



DATE DOWNLOADED: Sat Sep 5 14:05:43 2020

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org/HOL/License)

Citations:

Bluebook 21st ed.

Masha Litvinov, *Is Aereo the 21st Century Version of Rabbit Ears, or Is It Just Tying Loopholes*, 18 INTELL. PROP. L. BULL. 1 (2013).

ALWD 6th ed.

Litvinov, M. ., *Is aereo the 21st century version of rabbit ears, or is it just tying loopholes*, 18(1) Intell. Prop. L. Bull. 1 (2013).

APA 7th ed.

Litvinov, M. (2013). *Is aereo the 21st century version of rabbit ears, or is it just tying loopholes*. *Intellectual Property Law Bulletin*, 18(1), 1-34.

Chicago 7th ed.

Masha Litvinov, "Is Aereo the 21st Century Version of Rabbit Ears, or Is It Just Tying Loopholes," *Intellectual Property Law Bulletin* 18, no. 1 (Fall 2013): 1-34

McGill Guide 9th ed.

Masha Litvinov, "Is Aereo the 21st Century Version of Rabbit Ears, or Is It Just Tying Loopholes" (2013) 18:1 *Intellectual Property L Bull* 1.

MLA 8th ed.

Litvinov, Masha. "Is Aereo the 21st Century Version of Rabbit Ears, or Is It Just Tying Loopholes." *Intellectual Property Law Bulletin*, vol. 18, no. 1, Fall 2013, p. 1-34. HeinOnline.

OSCOLA 4th ed.

Masha Litvinov, *'Is Aereo the 21st Century Version of Rabbit Ears, or Is It Just Tying Loopholes'* (2013) 18 *Intell Prop L Bull* 1

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Is Aereo the 21st Century Version of “Rabbit Ears,” or Is It Just Tying Loopholes?

MASHA LITVINOV*†

INTRODUCTION

Currently, any person can go onto his or her roof, put up an antenna, and watch broadcast television for free, accessing channels such as ABC, NBC, CBS, and Fox. Most people, however, pay for these stations.¹ In fact, about 100 million of the 114 million U.S. homes with TVs pay for cable and satellite television in order to watch the popular free broadcast channels as well hundreds of cable channels most never watch.²

Enter Aereo, an Internet-based company that uses dime-sized antennas to pick up signals from network broadcasters and then, without the broadcasters’ permission, retransmits those signals to Internet-connected devices. Aereo sees itself as an innovator, providing a revolutionary service to modern consumers—synonymous with the “Rabbit Ears” used on old TVs. The networks, those providing the signals that Aereo broadcasts, disagree. They see these same “Rabbit Ears” as a giant loophole allowing infringement of their copyrights. Thus, the networks are asking the courts to require that the Rabbit Ears be taken down once and for all. Unfortunately, the Second Circuit has not been the hunting ground hoped for by the networks. Both the district and appellate courts have allowed Aereo to continue operating and, as rabbits have a tendency to do, reproduce in new markets.

The legal disagreement between Aereo and the networks began on March 1, 2012.³ The Plaintiffs, a group of corporate entities who engage “in the production, marketing, distribution, and transmission of broadcast television programs,”⁴ filed two complaints against Aereo. The complaints

* J.D./M.B.A., University of San Francisco School of Law, 2013. The author would like to thank the Intellectual Property Law Bulletin and Professor Bruce Price for their help with the preparation of this Article, Paris Gabel for countless hours spent discussing Aereo, and her parents, Alex and Yana Gorenstein, for their constant encouragement, love, and support.

† At the time this Article went to print, multiple unresolved cases were pending against Aereo in federal courts. Aereo was also expanding into new markets and meeting lawsuits at every turn. While it is possible that recent decisions have changed the legal landscape, this Article accurately reflects Aereo’s status as of September 2013.

1. Edmund Lee et al., *Fox TV Network May Move to Cable as News Corp. Fights Aereo*, BUSINESSWEEK (Apr. 11, 2013), www.businessweek.com/articles/2013-04-11/fox-tv-network-may-move-to-cable-as-news-corp-fights-aereo.

2. *Id.*

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

4. *Id.* at 375–76.

alleged that Aereo's service "unlawfully captures broadcast television signals in the New York City area, including . . . television programs on which Plaintiffs hold the copyright, and provides them over the Internet to Aereo subscribers."⁵ The Plaintiffs asserted multiple theories of liability, including contributory infringement, infringement of the right of reproduction, and infringement of the right of public performance.⁶

The Plaintiffs moved for a preliminary injunction on the grounds that Aereo was "directly liable for copyright infringement by publicly performing Plaintiffs' copyrighted works."⁷ However, the motion was denied, and Aereo was allowed to continue operations in New York.⁸ On April 1, 2013, the Plaintiffs also lost their interlocutory appeal in the Second Circuit.⁹ Thus, the question of whether Aereo is the 21st century version of "Rabbit Ears," or if the company is just tying loopholes, will have to be answered at trial.

This Article begins by examining Aereo's structure and business model, followed by a history of the industry that sparked debate over public performance of copyrighted works. The Article then reviews the preliminary injunction analysis from both the district court and Second Circuit in the case against Aereo. Next, the Article describes technologies similar to Aereo and various court interpretations of those technologies. The Article concludes with a discussion of the future of broadcast television and the role the Supreme Court may have to play.

I. BACKGROUND – AEREO

For the cost of \$8 a month, Aereo provides online access to free, over-the-air broadcast and local broadcast television shows.¹⁰ Aereo supplies subscribers with a remote antenna and Digital Video Recorder ("DVR"),¹¹ which subscribers can use to access major television networks and local stations via smartphones, tablets, and Internet-friendly TVs.¹² Aereo does not pay the TV broadcasters for access to their programming.¹³ Instead, Aereo's dime-sized antennas pick up the broadcast signals and transmit them to the user, acting like a "21st century version of 'rabbit ears.'"¹⁴

5. *Id.* at 376.

6. *Id.*

7. *Id.*

8. *Id.* at 375 ("[T]his Court concludes that it is bound to DENY Plaintiffs' request.").

9. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013) ("We agree and affirm the order of the district court denying the motion for a preliminary injunction.").

10. See AEREO, <https://www.aereo.com/> (last visited Apr. 8, 2013). The service was originally offered at \$12 a month and has since been lowered to \$8. See *id.*

11. *Aereo Terms of Use*, AEREO (July 30, 2012), <https://aereo.com/terms>. See Part I.C *infra* for a discussion of how the technology works.

12. See Kristen McCallion, "Technological Gimmickry" or a Novel Non-infringing Use?, *INTELL. PROP. MAG.*, June 2012, at 69.

13. *Id.*

14. Dan Rayburn, *Aereo Announces More Funding, for a Service No One Really Wants*, *STREAMINGMEDIABLOG* (Jan. 8, 2012, 2:28 PM), http://blog.streamingmedia.com/the_business_of_online_vi/2013/01/aereo-announces-more-funding-

A. HISTORY OF AEREO

Chet Kanojia founded Aereo.¹⁵ Observing the power cable broadcasters have over viewers, Kanojia realized that most viewers only watch seven or eight channels, not the "bajillion channels" available with a standard cable subscription.¹⁶ After the Second Circuit, in *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*,¹⁷ ruled that Cablevision's network DVR was legal, Kanojia was inspired.¹⁸ In an interview, Kanojia stated, "when the appellate court ruled that the network DVR was legal I said I just found my answer because if network DVR is legal and if I can provide network DVR with an antenna I solved my broadcast access problem."¹⁹

Aereo's developers view the service as merely the next step in the evolution of TV.²⁰ They argue that the government issues spectrum licenses to broadcasters²¹ in exchange for free-to-air television,²² and Aereo is simply increasing viewer access to what is free programming. The founders believe consumers are not interested in 500 channel subscription cable packages, but rather want only seven or eight broadcast channels, which are, and should be, accessible through an antenna.²³ Since society views antennas as "clumsy [and] technologically inferior," consumers are forced to purchase large cable packages to access basic broadcast channels. Aereo believes its dime-sized antennas are the solution to consumers' problem.²⁴

Public broadcasters find Aereo's position unconvincing. Broadcasters currently receive retransmission fees from cable networks for their

for-a-service-no-one-wants.html; McCallion, *supra* note 12, at 69.

15. *Executive Bio, Chaitanya "Chet" Kanojia, AEREO*, https://aereo.com/assets/marketing/mediakit/exec_bio_chet_kanojia.pdf (last visited Oct. 7, 2013). Aereo is not Chet Kanojia's first company. Deborah Yao, *Aereo CEO Plans Pricing Changes, Expansion*, SNL FINANCIAL (July 26, 2012), <http://www.snl.com/InteractiveX/Article.aspx?cid=A-15391199-12584>. Kanojia also founded Navik Networks, a company that collected cable TV viewership measurement data in real time from millions of homes and had all the major cable companies as clients. *Id.* Kanojia stated, "[a]s we looked at the data, it was sort of obvious that 80% of the people only watched seven or eight channels, and 27% of multichannel homes only watched broadcast." *Id.* Kanojia sold Navik Networks to Microsoft in 2008. *Id.*

16. Greg Sandoval, *Aereo's Founder Has Broadcast TV in a Headlock—Now What? (Q&A)*, CNET (July 19, 2012), http://news.cnet.com/8301-1023_3-57475141-93/aereos-founder-has-broadcast-tv-in-a-headlock-now-what-q-a/.

17. 536 F.3d 121 (2d Cir. 2008) (holding that the Remote Storage Digital Recording System did not create a public performance and thus was non-infringing).

18. Sandoval, *supra* note 16.

19. *Id.*

20. *Id.* ("With one step, we changed the entire TV industry. The television industry and its evolution are now starting towards the Internet and that was stopped until Aereo came along And I think as consumers start migrating to the Internet, new programming and new content are going to come in.").

21. Spectrum licenses refer to broadcast licenses that grant the licensee permission to use a portion of the radio frequency spectrum in a given geographic area for broadcasting purposes. *See FCC Encyclopedia, Accessing Spectrum*, FED. COMM'NS COMM'N, <http://www.fcc.gov/encyclopedia/accessing-spectrum> (last visited Apr. 8, 2013).

22. (*Founder Stories*) *Aereo's Chet Kanojia on How His Company is Putting a Wedge in Video Delivery*, TECHCRUNCH (Aug. 8, 2012), <http://techcrunch.com/2012/08/08/founder-stories-aereos-chet-kanojia-on-how-his-company-is-putting-a-wedge-in-video-delivery-tctv/> [hereinafter *Founder Stories*].

23. *See id.*

24. *See id.*

copyrighted material.²⁵ Thus, broadcasters argue Aereo is a loophole business—the company is structured to comply with current copyright regulations, yet still disrupts the current royalty model.²⁶ In other words, the broadcasters feel that in defending its service, Aereo’s founders are fully aware the company is exploiting an ambiguity in copyright law.

B. AEREO’S GOALS

After overcoming the preliminary injunction motion in both the trial and appellate courts, Aereo initiated a strong marketing campaign and expanded into new markets.²⁷ While, after the district court win, Kanojia stated that the company had not “yet marketed anything in New York,”²⁸ Aereo has since instituted clever marketing grabs in the area, such as offering free use of its product.²⁹ Kanojia also hinted at potential business partnerships for product distribution, content, and packaging.³⁰

Although Aereo’s legal battles were not meant as a marketing ploy, they have helped propel the company into the media spotlight. Aereo was included in TIME’s 50 Best Websites of 2012³¹ and has been covered by almost every other technology media outlet, making Aereo one of the most talked about technologies on the Internet.³²

Aereo is currently only available in select cities—New York, Houston, Boston, Salt Lake City, Atlanta, and Miami—but the company plans to expand rapidly in the coming year.³³ The operating plan for the new cities

25. *Id.* Under the Transmit Clause, “a cable television system is performing when it retransmits the broadcast to its subscribers.” H.R. Rep. 94–1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045; WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 685–86 (2d Cir. 2013). Congress recognized that requiring cable television systems to negotiate retransmission licenses with broadcasters might deter investment in cable systems, so it created a compulsory license for retransmissions by cable systems. *Id.*; *see also* 17 U.S.C. § 111(d) (2012).

26. David Carr, *Spreading Disruption, Shaking up Cable TV*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/business/media/barry-dillers-aereo-service-challenges-cable-television.html?pagewanted=all&_r=0.

27. Sandoval, *supra* note 16.

28. *Id.*

29. Peter Kafka, *Aereo Celebrates a Court Victory with Clever Marketing: Free Web TV for an Hour, or a Dollar for a Day*, ALL THINGS D (Aug. 2, 2012), <http://allthingsd.com/20120802/aereo-celebrates-a-court-victory-with-clever-marketing-free-web-tv-for-an-hour-or-a-dollar-for-a-day/>. Aereo previously offered a free thirty-day trial period, but its new promotion involves one free hour a day of the service, for an unlimited time. *See Try Aereo for Free*, AEREO, <https://aereo.com/try> (last visited Apr. 8, 2013).

30. Sandoval, *supra* note 16.

31. *See* Nick Carbon, *50 Best Websites 2012*, TIME (Sept. 16, 2012), <http://techland.time.com/2012/09/18/50-best-websites-2012/slide/aereo/>.

32. *See, e.g.*, Jordan Crook, *Aereo Looks to TV Providers, ISPs to Accelerate Growth*, TECHCRUNCH (Apr. 1, 2013), <http://techcrunch.com/2013/04/01/aereo-looks-to-tv-providers-isps-to-accelerate-growth/>; Gerry Smith, *Aereo Threatens Broadcasters by Streaming Network TV Online*, HUFFINGTON POST (July 20, 2012), http://www.huffingtonpost.com/2012/07/20/aereo-broadcasters-streams-networks-tv_n_1690173.html.

33. *Where Can I Get Aereo?*, AEREO, <https://aereo.com/coverage> (last visited Sept. 11, 2013). Aereo is currently facing a new legal battle in Boston, where Boston broadcaster WCVB (Hearst owned) filed its own complaint in July. *See* Jeff John Roberts, *Aereo Fight Moves to Boston with New TV Lawsuit*, GIGAOM (July 10, 2013), <http://gigaom.com/2013/07/10/aereo-fight-moves-to-boston-with-new-tv-lawsuit/>; *Hearst Stations, Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284 (D. Mass. Oct. 8, 2013) (denying broadcasters a preliminary injunction against Aereo’s service in the United

remains consistent with previous models; users will only be able to watch “in market” TV channels, including live over-the-air broadcasting and local networks.³⁴ These channels, Aereo argues, and the Second Circuit agrees, are freely available to the general population under the current regulatory scheme when using an antenna.³⁵

Aereo sees its product as cutting out the cable middleman and its service as an opportunity to change the broadcasting industry.³⁶ The company does not believe major broadcasters need to charge subscribers high transmission fees in order to remain profitable.³⁷ In fact, Barry Diller,³⁸ Aereo’s top investor, suggests that broadcasters turned the cable industry into a “competitive runway by not responding to consumers and gauging them at every turn.”³⁹ He has stated that “[p]rogramming over the Internet is going to happen, and cable is only now waking up to the fact that everybody hates them. I think we’re on the side of the angels.”⁴⁰

C. HOW THE TECHNOLOGY BEHIND AEREO WORKS

Much of the debate over whether Aereo is actually an innovative new service is centered on how the technology works.

(1) Antennas

Each Aereo antenna is roughly the size of a dime and consists of a pair of metal loops.⁴¹ Eighty of these dime-sized antennas are “packed on one end of a circuit board, with a metal rail that separates the area with antenna elements from an area housing the electronic components used to operate the antennas and process the signal.”⁴² Sixteen of the circuit boards are stored parallel to one another in a metal housing, with the antennas sticking out of the housing.⁴³ This placement results in the metal rails fitting closely together, forming a barrier between the antennas and other electronic

States Massachusetts District court).

34. See *Where Can I Get Aereo?*, *supra* note 33.

35. See *infra* Part II.

36. Carr, *supra* note 26.

37. *Id.* Diller is quoted as saying, “I don’t think that broadcast networks are in particular danger of not being able to be profitable enterprises, whichever way the technology goes.” *Id.* He goes on to say that “[t]he idea that they need retransmission consent fees, which have just come along in the last several years, to survive seems not right to me.” *Id.* However, Leslie Moonves, President and Chief CEO of CBS does not agree:

It is clear that the whole premise of Aereo is to make money off the back of the hundreds of millions of dollars we invest in programming We pay the N.F.L. \$1 billion a year. Right now we have a lot of correspondents in Rome. We think it is patently illegal to take our signal and those of the other networks and resell it without paying for it. It is so wrong on so many different levels.

Id.

38. Media mogul Barry Diller, the former head of Paramount Pictures, FOX Broadcasting, and ABC Broadcasting, joined Aereo’s Board of Directors in February of 2012. McCallion, *supra* note 12.

39. Carr, *supra* note 26.

40. *Id.*

41. *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 379 (S.D.N.Y. 2012).

42. *Id.*

43. *Id.*

elements of Aereo's system.⁴⁴

(2) User's Perspective: Watch & Record

From the user's perspective, Aereo's service is similar to a digital video recorder ("DVR"), the distinction being users access Aereo's programming through an Internet-based device rather than through a cable connection to their TV.⁴⁵ Aereo's platform offers users two options for viewing television programming: "Watch" or "Record."⁴⁶

If the user chooses the "Watch" function, after a short delay, Aereo's system transmits a webpage, allowing the user to watch the selected program at roughly the same time as the over-the-air broadcast.⁴⁷ The program can be paused or rewound, increasing the disparity between the time at which the program is initially broadcast and the time at which the user watches it.⁴⁸ While using the "Watch" function, the user can also switch to the "Record" feature, causing the Aereo system to retain a copy of the current program for later viewing.⁴⁹ If the user does not select the "Record" function during a live broadcast, a copy of the program is not retained and cannot be accessed again.⁵⁰

At the outset, users can also select programming through the "Record" function.⁵¹ The user can record a program that is currently being aired and then immediately begin playback while it is recorded (similar to the "Watch" function), or the user can select to record a program that will be broadcast at a later time.⁵²

(3) Behind the Scenes

When a user clicks the "Watch" function, the user's web browser sends a request to Aereo's Server, which then sends a request to Aereo's Antenna Server.⁵³ The Antenna Server allocates one of Aereo's dime-sized antennas to the user, and each antenna separately receives the incoming broadcast signal.⁵⁴ The genius behind Aereo, and the company's ultimate argument for non-infringement, is that no two users are assigned a single antenna at the same time.⁵⁵ That is, each Aereo antenna can only be used by one Aereo user at any given time, and the data obtained by a particular antenna is not accessible by any other user.⁵⁶

44. *Id.*

45. *Id.* at 377.

46. *Id.* Users are limited to free, over-the-air broadcasting. *Id.*

47. *Id.*; Daniel L. Brenner & Stephen H. Kay, *ABC v. Aereo, Inc.: When Is Internet Distribution a "Public Performance" Under Copyright Law?*, 24 INTELL. PROP. & TECH. L.J. 12 (2012). There is a short delay between the user selecting and the program starting. *Id.*

48. *Am. Broad. Cos.*, 874 F. Supp. 2d at 377.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; Brenner & Kay, *supra* note 47, at 13.

54. *Am. Broad. Cos.*, 874 F. Supp. 2d at 377–78; Brenner & Kay, *supra* note 47, at 13.

55. *Am. Broad. Cos.*, 874 F. Supp. 2d at 378.

56. *Id.* The major argument that Aereo is a loophole business stems from this feature. *See id.*

Once an antenna is selected, the Antenna Server sends two requests: a “tune” request, directing the user’s antenna to “tune into” a particular broadcast frequency band, and a request to the Streaming Server to create a unique directory to store output from the user’s antenna.⁵⁷ The antenna output is then processed into data by a transcoder and sent to the Streaming Server.⁵⁸ The Streaming Server saves the data on a hard disk to file in a previously created directory.⁵⁹ The file is next read into a RAM memory buffer, and once a sufficient amount of data has accumulated, the file is sent back to the user over the Internet.⁶⁰ Any additional data received from the antenna is saved to the disk, read into the RAM memory buffer, and transmitted to the user.⁶¹ The hard disk keeps all of the data while the program is in process, and the RAM memory buffer stores only a small amount of data that is continuously replaced as it moves to the user.⁶²

The process is essentially the same if the user selects the “Record” function.⁶³ The primary difference is that during the “Record” function, the file saved to the hard disk is tagged as permanent and automatically retained.⁶⁴ During the “Watch” function, the file is not automatically retained unless the user clicks “Record” while the program is still open on the user’s web browser.⁶⁵

II. INDUSTRY BACKGROUND

In 1927, Bell Laboratories and the Department of Commerce simultaneously transmitted live picture and voice, creating the first successful television transmission.⁶⁶ In the following years, television turned into an American staple. By 2012, it was estimated that 114.7 million U.S. households owned TVs.⁶⁷ Airwaves have always been considered publicly-owned and are licensed to broadcasters for the benefit of public interest, convenience, and necessity.⁶⁸

Over-the-air television is free to anyone who installs an antenna and

57. *Id.*; Brenner & Kay, *supra* note 47, at 13.

58. *Am. Broad. Cos.*, 874 F. Supp. 2d at 378; Brenner & Kay, *supra* note 47, at 13.

59. *Am. Broad. Cos.*, 874 F. Supp. 2d at 378; Brenner & Kay, *supra* note 47, at 13.

60. *Am. Broad. Cos.*, 874 F. Supp. 2d at 378; Brenner & Kay, *supra* note 47, at 13.

61. *Am. Broad. Cos.*, 874 F. Supp. 2d at 378; Brenner & Kay, *supra* note 47, at 13.

62. *Am. Broad. Cos.*, 874 F. Supp. 2d at 378; Brenner & Kay, *supra* note 47, at 13.

63. *Am. Broad. Cos.*, 874 F. Supp. 2d at 379.

64. *Id.*

65. *Id.*

66. *Communications History, Visionary Period 1880’s Through 1920’s*, FED. COMM’NS COMM’N, <http://transition.fcc.gov/omd/history/tv/1880-1929.html> (last visited Apr. 9, 2013). The first simultaneous transmission of live picture and voice was by Bell Laboratories and the Department of Commerce. *Id.*

67. *Nielsen Estimates Number of U.S. Television Homes to Be 114.7 Million*, NEILSON (May 3, 2011), <http://www.nielsen.com/us/en/newswire/2011/nielsen-estimates-number-of-u-s-television-homes-to-be-114-7-million.html>.

68. See Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162, 47 U.S.C. § 151 (repealed 1934); Amended Answer and Counterclaim at 9, *Am. Broad. Cos.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12-Civ-1543 (AJN)).

connects it to a receiving device.⁶⁹ Originally, cable was used as a means to transfer broadcast television to rural areas unable to pick up antenna signals.⁷⁰ However, cable is now widely used, with most American households using either cable or satellite as their primary source for television. Cable and satellite both offer a wide array of channels—it is estimated that the average household receives 118.6 channels—yet the average viewer watches only about seventeen of these channels.⁷¹

Under the Copyright Act, cable system operators and satellite carriers are required to pay compulsory licensing fees to content owners for the retransmission of broadcast programs.⁷² This means that broadcasters are paid by the cable and satellite companies for retransmissions of the same programs a consumer could pick up for free using an antenna. However, modern TV viewers consider the signal picked up from an antenna technologically inferior and “clumsy,” explaining why most consumers prefer to pay for the extra 101.6 channels they never watch.⁷³

As technology advances, substitutes to cable, satellite, and even basic free-to-air TV have entered the market. Services such as Netflix, Hulu, and Amazon allow consumers to pay monthly subscription fees for access to archived programs in a searchable library of previously aired TV programs and clips.⁷⁴ Many broadcast, and some cable, networks also offer shows online for free shortly after the original airdates.⁷⁵ The devices consumers use to watch programming are also changing. More people are watching shows on laptop computers, tablet devices, and cellular phones, as well as using services such as Slingbox⁷⁶ and Apple TV⁷⁷ to “placeshift” the programs.⁷⁸

A. COPYRIGHT INFRINGEMENT JURISPRUDENCE

To bring a claim of copyright infringement, a plaintiff is required to show: (1) he or she owns a valid copyright in the work, and (2) unauthorized copying or a violation of rights given by the Copyright Act

69. Larry Downes, *Aereo TV: Barely Legal by Design*, HARVARD BUSINESS REVIEW (Mar. 7, 2013, 9:00 AM), blogs.hbr.org/cs/2013/03/aereo_tv_barely_legal_by_desig.html.

70. Carson S. Walker, *A La Carte Television: A Solution to Online Piracy?*, 20 COMM.LAW CONSPICUOUS 471, 472, 474 (2012).

71. *Id.* at 472; see also David Lazarus, *Let's Pay Only for the TV We Watch*, L.A. TIMES (Nov. 12, 2008), <http://articles.latimes.com/2008/nov/12/business/fi-lazarus12>.

72. Mary Rasenberger & Christine Pepe, *Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?*, 59 J. COPYRIGHT SOC'Y 627, 642–43 (2012). Broadcasters must issue these compulsory licenses. See 17 U.S.C. § 111(d) (2006).

73. *Founder Stories*, *supra* note 22; Walker, *supra* note 70, at 472.

74. Scott Hervey & Matt Massari, *New Media Revolutionary or Copyright Infringer?*, 29 ENT. & SPORTS LAW 27 (2011). These services pay a licensing fee for the content they air. *Id.*

75. Walker, *supra* note 70, at 484.

76. See SLINGBOX, <http://www.slingbox.com/> (last visited Apr. 9, 2013).

77. See *Airplay*, APPLE, <http://www.apple.com/appletv/airplay/> (last visited Apr. 9, 2013).

78. Walker, *supra* note 70, at 485. Slingbox is a small box that is hooked up to a user's television and Internet connection that enables the use to receive a video feed in real time on multiple devices such as computers, laptops, tablets, or cellular phones. *Id.* “Placeshifting” provides another way of watching an already existing cable account over broadband internet. *Id.*

occurred.⁷⁹

The Copyright Act gives a copyright owner certain exclusive rights over his or her work, including the right “to perform the copyrighted work publicly.”⁸⁰ The Copyright Act defines “publicly perform” a work as:

(1) to perform or display it at a place open to the public or at any place . . . or (2) to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, *whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.*⁸¹

The second section of the above definition is commonly known as the “Transmit Clause”⁸² and was relevant to the favorable decisions *Cablevision* and *Aereo* received in their respective court cases.⁸³ If a transmission is found to be a public performance under the Transmit Clause, the transmitting party is guilty of copyright infringement; however, if a transmission is not considered a public performance, the party’s actions do not violate the Copyright Act.

In *Cablevision*, the Second Circuit laid out two crucial considerations for analyzing a potential copyright infringement under the Transmit Clause. First, the court found that, for infringement purposes, a transmission of a performance is itself a performance under the Transmit Clause.⁸⁴ The court explained, “in determining whether there has been a public performance, courts are to look to the transmission being made as the performance at issue, rather than simply to whether the public receives the underlying work.”⁸⁵ Second, the court found that the Transmit Clause directs courts to “examine who precisely is ‘capable of receiving’ a particular transmission of a performance” in order to determine if a performance is public.⁸⁶ Thus, in deciding whether a performance is public or private, courts in the Second Circuit must consider both the initial transmission and the ultimate receiver of the program.

B. FROM BETAMAX TO REMOTE DIGITAL RECORDING

*“One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.”*⁸⁷

79. Karl O. Riley, *To Be Fixed or Not to Be: The Seemingly Never-Ending Question of Copyrighted Material*, 8 NW. J. TECH. & INTELL. PROP. 323, 329 (2010).

80. 17 U.S.C. § 106(4) (2012) (emphasis added); *Cartoon Network LP, LLLP v. CSC Holdings (Cablevision)*, Inc., 536 F.3d 121, 126 (2d Cir. 2008).

81. 17 U.S.C. § 101 (2012) (emphasis added).

82. *Cablevision*, 536 F.3d at 134.

83. *See id.*; *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

84. *Cablevision*, 536 F.3d at 134–35, 139; *Am. Broad. Cos.*, 874 F. Supp. 2d at 383.

85. *Am. Broad. Cos.*, 874 F. Supp. 2d at 384–85.

86. *Id.* at 385 (quoting *Cablevision*, 536 F.3d at 135).

87. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (italics added).

Copyright law continually evolves to keep up with advancing technology, balancing the underlying artistic rights of the copyright holder against innovation. This struggle is exemplified by the emergence of new home video recording devices.⁸⁸ Lawsuits seem to follow the introduction of every novel recording device to the marketplace. Aereo's Internet streaming and digital recording technology is just the most recent home video recording device to be called into court.

The first case regarding a home video recording device involved a Videocassette Recorder ("VCR") known as the Sony Betamax.⁸⁹ Using the Betamax, a user could watch live TV while recording another program as well as fast-forward through commercials while watching the recording on the videocassette.⁹⁰ The videocassettes promoted further copying since they could be erased and reused.⁹¹

In *Sony Corp. of Am. v. Universal City Studios, Inc.*,⁹² broadcasters holding the copyrights to the television programs recorded on the Betamax brought a contributory infringement suit against Sony for manufacturing and commercially distributing the Betamax VCR.⁹³ Sony ultimately won the suit by demonstrating that "substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers" and that time-shifting was not likely to cause any harm to "the potential market for, or the value of . . . copyrighted works."⁹⁴ Therefore, Sony, the third-party manufacturer of the device, was exempt from contributory infringement since the underlying and dominant use of time-shifting by the VCR user was not infringing.⁹⁵ The *Sony* court's ultimate holding that "time-shifting is fair use" set the standard for future recording technology.⁹⁶

The next form of home video recording technology to develop was the Set Top Storage Digital Video Recorder ("STS-DVR").⁹⁷ The STS-DVR allowed users to record live television programs by storing digital copies of the program on an internal hard-drive within the DVR device.⁹⁸ Similar to using the VCR, the user could record one program while watching another one live as well as fast-forward and rewind through the recorded event.⁹⁹

88. In this context, I am referring to the whole broad spectrum of at home recorded, including DVR, VCR, etc.

89. *Sony*, 464 U.S. 417.

90. Justin M. Jacobson, *Cablevision's Remote DV-R System and a Solution for the Digital-Recording Age*, 27 *TOURO L. REV.* 461, 466-67 (2011); *Sony*, 464 U.S. at 422.

91. Jacobson, *supra* note 90, at 467; *Sony*, 464 U.S. at 422.

92. *Sony*, 464 U.S. 417.

93. Jacobson, *supra* note 90, at 466; *Sony*, 464 U.S. at 419-20.

94. *Sony*, 464 U.S. at 456; Jacobson, *supra* note 90, at 469.

95. *Sony*, 464 U.S. at 456; Jacobson, *supra* note 90, at 469.

96. *Sony*, 464 U.S. at 423, 444.

97. Riley, *supra* note 79, at 326; Jacobson, *supra* note 90, at 471.

98. *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 612 (S.D.N.Y. 2007); Jacobson, *supra* note 90, at 471-72.

99. Riley, *supra* note 79, at 326-27; *Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 612.

The Remote Service-Digital Video Recorder ("RS-DVR"), the most controversial device, came shortly thereafter. Similar to the VCR and the STS-DVR, the RS-DVR, which is still commonly used, allows users to record live television to view at a later time.¹⁰⁰ However, instead of storing the recorded program on a hard-drive within the DVR, the recorded programming is stored remotely on computer servers stationed at the cable company.¹⁰¹ Each subscriber is given a limited amount of storage space, and only that customer can access his or her own respective storage space.¹⁰²

This form of remote storage led to a slew of litigation against Cablevision Systems Corporation ("Cablevision"), the developer of the RS-DVR technology. Plaintiffs, the producers of copyrighted movies and television programs that provided programs to Cablevision, claimed that the operation of the RS-DVR system directly infringed their copyrights, "both by making unauthorized reproductions, and by engaging in public performance, of their copyrighted works."¹⁰³ The plaintiffs alleged that the RS-DVR allows Cablevision to offer copyrighted programming as "on-demand" without paying for it.¹⁰⁴ The plaintiffs argued that there was a significant legal difference between the VCR and the RS-DVR: the difference between fair use and an unauthorized rebroadcast.¹⁰⁵

The crucial determination in *Cablevision* was whether Cablevision *transmitted a performance* of the copyrighted works *to the public*.¹⁰⁶ Looking to the language of the Transmit Clause and legislative history,¹⁰⁷ the Second Circuit first found that a transmission of a performance is itself a performance.¹⁰⁸ The court then turned to determine who is "capable of receiving" a particular transmission or performance, stating that the "plain language [of the clause] instructs us that," in assessing whether it is to the public, "it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times."¹⁰⁹

100. Riley, *supra* note 79, at 327; *Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 612.

101. Riley, *supra* note 79, at 327; *Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 612.

102. Riley, *supra* note 79, at 327; *Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 612. For a further description of how the RS-DVR system works, see Riley, *supra* note 79, at 327–29.

103. *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121, 123 (2d Cir. 2008).

104. Downes, *supra* note 69.

105. *Id.*

106. *Cablevision*, 536 F.3d at 134. The Second Circuit reviewed the district court on three specific issues of the RS-DVR device: (1) whether the copyrighted materials were "fixed" as defined under the Copyright Act; (2) whether Cablevision made the copies; and (3) whether the transmissions were performed "to the public." *Id.*; Riley, *supra* note 79, at 334–35. This Article only discusses the holding from the third issue since that issue was the relevant question for the Aereo preliminary injunction. For a discussion of the other issues, see Riley, *supra* note 79, at 334–35.

107. See *Cablevision*, 536 F.3d at 135.

108. *Id.* at 134 ("The fact that the statute states 'capable of receiving the performance,' instead of 'capable of receiving the transmission,' underscores the fact that a transmission of a performance is itself a performance.").

109. *Id.*

The court ultimately sided with Cablevision and held that the transmitted performance is not “to the public” because the customer is the only one capable of receiving the playback copy.¹¹⁰ In making this determination, the court only looked to the audience receiving the transmission (the RS-DVR users) rather than the intended audience of the original transmission.¹¹¹ The court further noted that the plaintiffs’ interpretation of the clause would result in every performance being “to the public” and render the “to the public” language of the clause superfluous.¹¹² Ultimately, the court found that the RS-DVR playback did not involve the transmission of a performance “to the public” and did not constitute copyright infringement.¹¹³

III. PRELIMINARY INJUNCTION ANALYSIS

On March 1, 2012, Plaintiffs, a group of corporate entities who engage “in the production, marketing, distribution, and transmission of broadcast television programs,”¹¹⁴ filed two complaints against Aereo, alleging that Aereo’s “service unlawfully captures broadcast television signals in the New York City area, including at least some corresponding to television programs on which Plaintiffs hold the copyright, and provides them over the Internet to Aereo subscribers.”¹¹⁵ The Plaintiffs asserted multiple theories of copyright infringement liability in their complaints, including contributory infringement, infringement of the right of reproduction, and infringement of the right of public performance.¹¹⁶

On March 13, 2012, in an attempt to stop Aereo from performing its services, the Plaintiffs moved for a preliminary injunction on the grounds that Aereo was “directly liable for copyright infringement by *publicly performing Plaintiffs’ copyrighted works*.”¹¹⁷ This motion challenged only

110. Riley, *supra* note 79, at 337; *Cablevision*, 536 F.3d at 135–37.

111. Riley, *supra* note 79, at 337; *Cablevision*, 536 F.3d at 136–37.

112. Riley, *supra* note 79, at 337; *Cablevision*, 536 F.3d at 135–36 (“Doubtless the potential audience for every copyrighted audiovisual work is the general public.”).

113. *Cablevision*, 536 F.3d at 134. The *Cablevision* court also established two other principles relevant here. The court distinguished *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), and *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991), based on the fact that those cases involved the retransmission of a copyrighted work from a single master copy rather than unique copies created for each viewer. *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 384 (2012); *Cablevision*, 536 F.3d at 138–39. The Second Circuit supported such distinction in the Aereo appeal, endorsing the view that public performance occurs when an individual videocassette repeatedly plays for different members of the public at different times. *See WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013). The *Aereo* court also rejected the argument from the broadcasters that the upstream content providers transmitted the copyrighted work to Cablevision and other cable companies, which Cablevision retransmitted to its subscribers, thus making the initial transmission the relevant performance and that performance should be treated as the performance to the public. *Cablevision*, 536 F.3d at 135–36. The *Cablevision* court disagreed and stated that courts should look “downstream, rather than upstream or laterally, to determine whether any link in a chain of transmissions made by a party constitutes a public performance.” *Am. Broad. Cos.*, 874 F. Supp. 2d at 385; *Cablevision*, 536 F.3d at 136–37.

114. *Am. Broad. Cos.*, 874 F. Supp. 2d at 375.

115. *Id.* at 375–76.

116. *Id.*

117. *Id.* (emphasis added).

Aereo’s “Watch” function—those aspects of Aereo’s service “that allow subscribers to view Plaintiffs’ copyrighted television programs contemporaneously with the over-the-air broadcast of these programs.”¹¹⁸ The Plaintiffs alleged that Aereo’s broadcast service violated their exclusive copyrights.¹¹⁹ They claimed that Aereo retransmits their copyrighted programming without licensed permission and without payment to the television networks,¹²⁰ and Aereo’s simultaneous performance of programs to its subscribers constitutes unauthorized public performances in violation of the Copyright Act.¹²¹

Supporting their motion, the Plaintiffs first argued that Aereo’s antennas do not each operate as independent antennas, but instead function collectively as a single antenna, aided by a shared metallic substructure.¹²² The Plaintiffs also attempted to distinguish Aereo’s argument—that the performances are private by way of user-individual antennas—by referencing the Copyright Act’s language.¹²³ They claimed that the Copyright Act “explicitly provides that a transmission of a performance is public even if members of the public receive the transmission in separate places and at different times,”¹²⁴ making it irrelevant that Aereo offers an individual antenna because the retransmissions go to a public audience of Aereo subscribers.¹²⁵

The Plaintiffs also claimed that time-shifting was not applicable.¹²⁶ They asserted that Aereo subscribers watch the programs as they are broadcast, and thus, the viewers are not using copies created for “time-shifting,” and Aereo’s copies do not “break the chain of the over-the-air transmission.”¹²⁷ Instead, the Plaintiffs argued, Aereo engages in a public performance that “emanates from the original broadcast signal” passed along to the public.¹²⁸ Attempting to distinguish the *Cablevision* decision, the Plaintiffs claimed that Aereo’s copies merely facilitate the transmission of a single master copy rather than act as copies from which a distinct transmission should be made.¹²⁹

The Plaintiffs further claimed that Aereo’s service harms broadcasters’ infrastructure for delivering online content to customers via their own websites and authorized online networks. They argued that Aereo not only hurts the broadcaster, but also harms other companies, such as Hulu and iTunes, who operate authorized online television broadcast

118. *Id.*; see also Rasenberger & Pepe, *supra* note 72.

119. See *supra* Part II.A.; 17 U.S.C. § 106 (2012).

120. See McCallion, *supra* note 12.

121. *Id.* at 70.

122. *Am. Broad. Cos.*, 874 F. Supp. 2d at 379.

123. McCallion, *supra* note 12, at 70.

124. *Id.*; 17 U.S.C. § 101 (2012); see also *supra* Part II.A.

125. McCallion, *supra* note 12, at 70.

126. *Id.*

127. Rasenberger & Pepe, *supra* note 72, at 627.

128. *Am. Broad. Cos.*, 874 F. Supp. 2d at 385.

129. *Id.*

services.¹³⁰

Aereo's founders responded to the Plaintiffs' arguments with the assertion that they are providing consumers with technology that allows them to do only what they are already legally entitled to do.¹³¹ The founders cited the Radio Act of 1927 to demonstrate that the airwaves are owned by the public and licensed to broadcasters for the benefit of the public interest.¹³² This, in turn, allows Aereo to proceed without licenses because Aereo merely enables users to legally access free, over-the-air, television broadcasts using an antenna.¹³³ Since each antenna is prescribed to only one user, and only that user has access to it, the retransmissions are "private." Thus, Aereo argued, the service does not violate a copyright holder's exclusive rights.¹³⁴

Relying on *Sony*, Aereo further contended that consumers have a "well established right to record for their own personal use the programming content to which they have legal access."¹³⁵ Since each antenna functions independently, even if the court were to adopt the Plaintiffs' view that the copies are legally significant, "an injunction still should not issue because each user is receiving a distinct transmission generated by his or her own individually rented antenna."¹³⁶

A. APPLICATION OF *CABLEVISION* – DISTRICT COURT

Bound by the *Cablevision* decision, the district court held that the Plaintiffs failed to show a likelihood of success on the claim. Although the presiding judge agreed that the Plaintiffs demonstrated irreparable harm, the judge found that the broadcasters did not show that a balance of hardships decidedly tipped in its favor.¹³⁷

In the words of Daniel Brenner and Stephen Kay, "[t]he facts related to how programs are transmitted and received are key to the infringement

130. McCallion, *supra* note 12. Netflix and Amazon would also fall into this category. Plaintiffs license their content to authorized online broadcast services and are therefore making a profit from these ventures. This consideration would go the public interest factor in a preliminary injunction analysis.

131. McCallion, *supra* note 12, at 69–70.

132. Answer and Counterclaim at 9, *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12-Civ-1543 (AJN)).

133. McCallion, *supra* note 12, at 69–70; Amended Answer and Counterclaim at 9, *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12-Civ-1543 (AJN)). Diller said to CBS's Leslie Moonves that he would be willing to pay retransmission fees when and if CBS could get Radio Shake to pay retransmission fees for the antennas it sells. Carr, *supra* note 26.

134. McCallion, *supra* note 12, at 69–70; *see also* Amended Answer and Counterclaim at 9, *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12-Civ-1543 (AJN)) ("Companies that merely supply remote technological means that customers can use to make personal recordings and play them back are not liable for copyright infringement as to the recorded programming content.").

135. Amended Answer and Counterclaim at 9, *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12-Civ-1543 (AJN)). *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

136. *Am. Broad. Cos.*, 874 F. Supp. 2d at 385.

137. *See id.* at 373.

arguments made in the Aereo case.”¹³⁸ Although the parties did not significantly dispute how the technology worked, they disagreed over the function of Aereo’s antennas.¹³⁹ If, as the Plaintiffs asserted, the antennas were found to function as one big antenna, the case would have ended there. Since the *Cablevision* court, building off *Sony*, found the RS-DVR system lawful because it recorded a single program for each individual user, as opposed to creating one master copy accessible by all users, Aereo’s individualistic antenna saved the company from liability.¹⁴⁰ If the antennas worked as a group, such characteristic would have likely taken Aereo out of the *Cablevision/Sony* prevue and out of the scope of fair use.

The Plaintiffs even submitted expert testimony in support of their contention that Aereo’s antennas functioned collectively as a single antenna, aided by a shared metallic substructure.¹⁴¹ However, they did not present their expert as a witness at the hearing, and the court was troubled with the lack of detail in the expert’s methodology.¹⁴² The court ultimately found Aereo’s chief technology officer and experts more persuasive, with their demonstration that the proximity of one antenna to another did not improve signal reception.¹⁴³ The court stated, “[t]ests performed at the Aereo site demonstrate that the signal received by Aereo’s antennas is 1,000 times stronger than that needed for reliable reception, allowing Aereo to circumvent the difficulties associated with creating small antennas.”¹⁴⁴ The court found that “each antenna separately receives the incoming broadcast signal, rather than functions collectively with the other antennas or with the assistance of the shared metal substructure,” and that each antenna transmits one signal to an individual user and stores data independently.¹⁴⁵

(1) Preliminary Injunction Application

A preliminary injunction is considered an extraordinary remedy.¹⁴⁶ In a copyright infringement case, the plaintiff must establish:

(1) [A] substantial likelihood that the copyright owner will prevail on the merits; (2) a substantial threat the copyright owner will suffer irreparable harm if the preliminary injunction is not issued; (3) the threatened injury to the copyright owner outweighs the threatened harm the injunction may do to the alleged infringer; and (4) granting the

138. Brenner & Kay, *supra* note 47, at 12.

139. *Am. Broad. Cos.*, 874 F. Supp. 2d at 376–79.

140. Downes, *supra* note 69 (“If a million customers each asked Cablevision to record the season finale of ‘Top Chef,’ well, Cablevision’s remote DVRs would make a million separate copies of the show as it was aired and store them on the remote DVRs. When each individual later pressed play, they were watching the copy ‘they’ recorded. Just like a home DVR.”).

141. *Id.* at 379–80. Dr. John Volakis claims, “the antennas are packed on the board so close together on the board that the incoming signal ‘does not see the loops as separate elements, but rather as one continuous piece of metal,’” which is further aided by the metal substructure. *Id.*

142. *Id.* at 380–81.

143. *Id.*

144. *Id.*

145. *Id.* This conclusion is significant in framing the rest of the decision since this methodology brings Aereo clearly within the confines of the *Cablevision* decision.

146. *Id.* at 376.

injunction is in the public interest.¹⁴⁷

However, even if a plaintiff cannot demonstrate the requisite likelihood of success on the merits, a preliminary injunction may still be granted if the plaintiff is able to show “a serious question going to the merits to make them a fair ground for trial, with a balance of hardship tipping decidedly in the plaintiff’s favor.”¹⁴⁸

i. Likelihood of Success

Distinguishing Aereo’s service from the RS-DVR found lawful in *Cablevision* was the crux of the Plaintiffs’ argument. In *Cablevision*, each RS-DVR playback transmission was made to a single subscriber using a single unique copy produced by that subscriber.¹⁴⁹ The presiding judge found that Aereo’s system is “materially identical to that in *Cablevision*, suggesting that the copies Aereo creates are as significant as those created in *Cablevision*,” and that the overall factual similarity suggests Aereo’s service is lawful.¹⁵⁰ The Aereo service creates a unique copy of each program for each user requesting to watch the program. Thus, since the single-copy-based transmission is only sent to one subscriber, the transmission is not a public performance.¹⁵¹

Aereo’s technology seems to fit squarely within the *Cablevision* framework. “It appears that Aereo engineers have designed a system to . . . [produce] one copy per transmission (as opposed to one copy being the source basis of many transmissions) to bring it outside the ‘public performance’ definition.”¹⁵² Critics of the service claim that the one antenna per user model is not necessary to function and the technology was crafted solely to satisfy the legal requirement that the individual user make and access her own copy.¹⁵³ Critics assert that the real innovation is not Aereo’s dime-sized antenna, but Aereo’s “close reading of relevant case law, and a business model that just barely extends existing precedents to

147. HOWARD B. ABRAMS, LAW OF COPYRIGHT § 17:33 (2012). The presiding judge relied on the Supreme Court decision of *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), for establishing the preliminary injunction standards:

A preliminary injunction is an extraordinary remedy, granted only if the plaintiff establishes that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Am. Broad. Cos., 874 F. Supp. 2d at 376 (internal quotations omitted); see also *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597, 600 (5th Cir. 1996); *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 262 (6th Cir. 1988); *Plains Cotton Co-op. Ass’n of Lubbock, Texas v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1259 (5th Cir. 1987); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 613 (7th Cir. 1982).

148. *Am. Broad. Cos.*, 874 F. Supp. 2d at 376 (quoting *Metro Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010)).

149. *Am. Broad. Cos.*, 874 F. Supp. 2d at 386; *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121, 139 (2d Cir. 2008).

150. *Am. Broad. Cos.*, 874 F. Supp. 2d at 386.

151. Brenner & Kay, *supra* note 47, at 14.

152. *Id.*

153. Downes, *supra* note 69 (claiming that *Cablevision* could have recorded one stream of a program and played it back to all its customers instead of creating individual copies).

allow Aereo to operate without paying any licensing fees.”¹⁵⁴

Alternatively, many argue that there is nothing new or transformative about Aereo’s technology¹⁵⁵ and that Aereo does not disrupt the current cable system.¹⁵⁶

Aereo’s loophole “advantage is based on the assumption that . . . ‘one copy per subscriber’ is the best way to interpret the ‘transmit’ clause.”¹⁵⁷ Aereo’s founder, Chet Kanojia, even stated he was following the *Cablevision* decision and structured Aereo’s technology around the court’s holding.¹⁵⁸

Indeed, the *Aereo* court was unable to distinguish the Aereo service from the RS-DVR in *Cablevision*.¹⁵⁹ The court considered the Plaintiffs’ argument that Aereo’s copies are distinct from those at issue in *Cablevision* because Aereo allows users to view television programs almost simultaneously with the initial broadcast.¹⁶⁰ The Plaintiffs contended that in order to turn a facilitating copy into a transmission copy, any time-shifting must be “complete,” meaning there can be no overlap between the over-the-air broadcast and the consumer playback of the recorded copy.¹⁶¹ The Plaintiffs claimed that only complete time-shifting limits the potential audience to render the performance non-public.¹⁶² Thus, since Aereo’s programming can be viewed almost contemporaneously with live broadcasting, Aereo’s service should have violated the Copyright Act’s Transmit Clause.¹⁶³

The court criticized the Plaintiffs’ distinctions:¹⁶⁴ “The Court cannot accept [Plaintiffs’] reading of *Cablevision*, which applies controlling significance to facts on which the Second Circuit did not rely, requests that

154. *Id.* (“So what’s the real innovation here? Is it the company’s unique combination of cheap, miniature antennas and cheap data storage controlled by proprietary software and combined to create a cloud-based service that piggybacks on the customer’s existing Internet connections to simulate a small cable company? Or is the innovation the close reading of relevant case law, and a business model that just barely extends existing precedents to allow Aereo to operate without paying any licensing fees to the content providers?”).

155. Downes, *supra* note 69 (describing Aereo’s service as a “unique combination of cheap, miniature antennas and cheap data storage controlled by proprietary software and combined to create a cloud-based service that piggybacks on the customer’s existing Internet connections to simulate a small cable company”); *see also* Rayburn, *supra* note 14.

156. Rayburn, *supra* note 14. Aereo has implied that a big market to them would be about 300,000 users; however, the current market of cable and TV satellite users is over 100 million, meaning “[t]hat’s not even one half of one percent of the total number of cable/satellite TV subscribers in America.” *Id.*

157. Brenner & Kay, *supra* note 47, at 14.

158. Sandoval, *supra* note 16 (“[W]hen the appellate court ruled that the network DVR was legal I said I just found my answer because if network DVR is legal and if I can provide network DVR with an antenna I solved my broadcast access problem.”).

159. *Am. Broad. Cos.*, 874 F. Supp. 2d at 387.

160. *Id.*

161. *Id.*

162. *Id.* at 394.

163. Rasenberger & Pepe, *supra* note 72, at 641. The plaintiffs attempted to distinguish the facts of *Cablevision* on the grounds that Aereo’s subscribers are watching the programs as they are still being broadcast, they are not using the copies Aereo creates for “time-shifting” as the customers were in *Cablevision*. *Id.*

164. *Am. Broad. Cos.*, 874 F. Supp. 2d at 387.

this Court read volumes into *Cablevision*'s silence, and has no foundation in the articulated reasoning on which the Second Circuit's decision was actually grounded."¹⁶⁵ The appellate court's holding in *Cablevision* regarding the meaning of the Transmit Clause focused on who was "capable of receiving" a given performance in determining whether that performance was "to the public."¹⁶⁶ The Second Circuit never mentioned time-shifting as a reason to conclude that the performances were non-public. According to the district court, "nothing in the Second Circuit's analysis indicates that [the incomplete time-shifting] distinction is material."¹⁶⁷ Thus, nothing in the *Cablevision* decision suggested that whether a performance is public depends on the time in which individuals receive the transmission. The court also declined the Plaintiffs' argument distinguishing *Cablevision* on the ground that the court ruled on the lawfulness of a system with built-in time shifting and thus never addressed the case where programming could be viewed without time-shifting.¹⁶⁸ Finally, the court stated that the Plaintiffs' arguments were simply inconsistent with the reasoning of *Cablevision*:

Whether a user watches a program through Aereo's service as it is being broadcast or after the initial broadcast ends does not change that the transmission is made from a unique copy, previously created by that user, accessible and transmitted only to that user, the factors *Cablevision* identified as limiting the potential audience.¹⁶⁹

Unsurprisingly, the Plaintiffs' argument that time-shifting was defined in *Sony* also failed at the district court. The Plaintiffs reasoned that since *Sony* defined time-shifting and the technology in *Sony* only allowed for complete time-shifting, then complete time-shifting is required.¹⁷⁰ The court disagreed, stating that "[n]othing prevents a person from recording the first half of a show on a VCR, stopping that recording, and watching that recording while the second half of that program continues to be broadcast."¹⁷¹ Ultimately, the Plaintiffs were forced to concede that *Sony* focused on fair use and infringement of the right of reproduction, not on whether a copy sufficiently "breaks the chain of transmission" in order to avoid liability as a public performance.¹⁷²

Though unsuccessful at the district court level, the Plaintiffs preserved their arguments for appeal, hoping to find themselves in front of a more sympathetic audience in the Second Circuit.¹⁷³

165. *Id.* at 388.

166. *Id.*

167. *Id.*

168. *Id.* at 389.

169. *Id.*

170. *Id.* at 393.

171. *Id.*

172. *Id.* at 392.

173. Judge Chin, who originally found *Cablevision* to constitute Public performance, now sits on the Second Circuit. See Benjamin Weisler, *Appeals Court Judge and U.S. Attorney Are Confirmed*, N.Y. TIMES (Apr. 23, 2010), http://www.nytimes.com/2010/04/23/nyregion/23appoint.html?_r=0.

ii. Irreparable Harm

After the Plaintiffs failed to distinguish the Aereo technology from that in *Cablevision*, the district court could have concluded the analysis. However, recognizing the significance of the decision, the court chose to discuss the remaining preliminary injunction factors.¹⁷⁴ The second preliminary injunction factor is whether the Plaintiffs would suffer irreparable harm in the absence of an injunction.¹⁷⁵ The court noted that the historic tendency to issue a preliminary injunction in copyright cases reflects that “‘most copyright plaintiffs who have shown a likelihood of success on the merits would . . . be irreparably harmed absent preliminary injunctive relief.’”¹⁷⁶ However, in this case, the court found the inverse; although the Plaintiffs would likely suffer imminent irreparable harm, they had not succeeded on the merits.¹⁷⁷

To establish irreparable harm, the court agreed with many of the Plaintiffs’ claims. First, the court agreed that the Plaintiffs’ Neilson ratings,¹⁷⁸ which do not capture Aereo users, could be artificially lowered as a result of Aereo siphoning viewers away from traditional broadcasting.¹⁷⁹ Since high Neilson ratings are directly correlated with the ability to monetize broadcast programming by selling advertising space, the Plaintiffs would likely suffer from lower ratings.¹⁸⁰ Next, the court agreed that Aereo poaches viewers from cable companies that license content from the Plaintiffs, which could damage the Plaintiffs’ ability to negotiate retransmission agreements.¹⁸¹ These retransmission agreements add up to billions of dollars of revenue for broadcasters; therefore, the broadcasters could be damaged if they had to make concessions to licensees for the decrease in viewership.¹⁸² Finally, the court supported the Plaintiffs’ argument that loss of control over their content was likely to cause irreparable harm.¹⁸³ Aereo’s services may damage “Plaintiffs’ relationships with content providers, advertisers, or licensees to the extent that Aereo’s internet streaming of Plaintiffs’ programs causes Plaintiffs to violate agreements with these entities.”¹⁸⁴

174. *Am. Broad. Cos.*, 874 F. Supp. 2d at 397–98. Plaintiffs did in fact seek an interlocutory appeal. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

175. *Am. Broad. Cos.*, 874 F. Supp. 2d at 397 (“The relevant harm is the harm that (a) occurs to the parties’ legal interests and (b) cannot be remedied after a final adjudication whether by damages or a permanent injunction.”) (quoting *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010)); see also *ABRAMS*, *supra* note 148.

176. *Am. Broad. Cos.*, 874 F. Supp. 2d at 397.

177. *Id.* (“The evidence establishes that Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction.”) *Cablevision* bound the court’s decision on the merits. See *supra* Part III.A.

178. *Neilson Ratings*, WIKIPEDIA, http://en.wikipedia.org/wiki/Nielsen_ratings (last visited Nov. 19, 2013).

179. *Am. Broad. Cos.*, 874 F. Supp. 2d at 397–98.

180. *Id.* at 398.

181. *Id.*

182. *Id.*

183. *Id.* at 399.

184. *Id.*

Some of the Plaintiffs' claims for harm were nevertheless rejected.¹⁸⁵ The court rejected the assertion that free broadcast of major television events, such as the Super Bowl, would disappear since "there [was] no evidence such harm would actually occur during the pendency of this litigation."¹⁸⁶ The court further questioned whether Aereo harms the Plaintiffs' ability to enter the mobile viewing market.¹⁸⁷ Ultimately, the court found that the Plaintiffs' "showing of imminent irreparable harm [was] substantial, but not overwhelming."¹⁸⁸

It is understandable that the court found the Plaintiffs would suffer some irreparable harm from Aereo's service. Although Aereo's subscribers have access to free over-the-air television, it was established that very few would access this service using a large antenna and instead would pay for cable. Aereo's service potentially deprives the Plaintiffs of future customers, as well as current customers, who switch to Aereo's platform. Furthermore, Plaintiffs do not receive any compensation from Aereo for the retransmission of their broadcast. Broadcasters are not necessarily opposed to Aereo's service and technology, but assert that they should be compensated.¹⁸⁹

iii. Balance of Hardships

The third factor in a preliminary injunction analysis is the balance of hardships.¹⁹⁰ An injunction will only issue if the balance of hardships decidedly tips in favor of the plaintiff.¹⁹¹

The *Aereo* court compared the irreparable harms suffered by the Plaintiffs to potential harms Aereo would suffer if the Plaintiffs were successful in obtaining a preliminary injunction.¹⁹² Aereo identified several potential harms, the primary one being that an injunction could end Aereo's business.¹⁹³ At the time of the hearing, Aereo only had enough working capital to continue operating for about six to seven months without substantial further investment. It would be unlikely for Aereo to receive additional investment if the court granted the injunction. Aereo also highlighted the substantial labor and capital already invested in its business, all of which would be lost if the injunction issued.¹⁹⁴ Aereo further claimed

185. *Id.* ("The Court does not . . . believe that Plaintiffs will suffer the full magnitude of their claimed irreparable harm.")

186. *Id.* Judge Nathan notes specifically that Broadcasters have a nine-year contract with the Super Bowl. *Id.*

187. *Id.* at 400.

188. *Id.*

189. *See Carr, supra* note 26.

190. *Am. Broad. Cos.*, 874 F. Supp. 2d at 402; *see also* ABRAMS, *supra* note 148.

191. *Am. Broad. Cos.*, 874 F. Supp. 2d at 402; *see also* ABRAMS, *supra* note 148.

192. *Am. Broad. Cos.*, 874 F. Supp. 2d at 402-03. *See supra* Part III.A.1.ii for a discussion of the Plaintiffs' hardships.

193. *Am. Broad. Cos.*, 874 F. Supp. 2d at 402.

194. *Id.* at 402-03 ("A majority of Aereo's employees left jobs at other companies in order to come to Aereo . . . and would be likely to seek other employment should an injunction issue." "The development of Aereo's antennas and selecting a site for Aereo's facilities required substantial investment.").

that an injunction would "damage its goodwill with its customers, defeat its substantial investment in launching its service, and diminish its competitive advantage in launching a unique and innovative product."¹⁹⁵ The court found that in light of Aereo's evidence, and when balanced against the Plaintiffs hardships, "the balance . . . certainly does not tip 'decidedly' in favor of Plaintiffs."¹⁹⁶

The Plaintiffs' only rebuttal against Aereo's claims of hardship was proposing that Aereo's harms are not cognizable because Aereo's business is based on infringement.¹⁹⁷ The Plaintiffs relied on *WPIX, Inc. v. ivi, Inc.*,¹⁹⁸ in which the court issued a preliminary injunction banning defendant iviTV ("ivi") from continuing its service.¹⁹⁹ The *WPIX* court first determined that ivi had infringed plaintiffs' copyrights; therefore, "it follow[ed] that ivi is not legally harmed by the fact that it cannot continue streaming plaintiff's programming, even if this ultimately puts ivi out of business."²⁰⁰ The *Aereo* court, however, distinguished this decision because it was founded on at least a strong showing of a preliminary likelihood of success, "if not a firm conclusion of liability," and that *WPIX* "[did] not adequately contemplate the possibility that the infringer's service may be lawful."²⁰¹ In *Aereo*, the court already concluded that Aereo's service was lawful, and therefore it could not disregard the potential harms of an injunction.²⁰²

iv. Public Interest

The final factor in the preliminary injunction analysis is whether an injunction would disserve the public interest.²⁰³ In *Aereo*, the court found that the public would not be disserved by an injunction,²⁰⁴ holding that "[t]here is a strong public interest in the copyright system's function of motivating individuals to make available their works and increase the store of public knowledge."²⁰⁵

The court found that the Plaintiffs made a strong argument to uphold the copyright system and protection of copyrighted content. The Plaintiffs argued that Aereo and other services trying to bypass the current industry model jeopardize the creation of such content.²⁰⁶ The court was unimpressed with Aereo's argument that the public would be disserved

195. *Id.* at 403.

196. *Id.*

197. *Id.*

198. 765 F. Supp. 2d 594 (S.D.N.Y. 2011).

199. *Id.* See *infra* Part IV.A for discussion on iviTV.

200. *Am. Broad. Cos.*, 874 F. Supp. 2d at 403 (quoting *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 620–21 (S.D.N.Y. 2011)).

201. *Id.* at 403.

202. *Id.*

203. *Id.*; *Ebay, Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006); see also *ABRAMS*, *supra* note 148.

204. *Am. Broad. Cos.*, 874 F. Supp. 2d at 404.

205. *Id.* (citing *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010)).

206. *Id.* at 404.

because “the public has an interest in the availability of the broadcast and the free receipt of Plaintiffs’ content in the marketplace of ideas.”²⁰⁷ Pointing to various other lawful methods of receiving the Plaintiffs’ content, the court stated that “[t]here is logical gap between any public interest in receiving broadcast television signals generally and the public interest in receiving them from Aereo’s particular service.”²⁰⁸ Aereo’s argument that free broadcast TV is in the public interest also failed because Aereo, itself, is a business that does not provide free access.²⁰⁹

Even though Aereo charges for its service, companies similar to Aereo that offer new platforms to viewers are arguably greatly serving the public interest. This argument raises the ultimate debate over whether Aereo’s antennas are actually innovative, or if the real innovation stems from the reading of the law.

The *Aereo* court’s decision to analyze all four factors applicable in a preliminary injunction action offers all interested parties insight into how one court views Aereo’s technology, demonstrating which arguments the court finds strong and which lack merit. Even though Aereo was able to overcome the preliminary injunction action in district court, that was only the first battle in an ongoing war.

B. APPLICATION OF *CABLEVISION* – SECOND CIRCUIT

After losing the preliminary injunction, the Plaintiffs moved for an interlocutory appeal in the Second Circuit, and the case was briefed on an expedited schedule.²¹⁰ Although the Plaintiffs found an ally in Second Circuit judge Denny Chin, the majority felt bound by the *Cablevision* decision, and on April 1, 2013, the court upheld Aereo’s service as lawful.²¹¹

(1) *Cablevision*’s Interpretation of the Transmit Clause

The Second Circuit reiterated that the “transmit clause directs us to examine who precisely is ‘capable of receiving’ a particular transmission of a performance.”²¹² The RS-DVR system in *Cablevision* did not constitute public performance because: (1) the RS-DVR system created unique copies and (2) each RS-DVR transmission was generated from a unique copy. The potential audience of each RS-DVR transmission was only a single *Cablevision* subscriber; thus, the transmission was not “made to the

207. *Id.*

208. *Id.* The various lawful methods included standard broadcast transmission, cable television, and licensed Internet streaming sites. *Id.*

209. *Id.* (“The same logic would support a finding that the public interest favors imposing no copyright restrictions on any form of redistribution of Plaintiff’s broadcast television, as unrestrained piracy of that content would also increase public access to content broadcast over the free public airwaves.”).

210. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 682 (2d Cir. 2013).

211. *Id.* at 696.

212. *Id.* at 687.

public."²¹³

(2) *Cablevision's* Application to Aereo's System

The Second Circuit explicitly stated that the same features present in *Cablevision's* RS-DVR system were present in Aereo's system.²¹⁴ "The potential audience of each Aereo transmission is the single user who requested that a program be recorded," just like in *Cablevision*.²¹⁵ The Plaintiffs offered various arguments in an attempt to distinguish Aereo from *Cablevision*, but the majority of the Second Circuit was not persuaded. The Plaintiffs first argued that the issue in *Cablevision* was whether *Cablevision* needed an additional license to retransmit the programs recorded by the RS-DVR.²¹⁶ The Second Circuit rejected this²¹⁷ and firmly couched the issue as whether Aereo's retransmissions are public performances.²¹⁸ If they were, Aereo did not need a license.²¹⁹

The Plaintiffs' second argument was that discrete transmissions should be aggregated to determine whether such transmissions are public performances.²²⁰ The argument was broken down into two aspects: (1) since Aereo's discrete transmissions enable members of the public to receive "the same performance," the transmissions are made "to the public;" and (2) the Copyright Act requires that all of Aereo's discrete transmissions to the public "be aggregated and viewed collectively as constituting a public performance."²²¹ The Second Circuit found that both aspects of this argument were foreclosed by the *Cablevision* decision. As to the first aspect, the court stated that the Plaintiffs' reading was "nothing more than the *Cablevision* plaintiffs interpretation of the Transmit Clause," an approach that was explicitly rejected by the *Cablevision* court.²²² For the second element to be persuasive, the court would have had to find that aggregating transmissions was not foreclosed by *Cablevision*. The Plaintiffs' argued that because *Cablevision* only held that transmissions of the same performance or work made by different entities should not be aggregated, those made by the same entity should be aggregated.²²³ In

213. *Id.* at 689.

214. *Id.* at 690.

215. *Id.* ("When an Aereo customer elects to watch or records a program using either the "Watch" or "Record" features, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy.").

216. *Id.*

217. *Id.* ("*Cablevision* did not hold that *Cablevision's* RS-DVR transmissions were licensed public performances; rather it held they were not public performances.").

218. *Id.* ("Whether Aereo has a license is not relevant to whether its transmissions are public and therefore must be licensed.").

219. *Id.*

220. *Id.*

221. *Id.* at 690–91.

222. *Id.* at 690. Plaintiffs again attempt to equate Aereo's transmissions with the original broadcast rather than treating them as independent performances. *Id.*

223. *Id.* at 691.

rejecting this, the court concluded that following the Plaintiffs' logic would have required it to aggregate Cablevision's distinct RS-DVR transmissions, completely contradicting the court's previous decision.²²⁴ The court also stressed that *Cablevision* clarified that the relevant examination under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work. Yet, the only reason the Plaintiffs presented for aggregating Aereo's discrete transmissions was that they are of the same underlying work.²²⁵ Thus, the court concluded that they could not "accept Plaintiffs' arguments that Aereo's transmissions to a single Aereo user, generated from a unique copy created at the user's request and only accessible that user, should be aggregated for the purpose of determining whether they are public performances."²²⁶

The Plaintiffs next tried to differentiate Aereo from Cablevision by claiming Aereo's copies are merely a device by which Aereo enables its users to watch nearly live TV, while Cablevision's copies can only serve as the source of a transmission of a program after the original live broadcast had finished.²²⁷ That is, they claimed that Cablevision's copies "broke the continuous chain of retransmission to the public" in a way that Aereo's copies do not.²²⁸ The Plaintiffs argued that Aereo's copies are more analogous to temporary buffer copies created by Internet streaming, a process the Second Circuit has upheld as a public performance.²²⁹ The court denied this argument for two reasons. First, Aereo's copies allow the user to exercise the same control over their playback as the RS-DVR copies in *Cablevision*; thus, Aereo's copies have the same legal significance.²³⁰ Second, each Aereo antenna is assigned to an individual user and each copy of a program is only accessible by that individual user.²³¹ Thus, "the potential audience of each of Aereo's transmission was the single user to whom each antenna was assigned,"²³² similar to a transmission picked up from an individual's rooftop antenna and displayed in his living room.²³³ "Plaintiffs have presented no reason why the result should be any different

224. *Id.* ("Plaintiffs provide no reason why Aereo's multiple, audience-of-one transmissions of unique copies of the same underlying program should be aggregated but not Cablevision's multiple, audience-of-one transmissions of unique copies of the same underlying program.").

225. *Id.*

226. *Id.* at 691.

227. *Id.* at 691–92. Plaintiffs also argued, along similar lines, that the incomplete/complete time-shifting distinguished *Cablevision*, just as they did in front of the district court. *Id.* The Second Circuit rejected this argument as well. *Id.*

228. *Id.* at 692.

229. *Id.*; see also *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012). See *infra* Part IV.A for discussion about ivi technology and court holding.

230. *WNET*, 712 F.3d at 692 ("[T]he Aereo user selects what program he wishes a copy to be made of and then controls when and how that copy is played. This second layer of control, exercised *after* the copy has been created, means that Aereo's transmissions from the recorded copies cannot be regarded as simply one link in a chain of transmission, giving Aereo's copies the same legal significant as the RS-DVR copies in *Cablevision*.").

231. *Id.* at 693.

232. *Id.*

233. *Id.*

when that rooftop antenna is rented from Aereo and its signal transmitted over the internet: it remains the case that only one person can receive that antenna’s transmissions.”²³⁴ The entire process “has a potential audience of only one Aereo customer.”²³⁵

Finally, “Plaintiffs also [made] much of the undisputed fact that Aereo’s system was designed around the *Cablevision* holding.”²³⁶ The Plaintiffs emphasized that Aereo’s system specifically creates identical copies of the same programming for every user in order to avoid copyright liability.²³⁷ The Second Circuit found this argument to be misconstruing precedent: “[T]hat Aereo was able to design a system based on *Cablevision*’s holding to provide its users with nearly live television over the internet is an argument that *Cablevision* was wrongly decided; it does not provide a basis for distinguishing *Cablevision*.”²³⁸ The court noted that Aereo is not the first to design systems to avoid copyright liability.²³⁹

(3) Judge Chin’s Dissent

Although Aereo was able to overcome the interlocutory appeal and win over the majority of the Second Circuit, Judge Chin was not convinced. His dissent claimed that Aereo’s technology platform is a sham,²⁴⁰ stating that Aereo has “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.”²⁴¹ Judge Chin believed that Aereo’s service fits within the definition of the Transmit Clause’s public performance requirement.²⁴² He reasoned that Aereo’s system of thousands of antennas is a “device or process,” which Aereo uses to receive copyrighted images and sounds and “transmit or otherwise communicate” them to Aereo subscribers.²⁴³ Judge Chin claimed that “[w]hat Aereo is doing is not in any sense ‘private.’”²⁴⁴ Couched in these terms, Judge Chin

234. *Id.*

235. *Id.* Plaintiffs final argument is that Aereo’s system is functionally equivalent to a cable television provider, thus their transmissions cannot be public performances. *Id.* The court does not go into a detailed analysis on this issue, but it seems to have settled that the antenna function distinguishes Aereo from a cable service and analyzes it to a roof antenna, as well as the control a user has over the copy.

236. *Id.* at 694.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 697. As mentioned, Judge Chin was appointed to Second Circuit in 2010 and had originally ruled against *Cablevision*, finding the RS-DVR service a public performance. It would have been extremely surprising if he had now found in favor of Aereo.

241. *Id.* at 697. Rube Goldberg was an American cartoonist, sculpture, author, engineer, and inventor best known for a series of popular cartoons depicting complex gadgets that perform simple tasks in convoluted ways. See *Rube Goldberg*, WIKIPEDIA, en.wikipedia.org/wiki/Rube_Goldberg#cite_note-ab-1 (last visited Apr. 13, 2013).

242. *WNET*, 712 F.3d at 697; see also 17 U.S.C. § 106(4) (2012).

243. *WNET*, 712 F.3d at 697; see also 17 U.S.C. §§ 101, 106.

244. *WNET*, 712 F.3d at 699.

argued, Aereo's service "accords with the statute's instruction that a transmission can be 'to the public' even if 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.'"²⁴⁵ Since Aereo's service is transmitted to paying customers, all of its transmissions are "to the public," even if an intervening "device or process" limits the potential audience of each separate transmission to a single "member[] of the public."²⁴⁶

Judge Chin distinguished *Cablevision* on the ground that Cablevision was a cable operator with a license to retransmit broadcast and cable programming to its paying subscribers.²⁴⁷ He additionally highlighted two specific factual distinctions. First, Cablevision's RS-DVR service existed only for the purpose of producing a copy of material that had already been licensed for retransmission.²⁴⁸ According to Judge Chin, Aereo's purpose is to retransmit material, a service for which Cablevision required a license.²⁴⁹ "Aereo's use of copies is essential to its ability to retransmit broadcast television signals, while Cablevision's copies were merely an optional alternate to a set-top DVR."²⁵⁰ Judge Chin's second factual distinction centered on subscribers' interaction with Aereo's system. He argued that Cablevision subscribers were already paying for the right to watch the television programming and that the RS-DVR merely gave them the recording option.²⁵¹ Conversely, Aereo's system requires recording in order to watch television.²⁵² If the user wants to watch a program live, the user must still use Aereo to record the program.²⁵³ The system will then immediately begin playing back the user's copy as it is simultaneously being recording, and automatically delete the saved copy once the user is done watching the program.²⁵⁴ According to Judge Chin, these factual distinctions undermine the applicability of *Cablevision* to Aereo's system since Aereo was designed to be a substitute for viewing live television broadcasts.²⁵⁵

Judge Chin concluded by referencing the Second Circuit's decision in

245. *WNET*, 712 F.3d at 698; *see also* 17 U.S.C. § 101.

246. *WNET*, 712 F.3d at 699; *see also* 17 U.S.C. § 101.

247. *WNET*, 712 F.3d at 697. The majority was not persuaded by this argument. *Id.* Given that Judge Chin originally ruled that Cablevision's RS-DVR service violated copyright law and was a public performance, it almost appears that his current distinctions are themselves loopholes to his previous decision. It begs the question of whether his argument had been better received and set stronger precedent for other circuits if he had upheld his original interpretation of *Cablevision*.

248. *Id.* at 697 ("Whereas Cablevision promoted its RS-DVR as a mechanism for recording and playing back programs, Aereo promotes its service as a means for watching 'live' broadcast television on the Internet and through mobile devices.").

249. *Id.* at 702.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 703.

WPIX,²⁵⁶ where the court held that retransmitting copyrighted television programming by streaming it live over the Internet constituted a “public performance” in violation of the Copyright Act.²⁵⁷ He highlighted the language of the *WPIX* decision, stating that *ivi*’s streaming of copyrighted works over the Internet without permission would drastically change the industry.²⁵⁸ Judge Chin claimed that Aereo was doing precisely what *ivi* was enjoined from doing:²⁵⁹ “Today’s decision does not merely deny the broadcasters a licensing fee for Aereo’s activity; it provides a blueprint for others to avoid the Copyright Act’s licensing regime altogether.”²⁶⁰

IV. OTHER BATTLES IN THE INDUSTRY

*“As innovators create new platforms and technology, the boundaries of copyright law will be interpreted, reinterpreted, stretched, molded, questioned, and reinforced.”*²⁶¹

The Aereo litigation is not the only instance where broadcasters have sued over technological advances and new methods of bringing copyrighted content to consumers.²⁶² Two recent cases cast light on the Aereo preliminary injunction decision and the impact the outcome will have on the industry if the company ultimately prevails at trial.

A. *IVI* TV

In 2011, the New York District Court granted a preliminary injunction brought by a group of broadcast networks, including ABC, CBS, NBC, and Fox, against *ivi*TV, a business that profited off the retransmission of broadcasting signals.²⁶³ Without the consent of the broadcasters, *ivi* offered subscribers streaming copyrighted programs over the Internet.²⁶⁴ *ivi* claimed its service was not infringing on the Plaintiffs’ copyrights because it was a cable system entitled to a compulsory license under § 111 of the Copyright Act.²⁶⁵ The company began retransmitting signals from approximately thirty New York and Seattle broadcast TV stations in 2010,

256. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012).

257. *WNET*, 712 F.3d at 704–05. See *infra* Part IV.A for a discussion on *ivi*.

258. *Id.* at 704.

259. *WNET*, 712 F.3d at 704; see also *WPIX*, 691 F.3d at 286.

260. *WNET*, 712 F.3d at 705. It is interesting to note here that Plaintiffs petitioned for a rehearing *en banc* of the Second Circuit’s decision regarding the Preliminary Injunction and were denied. *Id.*

261. McCallion, *supra* note 12, at 70 (*italics added*).

262. *Id.*

263. *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 622 (S.D.N.Y. 2011), *aff’d*, *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012).

264. McCallion, *supra* note 12, at 70.

265. *Internet TV Service Not Entitled to License as Cable “System,”* 25 NO. 2 BUS. TORTS REP. 46, 47 (2012) [hereinafter *Internet TV Service*]. Section 111 of the Copyright Act authorizes cable TV companies to make secondary transmissions, as long as a nominal statutory licensing fee is paid, allowing it to stream television content. McCallion, *supra* note 12, at 70; see also 17 U.S.C. § 111 (2012).

and by 2011, it was also transmitting signals from stations in Los Angeles and Chicago.²⁶⁶ Within five months of operation, ivi offered over 4000 programs to its subscribers, who were able to access ivi's transmissions through ivi's "TV player" software upon payment of a \$4.99 monthly subscription fee.²⁶⁷

Almost immediately after the launch, program owners and broadcast stations filed suit against ivi, alleging copyright infringement and seeking damages and injunctive relief.²⁶⁸ The district court granted the plaintiffs' motion for a preliminary injunction, which was upheld by the Second Circuit because ivi failed to satisfy the initial likelihood of success factor.²⁶⁹ It was undisputed that ivi publicly performed plaintiffs' copyright protected programs.²⁷⁰ The principle issue in the case was whether ivi constituted a cable system under § 111.²⁷¹ If it did, ivi had a statutory defense to the plaintiffs' copyright infringement claims and would be entitled to a compulsory license to continue retransmitting the copyrighted programming.²⁷²

The appellate court applied the *Chevron* test, which requires a two-step process: "(1) determine whether Congress had clearly outlined its intent on the issue of Internet retransmissions in [§] 111 and, if further analysis was needed, (2) determine, and then defer to, the Copyright Office's interpretation of the statute, so long as such interpretation was 'reasonable.'"²⁷³ The court concluded that Congress did not intend for the compulsory license in § 111 to extend to Internet transmissions, explaining that if Congress had intended § 111 to apply, it would have stated so expressly.²⁷⁴ The court further held that extending the compulsory license requirement would not serve Congress' stated purpose since Internet retransmissions did not seek to address issues regarding reception and remote access to over the-air signals, which is necessary with cable programming.²⁷⁵

Although not directly analogous to Aereo, ivi faced a parallel legal problem. ivi is a new technology that does not fit into the current legal framework. ivi, seeing itself as an innovative online cable system providing a service to customers interested in traditional cable broadcast, claimed that it fully believed its system operated within the parameters of the law; however, broadcasters and courts disagreed. The question arises: Did ivi's

266. *Internet TV Service*, *supra* note 267, at 47.

267. *Id.* For an additional \$0.99 per month subscribers could record, pause, fast-forward, and rewind ivi's video streams. *Id.*

268. *Id.*

269. *Id.* See *supra* Part III.A for discussion of preliminary injunction criteria.

270. *Internet TV Service*, *supra* note 267, at 47.

271. *Id.*

272. *Id.*

273. *Id.* (citing *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837 (1984)).

274. *Internet TV Service*, *supra* note 267, at 47.

275. *Id.* The court also stated that the Copyright Office had consistently concluded that Internet retransmission services were not cable systems for purposes of § 111. *Id.*

founders really think they were innovating, or did they simply create a technology that loop-holed them into the current regulatory framework? *ivi* has since filed a Petition for Writ of Certiorari with the Supreme Court to review the Second Circuit decision.²⁷⁶ Although it was determined that *ivi* engaged in public performance, if the Supreme Court accepts the case, it could be an opportunity for the Court to define "public performance" under the Transmit Clause and clarify the standard for Aereo and other companies with similar technologies.

B. AEREOKILLER

Hot off the heels of Aereo's win in New York, other companies began creating similar technologies. One company, appropriately named Aereokiller,²⁷⁷ is facing the same legal battle as Aereo, but on the West Coast. Aereokiller's business is virtually the same as Aereo; however, Aereokiller claims its systems are "better and more legally defensible than Aereo's."²⁷⁸ Aereokiller, similar to Aereo, allows "users to use an individual mini digital antenna and DVR to watch or record free television broadcasts."²⁷⁹

Aereokiller argues that its service is legal because it is technologically analogous to Aereo's software, which the Second Circuit found non-infringing.²⁸⁰ Aereokiller argues that its service is not a public performance under the Transmit Clause, but instead is a "performance of a performance."²⁸¹ Unfortunately for Aereokiller, the Ninth Circuit is not bound by Second Circuit precedent.²⁸² When the major broadcasters brought a preliminary injunction action against Aereokiller, they were able to establish both the "likelihood of success" and "irreparable harm" factors necessary for an injunction.²⁸³

276. *ivi Status Update January, 5th 2013*, *ivi*, <http://www.ivi.tv/> (last visited Apr. 13, 2013); see also *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012), *petition for cert. filed*, (U.S. Dec. 21, 2012) (No. 12-798), available at <http://www.ivi.tv/wp-content/uploads/2013/01/Petition-for-Certiorari-Final.pdf>.

277. Aereokiller, backed by Alki David (heir to the Coca-Cola Hellenic shipping and bottling company), has received plenty of media attention, as well as criticism about the multiple name changes of the online service. Originally named FilmOn, David changed the name of the company to Aereokiller, then to BarryDriller "in order to mock Barry Diller's Aereo." Mike Masnick, *TV Broadcasters Sue Alki David's TV Streaming Service Once Again, to Establish More Bad Precedent*, TECHDIRT (May 29, 2013, 3:32 PM), <http://www.techdirt.com/articles/20130529/01484723236/tv-broadcasters-sue-alki-davids-tv-streaming-service-once-again-to-establish-more-bad-precedents.shtml>. Currently, Aereokiller is back to being named FilmOn, with David claiming "Aereokiller had merely been a passing fancy." See Jonathan Handel, *'Aereokiller' Hearing May Portend Difficulties for Networks*, HOLLYWOOD REPORTER (Aug. 28, 2013), <http://www.hollywoodreporter.com/thresq/aereokiller-filmon-hearing-may-portend-616737>.

278. *Fox Television Stations, Inc. v. Barry Driller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1141 (C.D. Cal. 2012).

279. *Id.*

280. *Id.*

281. *Id.* at 1145-46.

282. *Id.* at 1143 ("Second Circuit law has not been adopted in the Ninth Circuit, and this Court would find that the Ninth Circuit precedents do not support adopting the Second Circuit's position on the issue.").

283. *Id.*

Further, Judge Wu of the Ninth Circuit did not agree with the Second Circuit's interpretation of the Transmit Clause and held that the Copyright Act "sets forth what constitutes public performance of a copyrighted work, and says that transmitting a performance to the public is a public performance. It does not require a 'performance' of a performance."²⁸⁴ For Judge Wu, the emphasis on the unique individual copy of a transmission was immaterial.²⁸⁵ Judge Wu also disagreed with the Second Circuit's conclusion that Aereo provided a service equivalent to what individuals could lawfully do for themselves.²⁸⁶ Wu pointed to the Supreme Court case of *Fortnightly Corp. v. United Artists Television, Inc.*,²⁸⁷ in which the court noted a difference between an individual, or group of individuals, putting up an antenna for the purpose of improving television reception versus an entrepreneur putting up the antenna.²⁸⁸ Judge Wu claimed Congress relied on this difference when drafting the 1976 Copyright Act.²⁸⁹ Judge Wu found that Aereokiller's transmissions are likely public performances infringing the plaintiff's exclusive right of public performance,²⁹⁰ and "[t]hus, Plaintiffs have shown a likelihood of success on the merits on their public performance theory of liability, at least within the Ninth Circuit."²⁹¹ Thus, the Ninth Circuit granted the preliminary injunction against Aereokiller.

Currently, Aereo's planned expansion includes cities within every jurisdiction except those in the Ninth Circuit.²⁹² This aversion may be attributed to the Ninth Circuit's ruling against Aereokiller. The West is a hub for new technology and represents a huge untapped market that Aereo is voluntarily foregoing. Most broadcasters are also headquartered in California, so it is surprising that Aereo would not want to bring its service to the broadcaster's backyard unless, of course, Aereo wants to avoid additional litigation.

284. *Id.* at 1144.

285. *Id.* at 1145.

286. *Id.*

287. 392 U.S. 390 (1968).

288. *Id.* at 400; *Fox Television Stations*, 915 F. Supp. 2d at 1146.

289. *Fox Television Stations*, 915 F. Supp. 2d at 1146; see also H.R. Rep. No. 94-1476, at 88-89 (1976) ("Congress found that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . copyright royalties should be paid by cable operators to the creators of such programs.").

290. *Fox Television Stations*, 915 F. Supp. 2d at 1148.

291. *Id.* at 1147. Judge Wu goes on to discuss additional preliminary injunction factors. *Id.* at 1147-49.

292. See *Geographic Boundaries of United States Court of Appeals and United States District Courts*, U.S. COURTS, <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Apr. 13, 2013), and *We're Expanding!*, AEREO BLOG, <http://blog.aereo.com/2013/01/1716/> (last visited Apr. 13, 2013), for a comparison of the Ninth Circuit jurisdiction versus the cities in which Aereo will be available. See also Jeff John Roberts, *Who in the US Can Use Aereo's New TV Streaming Service?*, GIGAOM (May 31, 2013), <http://gigaom.com/2013/05/31/who-in-the-us-can-use-aereos-new-tv-streaming-service-map/> (showing where Aereo-type service is considered legal, illegal, disputed, or undetermined).

(1) Aereokiller in the D.C. Circuit

Due to Aereokiller’s losses in the courts, its technology is unavailable in almost a quarter of the country. With that in mind, the networks went in for another kill, in the smaller D.C. Circuit on the east coast.²⁹³

On May 23, 2013, the plaintiffs, again the four major national broadcast television channels—FOX, NBC, CBS, and ABC—sought a preliminary injunction against Aereokiller to prevent it from operating in the District of Columbia.²⁹⁴ The complaint read:

Our complaint . . . underscores our commitment to vigorously protect our copyrighted programming from illegal appropriation by opportunistic pirates A court in California has already enjoined Aereokiller from operating in nine western states, in the process recognizing that the commercial retransmission of our broadcasts without permission or compensation is a clear violation of the law and congressional intent. We believe that the D.C. court will uphold our copyright interests and further restrict Aereokiller’s operations.²⁹⁵

As with the injunction against Aereokiller in California, the plaintiffs again found success. On September 5, 2013, the United States District Court of Columbia ruled against Aereokiller, now known as FilmOn X, and found its service to violate the Copyright Act.²⁹⁶ The D.C. court was very cognizant of the past decisions in California and the Second Circuit and stated, “[t]he Court has carefully considered the rulings in *Cablevision* and *Aereo II*, but it is not bound by them.”²⁹⁷ The district court held that, under the Copyright Act and case law, “Plaintiffs are thus likely to succeed on the claim that FilmOn X violates Plaintiff’s exclusive public performance rights in their copyrighted works.”²⁹⁸ Under the district court’s analysis of the Copyright Act, “Film On X ‘transmit[s] . . . a performance . . . of the work . . . to the public, by means of any device or process.’”²⁹⁹ According to the district court, FilmOn X’s technology falls blatantly within the broad definition of public performance.³⁰⁰

The district court was not impressed by the single-user/single-antenna model, which the Second Circuit found so persuasive under *Cablevision*. The court found that the technology operates more as a single unit than individual antennas.³⁰¹ The district court concluded that what Aereokiller (and Aereo) see as new technology, or “the aggregation of several new kinds of technology,” does not avoid the Copyright Act.³⁰² Pointing to the

293. Masnick, *supra* note 279.

294. *Id.*

295. *Id.*

296. Fox Television Stations v. FilmOn, No. 13-758 (RMC), 2013 WL 4763414 (D.D.C. Sept. 5, 2013), at *1 (“This Court concludes that the Copyright Act forbids FilmOn X from retransmitting Plaintiff’s copyrighted programs over the Internet.”).

297. *Id.* at *4–5.

298. *Id.*

299. *Id.* at *12; *see also* 17 U.S.C. § 101 (2012).

300. *Id.*

301. *Id.* at *14.

302. *Id.*

definition of the Transmit Clause and Congress's intent that "device or process" include "all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system and any other techniques and systems not yet in use or even invented," the court held that FilmOn X is in no meaningful way different from cable television companies.³⁰³

Supporters of Aereo are outraged by FilmOn X's behavior and the precedent FilmOn X is setting for Aereo. "[B]ad cases make bad law, and the AereoKiller case is a bad case . . . the precedent will now be available to be used against Aereo itself The end result could be a disaster, and the TV broadcasters know it, because that's exactly what they want."³⁰⁴ Aereo is in a position where multiple circuits have ruled against similar technology, and Aereo's only recourse is to distinguish itself: "[T]o the extent the [*FilmOn* opinion] makes factual findings about the technology used by FilmOn, certain descriptions of the technology do not appear to track how the Aereo technology actually works."³⁰⁵

Although FilmOn X is no longer known as Aereokiller, the name change is appropriate, as Aereokiller has now cut off litigation in two circuit courts.

V. FUTURE IMPACT ON THE INDUSTRY

*"This isn't a fight about control of new technology that makes television better. It's about which law will determine the winners and losers in an industry where disruptive change is inevitable: Betamax and Cablevision on the one hand, or the FCC's retransmission rules on the other. Neither, of course, was intended or anticipated to decide the future of Internet television. Once again, technology change has outpaced legal change, causing yet another collision at their accident-prone intersection."*³⁰⁶

As the law struggles to keep up with technology, industry innovation is both advantageous and disruptive to all interested stakeholders.³⁰⁷ It is undisputed that broadcasters receive substantial retransmission consent fees from viewers, and if "distributors can bypass that system with a one-time technical fix, Aereo could change the economics of television

303. *Id.*

304. Masnick, *supra* note 279.

305. Eriq Gardner, *Aereo Tells Judge Not to Mind FilmOn Injunction*, HOLLYWOOD REPORTER (Sept. 12, 2013), <http://www.hollywoodreporter.com/thr-esq/aereo-tells-judge-not-mind-628396>. On October 8, 2013, Aereo won a preliminary injunction action filed by Hearst Stations, Inc. in the United States Massachusetts District Court. This win now results in multiple District Courts siding with Aereo and "legalizing" Aereo's service in more of the country. Aereokiller has yet to be successful in the courtroom. See sources cited *supra* note 33.

306. Downes, *supra* note 69 (italics added).

307. Brenner & Kay, *supra* note 47, at 3 ("The *Aereo* decision has large public policy and market consequences.").

profoundly.”³⁰⁸ Multiple sources point to the inefficiency and waste of the one-user one-copy model, suggesting users are not really benefitting from Aereo’s technology. Aereo admitted that its platform was designed to fall within the *Cablevision* model. However, it is unclear whether users really receive a superior product by following Aereo’s design. Perhaps users would be better served by a technology that creates only one copy, which is then transmitted to all subscribers.³⁰⁹ Though consumers could potentially receive a more economically feasible product, it could potentially come at the expense of broadcast events, such as the Super Bowl, if broadcasters retaliate.³¹⁰

Businesses like Aereo could threaten broadcast television as we know it. Shortly after the Second Circuit refused to grant the preliminary injunction that would have shut down Aereo, Fox threatened to switch its business to a subscriber model.³¹¹ Fox has been a free broadcast channel for twenty-six years, but News Corp. Chief Operating Officer Chase Carey said that if the courts do not shut down Aereo, News Corp. might be forced to stop airing altogether, and make its network available only to cable and satellite subscribers.³¹² “We need to be fairly compensated for our content We can’t sit idly by and let an entity steal our signal. We will move to a subscription model if that’s our only recourse.”³¹³ Although NBC and ABC refused to comment on this possibility, CBS Chief Executive Officer Les Moonves stated, “[t]rust me, the cable guys would love for us to do that.”³¹⁴ Observers are taking the threat seriously. With so many households already on a cable or satellite platform, “such talk can’t be dismissed as just bluster.”³¹⁵ “It’s a shot across the bow to the courts, and maybe to Congress, that broadcasters take this Aereo threat very seriously.”³¹⁶ It is questionable as to whether there is actual force behind the broadcasters’ threats. Broadcasters currently have a free license to broadcast on the public airwaves, and that free license is predicated on “the promise that they would broadcast in the public interest and convenience, and that they would remain free-to-air.”³¹⁷

308. *Id.* at 4.

309. This system has been held to violate copyright law as an unauthorized public performance. See *Colombia Pictures Indus., Inc. v. Redd Home, Inc.*, 749 F.2d 154 (3d Cir. 1984); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991).

310. Plaintiffs argue that free broadcast of major television events, such as the Super Bowl, would become a thing of the past. See *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 399 (S.D.N.Y. 2012).

311. *Lee, supra* note 1.

312. Felix Gillette, *Does Aereo Mean the End of Broadcast TV?*, *BUSINESSWEEK* (Apr. 8, 2013), <http://www.businessweek.com/articles/2013-04-08/does-aereo-mean-the-end-of-broadcast-tv>.

313. *Lee, supra* note 1.

314. *Id.* Univision Communications, the largest U.S. Spanish-language broadcaster, is also talking tough. *Id.* “We need to protect our product and revenue streams, and therefore we too are considering all of our options, including converting to pay TV,” Chairman Haim Saban said in a statement. *Id.*

315. *Id.*

316. *Id.* at 1.

317. *Id.* at 1–2.

“As innovators create new platforms and technology, the boundaries of copyright law will be interpreted, reinterpreted, stretched, molded, questioned, and reinforced.”³¹⁸ Currently, the Supreme Court may need to mold the existing framework to address this specific copyright question. With a strong Second Circuit decision in *Aereo*, and the Ninth Circuit potentially ready to support the lower court in *Aereo*killer, there is strong indication the jurisprudence will be split. Television broadcasting is a major industry in the United States, and not one that the Supreme Court would likely allow to continue in flux. The opportunity to address the issue has already arrived before the Supreme Court with *ivi*’s Petition for Writ of Certiorari.³¹⁹ For now, one thing remains clear: *Aereo* does not appear to be going anywhere anytime soon.

318. McCallion, *supra* note 12.

319. On October 11, 2013, Plaintiffs, in *WNET v. Aereo*, filed a Writ of Certiorari with the Supreme Court appealing the Second Circuit’s decision. Whether the Supreme Court will hear the case has yet to be determined. See Eriq Gardner, *TV Broadcasters Ask Supreme Court to Review Aereo Dispute (Read Petition)*, HOLLYWOOD REPORTER (Oct. 11, 2013), <http://www.hollywoodreporter.com/thr-esq/tv-broadcasters-ask-supreme-court-647849>.