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Trading Rabbit Ears for Wi-Fi: Aereo, the Public Performance Right, and How Broadcasters Want to Control the Business of Internet TV

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Trading Rabbit Ears for Wi-Fi: Aereo, the Public Performance Right, and How Broadcasters Want to Control the Business of Internet TV

ABSTRACT

Aereo, a start-up company that allows consumers to stream free, over-the-air broadcasts to their phones and computers, seems rather innocuous. Yet the major broadcasting networks have attempted to shut Aereo down since its inception, claiming that Aereo infringes on their copyright. Aereo claims that its unique technology—where each user is assigned their own, individual antenna—ensures that Aereo does not infringe on the broadcasters' public performance rights. The United States Supreme Court has granted certiorari on the matter.

The broadcasters are approaching the case as an existential battle, claiming that Aereo threatens retransmission fees, licensing fees broadcasters collect from cable companies. Broadcasters expect these fees to drive revenue growth over the next decade as advertising revenue stagnates. They claim that if Aereo is allowed to continue, cable companies will refuse to pay retransmission fees, destroying broadcast television.

This Note examines the broadcasters' claims on two points. First, the Note considers whether Aereo threatens retransmission fees, arguing that broadcasters have already lost leverage with cable networks. Second, this Note argues that the test for public performance under the Copyright Act does not hinge on how the alleged infringement affects the market for a work and that Aereo's service is a series of private performances.

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Broadcast television (TV) is under attack.[1] The Federal Communications Commission (FCC) wants to take away segments of the wireless spectrum from broadcasters to facilitate more wireless data transmissions.[2] Meanwhile, broadcasters are struggling to grow revenue; the rise of cable channels has eroded broadcasters' market

1. *See* Jim Edwards, *The Death of Television May Be Just 5 Years Away*, BUS. INSIDER (Dec. 2, 2011, 11:56 AM), http://articles.businessinsider.com/2011-12-02/news/30466538_1_hulu-number-of-tv-subscribers-phone-service.

2. *See* FCC, FCC 12-118, EXPANDING THE ECONOMIC AND INNOVATION OPPORTUNITIES OF SPECTRUM THROUGH INCENTIVE AUCTIONS (NPRM) 6–10 (Oct. 2, 2012) (Docket No. 12-268), *available at* http://www.fcc.gov/document/broadcast-television-spectrum-incentive-auction-nprm. Wireless spectrum is the finite wavelengths of radio frequencies used to transmit data wirelessly. *See* Marguerite Reardon, *Wireless Spectrum: What It Is, and Why You Should Care*, CNET (Aug. 13, 2012, 12:01 AM), http://www.cnet.com/news/wireless-spectrum-what-it-is-and-why-you-should-care.

share from 44 percent in 1980 to 25 percent today,[3] and attempts to profit from high demand for Internet viewing have led to mixed results.[4] Despite years of industry efforts, piracy still significantly cuts into broadcasters' revenues.[5] Even popular events like the Olympics, which generally boost network ratings, have failed to increase broadcasters' profits in recent years.[6] Some analysts and bloggers are already announcing the end of broadcast television.[7]

Yet hope remains for broadcasters.[8] Analysts expect retransmission fees—the fees broadcasters receive from cable providers under FCC regulations—to rise to $3 billion by 2015 because of high demand for network content.[9] In fact, major broadcaster CBS's bottom line essentially runs on retransmission fees. Currently, 10 percent of its earnings come from retransmission fees, and the company expects 70 percent of all earnings growth over the next five years to come from these fees.[10] As long as cable and retransmission fees keep growing, so will broadcasters' profits.[11]

Enter Aereo, a startup-Internet TV service in New York.[12] For just $8 per month, subscribers can watch and record live broadcast television over the Internet, storing up to twenty hours of recorded content on dedicated cloud servers.[13] Compared to the average cost of

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3. *See* Bill Gorman, *Where Did the Primetime Broadcast TV Audience Go?, TV by the Numbers*, ZAP 2 IT (Apr. 12, 2010), http://tvbythenumbers.zap2it.com/2010/04/12/where-did-the-primetime-broadcast-tv-audience-go/47976.

4. *See* Gina Hall, *Hulu and ESPN Drag Disney Down*, L.A. BIZ (Nov. 12, 2012, 10:37 AM), http://www.bizjournals.com/losangeles/news/2012/11/12/hulu-and-espn-drag-disney-down.html.

5. *See* Stephen Galloway, *Who Says Piracy Costs the U.S. $58 Billion a Year?*, HOLLYWOOD REP. (May 2, 2012, 8:00 AM), http://www.hollywoodreporter.com/news/piracy-costs-megaupload-kim-dotcom-318374.

6. *See* Julie Jacobson, *Studios Try to Quash Aereo Streaming TV Service*, CEPRO (Nov. 14, 2012), http://www.cepro.com/article/studios_try_to_quash_aereo_streaming_tv_service.

7. *See, e.g.*, Edwards, *supra* note 1; James Poniewozik, *Here's to the Death of Broadcast*, TIME (Mar. 26, 2009), http://www.time.com/time/magazine/article/0,9171,1887840-2,00.html.

8. *See* Joe Flint, *Broadcast Networks Will Rake in Retransmission Fees, Report Says*, L.A. TIMES (Nov. 11, 2011, 12:24 AM), http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/11/broadcast-networks-retransmission-consent-fees.html.

9. *See id.*

10. *See* Diane Mermigas, *CBS Keeps Broadcast Profitable atop Retransmission, Syndication Fees...for Now*, SEEKING ALPHA (Oct. 3, 2012, 11:06 AM), http://seekingalpha.com/article/902241-cbs-keeps-broadcast-profitable-atop-retransmission-syndication-fees-for-now.

11. *See* Flint, *supra* note 8.

12. *See* AEREO, www.aereo.com (last visited Jan. 23, 2014).

13. *See How Much Does Aereo Cost?*, AEREO, http://support.aereo.com/customer/portal/articles/383157-how-much-does-aereo-cost- (last visited Apr. 4, 2014).

basic cable—eighty-six dollars per month and growing[14]—Aereo offers unique value to consumers.[15]

Taking advantage of distinctive case law in the US Court of Appeals for the Second Circuit, Aereo created an Internet TV service that avoids copyright infringement and retransmission fees by transmitting a series of individual, private performances.[16] By assigning each user a miniature antenna and dedicated server space that the user controls directly, Aereo has survived broadcasters' initial attempts to enjoin its business.[17] Emboldened by its initial success, Aereo has now expanded into eleven American cities, with plans to expand into twenty-seven cities in the coming year.[18]

Obviously, broadcasters are upset that another company is profiting from broadcaster-created content without paying a licensing fee.[19] The greater concern for broadcasters, however, is that cable companies will mimic Aereo's technology to avoid paying retransmission fees if other courts embrace the reasoning of the Second Circuit.[20] In fact, when the Second Circuit published its decision allowing Aereo to continue its business operations, the major networks saw their share prices fall significantly.[21] Thus, in one way, Aereo may decide the fate of broadcast television.[22]

The Aereo decision also creates uncertainty about the copyright protection for broadcast content, making it difficult for broadcasters to

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14. *See* Brent Lang, *Average Monthly Pay-TV Bill Expected to Hit $200 in 2020*, THE WRAP (Apr. 11, 2012, 10:49 AM), http://www.thewrap.com/tv/column-post/average-pay-tv-subscription-expected-be-200-2020-36940.

15. *See How Much Does Aereo Cost?*, *supra* note 13 (showing that Aereo is significantly cheaper than cable).

16. *See* Adrianne Jeffries, *Who's Afraid of a Little Live TV? Why Streaming Service Aereo Scares the Broadcast Industry*, VERGE (Nov. 13, 2012, 9:50 AM), http://www.theverge.com/2012/11/13/3628402/aereo-streaming-live-tv-broadcasters.

17. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013) (affirming the denial of a preliminary injunction), *aff'd sub nom.* Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012), *cert. granted* No. 13-461, 2014 WL 92369 (U.S. Jan. 10. 2014); *see also* Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 376–77 (S.D.N.Y. 2012) (explaining Aereo's use of technology to avoid the Second Circuit's definition of "public performance").

18. *See Where Can I Get Aereo?*, AEREO, https://aereo.com/coverage (last visited Mar. 27, 2014).

19. *See* Associated Press, *Fox Exec: 'We Can't Sit Idly by and Let [Aereo] Steal Our Signal'*, ENT. WKLY. (Apr. 9, 2013, 9:23 AM), http://insidetv.ew.com/2013/04/09/fox-exec-we-cant-sit-idly-by-and-let-aereo-steal-our-signal (describing how broadcast networks have threatened to take their networks off-the-air and make them subscription only).

20. *See* Jeffries, *supra* note 16 (quoting Time Warner CEO Glenn Britt, "I don't know if [what Aereo does is] legal or not. But if it is, we [cable providers] should do it too.").

21. *See Signalled Out: Aereo, a Small Start-up, Has Infuriated Television Executives*, THE ECONOMIST, Apr. 13, 2013, available at http://www.economist.com/news/business/21576161–aereo–small-start–up–has-infuriated–television–executives–signalled–out.

22. *See id.*

plan for the future and preventing companies from offering new Internet TV services.[23] Aereo's reliance on the nuances of the Second Circuit's definition of "public performance" has led the company to invest in a complicated hardware design and forced it to avoid major markets in US judicial circuits that do not ascribe to the Second Circuit's views.[24] For example, if Aereo offers its services in California, it would be liable for infringement and immediately shut down because Ninth Circuit law suggests that any commercial retransmission is public in nature—a view based on the premise that broadcasters have an absolute monopoly over commercial exploitation of their work.[25] During a time when broadcast spectrum is in high demand,[26] shouldn't the law encourage broadcasters to innovate and offer more content through the Internet, which is less spectrum intensive?[27] Considering that the FCC gave broadcasters their spectrum rights with a clear directive to improve free access to information, should not courts encourage companies to create affordable Internet TV services?[28] Why should consumers be prevented from subscribing to a service like Aereo when if they wanted to invest in a home antenna and DVR, they could legally perform the exact same actions that Aereo enables them to take?[29]

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23. *See* WNET, Thirteen v. Aereo, Inc., 722 F.3d 500, 507 (2d Cir. 2013) (Chin, J., dissenting) (describing how *Cablevision* and the *Aereo* decisions have been criticized by academics and courts in California).

24. *See id. Compare Where Can I Get Aereo?*, *supra* note 18, *with Top 100 Television Markets*, STATION INDEX, http://www.stationindex.com/tv/tv-markets (last visited Jan. 3, 2014).

25. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138, 1151 (C.D. Cal. 2012) (striking down a service nearly identical to Aereo based on long-established Ninth Circuit principles).

26. *See* Stacey Higginbotham, *Spectrum Shortage Will Strike in 2013*, GIGAOM (Feb. 17, 2010, 1:00 PM), http://gigaom.com/2010/02/17/analyst-spectrum-shortage-will-strike-in-2013.

27. *See* David Oxenford, *In Less Than 3 Weeks, Let's Provide Detailed Analysis on Fundamentally Changing the Television Industry - Comments Sought on Encouraging Internet Video in Addition to Repurposing TV Spectrum*, BROADCAST L. BLOG (Dec. 6, 2009), http://www.broadcastlawblog.com/2009/12/articles/television/in-less-than-3-weeks-lets-provide-detailed-analysis-on-fundamentally-changing-the-television-industry-comments-sought-on-encouraging-internet-video-in-addition-to-repurposing-tv-spectrum.

28. *See* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) ("A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" (quoting Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966))).

29. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013) ("Aereo's system thus provides the functionality of three devices: a standard TV antenna, a DVR, and a Slingbox-like device."), *aff'd sub nom.* Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012), *cert. granted* No. 13-461, 2014 WL 92369 (U.S. Jan. 10. 2014).

Ideally, legislators would answer these questions.[30] But Congress is unlikely to take serious action in the next several years.[31] Instead, it will fall to the US Supreme Court and the companies themselves to create a solution that protects copyright owners while allowing consumers access to content at sustainable prices.[32] Fortunately, the Court recently granted certiorari in the Aereo case.[33]

Part I of this Note examines broadcasters' and cable companies' current business models and the companies' efforts to commercialize their products over the Internet.[34] Since many arguments against third-party Internet TV focus on the negative effect companies like Aereo will have on broadcasters' business, it is crucial to fully understand that business.[35] Part II examines how current law has developed to create a circuit split about the definition of "public performance."[36] Part III offers a business-oriented alternative to current copyright jurisprudence that acknowledges that, while broadcasters are entitled to profit from their broadcasts, nothing in current law grants them an exclusive right to control Internet TV.[37] When faced with a clear congressional directive to expand access to broadcast television, courts, including the Supreme Court, should allow technology like Aereo to enhance how consumers digest media.[38] Moreover, the proposed solution will enable broadcasters to rely less on retransmission fees and improve advertisement revenues.[39] Because broadcasters can actually improve their bottom lines through ad-based Internet broadcasts that capture user data and lower the risks of piracy, courts should stop protecting the broadcast industry and focus instead on the clear congressional directive of expanding access to broadcast television.[40]

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30. *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 157 (3rd Cir. 1984) ("It is acknowledged that it is the role of the Congress, not the courts, to formulate new principles of copyright law when the legislature has determined that technological innovations have made them necessary." (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Teleprompter Corp. v. CBS, 415 U.S. 394 (1974))).

31. *See infra* Part III.

32. *See infra* Part III.B–C.

33. *See WNET, Thirteen*, 712 F.3d 676.

34. *See infra* Part I.

35. *See e.g.*, Brief for Nat'l Ass'n of Broadcasters et al. as Amici Curiae Supporting Appellants at 15–16, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 4509866, at *15–16.

36. *See infra* Part II.

37. *See infra* Part III.

38. *See infra* Part III.

39. *See infra* Part III.

40. *See infra* Part III.

I. A BUSINESS PERSPECTIVE: TELEVISION BROADCASTERS, THE CABLE COMPANIES, AND INTERNET PIRATES

A discussion of US copyright and broadcasting policy must start with an understanding of the interests at play.[41] Broadcasters are relying more and more on retransmission fees for revenue growth, which helps explain their reaction to Aereo's business model.[42] US law, inefficiencies in capturing advertising revenue, and the growth of the Internet have pushed broadcasters towards retransmission fees because other avenues of growth have failed.[43] This overreliance on retransmission fees has prevented broadcasters from innovating and has created a market for companies like Aereo to drastically alter the status quo.[44]

A. How Broadcasters Make Money

Most people are familiar with the general business plan of the large broadcast networks—ABC, CBS, FOX, and NBC—that broadcast television shows over the air: broadcast television makes money through advertisements.[45] This general understanding is fairly accurate, as advertisers pay over $34 billion annually to broadcasters.[46] Broadcasters, in turn, use this money to buy and produce content, operate broadcast towers, and pay independent "affiliate stations" to broadcast their channels.[47]

The price of an advertisement, or "ad spot," is linked to the popularity of the accompanying programming; fees range from $18 for small cable networks[48] to $3.5 million for a 30-second Super Bowl

41. *See* DAVID P. BARON, BUSINESS AND ITS ENVIRONMENT, 5–10 (5th ed. 2005) (describing an analytical approach to analyzing the nonmarket environments of business such as government regulation).

42. *See infra* Part I.B.

43. *See infra* Part I.A–B.

44. *See infra* Part I.A–B.

45. *See* Guy Di Piazza & Martin Olausson, Digital Media Strategies Service, *The Television and Movie Industry Explained: Where Does All the Money Go?*, STRATEGY ANALYTICS (June 2007), *available at* http://www.strategyanalytics.com/reports/vg5d52vcWt/single.htm.

46. *See* Wayne Friedman, *U.S. Ad Spend Dips to $34 Billion, TV Down 6% Overall*, MEDIADAILYNEWS (Dec. 16, 2013, 10:22 AM), http://www.mediapost.com/publications/article/215629/us-ad-spend-dips-to-34-billion-tv-down-6-over.html.

47. *See* Ryan Nakashima, *Networks Spend Money to Make Money*, TVNEWSCHECK (June 2, 2010, 2:50 PM), http://www.tvnewscheck.com/article/42680/networks-spend-money-to-make-money; Sam Schechner & Rebecca Dana, *Local TV Stations Face a Fuzzy Future*, WALL ST. J. (Feb. 10, 2009, 11:59PM), http://online.wsj.com/news/articles/SB123422910357065971.

48. *See* Michael Kanellos, *Spot Runner Culls Unsold TV Spots*, CNET (Mar. 14, 2006, 6:12 AM), http://news.cnet.com/Spot-Runner-culls-unsold-TV-spots/2100-1024_3-6049354.html.

advertisement.[49] While the value of each "ad spot" is tied to a program's popularity, about two-thirds of all television advertising money goes to broadcasters, even though only one-third of the overall television audience watches broadcast television.[50] This disparity reflects advertisers' collective reliance on Nielsen ratings to determine the value of particular ad spots.[51]

Nielsen provides "commercial ratings" that track how many viewers watched the advertisements within a show.[52] These ratings are currently the only measure national advertisers have to gauge the "value" of an advertisement placed in a certain time slot.[53] But Nielsen has failed to update its methods to adapt to the changing ways that people consume media.[54]

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49. *See Super Bowl Ads Cost Average of $3.5M*, ESPN (Feb. 6, 2012, 11:22 AM), http://espn.go.com/nfl/playoffs/2011/story/_/id/7544243/super-bowl-2012-commercials-cost-average-35m.

50. *See* Kanellos, *supra* note 48.

51. *See* John Herrman, *Why Nielsen Ratings Are Inaccurate, and Why They'll Stay That Way*, SPLITSIDER (Jan. 31, 2011), http://splitsider.com/2011/01/why-nielsen-ratings-are-inaccurate-and-why-theyll-stay-that-way (describing how advertisers understand that Nielsen ratings are inaccurate); Ted Linhart, *How I learned to Stop Worrying and Love Live+7*, TEDONTV (Jan. 30, 2011), http://tedontv.blogspot.com/2011/01/how-i-learned-to-stop-worrying-and-love.html (describing how network executives use Nielsen ratings to guess what shows will be profitable); Tom Vanderbilt, *The Nielsen Family Is Dead*, WIRED (Mar. 19, 2013, 6:30 AM), http://www.wired.com/underwire/2013/03/nielsen-family-is-dead (interviewing an advertising executive, who explains that companies pay for perceived popularity, even when Nielsen ratings don't reflect that perception).

52. *See* Herrman, *supra* note 51. Additionally, Nielsen also provides the "ratings" and demographic numbers familiar to casual observers of television show popularity. *See id.*

53. *See generally Numbers 102*, ZAP2IT TV BY THE NUMBERS, (Jan. 21, 2009), http://tvbythenumbers.zap2it.com/numbers-102 (explaining that, despite recognition that Nielsen numbers are flawed, ad executives use Nielsen data almost exclusively, even with set top box data beginning to enter the market). Note that local advertisements, which represent a small portion of advertising revenue, are set by Nielsen surveys four times a year. This survey period, commonly known as "sweeps," shares many of the same issues that plague Nielsen ratings and are not addressed directly here. *See* Sean Rocha, *How Does Sweeps Week Work?*, SLATE (Feb. 16, 2004, 6:50 PM), http://www.slate.com/articles/news_and_politics/explainer/2004/02/how_does_sweeps_week_work.html; *A Few Chicago TV Stations Can Claim Victory from February 2014 Ratings Sweeps*, CHICAGOLAND RADIO & MEDIA, (Mar. 3, 2014, 3:55 PM), http://chicagoradioandmedia.com/news/6383-a-few-chicago-tv-stations-can-claim-victory-from-february-2014-ratings-sweeps (explaining the effect of sweeps ratings on local advertising rates for the next quarter). *But see* Brad Adgate, *Why TV Sweeps Needs to Die*, ADVERTISING AGE (Dec. 9, 2010) http://adage.com/article/media/tv-sweeps-die/147562 (noting that advertisers have shifted towards using People Meter data, which is available year-round, to buy local ads in the 25 largest markets).

54. *See* Rosie Baker, *Twitter to Impact Price of TV Ads*, ADNEWS, http://www.adnews.com.au/adnews/twitter-to-impact-price-of-tv-ads (Jan. 29, 2014) (noting that Nielsen's recently launched Twitter ratings system may begin impacting ad prices in the future); *see also Anyway You Watch It: Nielson to Incorporate Mobile Viewing into TV Ratings and Dynamic Digital Ratings*, NIELSEN (Oct. 28 2013), http://www.nielsen.com/us/en/newswire/2013/any-way-you-watch-it-nielsen-to-incorporate-mobile-viewing.html (announcing

Nielsen ratings are based on a survey of approximately 25,000 households, according to an interview from 2010.[55] Whenever anyone in a "Nielsen family" watches TV programming on a traditional television set, a Nielsen People Meter records all relevant data, including the family member(s) watching, the chosen channel, and whether the channel is changed during commercials.[56] Nielsen then extrapolates this raw data to estimate each show's popularity and the number of advertisements watched.[57]

Several flaws in Nielsen's methodology have raised concerns about the accuracy of the final commercial-ratings number.[58] First, 25,000 households is a remarkably small sample size for a television audience of 115 million households.[59] Additionally, Nielsen ratings only track viewing on traditional TV sets; thus, any TV shows watched on a laptop or tablet—the preferred medium for consumers in the coveted eighteen to forty-nine demographic[60]—are excluded from the raw data.[61] This causes Nielsen ratings to favor shows watched by

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plans to begin tracking tablet and smartphone viewing in time for the 2014–2015 television season).

55. *See* Charlie Jane Anders, *How the Nielsen TV Ratings Work — and What Could Replace Them*, IO9 (Sept. 17, 2010 2:08 PM), http://io9.com/5636210/how-the-nielsen-tv-ratings-work--and-what-could-replace-them.

56. *See* Herrman, *supra* note 51. Nielsen also uses "TV Diaries" to track local ratings; since this Note focuses on national rates and policies, the discussion focuses on the Nielsen People Meters. However, serious issues also plague the diary-based system, which drive about twelve percent of total ad revenues. *See* Anna Li, *Nielsen Method for TV Ratings Missing Minorities, Young People*, POYNTER (Oct. 16, 2013, 8:00 AM, updated Oct. 18, 2013, 9:49 AM), http://www.poynter.org/latest-news/measuring-audience/225876/nielsen-method-for-tv-ratings-missing-minorities-young-people (reporting flaws in the diary system found in by a Nielsen-funded think-tank).

57. *See* Anders, *supra* note 55.

58. *See, e.g.*, Bill Carter & Stuart Elliott, *Media Companies Seek Rival for Nielsen Ratings*, N.Y. TIMES, Aug. 14, 2009, http://www.nytimes.com/2009/08/15/business/media/15ratings.html.

59. *See* Anders, *supra* note 55; *Nielsen Estimates 115.6 Million TV Homes in the U.S., Up 1.2%*, NIELSEN (May 7, 2013), http://www.nielsen.com/us/en/newswire/2013/nielsen-estimates-115-6-million-tv-homes-in-the-u-s---up-1-2-.html.

60. *See* Katherine Rosman, *In Digital Era, What Does 'Watching TV' Even Mean?*, WALL ST. J. (Oct. 8, 2013, 9:43 PM), http://online.wsj.com/news/articles/SB10001424052702303442004579123423303797850 ("[F]or the first time we are devoting more attention each day to smartphones, computers and tablets [than to TV]. . . . [T]he trend [is] toward watching TV shows on devices other than televisions . . . ."); Associated Press, *Baby Boomers Upset TV Isn't All About Them*, TODAY (updated Nov. 28, 2006, 12:07 PM), http://www.today.com/id/15806591#.UwaUEHlR5Ig (describing "[t]he TV industry's slavish devotion to ratings within the 18-to-49-year-old demographic").

61. *See* Healy Jones, *Tablet TV Overtakes Laptop*, STARTABLE (Apr. 18, 2012), http://www.startable.com/2012/04/18/tablet-tv-overtakes-laptop; *see also* Baker, *supra* note 54, (noting that Nielsen's recently launched Twitter ratings system may begin impacting ad prices in the future); *Anyway You Watch It*, *supra* note 54 (announcing plans to begin tracking tablet and smartphone viewing in time for the 2014–2015 television season).

older viewers, helping explain why Betty White's *Off Their Rockers* has consistently trounced "hipper" shows like *The Office* and *Community* in Nielsen's ratings.[62]

Advertisers and television executives are aware of these shortcomings but can do little about it.[63] As one executive explained:

> [D]o [Nielsen ratings] reflect accurately how many people are viewing this content? The answer is no. . . . Are we happy with the way we're following technology and being able to measure it? No. We're way behind. On the other hand, are Nielsen ratings important and critical to the industry and as important to the industry as they [ever] were? Absolutely, when you consider that if we didn't have them, we wouldn't get paid.[64]

Some changes are coming: Nielsen has partnered with Twitter to track online "engagement" during shows,[65] and Comcast is pairing with Nielsen to measure tablet viewing.[66] Nielsen continues to develop an online measuring tool in hopes of providing a "unified" metric for advertisers.[67] Despite pleas from advertisers, however, Nielsen will not launch an online tracking system until the fall of 2014 at the earliest.[68] Broadcasters are beginning to seek alternative means of tracking viewership, such as leveraging set-top boxes and other existing technologies to expand the raw data used to develop ratings.[69]

Still, the fact remains that Nielsen is the standard for setting advertisement rates.[70] That means that broadcasters continue to ask

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62. *See* Dustin Rowles, *All Your Favorite Shows May Be Cancelled: Why Bad Nielsen Ratings* Should *Be Great for Quality Television*, PAJIBA (Apr. 23, 2012), http://www.pajiba.com/think_pieces/all-your-favorite-shows-may-be-cancelled-why-bad-nielsen-ratings-should-be-great-for-quality-television-.php (examining how Betty White's *Off Their Rockers* consistently beat out *The Office* and *Community* in Nielsen ratings despite much larger internet footprints of the latter shows).

63. *See* Herrman, *supra* note 51.

64. *Id.* (quoting NBC's Alan Wurtzel).

65. *See* Arif Durrani, MediaWeek, *Twitter Partners with Nielsen on 'Social TV' Ratings*, PRWEEK (Dec. 18, 2012), http://www.prweekus.com/twitter-partners-with-nielsen-on-social-tv-ratings/article/273157.

66. *See* Jeanine Poggi, *Comcast and Nielsen to Start Testing Commercial Ratings for Tablets*, ADVERTISING AGE (May 21, 2012), http://adage.com/article/media/comcast-start-testing-commercial-ratings-tablets/234887.

67. *See Nielsen Bridges Online and Offline Behaviors with Innovative Cross-Platform Offering*, NIELSON (Aug. 7, 2012), http://www.nielsen.com/us/en/insights/press-room/2012/nielsen-bridges-online-and-offline-behaviors-with-innovative-cro.html.

68. *See* Brian Stelter, *Nielsen Will Add Mobile Viewership to Ratings*, N.Y. TIMES, Sept. 20, 2013, http://www.nytimes.com/2013/09/20/business/media/nielsen-will-add-mobile-viewership-to-ratings.html?smid=tw-share&_r=3&.

69. *See Nielsen Reveals Plan for Next Generation Local Audience Ratings*, NIELSEN (July 20, 2012), http://www.nielsen.com/us/en/insights/press-room/2012/nielsen-plan-next-generation-local-audience-ratings.html.

70. *See* Stuart Elliott, *How to Value Ratings with DVR Delay?*, N.Y. TIMES, Feb. 13, 2006, http://www.nytimes.com/2006/02/13/business/media/13adcol.html.

advertisers to pay an average of $110,000 for primetime advertisements with little reliable data or assurances that those advertisements are reaching the targeted audience.[71]

B. Retransmission Fees—the Growth Driver for Broadcast TV

Until recently, advertisements were the primary revenue source for networks like ABC, CBS, FOX, and NBC.[72] Although advertisement revenue is still the largest revenue source, most broadcasters expect retransmission fees to drive revenue growth over the next decade, with CBS hoping to double its retransmission fees in the next year.[73]

Retransmission consent is a relatively new concept; the 1992 Cable Act ('92 Act) created a "must carry/retransmission consent" option for television broadcasters.[74] Most large broadcasters chose retransmission-consent designation, allowing them to negotiate retransmission fees with cable providers.[75] While it took time for broadcasters to understand how to value their retransmission consent, eventually the fees exploded.[76] Today, retransmission fees are the primary driver of growth for broadcaster profits, with CBS expecting to quadruple its fees by 2016.[77] While retransmission-fee negotiations are slightly complicated when cable providers own the broadcaster—Comcast's ownership of NBC Universal, for

71. *See* Anthony Crupi, *In Their Prime: Broadcast Spot Costs Soar, Gap Between Network and Cable CPMs Remains Vast*, ADWEEK (June 22, 2011, 1:47 PM), http://www.adweek.com/news/television/their-prime-broadcast-spot-costs-soar-132805#1.

72. *See* James L. Gattuso, *Adjusting the Picture: Television Regulation for the 21st Century*, HERITAGE FOUND. BACKGROUNDER No. 2741, at 3 (Nov. 6, 2012), *available at* http://heartland.org/sites/default/files/bg2741.pdf.

73. *See id.*; Roger Yu, *Retransmission Fee Race Poses Questions for TV Viewers*, USA TODAY (Aug. 2, 2013, 6:08 PM), http://www.usatoday.com/story/money/business/2013/07/14/tv-retrans-fees/2512233; *Broadcasters Falsely Claim Retrans Fees on the "Decline"*, AM. TELEVISION ALLIANCE (Aug. 8, 2013), http://www.americantelevisionalliance.org/broadcasters-falsely-claim-retrans-fees-on-the-decline.

74. *See* Gattuso, *supra* note 72, at 3, 5. Because this Note deals only with large broadcasters, the history of the "must carry" designation is omitted. In short, must-carry status allows local broadcasters to waive any right to a retransmission fee in order to require cable companies to include the channel on basic cable. *See id.*

75. *See id.* at 3 (noting that, for the first time, broadcasters could negotiate with cable companies outside of government-set retransmission fees and compulsory licenses).

76. *See id.*

77. *See* Tim Molloy, *CBS to Quadruple Retransmission Fees to $1B by 2016, Report Says*, WRAP (Sept. 12, 2012, 1:43 PM), http://www.thewrap.com/tv/column-post/cbs-quadruple-retransmission-fees-1b-2016-report-says-56136.

example[78]—most analysts expect these fees to be the primary revenue growth for broadcasters into the future.[79] In short, retransmission fees are essential to most major broadcasters' current business model.[80]

C. The Internet—Squandered Opportunities and Pirates

Why will broadcasters rely on retransmission fees? In part because broadcasters have failed to capture significant revenue from Internet TV.[81] In the 1990s, Internet access and use began spreading throughout the United States.[82] Today, 81 percent of Americans have access to the Internet,[83] and over 68 percent of households have access to broadband.[84] As access to high-speed Internet has grown, more companies have looked to the Internet to expand the profitability of media consumption.[85] Unfortunately, increased speeds have also led to greater opportunities for online piracy.[86] In fact, every time a legal service has raised its fees in order to increase profits from online media consumption, there has been a corresponding increase in piracy.[87]

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78. *See* Brian Stelter, *In Comcast-NBC Deal, Local Stations Request Conditions, Media Decoder*, N.Y. TIMES (June 22, 2010, 12:14 PM), http://mediadecoder.blogs.nytimes.com/2010/06/22/in-comcast-nbc-deal-local-stations-request-conditions.

79. *See, e.g.*, *SNL Kagan Releases Broadcast Retransmission Fee Projections through 2017*, PRWEB (May 25, 2011), http://www.prweb.com/releases/2011/5/prweb8483711.htm.

80. *See id.*

81. *See* Eric Savitz, *Online Display Ads: The Brand Awareness Black Hole*, FORBES (May 7, 2012, 8:36 PM), www.forbes.com/sites/ciocentral/2012/05/07/online-display-ads-the-brand-awareness-black-hole (describing how content owners have failed to capture revenue from online media consumption).

82. *See* PEW INTERNET & AM. LIFE PROJECT, PEW RESEARCH CTR., DIGITAL DIFFERENCES 4 (Apr. 13, 2012), *available at* http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Digital_differences_041312.pdf.

83. *See id.* at 2.

84. *See* Daniel Tencer, *15 Countries with the Greatest Access to Broadband*, HUFFINGTON POST (Jan. 21, 2013, 10:16 AM), http://www.huffingtonpost.ca/2012/08/02/broadband-internet-penetration-oecd_n_1730332.html#slide=1317812.

85. *See* Baoding Hsieh Fan, *When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting*, 52 FED. COMM. L.J. 619, 624–25 (2000).

86. *See* Sarah Jacobsson Purewal, *Does Faster Internet Access Lure Piracy?*, PCWORLD (May 4, 2012, 7:56 AM), http://www.pcworld.com/article/255055/does_faster_internet_access_lure_piracy_.html.

87. *See* Carson S. Walker, Comment, *A La Carte Television: A Solution to Online Piracy?*, 20 COMMLAW CONSPECTUS 471, 471 (2012).

1. Netflix: A $7.99 Video Library

One of the primary concerns when networks began exploring Internet TV was the potential effect on DVD sales.[88] Because savvy users could easily share shows through the Internet, what would prevent them from creating vast digital libraries and never buying another DVD?[89] While DVD sales have certainly suffered because of Netflix,[90] broadcasters have gladly traded revenue from DVDs for the huge payments coming from the popular streaming service.[91] Current contracts provide over $100 million annually to some networks,[92] and given Netflix's recent focus on television offerings,[93] broadcasters may reasonably expect consistent growth from their digital-distribution divisions.[94]

Whether Netflix has truly solved the mystery of Internet TV remains unclear.[95] Restrictions still exist on the timing of Netflix releases—usually Netflix does not have a season of a program until after the next season begins airing.[96] While this delay strategy "protects" the original broadcast and may shuttle some viewers into video-on-demand (VOD) solutions, it may also drive Internet piracy.[97]

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88. *See* Rosario T. Calabria, *Internet TV Downloads Help, Not Hurt, TV DVD Sales*, YOUR ENT. NOW (Sept. 24, 2006, 3:18 PM), http://yourentertainmentnow.com/2006/09/24/internet-tv-downloads-help-not-hurt-tv-dvd-sales.

89. *See* Steve Sanger, *DVD Sales Drop Like a Stone as Internet TV Booms*, WORLD TV PC (May 2, 2010), http://www.worldtvpc.com/blog/dvd-sales-drop-stone-internet-tv-booms.

90. *See id.* Netflix operates a DVD-by-mail service and a streaming service that allows subscribers unlimited access to online material for a monthly fee. *See* Tracy V. Wilson & Stephanie Crawford, *How Netflix Works*, HOWSTUFFWORKS, http://electronics.howstuffworks.com/netflix.htm (last visited Feb. 21, 2014).

91. *See* Graeme McMillan, *CBS Boss: Extending Deal with Netflix Is 'Preordained'*, DIGITAL TRENDS (Aug. 2, 2012), http://www.digitaltrends.com/web/cbs-boss-extending-deal-with-netflix-is-preordained (quoting CBS CEO Les Moonves as stating extension of Netflix contract was "preordained").

92. *See* Paul Bond, *Netflix-CBS Deal Worth $200M, Says Analyst*, HOLLYWOOD REP. (Feb. 23, 2011, 6:16 PM), http://www.hollywoodreporter.com/news/netflix-cbs-deal-worth-200m-160914.

93. *See* Rick Aristotle Munarriz, The Motley Fool, *Netflix Wants You to Go on a Binge*, DAILY FIN. (Jan. 30, 2012, 1:32 PM, updated Jan. 30, 2012, 1:34 PM), http://www.dailyfinance.com/2012/01/30/netflix-wants-you-to-go-on-a-binge.

94. *See* Gabriela Meller, *Netflix: Friend or Foe to the Broadcasting Business?*, ZINTRO (Aug. 7, 2013), http://blog.zintro.com/2013/08/07/netflix-friend-or-foe-to-the-broadcasting-business.

95. *See id.*

96. *See* Daniel Frankel, *For Netflix Users, "Catch-up" TV Viewing Has a Catch*, PAIDCONTENT (June 21, 2012, 4:58 PM), http://paidcontent.org/2012/06/21/for-netflix-users-catch-up-tv-viewing-has-a-catch.

97. *See id.*; Calum Atkinson, *Television Piracy: It's Just Too Convenient!*, PLANET IVY (July 24, 2012), http://planetivy.com/news/6127/television-piracy-its-just-too-convenient; Karl Bode, *Red Box, Netflix Fight Disney over New Release Delay Because Stupid Rules Will Keep the*

Additionally, while Netflix has enjoyed enormous growth over the past several years,[98] recent developments raise questions about whether its quick rise may have already peaked: in 2012, a price-hike announcement led to mass cancellations, loss of shareholder wealth,[99] and a hostile-takeover bid.[100] Outside competition has maintained prices for internet-only service at $7.99, suggesting that demand for video-streaming services is relatively elastic, with a price point of no more than ten dollars per month before subscribers switch to another service or resort to piracy.[101] Any limit on Netflix's growth would in turn limit any licensing fees paid to broadcasters.[102]

2. Hulu, Hulu Plus, and Video-On-Demand: Less Than 5 Percent Market Share

When first announced, Hulu seemed like a brilliant idea: broadcasters, working together, would make their shows available online, for free.[103] Using a model similar to their advertising-based broadcasts, networks could collaborate to create an Internet TV portal superior to virus-laden pirate sites.[104] Hulu quickly became a top-ten video website, adding the subscription-based service, Hulu Plus in

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DVD from Playing, Right?, BROADBAND DSL REPORTS (June 7, 2012), http://www.dslreports.com/shownews/Red-Box-Netflix-Fight-Disney-Over-New-Release-Delay-119842.

98. *See* Darrell Etherington, *Netflix Hits 30 Million Members After Q3 Subscriber Growth "Forecasting Error"*, TECHCRUNCH (Oct. 25, 2012), http://techcrunch.com/2012/10/25/netflix-hits-30-million-members-after-q3-subscriber-growth-forecasting-error.

99. *See* Michael Liedtke, *Price Hike Still Haunts Netflix*, USA TODAY (July 13, 2012, 7:13 AM), http://usatoday30.usatoday.com/tech/news/story/2012-07-13/netflix-price-hike/56185792/1.

100. *See* David Goldman, *Netflix Adopts Poison Pill to Fend off Icahn*, CNN MONEY (Nov. 5, 2012, 12:12 PM) http://money.cnn.com/2012/11/05/technology/netflix-poison-pill/index.html.

101. *See* Julian Horsey, *Amazon Closes Amazon Prime Monthly Payment Option*, GEEKY GADGETS (Nov. 19, 2012, 11:08 AM), http://www.geeky-gadgets.com/amazon-closes-amazon-prime-monthly-payment-option-19-11-2012. Since Netflix has been credited with curbing piracy, it follows that an increase in Netflix fees could have the reverse effect. *See* Farhad Manjoo, *How Netflix Is Killing Piracy*, SLATE (July 26, 2011, 5:15 PM), http://www.slate.com/articles/technology/technology/2011/07/how_netflix_is_killing_piracy.html.

102. Netflix also plans to continue expanding its original programming operations, which could reduce its reliance on broadcast-TV offerings. *See* Todd Spangler, *Netflix to Expand into Original Movies, Will Double Spending on Originals in 2014*, VARIETY (Oct. 21, 2013), http://variety.com/2013/digital/news/netflix-to-expand-into-original-movies-will-double-spending-on-originals-in-2014-1200748504.

103. *See* Frank Rose, *Free, Legal and Online: Why Hulu Is the New Way to Watch TV*, WIRED (Sept. 22, 2008), http://www.wired.com/entertainment/theweb/magazine/16-10/mf_hulu?currentPage=all.

104. *See id.*

2010.[105] In May 2012, Hulu streamed more videos than any other site except YouTube[106] and posted $700 million in revenue for fiscal year 2012.[107]

The company's future is still very much in doubt, however.[108] In December 2012, Hulu did not even rank in the top ten of streaming sites, falling from fifth place in December 2011.[109] Its major nonnetwork investor recently exercised a put option worth $200 million to divest from the company, forcing Hulu to go into debt and prompting senior management to leave the company.[110] Outsiders wonder whether the networks—who have great interest in protecting the value of traditional ad revenues—are inadvertently (or intentionally) hurting Hulu.[111] Many investors question whether Hulu is sustainable,[112] particularly with its 1.4 percent market share of video streaming.[113]

Similarly, "a la carte" VOD services such as iTunes and Amazon suffer from networks' fears of cannibalizing their traditional advertising revenue.[114] Although VOD revenue from cable networks is expected to grow substantially over the next several years,[115] it is unclear how well networks will be able to capitalize on increased VOD

105. *See* Press Release, Hulu, Hulu Launches Preview of Subscription Service Hulu Plus (June 29, 2010), *available at* http://www.hulu.com/press/hulu_plus_press_release.html.

106. *See* Janet Morrissey, *Hulu's Network Drama*, CNNMONEY (Aug. 20, 2012, 5:00 AM), http://tech.fortune.cnn.com/2012/08/20/hulu-problems-kilar.

107. *See* Janet Morrissey, *The Beginning of the End for Hulu?*, CNNMONEY (Jan. 8, 2013, 7:04 AM), http://tech.fortune.cnn.com/2013/01/08/hulu.

108. *See* Peter Kafka, *Another Key Hulu Executive Leaves*, ALL THINGS D (Oct. 1, 2013, 10:08 AM), http://allthingsd.com/20131001/another-key-hulu-executive-leaves.

109. *See* Erik Gruenwedel, *Hulu Again Missing from Top Online Video Rankings*, HOMEMEDIA (Jan. 14, 2013), http://www.homemediamagazine.com/hulu/hulu-again-missing-top-online-video-rankings-29339.

110. *See* Morrissey, *The Beginning of the End for Hulu?*, *supra* note 107.

111. *See* Morrissey, *Hulu's Network Drama*, *supra* note 106.

112. *See* Morrissey, *The Beginning of the End for Hulu?*, *supra* note 107.

113. *See* Owen Thomas, *Online Video Piracy Is Fading Away, Thanks to Netflix*, BUS. INSIDER (Nov. 7, 2012, 6:27 AM), http://www.businessinsider.com/netflix-bittorrent-sandvine-report-2012-11.

114. *See* Chris Dziadul, *On Demand TV Revenues Set to Soar*, BROADBAND TV NEWS (July 24, 2011), http://www.broadbandtvnews.com/2011/07/24/on-demand-tv-revenues-set-to-soar ("Some have advocated that the provision of a large pool of on-demand titles plus the rapid take-up of connected sets will accelerate the demise of linear channels.").

115. *See id.* VOD provides revenue to broadcasters by either keeping advertisements intact during the playback or providing additional fees from cable providers for the right to offer their subscribers VOD services. *See* Brian Steinberg, *Comcast, Nielsen Unveil Plan to Get More Ad Money from Video on Demand*, VARIETY (Dec. 1, 2013, 9:00 PM), http://variety.com/2013/tv/news/comcast-nielsen-unveil-plan-to-get-more-ad-money-from-video-on-demand-1200907881.

offerings, particularly since many of these options do not include advertisements.[116]

3. The Pirate Bay and Plundering Broadcast Television

Unfortunately, few studies have examined the impact of piracy on broadcast television alone.[117] Instead, various industries have estimated the overall cost of piracy.[118] For example, in the recent Stop Online Privacy Act (SOPA) debate, experts estimated that overall media piracy is $58 billion[119] annually while Asian pay-TV providers may lose over $1.06 billion annually.[120] Anecdotally, broadcasters lose significant revenues due to consumers pirating sports broadcasts[121] and using illegal streaming sites to avoid paying for DVR and VOD services.[122]

Regardless of broadcast piracy's current costs, the existing literature on media piracy has much to teach broadcasters about any future attempts to commercialize Internet TV.[123] By learning lessons from the music industry, broadcasters may avoid future losses to piracy.[124]

Experts generally agree that music piracy can be explained through a behavioral model where consumers view piracy as an accepted norm.[125] Whether because consumers view CDs as being

116. *See* Brian Stelter, *As DVRs Shift TV Habits, Ratings Calculations Follow*, N.Y. TIMES, Oct. 6, 2013, http://www.nytimes.com/2013/10/07/business/media/dvrs-shift-tv-habits-and-ratings.html?pagewanted=all.

117. *See* Galloway, *supra* note 5.

118. *See id.*

119. *See id.*

120. *See Asian Pay-TV Piracy to Cost $1b in 2005*, DAILY STAR (Oct. 27, 2005), *available at* http://www.asiaarts.ucla.edu/article.asp?parentid=32322.

121. *See* Brett Hutchins, *'Robbing the World's Largest Jewelry Store'? Digital Sports, Piracy, Industry Hyperbole, and Barriers to an Alternative Online Business Model*, 2011 AUSTRALIAN AND N.Z. COMM. ASS'N CONF. PROC., *available at* http://www.anzca.net/conferences/past-conferences/114-anzca11-proceedings.html.

122. *See* SHEILA SELES, IT'S (NOT) THE END OF TV AS WE KNOW IT: UNDERSTANDING ONLINE TELEVISION AND ITS AUDIENCE, CONVERGENCE CULTURE CONSORTIUM (2009), *available at* http://convergenceculture.org/research/C3NotEndTVExecSum.pdf.

123. *See* ALEC AUSTIN, HOW TO TURN PIRATES INTO LOYALISTS: THE MORAL ECONOMY AND ALTERNATIVE RESPONSE TO FILE SHARING, CONVERGENCE CULTURE CONSORTIUM (2006), http://convergenceculture.org/research/c3_pirates_into_loyalists.pdf.

124. *See id.*

125. *See* ABIGAIL DE KOSNIK, PIRACY IS THE FUTURE OF TELEVISION, CONVERGENCE CULTURE CONSORTIUM (2010), *available at* http://convergenceculture.org/research/c3-piracy_future_television-full.pdf; Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006).

overpriced[126] or because they do not believe they are harming anyone by stealing music,[127] most experts believe that the key to defeating piracy is changing that societal norm.[128] Certainly enhanced enforcement mechanisms have not worked; increased infringement actions have actually antagonized consumers,[129] and pirates have made sharing services nearly impossible to shut down.[130] Instead, many experts suggest that engaging casual music pirates, offering value-added services to convince consumers to pay for content,[131] and creating online communities that make fans feel invested in seeing their favorite bands succeed.[132] This helps separate the "casual" pirates from systematic thieves and changes normative values about piracy.[133]

Already, there is evidence that consumers view the piracy of broadcast television as a social norm.[134] Particularly because broadcast television is free to access, consumers easily justify pirating broadcast television on a cost-basis, similar to music pirates who complained about the rising costs of CDs.[135] As broadcasters attempt to commercialize over the Internet, piracy will likely increase, and broadcasters must be prepared to protect their revenues.[136]

In short, broadcasters rely on retransmission fees because they have no other options. The inefficiency of Nielsen ratings prevents broadcasters from effectively pursuing increased advertising revenue, while attempts to profit off of demand for Internet TV have failed. Looking forward, any attempt to grow Internet TV revenues will need to prevent piracy from rendering those attempts unprofitable.

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126. *See* AUSTIN, *supra* note 123, at 11.

127. *See* Schultz, *supra* note 125, at 667.

128. *See* AUSTIN, *supra* note 123, at 18–22.

129. *See id.* at 16–17.

130. *See* Nick Bilton, *Internet Pirates Will Always Win*, N.Y. TIMES, Aug. 4, 2012, http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html?_r=1& (describing how the Pirate Bay has become so de-localized that even an injunction could not keep the site offline for more than a week).

131. *See* Schultz, *supra* note 125, at 677–78.

132. *See* AUSTIN, *supra* note 123, at 18.

133. *See id.* at 19–20.

134. *See* PRICEWATERHOUSECOOPERS LLP, THE SPEED OF LIFE CONSUMER INTELLIGENCE SERIES: DISCOVERING BEHAVIORS AND ATTITUDES RELATED TO PIRATING CONTENT (2010) [hereinafter DISCOVERING BEHAVIORS], *available at* http://www.pwc.com/us/en/industry/entertainment-media/assets/piracy-survey-summary-report-0111.pdf.

135. *See* AUSTIN, *supra* note 123, at 11.

136. *See* DE KOSNIK, *supra* note 125, at 6–10.

II. A LEGAL PERSPECTIVE: COPYRIGHT LAW, COMMUNICATIONS POLICY, AND INTERNET QUESTIONS OF OWNERSHIP

The evolution of copyright and communications policy with regard to broadcast TV illuminates how Aereo threatens broadcasters' retransmission fees.[137] The interplay between copyright protection and the broadcasting rights granted by the communications policy have shaped the evolution of broadcasters' rights.[138] As recent cases have applied those policies to Internet TV, a circuit split has developed that Aereo is attempting to exploit.[139]

A. US Broadcasters' Rights: Limited Copyright but a (Not-Quite Property) Right to Retransmissions

Broadcasters have two primary rights in their broadcasts: (1) copyright over the content they create (or license) and (2) a quasi-right in their actual transmission over the air.[140] The US Constitution gave Congress the right to create copyright law,[141] and the rights of authors are codified in the Copyright Act of 1976.[142] Congress granted copyright holders five primary exclusive rights, although broadcasters primarily exercise the right to control reproduction of the protected work and the right to control public performances of the work.[143] According to the Copyright Act, a copy has been made if "a work is fixed by any method . . . from which the work can be . . . reproduced."[144] In order to be "fixed," a work must be "sufficiently permanent or stable to permit it to be . . . reproduced . . . for a period of more than transitory duration."[145]

In the 1960s, as cable networks began to spread throughout the country, broadcasters worried about their ability to compete in a

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137. *See* Jeffries, *supra* note 16 (quoting Time Warner CEO Glenn Britt, "I don't know if [what Aereo does is] legal or not. But if it is, we [cable providers] should do it too.").

138. *See infra* Part II.A.

139. *See infra* Part II.B.

140. *See* Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. S 325(B)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 107 (1996).

141. *See* U.S. CONST. art. I, § 8, cl. 8.

142. *See* 17 U.S.C. § 106 (2012).

143. *See* Cartoon Network, LP v. CSC Holdings, Inc., 536 F.3d 121, 125 (2d Cir. 2008). The Copyright Act provides five protections: the right to reproduce copyrighted works, to prepare derivative works, distribute or sell copies of the work, to perform the work publicly, to display the work publicly (and, for music, distributing the work through a digital medium). *See id.*

144. 17 U.S.C § 101 (2012).

145. *Id.*

crowded market.[146] Before that time, the three over-the-air broadcasters—ABC, CBS, and NBC—were the only source of television content and, since they faced no competition and did not have to pay for their spectrum, were "gold mines."[147] Because higher quality images could be sent over cable, however, fledgling companies that transmitted broadcast television over cable networks became extremely popular.[148] Although these cable companies aired the broadcasts with the original advertisements intact, broadcasters quickly filed suit, complaining that the cable companies should pay them additional fees.[149] Broadcasters were concerned that cable companies would eventually insert their own advertisements into broadcasts, replacing the original advertisements and greatly reducing the value of broadcast programming.[150]

Initially, the Supreme Court ruled that cable providers could legally rebroadcast free, over-the-air television without paying licensing fees, in part to facilitate development of cable infrastructure throughout the country.[151] Reasoning that cable networks operated as "community antennas" that merely enhanced what consumers could already do for free, the Court found that retransmission of intact broadcasts were not separate "performances" of copyrighted material.[152] Congress later redefined the meaning of "public performance," creating the "Transmission Clause" in the Copyright Act of 1976.[153] This change colored cable retransmissions as public performances because they transmitted performances "by means of any device or process" that the public received "in the same place or in separate places and at the same time or at different times."[154] Recognizing the need to encourage the development of cable networks, Congress also created a compulsory licensing scheme for cable

146. *See* James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane*, ARS TECHNICA (Aug. 30, 2012, 8:00 AM), http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane.

147. *See* CLARENCE JONES, WINNING WITH THE NEWS MEDIA: A SELF-DEFENSE MANUAL WHEN YOU'RE THE STORY 313 (8th ed. 2005).

148. *See Cable's Story*, NAT'L CABLE & TELECOMM. ASS'N, http://www.ncta.com/About/About/HistoryofCableTelevision.aspx (last visited Mar. 26, 2014).

149. *See* Grimmelmann, *supra* note 146.

150. *See id.*

151. *See* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 412–13 (1984); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398–99 (1968) ("Broadcasters perform. Viewers do not . . . ."); *see also* Grimmelmann, *supra* note 146 (describing how the Supreme Court promoted public access in the *Fortnightly* decisions and how Congress quickly responded by enacting the "transmit clause").

152. *See Fortnightly*, 392 U.S. at 399–400.

153. *See* 17 U.S.C. § 111 (2012), ("Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable"); Grimmelmann, *supra* note 146.

154. 17 U.S.C. § 101 (2012).

networks, allowing providers to rebroadcast local signals for a regulated fee based on gross cable receipts.[155] The compulsory license required cable networks to keep advertisements intact.[156] Eventually, Congress enacted the '92 Act, which overlaid the must-carry–retransmission-consent dichotomy on top of the compulsory license scheme.[157]

B. Broadcasters' Copyright and Fair Use

At first glance, the section 111 compulsory license created by the 1976 Copyright Act appears to greatly reduce the value of a broadcaster's copyright; the economic value of broadcasters' rights comes from FCC regulations requiring retransmission consent, not the nominal compulsory license fee.[158] But in the early 1980s, broadcasters turned to copyright law to fight off a new threat from Betamax recorders.[159]

With the advent of Betamax and VHS, many Americans began recording television shows for later viewing.[160] Concerned that those audiences would cut into advertising revenues by fast forwarding through ads, broadcasters sought a preliminary injunction banning Betamax from being sold in the United States[161] They accused Sony, the manufacturer of Betamax, of contributorily infringing their copyright, relying on the theory that Sony was providing the means for consumers to illegally copy protected works.[162]

In the 1984 case *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court disagreed, holding that "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another."[163] Looking to the requirements of secondary liability under the Patent Act to interpret copyright law, the Court held that Sony was not liable for contributory infringement so long as Betamax was capable of "substantial noninfringing uses."[164]

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155. *See* Lubinsky, *supra* note 140, at 111.

156. *See id.* at 107–08.

157. *See id.* at 113. While many experts strongly advocated for a combination of the compulsory-license and the retransmission-consent concepts, jurisdictional issues between House committees prevented this alteration to copyright law. *See id.* at 115.

158. *See id.* at 111–12 (noting that the compulsory license is a nominal fee, reducing the value of the copyright, while the value of the right to retransmit the broadcast itself is quite valuable).

159. *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 420 (1984).

160. *See id.*

161. *See id.*

162. *See id.*

163. *Id.* at 434.

164. *See id.* at 442.

Then the Court considered whether consumer-made copies actually infringed on broadcaster copyright.[165] Broadcasters claimed that Betamax consumers were creating video libraries that infringed upon their copyright.[166] Again, the Court disagreed.[167] Although Betamax players allowed consumers to make copies of copyrighted broadcasts, the Court noted that many consumers used the technology to "timeshift" programming in order to watch it later.[168] Looking at the legislative policies behind the fair use exception,[169] the Court concluded that timeshifting was not a commercial use of the copyrighted broadcasts and served the public policy of expanding access to free, over-the-air broadcasts, making private copying of broadcast works a fair use.[170]

Sony paved the way for future digital-video recording (DVR) services like TiVo and DVR set-top boxes.[171] In 2006, the cable provider Cablevision began offering a remote DVR service called remote-service digital-video recording (RS-DVR).[172] Instead of requiring consumers to have a set-top box and hard drive in their homes, RS-DVR allowed consumers to record shows and store them on Cablevision's remote cloud servers.[173] Broadcasters sought an injunction, claiming not only that Cablevision was making unauthorized copies but also that it was publicly performing copyrighted material.[174]

The Second Circuit overturned summary judgment for the broadcasters, holding that Cablevision was only facilitating timeshifting, not making a public performance.[175] It is important to note, however, that the court did not base its ruling on the fair use precedent from *Sony*; neither the broadcasters nor Cablevision raised an issue of secondary liability.[176] Instead, broadcasters specifically asked the court to analyze three questions: (1) whether buffering a master copy (required for the DVR to save copies on the cloud) is an

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165. *See id.*

166. *See id.* at 450 n.33.

167. *See id.* at 481–82.

168. *See id.* at 442.

169. *See* 17 U.S.C. § 107 (2012).

170. *See Sony Corp.*, 464 U.S. at 454–56.

171. *See* Matthew Scherb, *Free Content's Future: Advertising, Technology and Copyright*, 98 NW. U. L. REV. 1787, 1816 (noting that Commercial Skip and other programs allowing viewers to skip ads have generally been abandoned under threat of copyright suits).

172. *See* Cartoon Network, LP v. CSC Holdings, Inc., 536 F.3d 121, 125 (2d Cir. 2008).

173. *See id.* (noting that cloud servers allow consumers to quickly and remotely access data saved on servers maintained by the company at a company-operated location).

174. *See id.*

175. *See id.* at 140.

176. *See* Grimmelmann, *supra* note 146.

illegal reproduction; (2) whether Cablevision was directly liable for facilitating the creation of the copies; and (3) whether Cablevision was making a public performance.[177]

The Second Circuit held that buffering was not infringement because it was too transitory to count as a reproduction.[178] As noted above, the Copyright Act requires that copies be "fixed" in order to be infringing.[179] Noting that the buffered copies exist for no more than "a fleeting 1.2 seconds," the court found the buffered data to be transitory and ruled for Cablevision.[180]

Additionally, the DVR copies made by Cablevision on behalf of its customers were not a violation of the reproduction right because customers controlled the recording process.[181] Looking to the *Sony* Court's jurisprudence on contributory liability, the Second Circuit concluded that copyright law maintains a "meaningful distinction between direct and contributory copyright infringement" and held that companies could not be found liable for facilitating the reproduction of copyrighted works.[182] Likening Cablevision to a "proprietor who charges customers to use a photocopier on his premises," the court found that Cablevision did not have enough control over how consumers used its product to be directly liable for customer-made copies.[183] The court focused on the fact that RS-DVR did not make any copies without direct, specific instructions from consumers.[184]

The critical question was whether the transmissions sent to Cablevision customers were public performances under the Copyright Act.[185] Because Cablevision assigned each user a personal copy of a recorded show, as opposed to allowing users to merely access a "master copy," the Second Circuit held that Cablevision was making a series of private, noninfringing performances.[186]

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177. *See Cartoon Network*, 536 F.3d at 125.

178. *See id.* at 130. Buffering is a process where computers save parts of a file in a temporary location in order to facilitate copying or moving the data. *See id.*

179. *See id.* at 127.

180. *See id.* at 129–30.

181. *See id.* at 131.

182. *See id.* at 133.

183. *See id.* at 131–32 ("We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.").

184. *See id.* at 133 ("[C]opies produced by the RS-DVR system are 'made' by the RS-DVR customer, and Cablevision's contribution to this reproduction by providing the system does not warrant the imposition of direct liability.").

185. *See id.* at 134.

186. *See id.* at 138.

Specifically, the court looked to the language of the Transmission Clause to find meaningful differences between the transmissions of Cablevision's system—which sent one user-specific transmission to one consumer—and the "community antennas" that motivated Congress to enact the Transmission Clause—which sent transmissions to multiple users from a master copy.[187]

As noted above, the Transmission Clause gives copyright holders the exclusive right "to transmit or otherwise communicate a performance or display of the work . . . to the public."[188] Cablevision argued that the public did not have access to its transmission because each transmission was available only to individual users who had selected it.[189] The broadcasters argued that the "performance" was the broadcast itself, which Cablevision was in fact making available to the public.[190] Thus, the key question was what constitutes a "performance" under the Copyright Clause.[191]

Looking at the legislative history of the Transmission Clause, the Second Circuit classified each transmission of a program as an individual performance; as long as that transmission was not available to the public, Cablevision was not infringing.[192] Indeed, the House Report on the clause notes that if "the potential recipients of the transmission represent a limited segment of the public," the performance was not public.[193] The court reasoned that if the broadcaster's interpretation were correct, then it would "render the 'to the public' language surplusage."[194] Thus, as long as each transmission was available only to individual consumers, remote DVR services are legal.[195]

187. *See id.* at 131 ("We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.").

188. 17 U.S.C. § 101 (2012).

189. *See Cartoon Network*, 536 F.3d at 132, 134.

190. *See id.* at 125.

191. *See id.* at 134.

192. *See id.* at 134–35, 137 ("The fact that the statute says '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.").

193. *See id.* at 135 (quoting H.R. REP. NO. 94-1476, at 64–65 (1976)).

194. *Id.* at 135–36 ("But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after 'performance.'").

195. *See id.* at 139.

C. Enter Aereo: Tiny Antennas, Big Questions

Aereo's founders saw demand for better online television,[196] noticing that broadcast TV was the most watched and in-demand programming available.[197] They also recognized that many people did not receive good reception in their homes or simply did not want the hassle of setting up a DVR system and rabbit ears.[198] Also, several different companies had tried and failed to enable customers to better access media that they could access freely or cheaply.[199] Through Cablevision, Aereo's founders saw an opportunity: by building thousands of tiny antennas and assigning each one to a user, they could ensure that any potentially infringing copy was made "automatically upon [a] customer's command" and was not broadcast to the public.[200]

Thus, Aereo was born: for eight dollars per month, subscribers in several cities can stream live-broadcast TV from Aereo's website.[201] Because Aereo places the antennas near broadcasting towers, signals are crystal clear.[202] Additionally, users can record shows that they would otherwise miss; Aereo uses a system nearly identical to Cablevision's to ensure that any copies are transitory and that each user receives her own dedicated copy.[203] Should Aereo succeed, cable executives have already noted that they would consider adopting similar technology to either avoid retransmission fees or greatly reduce them.[204]

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196. *See* Mariko Hewer, *Aereo, amid Challenges, Looks Ahead to Possibilities*, FIERCEONLINEVIDEO (Aug. 28. 2013), http://www.fierceonlinevideo.com/story/aereo-amid-challenges-looks-ahead-possibilities/2013-08-28.

197. *See* Eric Deggans, *Television Viewers Shifting From Broadcast to Cable*, TAMPA BAY TIMES (Mar. 10, 2013, 5:30 AM), http://www.tampabay.com/features/media/television-viewers-shifting-from-broadcast-networks-to-cable/2108131 (explaining that broadcast shows almost always have more viewers, but that certain cable shows have matched broadcast ratings).

198. *See It's Not Magic. It's Wizardry.*, AEREO, https://aereo.com/how-it-works (last visited Mar. 27, 2014).

199. *See* Hewer, *supra* note 196; IVI, http://www.ivi.tv (last visited Mar. 27, 2014); Janko Roettgers, *Zediva Completes Liquidation, Customers Get Nothing*, GIGAOM (Mar. 19, 2012. 8:27 AM), http://gigaom.com/2012/03/19/zediva-liquidation-assets.

200. *See Cartoon Network*, 536 F.3d at 131, 133.

201. *See Frequently Asked Questions*, AEREO, https://aereo.com/faqs (last visited Mar. 27, 2014).

202. *See* Ryan Downey, *Aereo Will Expand to Offer Service Raleigh, N.C. Service Inviting Residents to Pre-Register*, STREAMING ADVISOR (Jan. 13, 2014), http://thestreamingadvisor.com/tag/aereo-streaming.

203. *See* Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 385 (S.D.N.Y. 2012).

204. *See* Jeffries, *supra* note 16 (quoting Time Warner CEO Glenn Britt, "I don't know if [what Aereo does is] legal or not. But if it is, we [cable providers] should do it too.").

As with VCRs and DVRs, broadcasters quickly sued Aereo.[205] The United States District Court for the Southern District of New York found that *Cablevision* controlled and that the broadcasters "failed to demonstrate they are likely to succeed in establishing that Aereo's system results in a public performance."[206] The Second Circuit affirmed and subsequently denied rehearing.[207] These legal victories have emboldened Aereo, and the company plans to continue expanding service into twenty-three cities by 2014.[208]

D. The Ninth Circuit's Alternative Approach: Money Makes it Public

Other courts have not embraced the Second Circuit's approach to the Transmission Clause, thereby limiting Aereo's availability across the country.[209] The United States Court of Appeals for the Ninth Circuit approaches the issue from an entirely different perspective, focusing on the commercial nature of a transaction when determining whether a transmission infringes on the public performance right.[210]

For example, when Zediva, a DVD rental company in California, designed an Internet-streaming service around the *Cablevision* decision, it was quickly enjoined out of business.[211] Zediva bought retail copies of newly released DVDs and allowed subscribers to stream these movies by "leasing" one of thousands of DVD players at Zediva headquarters.[212] When a subscriber requested a movie, the appropriate DVD would be loaded into a player and streamed to that subscriber alone.[213] Zediva attempted to cast its operations as "a DVD with a very long cable attached."[214] The district court granted a preliminary injunction against Zediva, noting that not only was the

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205. *See Am. Broad. Cos.*, 874 F. Supp. 2d at 396.

206. *Id.*

207. *See* WNET, Thirteen v. Aereo, 722 F.3d 500, 696 (2d Cir. 2013) (denying *in banc* rehearing), *cert. granted*, 134 S. Ct. 896 (2014).

208. *See Where Can I Get Aereo?*, *supra* note 18.

209. *See, e.g.*, Fox Television Stations, Inc. v. BarryDriller Content Sys., 915 F. Supp. 2d 1138, 1143 (C.D. Cal. 2012); Fox Television Stations, Inc. v. FilmOn X LLC, Civil Action No. 13-758 (RMC), 2013 WL 4763414, at *1 (D.D.C. Sept. 5, 2013).

210. *See BarryDriller*, 915 F. Supp. 2d at 1146 ("Congress has rejected that mode of reasoning in [copyright]. The equivalency between (1) what individuals could lawfully do for themselves and (2) what a commercial provider doing the same thing for a number of individuals could lawfully do . . . [guided the 1976 Copyright Act].").

211. *See* Warner Bros. Entm't v. WTV Sys., 824 F. Supp. 2d 1003, 1015 (C.D. Cal. 2011).

212. *See id.* at 1006.

213. *See id.* at 1007.

214. *See* Grimmelmann, *supra* note 146 (quoting Opposition to Motion Picture Studios' Motion for Preliminary Injunction, *Warner Bros. Entm't*, 824 F. Supp. 2d 1003 (No. 2:11-cv-02817-JFW-E)).

relationship between Zediva and subscribers commercial in nature, but also the case was distinguishable from Cablevision because a single DVD would be played for multiple users, as opposed to Cablevision's one-copy-per-user model.[215] Some observers have suggested that a key difference between Zediva and Cablevision was the source of copyrighted material: movies are produced under a business model that requires purchase for profit, while broadcast TV profits from advertisements and retransmission fees.[216]

Additionally, the United States District Court for the Southern District of California recently enjoined Aereokiller, an Aereo copycat, citing the company's economic function.[217] Noting that Ninth Circuit's law focuses on the "public performance of the copyrighted work" and not "whether the transmission is publicly performed," the court found that Aereokiller has almost no chance of succeeding on the merits.[218] As the district court explained in *On Command Video Corp. v. Columbia Pictures Indus.*, Ninth Circuit precedent suggests that

> the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, "public" one regardless of where the viewing takes place. The non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute "the public" under the transmit clause.[219]

In short, because commercial enterprises necessarily open their services "to the public," any transmissions they make must transitively also be public.[220]

Until this circuit split is resolved, broadcasters will be unsure about the future value of retransmission fees.[221] Moreover, uncertainty about what is legal and what is not is retarding the

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215. *See Warner Bros. Entm't*, 824 F. Supp. 2d at 1010.

216. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.14[C][3] (2006) (noting that Ninth Circuit jurisprudence that relies on the commercial aspect of a performance does not align with the statute).

217. *See* Fox Television Stations, Inc. v. BarryDriller Content Sys., 915 F. Supp. 2d 1138, 1151 (C.D. Cal. 2012).

218. *Id.* at 1145 (emphasis added).

219. On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991).

220. *See id.* Additionally, courts have focused on the reaction of Congress to the Supreme Court's "community antenna" case, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), to suggest that the 1976 Act was meant to capture "any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented." *See* Fox Television Stations, Inc. v. FilmOn X LLC, 2013 WL 4763414, at *11–12 (D.D.C. Sept. 5, 2013) (quoting H.R. REP. NO. 94-1476, at 63–64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677).

221. *See, e.g.*, *Disrupting Big Cable and Big Internet*, BLOOMBERGBUSINESSWEEK (Jan. 30, 2014), http://www.businessweek.com/articles/2014-01-30/t-mobile-aereo-shake-up-telecom-tv-industries (explaining how Aereo puts retransmission fees at risk).

growth of Aereo and preventing other innovative companies from expanding consumer access to media.[222]

III. PRIVATE AND JUDICIAL SOLUTIONS THAT ADDRESSES PIRACY, BOTTOM LINES, AND CONGRESSIONAL DIRECTIVES

Internet TV will continue growing.[223] Thus, the United States needs a clear answer regarding broadcasters' and copyright holders' rights.[224] Typically, Congress should address major technological changes that affect copyright.[225] But with major political gridlock expected in the next several years,[226] it seems unlikely that a meaningful overhaul of both the copyright system and communications policy will occur.[227] While the FCC and the Copyright Office have recommended phasing out the compulsory license scheme,[228] bills to amend the Cable Act stalled in committee during the 112th Congress.[229] When faced with a dysfunctional legislature, courts should take the advice of the *Sony* Court and apply the law "as it now reads."[230] Private parties or the judiciary can effect a solution for the Internet TV puzzle without relying on Congressional action.[231]

A. Reliance on the Commercial Aspects of Internet TV Goes Against Current Law

As noted above, certain courts have relied on the commercial relationship between Aereo and its customers to conclude that such

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222. *See* Dan Prochillo, *FilmOn Doesn't Want to Pause Case for Aereo Ruling*, LAW360 (Jan. 16, 2014), http://www.law360.com/articles/501845/filmon-doesn-t-want-to-pause-case-for-aereo-ruling; Shalini Ramachandran, *High-Quality Problem? Aereo Says No More Room for More NYC Customers*, WALL ST. J. (Jan. 31, 2014, 6:36 PM), http://blogs.wsj.com/corporate-intelligence/2014/01/31/high-quality-problem-aereo-says-no-room-for-more-nyc-customers (suggesting that the need for additional antennas has slowed Aereo's ability to scale operations).

223. *See* DE KOSNIK, *supra* note 125.

224. *See infra* Part III.C.

225. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

226. *See* Joshua Tucker, *Fundamentals of Lawmaking: Gridlock in the 113th Congress*, MONKEY CAGE (Nov. 2, 2012), http://themonkeycage.org/blog/2012/11/09/fundamentals-of-lawmaking-gridlock-in-the-113th-congress.

227. *See* David Hatch, *It's a Long, Hard Road to Retrans Reform*, TVNEWSCHECK (Sept. 5, 2012, 7:58 AM), http://www.tvnewscheck.com/article/61929/its-a-long-hard-road-to-retrans-reform (noting that even attempts to use the reauthorization of the Satellite Television Extension and Localism Act of 2010 in 2014 may not be enough to spark meaningful reform).

228. *See* John Eggerton, *Padden: Get Rid of Compulsory License and Retrans*, BROADCASTING & CABLE (July 20, 2012, 10:47 AM), http://www.broadcastingcable.com/article/487501-Padden_Get_Rid_of_Compulsory_License_and_Retrans.php.

229. *See* S. 2008, 112th Cong. (2011).

230. *See Sony Corp.*, 464 U.S. at 456.

231. *See infra* Part III.A–C.

services are "performance to the public."[232] This interpretation has no grounding in current copyright law and instead conflates "fair use" jurisprudence and the public performance right.[233]

Consider *On Command*, in which the district court held that Ninth Circuit precedent suggests that "the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, 'public' one regardless of where the viewing takes place."[234] This ignores other Ninth Circuit precedent that contrarily suggests that commercial transactions can lead to private performances.[235] In *Professional Real Estate*, the Ninth Circuit held that, although a hotel was "open to the public," once a hotel room was rented, it became a private space capable of hosting a private performance.[236]

Perhaps some courts look to the commercial nature of the transaction because they effectively misread *Sony*.[237] In *Sony*, the Court looked to the commercial nature of recording shows with Betamax because "commercial nature" is one of the traditional factors for evaluating fair use.[238] Broadcasters could use the commercial nature of Aereo's service to challenge extending *Sony* to cover the copies made at customers' requests, but it goes against current law to use the commercial nature of a transaction to evaluate whether it is public.[239] In short, at some point, an Aereo-like service will likely survive court review.[240]

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

233. *Compare BarryDriller*, 915 F. Supp. 2d 1138, *with Sony*, 464 U.S. 417.

234. On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991).

235. *See* Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 282 (9th Cir. 1989).

236. *See id.* at 281.

237. *Cf.* 464 U.S. at 448, 450 (noting that part of the test for fair use is whether the use affects the commercial market for the product).

238. *See id.* at 448.

239. *Compare* 17 U.S.C. § 101 (2012) (defining public performance), *with* 17 U.S.C. § 107 (2012) (defining fair use by the effect on commercial market).

240. What if instead of renting antennas, Aereo sold antennas to members and charged a monthly maintenance fee? This would be no different than a consumer using a Slingbox to transmit broadcast signals from one part of their home to another or consumers accessing media stored at their home while on vacation. How could any court enjoin that kind of service without completely ignoring the statutory language?

B. Broadcasters Should Embrace Services Like Aereo

Broadcasters are approaching the battle with Aereo as an existential fight.[241] While this animosity appears to stem from the likelihood that cable companies would use Aereo's technology to lower retransmission fees,[242] cable providers will almost certainly find a way to lower retransmission fees regardless of the outcome of the Aereo case.[243] What would stop cable companies from simply refusing to carry networks on their basic cable packages and offering consumers a high definition (HD) antenna alongside their set-top box?[244] Time Warner has already experimented with this idea, offering customers free rabbit ears in preparation for blacking out CBS during a contentious negotiation.[245] Companies like Boxee offer similar solutions for consumers wishing to lower their cable costs.[246] With some cable providers aggressively highlighting the expense of retransmission fees on customer bills,[247] it seems likely that companies can and will sell customers lower-cost packages that rely on Aereo-like services to access the major networks (in HD, no less).[248]

Thus, the argument that Aereo may "irreparably harm" broadcasters' ability to negotiate retransmission fees seems exaggerated; broadcasters may have already lost their leverage in these negotiations.[249] Using this assumption as a starting point, instead of worrying that Aereo could hurt retransmission fees,

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241. *See, e.g.*, Brief for Nat'l Ass'n of Broadcasters, et al. as Amici Curiae Supporting Appellants at 15–16, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 4509866, at *15–16.

242. *See* Jeffries, *supra* note 16.

243. *See* Brian Watt, *Time Warner Cable to Provide Free Antennas; CBS Announces New Deal with Verizon FIOS*, S. CAL. PUB. RADIO (Aug. 22, 2013, 4:43 PM), http://www.scpr.org/blogs/economy/2013/08/22/14569/time-warner-cable-to-provide-free-antennas-cbs-ann (describing how Time Warner planned to offer subscribers free rabbit ears during a negotiation with CBS over retransmission fees).

244. *Cf. id.* (explaining how Time Warner has already used a similar strategy in retransmission fee negotiations).

245. *See id.*

246. *See* Chris Welch, *Leaked Boxee TV Adds HDTV Antenna and DVR to Let You Ditch Cable for Good*, VERGE (Oct. 8, 2012, 7:23 PM), http://www.theverge.com/2012/10/8/3474602/boxee-tv-live-hdtv-antenna-dvr-apps.

247. *See What Is the Local Broadcast Retransmission Fee?*, MIDCONTINENT COMM., http://www.midcocomm.com/resourcecenter/index.cfm/251/Video/What-is-the-Local-Broadcast-Retransmission-Fee (last visited Mar. 27, 2014) (explaining why retransmission fees appear on consumer bills).

248. *See* Watt, *supra* note 243 (describing how Time Warner planned to offer subscribers free rabbit ears during a negotiation with CBS over retransmission fees).

249. *But see* Brief for Nat'l Ass'n of Broadcasters, et al. as Amici Curiae Supporting Appellants at 18, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 4509866.

broadcasters should embrace services like Aereo as a way to enhance their advertising revenues.[250]

Broadcasters have traditionally resisted Internet TV services because of concerns that they would cannibalize their normal advertising revenues.[251] In fact, Hulu's troubles have been tied to broadcasters overprotecting original broadcasts.[252] But as Aereo has demonstrated, there is a demand for Internet-based access to broadcast programming with advertisements intact.[253]

More importantly, Internet-streaming services provide huge opportunities to grow advertising revenues.[254] In addition to expanding the potential audience for broadcast programming, Internet-streaming services offer data metrics far superior to Nielsen's outdated methodologies.[255] Already, companies like Tivli are using Internet TV to develop advanced data metrics to better understand which shows particular demographics are watching, noting that they have analytics that "would make companies like Nielsen cry."[256] When vying for precious advertising dollars, the company with strong raw data and advanced analytics will have a distinct competitive advantage.[257]

Broadcasters may worry that Internet TV services could hurt local affiliates—who depend on revenues from local advertisers[258]—but Aereo's technology has already solved that concern because it limits customers' collective ability to access nonlocal broadcasts.[259] While certain consumers may use tools to avoid geographical restrictions,[260] it seems unlikely that those willing to take such measures are not already pirating television shows

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250. *See supra* Part I.A.

251. *See* Grimmelmann, *supra* note 146.

252. *See* Morrissey, *Hulu's Network Drama*, *supra* note 106.

253. *See* Jamie Beach, *Aereo Bags $38mn Funding, Eyes 22 New US Cities*, IP&TV NEWS (Jan. 10, 2013), http://www.iptv-news.com/2013/01/aereo-bags-38mn-funding-eyes-22-new-us-cities.

254. *See supra* Part I.A

255. *See* Kyle Alspach, *Reinventing TV, at Least at Harvard*, BOS. BUS. J. (Nov. 16, 2011, 8:40 AM), http://www.bizjournals.com/boston/blog/startups/2011/11/reinventing-tv-at-least-at-harvard.html?page=all; *supra* Part I.A.

256. *See* Alspach, *supra* note 255 (quoting Tuan Ho, co-founder of Tivli).

257. *See* Stelter, *As DVRs Shift TV Habits*, *supra* note 116.

258. *See* Grimmelmann, *supra* note 146.

259. *See id.*

260. *See Change Your IP Country Location*, IPRIVACYTOOLS.COM, http://www.iprivacytools.com/change-ip-country-location (last visited Mar. 27, 2014).

online.[261] Thus, concerns about hurting the local nature of the television market can be addressed through existing technology.[262]

Moreover, these services offer broadcasters an opportunity to capture advertising revenue for online media consumption.[263] Current estimates suggest that there is nearly a $20 billion gap between the advertising value of media consumed online and the advertising dollars spent to accompany that media.[264] While not all of that gap can be attributed to broadcast media, it certainly suggests that broadcasters could and should do a better job capitalizing on their content online.[265]

Finally, a business model that embraces Internet TV could also help capture revenue lost to piracy.[266] Many studies suggest that persuading consumers to pay for television shows that are broadcast freely is a losing battle.[267] Yet 87 percent of consumers are willing to watch advertisements in return for access to free content.[268] By pairing a streaming service with a value-added DVR function, broadcasters could likely support a $7 to $10 per month service that tracks customer watching habits and keeps advertisements intact (indeed, Aereo's success suggests that consumers are willing to pay).[269]

Presently, not enough data exist to definitively state that broadcasters can profit from Internet TV services.[270] When balanced against the near certainty that cable companies will find a way to lower retransmission fees, however, broadcasters have a strong incentive to explore the potential revenues of ad-supported Internet TV—particularly before an Aereo-like service finds a legal way to stream broadcast television.[271]

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261. *See id.* (outlining a difficult and complicated process).

262. *See MLB.com At Bat Blackout Restrictions*, MLB.COM, http://mlb.mlb.com/mobile/atbat_blackouts.jsp (last visited Mar. 27, 2014) (describing how Major League Baseball already restricts streaming services to protect local broadcasts).

263. *See* Savitz, *supra* note 81.

264. *See id.*

265. *See id.*

266. *See supra* Part I.C

267. *See* DISCOVERING BEHAVIORS, *supra* note 134.

268. *See* DISCOVERING BEHAVIORS, *supra* note 134.

269. *See* Christine Lagorio-Chafkin, *Aereo Keeps Growing, Keeps Making Enemies*, INC. (Sept. 24, 2013), http://www.inc.com/christine-lagorio/aereo-expands-controversy-continues.html.

270. *See supra* Part I.C.

271. *See* Lagorio-Chafkin, *supra* note 269.

C. A Legal Solution: Stop Protecting Broadcasters and Look to the Statute

The primary question facing the Court in the *Aereo* case is how to interpret the Transmission Clause.[272] Some courts have been swayed by public policy arguments or concerns about the viability of the broadcasting industry if the public performance right is limited.[273] But as noted above, the breadth of the public performance right does not necessarily implicate the survival of over-the-air broadcasters.[274] Thus, the Court should look to the language of the statute to determine exactly what the public performance rights protect.[275] The statute gives copyright holders exclusive power to:

> transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[276]

By its clear language, the statute prevents third parties from broadcasting a performance to many consumers in one location or many consumers at different locations.[277]

The questions presented in *Aereo* and *Cablevision* focus on the term "performance" when considering the phrase "capable of receiving the performance or display."[278] If "performance" refers to the original performance of the copyrighted material, then Aereo and Cablevision were infringing.[279] If the Transmission Clause classifies each transmission as its own "performance" of the work, then Aereo and Cablevision were not infringing.[280]

Melville Nimmer addressed this issue by creating the following hypothetical: imagine a phonograph record played in the privacy of your home.[281] If, at various times, members of the public listened to their copies of the same record, common sense suggests that there is

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272. *See* WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d Cir. 2011); Fox Television Stations, Inc. v. BarryDriller Content Sys., 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

273. *See WPIX*, 691 F.3d at 281; *BarryDriller*, 915 F. Supp. 2d at 1143.

274. *See supra* Part III.A.

275. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994) (emphasizing a plain language philosophy when evaluating terms of the Copyright Act).

276. 17 U.S.C. § 101 (2012).

277. *See* Jeffrey Malkan, *The Public Performance Problem in* Cartoon Network LP v. CSC Holdings, Inc., 89 OR. L. REV. 505, 516–17 (2010).

278. *Id.* at 530.

279. *See id.* at 532.

280. *See id.*

281. *See id.* at 515.

still not an infringement of the public performance right.[282] If the actual performance of the copyrighted work constitutes the "performance" in the Transmission Clause, however, then listening to the phonograph would be a public performance because "other members of the public will be playing duplicates of the same recorded performance 'at a different time.'"[283] In order to correct that "absurd" interpretation, Nimmer created a doctrine that focused on separate copies of each protected work, noting that transmission(s) of a single copy is the correct way to measure whether it is public.[284] Indeed, preventing companies from publicly disseminating a single copy of a performance is exactly the goal Congress intended when it created the Transmission Clause in reaction to community antennas.[285]

Critics have noted that, although the Transmission Clause initially equates "transmissions" with "performances," the statute later says "capable of receiving the performance."[286] These critics suggest that Congress did not have a full understanding of how digital copies would work in the future and could not have been prepared for services like Cablevision's that could so easily create separate copies of a performance.[287] Pointing to a 1967 legislative report that states "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public," these critics argue that Congress wanted to extend copyright protections to cloud services.[288]

However, reliance on a report "issued nearly a decade before the Act" was passed[289] seems misguided, particularly in light of contemporaneous legislative history that clearly suggests that "[t]he same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the

282. *See* NIMMER & NIMMER, *supra* note 216, § 8.14[C][3] ("It is absurd to suppose that under the current Act it has become necessary for private purchasers of phonorecords to obtain a performing rights license from ASCAP or BMI before they may lawfully play such phonorecords within their homes.").

283. Malkan, *supra* note 277, at 515 (quoting NIMMER & NIMMER, *supra* note 216, § 8.14[C][3]).

284. NIMMER & NIMMER, *supra* note 216, § 8.14[C][3].

285. *See* 17 U.S.C. § 111 (2012).

286. *See* Malkan, *supra* note 277, at 536 (emphasis added).

287. *See id.* at 537.

288. *See id.* at 543 (quoting On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991) (quoting H.R. REP. NO. 90-83, at 29 (1967))) ("It is more than likely that Congress intended the transmit clause to extend performance rights to the 'celestial jukebox' or what subsequently became known to Congress . . . as 'interactive services' . . . .").

289. *See* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 134 (2d Cir. 2008).

occupants of hotel rooms or the subscribers of a cable television service."[290]

Additionally, there is little risk that looking to the individual transmission to resolve the public performance issue will lead to under-protected copyright: in order to take advantage of Nimmer's separate-copies doctrine, one must have legally obtained multiple copies of a work.[291] In other words, Aereo's ability to retransmit broadcast television is limited by its customers' ability to make copies that fall under the statute's fair use defense.[292] Thus, the reproduction right prevents companies like Aereo from rampantly making multiple copies of a work in order to avoid the public performance right. The fair use limitations act as a backstop to private performances, ensuring that broadcasters are protected from abusive practices so long as their works are only copied by individuals seeking to timeshift. By adopting this view, the Court could protect broadcasters from bad actors while encouraging innovation and consumer access to media.[293]

IV. CONCLUSION

Aereo is taking advantage of a gap in copyright law to allow consumers greater access to free, over-the-air television.[294] While it is currently only a small player in the market, it has the possibility to completely upend how consumers digest broadcast television.[295] Aereo's business model also exemplifies how broadcasters have failed to capitalize on the potential of Internet TV: similar services could expand audiences, increase advertising revenue, and combat piracy.

The biggest obstacle to Internet television is the uncertainty regarding the definition of public performance in the Transmission Clause. But the statutory language is fairly clear: a transmission is a performance, and if that performance is limited to individual users, then it should be considered private.[296] The Supreme Court should reject overly protective policies that could imbue broadcasters with a quasi-property right in their broadcasts and instead embrace the

290. H.R. REP. NO. 94-1476, at 64–65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

291. *See* Malkan, *supra* note 277, at 542.

292. *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 432 (1984).

293. *Cf.* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 927 (2005) (emphasizing the importance of balance between "the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement").

294. *See* Jacobson, *supra* note 6.

295. *See* Jeffries, *supra* note 16.

296. *See* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 135 (2d Cir. 2008).

Second Circuit's approach to public performances. Should that jurisprudence contravene Congressional intent, the legislature may respond by altering the law.[297] Until that point, the Court should limit itself to the law's plain language, which says that transmissions are performances.[298]

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297. *See* Brendan Sasso, *Broadcasters May Turn to Congress for Help in Bid to Kill Web TV Service*, THE HILL (Apr. 13, 2013, 12:05 PM), http://thehill.com/blogs/hillicon-valley/technology/293713-broadcasters-may-turn-to-congress-in-bid-to-kill-web-tv-service.

298. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994) (emphasizing a plain language philosophy when evaluating terms of the Copyright Act).

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