *WPIX, Inc. v. ivi, Inc.*, the Second Circuit deferred to and agreed with the Office’s interpretation of Section 111. As explained in that case, Section 111 is meant to encompass “localized retransmission services” that are “regulated as cable systems by the FCC.” We do not see anything in the Supreme Court’s recent decision in *American Broadcasting Cos. v. Aereo, Inc.* that would alter this conclusion.<sup>61</sup>

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<sup>56</sup> See Transcript of Oral Argument at 3, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014) (No. 13-461).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Aereo, Inc.*, 134 S.Ct. at 2507.

<sup>60</sup> Letter of Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, to Mr. Matthew Calabro of Aereo, Inc. (July 16, 2014) (citation omitted).

<sup>61</sup> Letter of Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, to Mr. Matthew Calabro of Aereo, Inc. (July 16, 2014) (citation omitted).

Back in the district court, Aereo asked for a compulsory license under Section 111 based on the Supreme Court's "duck test" that concluded that Aereo looked and functioned like a cable company.<sup>62</sup> However, the broadcasters countered this request by arguing that under *ivi*, online streaming services do not qualify as cable companies.<sup>63</sup> The court ruled for a preliminary injunction against Aereo's streaming service, but not its "Watch Now" function's delayed programs.<sup>64</sup> After spending millions of dollars on this litigation battle and being forced to stop its services, Aereo announced that it had filed for Section 11 Bankruptcy on November 20<sup>th</sup>, 2014.<sup>65</sup>

## V. FEDERAL COMMUNICATIONS COMMISSION PROPOSAL

In October 2014, FCC Chairman Tom Wheeler gave notice of a proposed rulemaking to update the Commission's rules "to give video providers who operate over the Internet – or any other method of transmission – the same access to programming that cable and satellite operators have."<sup>66</sup> The proposal to update the FCC's interpretation of the definition of a multichannel video programming distributor to make it technology-neutral would mean that the interpretation of multichannel video programming distributor ("MVPD") would no longer be tied to transmission facilities.<sup>67</sup> Currently, MVPDs do not include online video distributors.<sup>68</sup> Chairman Wheeler likened this change to the broadening of the interpretation of MVPD to include satellite transmission in the 1990s, a decision that spurred the growth of the satellite video business.<sup>69</sup>

While the FCC is currently seeking comment on the possible limitations to its new MVPD definition, the possibility of this change would mean that future Aereo-like technology would meet the statutory license requirements automatically. This proposal would let Internet-video services negotiate for

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<sup>62</sup> Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), [http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?\\_r=0](http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0).

<sup>63</sup> Broadcasters used the decisions in *ivi*, in which the Court held that *ivi*'s Internet transmissions were not covered by the Copyright Act. This was partly based on *ivi*'s unlimited geographical reach.

<sup>64</sup> Steel, *supra* note 62.

<sup>65</sup> *Id.*

<sup>66</sup> Statement of Chairman Tom Wheeler, *FCC-14-210A2*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/article/fcc-14-210a2>.

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

the right to distribute local television programming and cable programs.<sup>70</sup> Aereo founder Chet Kanojia noted, a technology-neutral definition of an MVPD that encompasses “linear online video distributors will create a stronger, more competitive television landscape for consumers.”<sup>71</sup>

## VI. ANALYSIS

### *A. The ivi decision should not have applied to Aereo because Aereo’s business model is substantially different from ivi’s.*

The *ivi* decision should not apply to technology like Aereo because the technologies, while similar, are different in key ways. Not only did the Second Circuit note that *ivi*’s transmissions were “vastly different from the technology in *Fortnightly* and *Teleprompter*,” the Supreme Court found that Aereo’s “Watch Now” function was “overwhelming[ly] like[.]” and “highly similar” to the technology in *Fortnightly* and *Teleprompter*.<sup>72</sup> One of the main differences is that the *ivi* technology involved “geographically unbounded” transmissions.<sup>73</sup> The main issue in *ivi* was *ivi*’s geographically *unrestricted* transmissions, which Section 111 does not cover. Section 111’s compulsory license scheme was created to support “local market – rather than national market – systems....”<sup>74</sup> Therefore, Congress did not intend for the compulsory license to cover *ivi*’s service.<sup>75</sup> In contrast, Aereo’s service did not provide geographically unrestricted transmission because it limited their subscribers to residents of a specific geographical area.<sup>76</sup>

### *B. Aereo met the Statutory License requirements under Section 111.*

<sup>70</sup> Todd Shields and Alex Barinka, *Aereo Sees Path Forward in FCC Online Video Proposal*, BLOOMBERGBUSINESS (Oct. 29, 2014: 11:33AM), <http://www.bloomberg.com/news/articles/2014-10-28/help-for-online-video-competition-to-be-considered-at-fcc>.

<sup>71</sup> Edward Wyatt, *F.C.C. Proposal Would Allow à la Carte Internet Video Services*, N.Y. TIMES (Oct. 29, 2014), [http://bits.blogs.nytimes.com/2014/10/29/f-c-c-proposal-would-allow-a-la-carte-internet-video-services/?\\_r=0](http://bits.blogs.nytimes.com/2014/10/29/f-c-c-proposal-would-allow-a-la-carte-internet-video-services/?_r=0).

<sup>72</sup> *Am. Broad. Cos. v. Aereo, Inc.*, 134 S.Ct. 2501, 2507, 2511 (2014).

<sup>73</sup> *Aereo, Inc.’s Opposition to Plaintiff’s Memorandum in Support of Preliminary Injunction at 15*, WNET, *Thirteen v. Aereo, Inc.*, Civil Action No. 12-CV-1540 (S.D.N.Y. August 29, 2014).

<sup>74</sup> *Id.* at 16.

<sup>75</sup> *WPIX, Inc. v. ivi, Inc.*, 691 F. 3d 275, 284 (2d Cir. 2012) (reiterating that the Copyright Office’s requirement that “a provider of broadcast signals be an inherently localized transmission media or limited availability to qualify as a cable system”)(citing FED. REG. 31595 (July 11, 1991)).

<sup>76</sup> Baoding Hsieh Fan, *When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting*, 52 Fed. Comm. L.J. 619 (2000).

Aereo initially portrayed itself as merely supplying its subscribers with the equipment (antennas) that operated like a home antenna or DVR device. However, the Supreme Court found that Aereo's activities were similar to those Congress targeted by the Transmit Clause.<sup>77</sup> The Court noted that "the Clause makes clear that an entity that acts like a CATV system itself performs, even when it simply enhances viewers' ability to receive broadcast television signals."<sup>78</sup>

"Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments," Aereo infringed broadcasters' copyrights to programming when it retransmitted broadcast content without a license.<sup>79</sup> Aereo's technology could derive its compulsory license from the cable compulsory license. Subscription Internet TV "arguably fit[s] within the expansive definition of a 'cable system' under Section 111(f)."<sup>80</sup> Internet TV companies that "structure their operations to simulate a cable system's geographical constraints," limit their subscribers to residents of a specific geographical area, and meet Section 111(e)'s restrictions on simultaneous transmissions would fall within the expansive definition.<sup>81</sup> Aereo met all of these requirements and purposefully structured their operations to follow the restrictions and rules in Section 111.<sup>82</sup>

Further, this copyright privilege should be extended to Internet television because this is an innovative and emerging technology that needs further "incentives to spur development."<sup>83</sup> Like satellite retransmission start-ups in 1988, Internet retransmission start-ups will likely face an uphill

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<sup>77</sup> *Aereo*, 134 S. Ct. at 2506 ("Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.").

<sup>78</sup> *Id.* See also Mark P. McKenna, *The Limits of the Supreme Court's Technological Analogies*, SLATE (June 26, 2014, 12:07 PM), [http://www.slate.com/articles/technology/future\\_tense/2014/06/abc\\_v\\_aereo\\_ruling\\_the\\_supreme\\_court\\_s\\_terrible\\_technological\\_analogies.single.html](http://www.slate.com/articles/technology/future_tense/2014/06/abc_v_aereo_ruling_the_supreme_court_s_terrible_technological_analogies.single.html) ("Aereo fit the statutory definition since it '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.'")(quoting *J. Sotomayor, Oral Arguments, Am. Broad. Cos. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014)).

<sup>79</sup> *Am. Broad. Cos. v. Aereo, Inc.*, 134 S.Ct. 2507 (2014).

<sup>80</sup> Fan, *supra* note 77, at 619.

<sup>81</sup> *Id.*

<sup>82</sup> Aereo's "Watch Now" function does not provide subscribers with access to broadcasted programs outside of their home (NYC) designated market area; rather, it gives only geographically-restricted access through local physical antenna facilities.

<sup>83</sup> Fan, *supra* note 77, at 619.

battle when negotiating with broadcasters for individual licenses. Further, these Internet services also perform the exact same function as cable companies. They simply provide their service through a different medium, a tactic that could strengthen local broadcasting by allowing it to reach a wider audience.

### *C. Implications of the Duck Test Going Forward*

#### *1. Extinction*

Aereo's demise has created a stir among innovators and tech companies. They express concern that the *Aereo* decision will interfere with innovation and potential investments because it created legal uncertainty.<sup>84</sup> The wider impact of this ruling and Aereo's subsequent bankruptcy point to a larger tension between technological innovations and the legal red tape they battle. For example, the Supreme Court's ruling that Cablevision's remote DVR was legal helped spur about \$1 billion of investments in new cloud storage services—a forty one percent increase.<sup>85</sup> Decisions around copyright issues can have a significant impact because these issues tend to deal with expensive technology.<sup>86</sup> Therefore, any risk of legal uncertainty can deter the initial investment by the technology industry.<sup>87</sup>

#### *2. Birds of a Feather Flock Together*

Aereo's business model and its demise have sparked a movement for changes in TV broadcasting and FCC regulations. In October 2014, CBS, one of the companies that sued Aereo, announced the launch of "CBS All Access," a subscription service that streams CBS content online to customers for just \$5.99 a month and is intended for people who do not receive CBS programming via cable or satellite.<sup>88</sup> Like Aereo's service, CBS All Access sells access to public programming that is available for free

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<sup>84</sup> Julian Sanchez, *The Supreme Court's Aereo Effect Might Evaporate Silicon Valley's Cloud*, THE GUARDIAN (June 25, 2014), <http://www.theguardian.com/commentisfree/2014/jun/25/supreme-court-aereo-ruling-cloud-computing>.

<sup>85</sup> Josh Lerner, *Lost in the Clouds: The Impact of Copyright Scope on Investments in Cloud Computing Ventures* (2013), [http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/2012\\_christensenlerner\\_lost\\_in\\_the\\_clouds.pdf](http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/2012_christensenlerner_lost_in_the_clouds.pdf).

<sup>86</sup> *Id.*

<sup>87</sup> *See generally* Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 730–32. (“[C]larity [of law] is essential to promote progress, because it enables efficient investment in innovation.”).

<sup>88</sup> Brian Stelter & Frank Pallotta, *New Way To Watch CBS Shows, For \$6 A Month*, CNN MONEY (Oct. 16, 2014, 12:06 PM), <http://money.cnn.com/2014/10/16/media/cbs-digital-subscription-service/>.

to anyone with a broadcast antenna.<sup>89</sup> Shortly before CBS's announcement, HBO also announced its own "a la carte" TV streaming service, which will not require a cable subscription.<sup>90</sup> These services that "circumvent[] conventional delivery systems" appeal to people who do not subscribe to any form of cable or satellite television—the same customers Aereo targeted.<sup>91</sup>

It seems as though Internet television will continue to exist after Aereo, though only through *existing* content companies, such as HBO and CBS.<sup>92</sup> This restricted competition in the market for Internet TV may come at the cost of consumers who argue that packaged cable television forces them to pay for broadcast programming they do not watch. While copyright owners now understand the attraction to streaming public programming online, "they should not be allowed to hoard programming that has already been broadcast over the air with the effect of precluding new entrants into the retransmission market."<sup>93</sup> Not only would "hoarding" prevent smaller, newer entrants from obtaining rights to the programming, but it will also hinder free enterprise and public access to public programming.

After Aereo, FCC Chairman Wheeler announced that the FCC will focus on the regulatory framework for Internet TV.<sup>94</sup> He argued that, "[c]onsumers will be able to buy the channels they want instead of having to pay for channels they don't want."<sup>95</sup> While invoking Aereo's demise in his announcement, he noted that the "idea that entrepreneurs should be able to assemble programs to offer consumers choices is something that shouldn't be hindered by the FCC."<sup>96</sup> According to Wheeler, "A key component of

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<sup>89</sup> Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, THE NEW YORK TIMES (Oct. 16, 2014), [http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html?\\_r=0](http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html?_r=0).

<sup>90</sup> David Lazarus, *Moves by HBO, CBS Could be Tipping Point for a la Carte Pricing*, LA TIMES (Oct. 16, 2014: 4:41 PM), <http://www.latimes.com/business/la-fi-lazarus-20141017-column.html>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (noting that "[i]t's just a matter of time before ABC, NBC and Fox jump on the bandwagon. . . HBO taking the online plunge represents a tipping point for TV content. It validates that a network can potentially thrive outside the established pay-TV universe and demonstrates that a market exists for a so-called a la carte system — paying only for the channels you want").

<sup>93</sup> Fan, *supra* note 77, at 619.

<sup>94</sup> Tom Wheeler, *Tech Transitions, Video, and the Future*, FED. COMM'NS COMM'N (Oct. 28, 2014: 1:48 PM), <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

rules that spur competition is assuring the FCC's rules are technology-neutral.”<sup>97</sup>

### CONCLUSION

While the Internet continues to provide a medium for technological advancements in a number of industries, it heavily represents the convergence of telecommunications, the computer industry, and mass media. Coupled with the Internet’s widespread accessibility, it is likely that Internet TV streaming will become a salient and economical medium for broadcast programming. However, without the laws and regulations to support these changes, the innovations that spearhead them, like Aereo, will likely fail.

The current copyright licensing process for secondary transmissions of broadcast signals should be extended to Internet television. Not only do the reasons for granting a compulsory license to cable systems apply similarly to complying Internet TV companies, like Aereo, but this extension is also necessary to maintain fair competition between the emergent delivery mediums in this industry. Congress must begin considering the volume and variety of broadcast programming that the Internet makes available, the timeliness and accessibility of the programming, and whether individual license negotiations will reflect a fair price point.

Rather than searching for an answer in case law that could not have foreseen this type of technology, the courts and Congress should be looking for a new way to categorize Aereo’s technology by creating different laws or extending current ones to govern its use. As the Supreme Court noted in *Sony*, “[i]t may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.”<sup>98</sup>

Here, Aereo developed a business model with deliberate attention to existing copyright laws, but was unfairly punished for investing in and creating a technological innovation because it used the law to its advantage. Rather, it should have been allowed to reap the benefits given to cable companies under the Copyright Act because it endured the legal burdens of being “like a cable company.” While there is currently a gap in the Copyright Act that has failed to keep up with changes in technology, it is the role of the Legislature, not the courts, to fill these gaps.

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<sup>97</sup> *Id.*

<sup>98</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).



This legal issue illustrates how fast technological innovations are moving and how slow the legal system can be to understand them. The existing laws are being so narrowly interpreted that they are mistakenly hindering the technological innovations that surpass their reach. Perhaps a solution to this problem is for Congress to follow the FCC's lead in creating "technology neutral" laws. Regardless of which solution Congress eventually decides on to repair the current law and technology gap, "[t]wenty-first century consumers shouldn't be shackled to rules that only recognize 20th century technology."<sup>99</sup>

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<sup>99</sup> Wheeler, *supra* note 95.