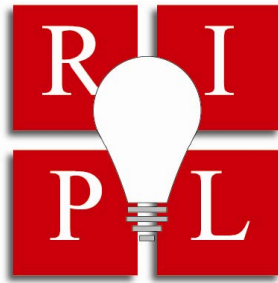


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



AEREVOLUTION: WHY WE SHOULD, BRIEFLY, EMBRACE UNLICENSED ONLINE STREAMING OF RETRANSMITTED BROADCAST TELEVISION CONTENT

BRADLEY RYBA

ABSTRACT

The United States has long recognized broadcast television programming's importance to the public's information and entertainment needs. Accordingly, Congress has historically offered strong copyright protections for broadcast television networks. Those strong protections allowed broadcast networks to withstand business threats from innovations like cable television and VCRs. However, Congress' recent silence on DVRs and cloud computing technology has allowed an entrepreneur to create the networks' next biggest threat, Aereo. The creators of Aereo and similar businesses designed their services specifically around ambiguities within copyright law that could allow them to transmit networks' content without paying the otherwise necessary consent fees. These services capture networks' free over-the-air broadcasts and retransmit a copy of those broadcasts to subscribers from a user-specific cloud. Essentially, Aereo-like services allow viewers to receive and record television without any physical equipment like antennas or DVRs. Broadcast networks have fought Aereo-like services in courts to ensure that these services will not affect their revenue streams. Yet, as other digital services and consumer viewing habits continue to threaten the networks' business models, broadcast networks' battles with Aereo, may really be a battle with themselves. This comment explores the legal ambiguities surrounding Aereo's creation and its usefulness in the television market. It determines that Aereo-like services are a present necessity to the broadcast industry, but also a long-term harm if Congress leaves them completely unregulated. Thus, this comment proposes business and congressional solutions to encourage legal clarity to secure rich broadcast television for the digital world.

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AEREVOLUTION: WHY WE SHOULD, BRIEFLY, EMBRACE UNLICENSED
ONLINE STREAMING OF RETRANSMITTED BROADCAST TELEVISION
CONTENT

BRADLEY RYBA

I. INTRODUCTION	579
II. BACKGROUND	580
A. Transmit Clause.....	580
B. Design On a Dime	582
C. Networks Want Aereo-like Services to Stay Out of Their Territory.....	583
1. Rapidly Growing Consent Fees	583
2. Ratings Battle	584
D. Cloudy With a Chance of Conflicting Court Decisions	585
1. Aereo and FilmOn Are Not <i>ivi</i> Leaguers	586
2. <i>Cablevision's</i> Rationales Get No Respect Outside the Second Circuit ..	587
III. ANALYSIS	588
A. Developing Story	588
1. Statutory Basis to Separate <i>Cablevision</i> from Standard DVRs?	588
2. The Aereo and FilmOn Courts Applied Conflicting, But Credible, Reasoning	589
B. Consumer Viewing Habits Demanded a Revolution.....	591
1. Game of Clones	591
2. Modern Family.....	592
3. Aereo-like Services Could Just Be the Cordless Cable System.....	593
IV. PROPOSAL	595
A. Networks Go Live Online	595
B. Congress Acts for Legal Clarity that Promotes Networks' Market Sustainability	596
1. Clearly Require All Services To Pay Networks.....	596
2. Secure Free Over-the-air Television Content	598
C. The Best Balance of Legal Certainty, Networks' Rights, and Public Television Access	599
V. CONCLUSION	600

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CONTENT

BRADLEY RYBA*

I. INTRODUCTION

“The revolution will be no re-run brothers; the revolution will be live.”¹ The future of broadcast television in the digital age is quite cloudy. Online services like Hulu and Netflix, which provide only previously aired content, have slowly initiated change in the television broadcast industry.² However, a perceived loophole in copyright law has spawned new Internet services that could rapidly change the entertainment industry.³ These new services combine an old idea—over-the-air television antennas—with the recent technology of remote, cloud storage of content.⁴

Two such services, Aereo and FilmOn, known collectively in this comment as Aereo-like services, aim to quickly and drastically change the television market.⁵ Unsurprisingly, Aereo-like services have united broadcast networks fighting against use of their content and split courts concerning whether this new process violates copyright law.⁶ The parties, the courts, and policymakers all realize the impact that Aereo-like services could have for a nationally important broadcast industry.⁷

* © Bradley Ryba 2014. J.D. Candidate, May 2015, The John Marshall Law School; B.A. in Political Science, Western Illinois University. I thank Andrew McElligott for his guidance in preparing this comment. I also thank the rest of RIPL for their meticulous editing and commitment to scholarly excellence. Any errors in this comment are my own.

¹ GILL SCOTT-HERON, *The Revolution Will Not Be Televised*, on SMALL TALK AT 125TH AND LENOX (Flying Dutchman Records 1970).

² See Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 COMM'LAW CONSPECTUS 375, 394–95 (2010) (stating that although Hulu, whose owners include NBC, ABC and Fox, has reached over 40 million viewers a month, currently those viewers primarily use this service only as a supplement to existing cable and broadcast TV options). “Over-the-top” (broadband delivery of content) services like Hulu and Netflix pay licensing fees but do not offer any live TV options for viewers. See *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285–86 (2d Cir. 2012). Conversely, Aereo and FilmOn do not pay licensing fees and do offer the major broadcast networks live. See, e.g., *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 681 (2d Cir. 2013).

³ See *WNET*, 712 F.3d at 689.

⁴ *Id.* at 680–81.

⁵ See Lee Gesmer, *Aereo, Antenna Farms and Copyright Law: Creative Destruction Come to Broadcast TV*, 18 No. 7 CYBERSPACE LAW. 16 (2013) (noting the potential for Aereo-like services to lead consumers to cancel cable subscriptions and reduce the networks' revenue from cable retransmission agreements).

⁶ See Petition for Writ of Certiorari at 25, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (U.S. Oct. 11, 2013), 2013 WL 5616728, at *25 (contrasting the FilmOn rulings with the Aereo decisions).

⁷ See Brief for Media Inst. as Amici Curiae in Support of Petitioners at 6, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Feb. 26, 2014), 2014 WL 828077, at *6 (explaining how Aereo can cripple the broadcast industry and deprive the public of essential free over-the-air television); Brief for The Consumer Fed'n of Am. & The Consumers Union in Support of Respondent at 16, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Apr. 2, 2014), 2014 WL 1348473, at *16 (explaining how Aereo can “benefit

Indeed, Aereo-like services could be the live television revolution that saves a slowly declining broadcast industry, or conversely the final nail in the coffin for free broadcast television.⁸

This comment explores substantial benefits and also devastating long-term harms of Aereo-like services. Part I will supply background information on companies utilizing a current loophole in copyright law that could threaten the broadcast television industry. Part II will discuss why courts should currently not find these services infringing based on legal and policy considerations. Part III will propose regulations to foster these services in the market with cable and satellite companies, collectively known as multichannel video programming distributors (“MVPDs”), and network broadcast companies.

II. BACKGROUND

This section provides an overview of the relevant statutes and case law leading up to the inception of the Aereo and FilmOn services. It will then explore these two services and the networks’ interests they could harm. It concludes by introducing Aereo and FilmOn’s recent conflicting court decisions.

A. Transmit Clause

The 1976 Copyright Act gave a copyright owner the exclusive right to reproduce, to distribute copies to the public, and to perform its work publicly.⁹ The Act begins by defining a public performance as either performing or displaying a copyrighted work at a place open to the public.¹⁰ The Act’s next, and recently controversial, definition of public performance, known as the Transmit Clause, states that performing a work publicly includes:

[T]o transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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 or different times.¹¹

broadcasters by making their programming more attractive by empowering consumers to manage it on their own terms.”)

⁸ See, e.g., Julianne Pepitone, *Will Broadcasters Beat Aereo at Its Own Game*, CNNMONEY (April 25, 2013, 2:46 PM), <http://money.cnn.com/2013/04/25/technology/yahoo-snl-aereo/> (noting that networks’ anger over Aereo-like services has prompted them to focus more on online streaming of content, in light of the potential for a substantial loss of retransmission fee revenue).

⁹ 17 U.S.C. § 106 (2012). The 1976 Copyright Act amended the 1909 Copyright Act, which predated the widespread use of motion pictures, radio, and television. See H.R. REP. NO. 94–1476, at 47 (1976).

¹⁰ 17 U.S.C. § 101 (2012).

¹¹ *Id.* The Transmit Clause superseded two controversial Supreme Court decisions dealing with public performance, *Fortnightly* and *Teleprompter*. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709–10 (1984). *Fortnightly*, an early cable company, retransmitted content without a license

Since that Act, courts have addressed many new technologies on the marketplace.¹² In 1983, the Supreme Court upheld the use of Betamax recorders, an early version of the VCR, to allow television viewers to time shift, record programs to view later.¹³ The Court found nothing in the Copyright Act that prohibited television viewers from time shifting content, nor did it find anything that would prohibit the sale of time-shifting devices.¹⁴

Twenty-five years later, in *Cablevision*, the Second Circuit upheld the use of cloud-based DVRs.¹⁵ Content owners sued Cablevision when it proposed to implement a system that allowed it to remotely store and copy television content at the request of its subscribers.¹⁶ Rather than merely analogizing DVR recordings to VCR recordings, the *Cablevision* court conducted a complex analysis of the Transmit Clause to determine this process' legality.¹⁷ The court explained that whether a performance is private or public turns on who can receive the transmission.¹⁸ Considering that a company can limit the audience that receives an individualized copy, as opposed to repeatedly sharing the original, transmitting copied content is not

through its system of antennas to individual viewers. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391–92 (1968). The Court held that this process was not a public performance because the cable companies were only aiding viewers in receiving local broadcasters' content. *Id.* at 399–400. In 1974, the Court expanded this view of private performance to distant signals beyond the range of viewers' antennas. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 412–13 (1974). In light of those decisions regarding new technological advances, Congress expressed its intent for the Transmit Clause to require all cable companies, who transmit content through any conceivable form of wired or wireless media, to pay royalties to broadcasters. *See H.R. REP. NO. 94-1476*, at 64 (1976).

¹² *See, e.g.*, Mitchell Zimmerman & Chad Woodford, *Cartoon Network v. Cablevision—Buffer Reproductions Are Not Infringing Copies, Holds Second Circuit In “Remote” DVR Case*, 13 No. 8 CYBERSPACE LAW. 9 (2008) (summarizing the court's reasoning to uphold the DVR after courts upheld a traditional VCR).

¹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (reasoning that the societal benefits, mainly increased public access from time shifting, outweigh the speculative harm to copyrighted works from private consumer recording).

¹⁴ *Id.* at 431. Content owners sued Sony on the basis of contributory infringement, a type of secondary liability not specifically mentioned in the Copyright Act. *See id.* at 434–35. For contributory infringement, courts require that a defendant had control of the copyrighted works and actively or passively induced others to infringe that content. *Id.* at 437–38. The *Sony* court found that Sony was not contributorily liable because its device was capable of “substantial non-infringing uses” such as private home recordings. *Id.* at 456. Considering that Aereo-like services are made only to transmit and record television, they currently do not provide consumers with any private non-infringing uses, if their retransmissions violate copyright law. *See id.* However, networks have sued Aereo only on the basis of direct infringement and not under contributory infringement. Brief for Respondent at 40, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Mar. 26, 2014), 2014 WL 1245459, at *40.

¹⁵ *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121, 138 (2d Cir. 2008) (reasoning that because each DVR copy is made by an individual subscriber, those single copies are not a public performance).

¹⁶ *Id.* at 124.

¹⁷ *Id.* at 134.

¹⁸ *Id.* at 140.

a public performance.¹⁹ Thus, Cablevision did not publicly perform content because its subscribers could only access their own, unique copy of content.²⁰

B. Design On a Dime

Recently companies have begun to take advantage of the *Cablevision* ruling.²¹ Two competing companies, FilmOn and Aereo, both designed similar systems to specifically comply with the *Cablevision* decision.²² These companies utilize thousands of dime-sized antennas to capture over-the-air broadcasts, which are then saved on remote hard drives.²³ When a user requests a certain program, the server sends an individual copy for that user to view on an Internet-connected device.²⁴

A user may watch programs live on a several-second delay or choose to record a program to an individualized cloud-based DVR to view later.²⁵ If a user does not record the program, the copy is erased and cannot be viewed again.²⁶ Thus, two subscribers will never use the same antenna or view the same copy of a recording.²⁷ Essentially, these services package the use of an antenna, a DVR, and a Slingbox into one digital service for customers.²⁸

¹⁹ *Id.*

²⁰ *Id.* Additionally, the court noted that Cablevision could only possibly be contributorily liable, and not directly liable, for infringement because their subscribers “made” the copies of the content. *Id.* at 133.

²¹ See, e.g., *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 694–95 (2d Cir. 2013) (noting that many cloud computing services, besides Aereo, have designed systems around *Cablevision*).

²² *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 WL 4763414, at *8 (D.D.C. Sept. 5, 2013). Former Chairman and CEO of Fox, Barry Diller, funds Aereo. See, e.g., *Diller v. Barry Driller, Inc.*, No. CV 12-7200 ABC (Ex), 2012 WL 4044732, at *1 (C.D. Cal. Sept. 10, 2012). Aereo received an injunction against FilmOn’s founder, Alki David, when he attempted to use “BarryDriller” as the name for his FilmOn streaming service. *Id.* at *10. David subsequently settled another Aereo trademark infringement lawsuit after he used the name Aereokiller. Eriq Gardner, *Hollywood Docket: Digital Music Class Action; Aereokiller Settlement; Snoop Lion Lawsuit*, HOLLYWOOD REPORTER (May 21, 2013, 11:32 AM), <http://www.hollywoodreporter.com/thr-esq/hollywood-docket-digital-music-class-526214>.

²³ *WNET, Thirteen*, 712 F.3d at 682. The District Court previously determined that each of these antennas operate independently. *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 381 (S.D.N.Y. 2012). Accordingly, Aereo’s Second Circuit case involved a purely legal issue, application of the Transmit Clause. *Id.*

²⁴ *WNET*, 712 F.3d at 682.

²⁵ *Id.*

²⁶ *Id.* at 682–83.

²⁷ *Id.*

²⁸ *Id.* at 682. A Slingbox connects to the source of an individual’s television signal and home network, allowing that person to place-shift their television content to watch on an Internet-connected device. See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1900–01 (2007). See generally *Fox Broad. Co., Inc. v. Dish Network LLC*, 723 F.3d 1067, 1079 (9th Cir. 2013) (denying Fox’s motion for a preliminary injunction against Dish Network for its Hopper that can utilize Sling technology); Eriq Gardner, *Fox Loses Bid To Stop Hopper’s Place Shifting Technology*, HOLLYWOOD REPORTER (Sept. 23, 2013, 3:03 PM), <http://hollywoodreporter.com/thr-esq/fox-loses-bid-stop-hoppers-634791> (reporting that judges within the Ninth and Second Circuit have denied networks’ requests for injunctions against Dish’s Hopper preequipped with Sling).

Consumers have greeted this mix of old and new technology with curiosity, allowing Aereo to steadily expand its market.²⁹ FilmOn, which also offers a free option, has broadcast in major cities throughout the United States since its inception.³⁰ While neither service has released their subscription numbers, their systems have the potential for substantial profit with marginal expenses.³¹

C. Networks Want Aereo-like Services to Stay Out of Their Territory

Although many consumers view Aereo-like services as an innovative convenience, networks see these new services as a competitive threat to their licensing fees and advertising dollars.³² Indeed, Aereo-like services could impact both advertising dollars, which comprise about ninety percent of networks' revenue, and retransmission fees, which account for essentially all of the networks' remaining revenue.³³

1. Rapidly Growing Consent Fees

The Copyright Act provides a compulsory license for certain localized MVPDs that meet Federal Communications Commission ("FCC") requirements to retransmit broadcasters' content without consent.³⁴ The MVPDs must still pay royalties for the

²⁹ See *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 399 (S.D.N.Y. 2012) (noting that even if Aereo did not expand beyond New York, its service is quickly growing and it has increased by thousands of customers within New York in the span of a few months); *Aereo Coverage*, AEREO, <https://aereo.com/coverage> (last visited Apr. 13, 2014) (illustrating that Aereo is soon expanding to many large cities throughout the Eastern, Southern and Midwestern United States).

³⁰ *Fox TV Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 Dist. LEXIS 126543, at *8 (D.D.C. Sept. 5, 2013) (noting that FilmOn began broadcasting in cities like Los Angeles and Chicago). Aside from a free standard definition option, FilmOn offers options ranging from a la carte choices for \$0.99 per month to a large mix of U.S. programs for a yearly subscription of \$99.50. *FilmOn Subscriptions*, FILMON, <https://www.filmon.com/subscriptions> (last visited May 15, 2014). Aereo offers only one package for local channels for \$8 per month, as well as an option to upgrade for more DVR space for an extra \$4 per month. *Aereo Support Center*, AEREO, <http://support.aereo.com/customer/portal/articles/383157-how-much-does-aereo-cost-> (last visited May 15, 2014).

³¹ See *ABC, Inc.*, 874 F. Supp. 2d at 399 (explaining that Aereo could prompt a substantial amount of cable customers to cancel their cable subscriptions); Joan E. Solsman, *Aereo CEO: Service Will Turn a Profit Before Turning in 1M Subscribers*, CNET (August 14, 2013, 6:38 PM), http://news.cnet.com/8301-1023_3-57598600-93/aereo-ceo-service-will-turn-a-profit-before-turning-in-1m-subscribers/ (noting Aereo CEO Chet Kanojia's claim that Aereo will be profitable with hundreds of thousands of subscribers, as opposed to other companies, like Pandora, with hundreds of millions customers and only a slim profit).

³² See *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp.2d 373, 398 (S.D.N.Y. 2012).

³³ See Brief for The Nat'l Ass'n of Broadcasters as Amici Curiae in Support of Petitioners at 20–22, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Mar. 3, 2014), 2014 WL 828071, at *20–22.

³⁴ See 17 U.S.C. § 111(c) (2012) (codifying cable systems consent); 17 U.S.C. § 119 (codifying satellite carrier consent); 17 U.S.C. § 122 (codifying local satellite broadcast consent).

content to the Register of Copyrights.³⁵ In 2013, the Copyright Office dispensed over \$310,000,000 of compulsory licensing fees to networks.³⁶

However, many services currently do not qualify for this license and are therefore governed by the Cable Television Consumer Protection and Competition Act of 1992.³⁷ That act provides that MVPDs must negotiate with broadcasters, typically every three years, in order to display their content.³⁸ The retransmission fees that MVPDs pay have become a substantial revenue source for networks.³⁹ As a whole, networks will receive an estimated \$2.8 billion in revenue from retransmission fees in 2014.⁴⁰ Understandably, broadcast companies view Aereo-like services, which pay no such fee, as a distinct threat to this rapidly growing source of revenue.⁴¹

2. Ratings Battle

Television ratings and advertising dollars are a separate interest that Aereo-like services could threaten.⁴² Nielsen ratings are the primary source for television audience measurement and analytics.⁴³ The Nielsen reports, which track programs' demographics, are vital to networks' securing lucrative advertising deals.⁴⁴ Collectively, networks receive around \$17 billion in advertising revenue each year.⁴⁵

³⁵ 17 U.S.C. § 111(d) (codifying the formula for determining the amount of royalties a cable system pays to the Copyright Office on the basis of specified percentages of gross receipts from subscribers to the cable service).

³⁶ UNITED STATES COPYRIGHT OFFICE, LICENSING DIVISION REPORT OF RECEIPTS (Apr. 3, 2014), <http://www.copyright.gov/licensing/lic-receipts.pdf>.

³⁷ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 630 (1994) (noting that one of the Copyright Act's purposes was to increase regulation of the cable industry to address the increasing inability of broadcast networks to compete for viewers and revenue); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (explaining that balancing the availability of free television with securing the benefits of cable television for the maximum number of viewers is an important and substantial federal interest).

³⁸ 47 U.S.C. § 325(b).

³⁹ Katerina Matsa, *Time Warner vs. CBS: The High Stakes of Their Fight Over Fees*, PEW RESEARCH CTR. (August 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/time-warner-vs-cbs-the-high-stakes-of-their-fight-over-fees/>.

⁴⁰ *Id.*

⁴¹ *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 398 (S.D.N.Y. 2012) (explaining the networks' argument that cable companies will be unwilling to pay retransmission fees if Aereo receives the same content without paying fees).

⁴² *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 603 (D.C. Cir. 1988).

⁴³ *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1267 (11th Cir. 2013) (noting that Nielsen exercises a monopoly over the television audience measurement services industry).

⁴⁴ *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1344 (S.D. Fla. 2011) (explaining that Nielsen ratings directly affect the cost companies will pay for advertisements).

⁴⁵ Edmund Lee, Alex Sherman & Alex Fixmer, *Nielsen's Slow Shift to the Web Hinders TV Networks*, BLOOMBERG (May 14, 2013, 3:45 PM), <http://www.bloomberg.com/news/2013-05-14/tablets-hurt-network-tv-ad-revenue-tied-to-nielsen-rating.html>.

However, Nielsen will only begin to measure online viewers in 2014.⁴⁶ Still, it will only count viewers who watch programs that have the same ads in the same order as the television broadcast.⁴⁷ This will exclude program views for services like Netflix, which operates ad-free, and FilmOn, which displays additional commercials from its own advertisers.⁴⁸ Importantly, Aereo does present the same advertisements in the same manner as the television broadcasts.⁴⁹ Nielsen has also explicitly stated that it will include Aereo in its ratings sample.⁵⁰

Nevertheless, Nielsen's online tracking is in its developmental stage and it has no official timing for when it can track Aereo's views.⁵¹ Thus, these services have the potential to cost networks some amount of advertising dollars.⁵²

D. Cloudy With a Chance of Conflicting Court Decisions

Unsurprisingly, Aereo-like services have spawned lawsuits by broadcast networks throughout the country.⁵³ Notwithstanding a recent Second Circuit decision, the broadcast companies have been largely successful in fighting these services in court.⁵⁴

First, a predecessor to Aereo, *ivi*, failed to establish that these services are analogous to cable providers.⁵⁵ *ivi* argued that it was entitled to the compulsory license because it was a cable system.⁵⁶ The court held that a streaming Internet service that provides its customers with retransmissions of television broadcasts could not qualify as a cable system under the compulsory license.⁵⁷ The court relied heavily upon the Copyright Office's consistent opposition to an Internet statutory license, as well as legislative history intending to narrow this license generally.⁵⁸

⁴⁶ Brian Stelter, *Nielsen Will Add Mobile Viewership to Ratings*, N.Y. TIMES (Sept. 20, 2013), at B13, http://www.nytimes.com/2013/09/20/business/media/nielsen-will-add-mobile-viewership-to-ratings.html?_r=0.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Anick Jesdanun, *Review: Aereo Makes it Tempting to Cut Cable TV*, ASSOCIATED PRESS (Jan. 12, 2013, 8:00 AM), <http://www.usatoday.com/story/tech/2013/01/11/aereo-cable-tv/1823809>.

⁵⁰ Brian Stelter, *Nielsen Adjusts its Ratings to Add Web-Linked TVs*, N.Y. TIMES (Feb. 21, 2013), http://mediadecoder.blogs.nytimes.com/2013/02/21/tvs-connected-to-the-internet-to-be-counted-by-nielsen/?_r=0 (noting that Pat McDonough, the senior vice president for insights and analysis at Nielsen, stated that Nielsen will include Aereo in its viewing sample).

⁵¹ Todd Spangler, *Nielsen Proves It Can Track Mobile TV Viewing, But Work Is Just Beginning*, VARIETY (June 4, 2013, 1:00 PM), <http://variety.com/2013/digital/news/nielsen-proves-it-can-track-mobile-tv-viewing-but-work-is-just-beginning-1200492069/>.

⁵² *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285–86 (2d Cir. 2012) (emphasizing that Internet transmissions reduce the value of local advertisements that aim to target select audiences).

⁵³ *Fox TV Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 WL 4763414, at *1 (D.D.C. Sept. 5, 2013).

⁵⁴ *Id.* at *18.

⁵⁵ *WPIX*, 691 F.3d at 284–85.

⁵⁶ *Id.* at 277–78. *See also* *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 602 (S.D.N.Y. 2011) (noting that the FCC does not regulate the Internet and no technology that does not comply with FCC regulations has ever been able to utilize the Section 111 compulsory license).

⁵⁷ *WPIX*, 691 F.3d at 282–83.

⁵⁸ *Id.* (noting that Congress intended this compulsory license to support local cable systems and address issues of reception and access to broadcast channels). *See generally* *Tasini v. N.Y.*

1. *Aereo and FilmOn Are Not *ivi* Leaguers*

Neither Aereo nor FilmOn has taken *ivi*'s position that it is operating as a cable system.⁵⁹ Thus, the argument has turned to the meaning of the Transmit Clause to determine public performance.⁶⁰

The networks have argued that this clause is unambiguous and that Congress intended it to apply to all services, even those not in existence at the time it was enacted.⁶¹ They contend that these separate transmissions, viewed in the aggregate, are clearly unlicensed public performances.⁶² They attempt to distinguish *Cablevision* because that cable operator was only allowing users to copy content that it already had a license to retransmit to its subscribers.⁶³

FilmOn and Aereo have taken positions that they offer a service that customers could lawfully recreate using their own home-based equipment.⁶⁴ They contend that Congress intended its definition of transmit to limit broadcasters' ability to prevent private transmissions.⁶⁵ Accordingly, within the parameters of *Cablevision*, the services maintain that they are privately performing networks' content, because they facilitate only one-on-one transmissions.⁶⁶

Times Co., Inc., 206 F.3d 161, 168 (2d Cir. 2000) (stating that courts should construe a compulsory license, which is an exception to copyright law, narrowly to respect the original provision); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 610 (D.C. Cir. 1988) (noting that the courts will defer to the Copyright Office's interpretation of the Copyright Act).

⁵⁹ *Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1140–41 (C.D. Cal. 2012).

⁶⁰ *Id.* at 1144. See also Jeffery Malkan, *The Public Performance Problem in Cartoon Network Lp v. CSC Holdings, Inc.*, 89 OR. L. REV. 505, 513–14 (2010) (explaining the difficulty of analyzing the separate places and different times language of the transmit clause, especially after the *Cablevision* decision).

⁶¹ *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 699 (2d Cir. 2013) (Chin, J., dissenting).

⁶² Don Jeffery, *Aereo's Wins Sends Networks on Hunt to Stop Streaming TV*, BLOOMBERG (Aug. 27, 2013, 4:16 PM), <http://www.bloomberg.com/news/2013-08-27/aereo-wins-send-networks-on-hunt-to-stop-streaming-tv.html> (reporting that NBC's counsel argued to the Ninth Circuit Court of Appeals that “[s]inging in the shower is a private performance. Sending transmissions to 50,000 customers is not singing in the shower”).

⁶³ *WNET, Thirteen*, 712 F.3d at 702 (Chin, J., dissenting).

⁶⁴ *Fox TV Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 U.S. Dist. LEXIS 126543, at *35–36 (D.D.C. Sept. 5, 2013).

⁶⁵ See *id.* at *35 (explaining FilmOn's argument that the court should consider the perspective of consumers who have a recognized right to use technology to record over-the-air broadcasts to view at a later time).

⁶⁶ *Id.* at *35–36. Aereo asserted an alternative argument to the Supreme Court that they could not be directly liable for infringement. Brief for Respondent at 40, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (U.S. Mar. 26, 2014), 2014 WL 1245459, at *40. Aereo contended that they merely provided the equipment for their subscribers and that the subscribers, themselves, controlled the copies of the networks' content. *Id.* at *41.

2. *Cablevision's Rationales Get No Respect Outside the Second Circuit*

In December 2012, the District Court for Central California agreed with the networks and issued a circuit-wide injunction against FilmOn.⁶⁷ The court expressly rejected *Cablevision's* reasoning as applied to Internet retransmissions.⁶⁸ The court reasoned that it is immaterial whether a copyrighted work is copied and then transmitted, because the Copyright Act is concerned with performance, not “sinusoidal waves” of transmissions.⁶⁹ Therefore, according to the court, FilmOn’s one-on-one transmissions of copies were collectively transmissions to the public, and thus public performances.⁷⁰ Additionally, the court rejected FilmOn’s argument that it is just providing a service that individuals could lawfully create for themselves.⁷¹

Conversely, in April 2013, the Second Circuit sided with Aereo and affirmed the district court’s holding that Aereo’s retransmissions are likely private performances.⁷² The court reaffirmed its reasoning in *Cablevision* that a process that creates and sends unique copies of every program to each customer is not a public performance.⁷³ The court noted that *Cablevision's* original license to retransmit the content copied by its customers is immaterial because private performances do not require any sort of license.⁷⁴ Thus, without legislative guidance to address Aereo and similar technology, the court found Aereo non-infringing under *Cablevision's* reasoning.⁷⁵

However, in September 2013, the District Court for the District of Columbia granted a nation-wide injunction, notwithstanding the Second Circuit, against FilmOn.⁷⁶ The court flatly rejected FilmOn’s argument that it operates as a one-on-one service with each of its individual customers because its entire system—its server and thousands of antennas—should be viewed in the aggregate.⁷⁷ The court found no way to exclude FilmOn’s transmissions from the Transmit Clause because FilmOn is literally using a process to transmit content to multiple members of the public.⁷⁸ Finally, the court noted that FilmOn’s performances are essentially identical to cable companies’ public performances.⁷⁹

⁶⁷ Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1148 (C.D. Cal. 2012).

⁶⁸ *Id.* at 1146.

⁶⁹ *Id.* at 1144–45.

⁷⁰ *Id.*

⁷¹ *Id.* at 1146 (rejecting the Second Circuit’s reasoning in *Cablevision*, and subsequently *Aereo*, because that reasoning is identical to the reasoning of *Fortnightly*, which Congress expressly rejected when it created the 1976 Copyright Act).

⁷² WNET, Thirteen v. Aereo, Inc., 712 F. 3d 676, 696 (2d Cir. 2013).

⁷³ *Id.* at 690.

⁷⁴ *Id.* (noting the networks’ attempt to distinguish Aereo’s service from *Cablevision's* service, because *Cablevision* received a license to transmit the network’s content).

⁷⁵ *Id.* at 695. The court acknowledged that Aereo’s transmissions could resemble private performances from personal devices, but also public performances from cable companies. *Id.* Yet, under *Cablevision*, the law commanded that the court treat Aereo’s performances as private. *Id.*

⁷⁶ Fox TV Stations, Inc. v. FilmOn X LLC, No. 13-758 (RMC), 2013 WL 4763414, at *18 (D.D.C. Sept. 5, 2013).

⁷⁷ *Id.* at *14.

⁷⁸ *Id.*

⁷⁹ *Id.* at *14.

III. ANALYSIS

This section will explore legal and policy reasons why courts should currently not treat Aereo as an infringing service. Part A will discuss the different rational meanings of the Transmit Clause and briefly critique the recent *Aereo* and *FilmOn* court rulings. This section will conclude with Part B, discussing the realistic harms and benefits of Aereo-like services.

A. Developing Story

As with many new technologies, the law is unclear as to whether the courts should consider Aereo-like services as copyright infringers.⁸⁰ The meaning of the Transmit Clause has been the crux of the legal confusion surrounding these services in recent court decisions.⁸¹ This recent confusion surrounding the Transmit Clause itself is rooted in the *Cablevision* ruling.⁸²

1. Statutory Basis to Separate Cablevision from Standard DVRs?

Although the Second Circuit's decision that transmitting copies of content for individual users qualified as a private performance was controversial, it was not unjustified.⁸³ In fact, Supreme Court Justice Kagan, who was then Solicitor General, wrote an amicus curiae brief in support of the Second Circuit's decision.⁸⁴ She noted how problematic *Cablevision* could be if courts read it broadly to apply to other services.⁸⁵ However, she emphasized that the Second Circuit intended to take a narrow approach applicable only to *Cablevision*'s facts.⁸⁶ Notably, at that time there

⁸⁰ Compare *WNET*, 712 F.3d at 696 (holding that Aereo is not infringing), with *Fox TV Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1148 (C.D. Cal. 2012), and *FilmOn X LLC*, 2013 WL 4763414, at *13, 14 (D.D.C. Sept. 5, 2013) (holding that FilmOn infringes upon broadcasters' content).

⁸¹ Compare *WNET*, 712 F.3d at 689 (adopting the approach that multiple discrete transmissions do not equate to a public performance), with *Fox TV Stations, Inc.*, 915 F. Supp. 2d at 1145–46, and *FilmOn X LLC*, LEXIS 126543 at *13, 14 (applying the Transmit Clause broadly to FilmOn's transmissions).

⁸² See, e.g., *Fox TV Stations, Inc.*, 915 at 1145–46 (reasoning that *Cablevision*'s approach is similar to the Supreme Court's approaches in *Fortnightly* and *Teleprompter* that Congress rejected).

⁸³ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.14[C][3] (2013) [hereinafter NIMMER ON COPYRIGHT] (explaining that giving the same copy of a work to numerous members of the public, whether at the same of different times, is a public performance). It rationally follows that transmitting distinct copies, thereby limiting the potential audience of that transmission, is not a public performance. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008).

⁸⁴ Brief for the United States as Amici Curiae at 22, *CNN, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009).

⁸⁵ *Id.*

⁸⁶ *Id.* at 21.

were no other conflicting court decisions dealing with similar DVR recording processes.⁸⁷

Some fear those problems have now materialized, because the Second Circuit has applied *Cablevision* to the Aereo service.⁸⁸ Cablevision Inc. itself expressed its opposition to Aereo and urged the court to narrowly strike down Aereo's system so that other cloud-based services would not be affected.⁸⁹ However, this position may not be necessary because both services could rationally be considered non-infringing under the Transmit Clause.⁹⁰

2. The Aereo and FilmOn Courts Applied Conflicting, But Credible, Reasoning

The Second Circuit's expansion of *Cablevision*'s holding to Aereo's system is a logical progression from *Cablevision*.⁹¹ Considering that Aereo is a mere modification of Cablevision's cloud DVR system, with an ability to watch live television, the court did not have an apparent legal basis to hold Aereo as an infringing service.⁹² Even notwithstanding *Cablevision*, there may have been no legal grounds to separate Aereo's recordings from that of ordinary DVR recordings.⁹³

The dissent in that case points out that Aereo's system is essentially no different from that of a cable provider that pays retransmission fees.⁹⁴ However, technological progressions have presumably rendered these services legally distinct.⁹⁵

⁸⁷ *Id.* at 7 (noting that the Second Circuit was the first, but likely not the last, appellate court to address DVRs and similar technologies).

⁸⁸ *See, e.g.*, Brief for Ralph Oman, Former Register of Copyrights as Amici Curiae at 19–20, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (urging the Second Circuit to limit *Cablevision* to its facts to prevent Aereo-like services from exploiting a perceived loophole).

⁸⁹ Brief for Cablevision Sys. Corp. as Amici Curiae in Support of Reversal at 3, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (arguing that Aereo is both performing work publicly and reproducing copyrighted work in violation of the Copyright Act). *But see* Joe Flint, *Cablevision Blasts Broadcasters' Supreme Court Filing Against Aereo*, L.A. TIMES (October 11, 2013, 6:12 PM), <http://articles.latimes.com/2013/oct/11/entertainment/la-et-ct-cablevision-aereo-20131011> (reporting that Cablevision criticized the broadcasters' decision to file for writ of certiorari review for the Second Circuit's decision regarding Aereo).

⁹⁰ *See, e.g.*, *WNET*, 712 F.3d at 695.

⁹¹ *See, e.g.*, *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284, at *14–15 (D. Mass. Oct. 8, 2013) (finding the Second Circuit's application of *Cablevision* to Aereo persuasive).

⁹² *See WNET*, 712 F.3d at 695. Without overruling *Cablevision*, it could have been impermissible policy-making for the court to exclude Aereo from its holding, especially after other similar services relied on *Cablevision*. *See id.*

⁹³ *See* NIMMER ON COPYRIGHT, *supra* note 83, § 8.14[C][3] (explaining that showing only one copy of a work to different members of the public is a public performance). Aereo's system, which operates in the same manner in both the "Watch Now" and "Record" modes, replicates how a home-based DVR user watches and records live television. *See WNET*, 712 F.3d at 682–83.

⁹⁴ *WNET*, 712 F.3d at 697.

⁹⁵ *See* *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008). The *Cablevision* Court, perhaps recognizing the emerging usefulness of cloud-computing services, endorsed services that create copies of content for each individual consumer, whereas MVPDs do not create similar unique copies of content for each of their individual users at those users' request. *Id.* Hence, the law may currently support Aereo-like services' unlicensed delivery of content, even though it is less efficient than the more direct method of MVPDs. *See id.*

Furthermore, Congress has not explicitly addressed Internet television services in any of its acts, including its act that set up retransmission consent agreements for cable systems.⁹⁶

That dissent also distinguished Aereo from DVR recordings on the basis that Aereo could act as a substitute for live television, whereas DVR systems only record programs already purchased by consumers.⁹⁷ While factually correct, this assertion disregards *Cablevision's* legal rule that separate individualized transmissions are not public performances.⁹⁸ Therefore, following *Cablevision*, whether a single user is viewing an unpurchased program live is immaterial to this particular public performance legal analysis.⁹⁹

Conversely, the D.C. District Court took a separate logical approach in striking down FilmOn's service.¹⁰⁰ The court was warranted in examining the statute's plain language together with the House Report to determine that the Transmit Clause applies to any and every service or process.¹⁰¹ The court's viewing of FilmOn's whole system in the aggregate, thereby collectively constituting a public performance, was also rational and realistic.¹⁰² However, this formal approach ignores post 1976 case law and technological advances.¹⁰³ It also presumes Congress' intent that Aereo-like services should be infringing.¹⁰⁴

Still, both the Second Circuit's holistic approach and the D.C. and California court's functionalist approach have reached rational but conflicting decisions.¹⁰⁵ Therefore, only Congressional revision can provide the most definitive answer to this

⁹⁶ 47 U.S.C. § 325(b) (2012); *see also* Amol Sharma & Shalini Ramachandran, *Broadcasters Ask High Court to Stop Aereo*, WALL ST. J. (Oct. 11, 2013, 4:56 PM), <http://online.wsj.com/news/articles/SB10001424052702303382004579129752289337822> (reporting that Congress has not shown signs that it is prepared to pass intervening legislation to address Aereo).

⁹⁷ *See WNET*, 712 F.3d at 702–03.

⁹⁸ *See, e.g., Cartoon Network*, 536 F.3d at 139.

⁹⁹ *Id.*

¹⁰⁰ *See Fox TV Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 U.S. Dist. LEXIS 126543, at *43–44 (D.D.C. Sept. 5, 2013).

¹⁰¹ *See id.* at *45–47. In interpreting the Transmit Clause alone, it could make sense for courts to read public performance broadly to ensure that the law does not separate infringing from non-infringing services based solely upon technicalities in their delivery methods of the same content. *See id.*

¹⁰² *See id.* at *47–49. Again, it could make sense to not separate infringing from non-infringing services based upon the technicality of whether their several antennas, in the same location, act dependently or independently of each other. *See id.*

¹⁰³ *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). A strict interpretation of the Transmit Clause, without examining the current technological market and private consumer interests, would likely not have resulted in the Supreme Court upholding the use of VTR tapes. *See id.*

¹⁰⁴ *Id.* at 430–31 (explaining that it has been Congress' task, since the development of copyright law, to provide copyright protection as new technologies develop).

¹⁰⁵ *Compare WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 694–95 (2d Cir. 2013) (examining Aereo's legal sufficiency in light of *Cablevision*, especially considering *Cablevision's* impact on innovative services seeking to avoid copyright liability), *with Fox TV Stations, Inc.*, 2013 U.S. Dist. LEXIS 126543, at *42–46 (taking a broad perspective that FilmOn is literally sending out transmissions to the public). Ultimately, the Supreme Court granted certiorari only for Aereo's Second Circuit decision and the Ninth and D.C. Circuits issued a stay on FilmOn's appeals. Brief for FilmOn X, LLC as Amici Curiae in Support of Respondent at 4, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Apr. 2, 2014), 2014 WL 1348476, at *4.

unclear and contentious area of law.¹⁰⁶ In the interim, *stare decisis* and judicial restraint should prevent courts from holding Aereo-like services as copyright infringers.¹⁰⁷

B. Consumer Viewing Habits Demanded a Revolution

Certainly, Aereo-like services negatively affect networks' copyright interests because they transmit networks' content without consent.¹⁰⁸ However, copyright protection is equally concerned with maximizing the benefits that the public receives from creative works.¹⁰⁹ A balance of those two interests establishes that Aereo-like services are a present necessity but also a long-term liability for television.¹¹⁰

1. Game of Clones

Although difficult to predict, Aereo-like services could cost networks a significant amount of revenue in the future through loss of retransmission fees and advertising dollars.¹¹¹ Still, any lost profits that Aereo could cost networks may be only incidental to the inevitable Internet television revolution.¹¹²

First, the Nielsen ratings system will soon track Aereo's viewers, and so Aereo's effect on advertising revenue could be minimal.¹¹³ Cable television and other Internet-based services have progressively detracted some amount of advertising

¹⁰⁶ See Brief for Respondent at 49, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Mar. 26, 2014), 2014 WL 1245459, at *49. Court decisions finding Aereo-like services infringing leave a peculiar dichotomy between Aereo-like services and other cloud computing services. *See id.* These decisions dictate that users playing back content stored on physical DVRs to themselves are private performances; yet users playing back that same content from cloud DVRs to themselves are public performances. *See id.* Considering that there is no statutory basis to separate Aereo-like services from other cloud computing services, the same rationale should apply to all cloud computing services. *See id.* Accordingly, cloud computing services, like Google Drive, could face copyright liability for their users' "public performances," even though those users would undisputedly be engaging in private performances if they played back content stored on physical devices. *Id.* Thus, court decisions against Aereo-like services create more uncertainty and possible liability for all cloud computing services. *See* Brief for Computer & Commc'ns Indus. Ass'n & Mozilla Corp. in Support of Respondent at 16, *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (Apr. 2, 2014), 2014 WL 1319386, at *16.

¹⁰⁷ *Sony Corp. of Am.*, 464 U.S. at 430–31 (emphasizing that the judiciary should be reluctant to expand copyright protections without explicit legislative guidance).

¹⁰⁸ *See Fox TV Stations, Inc.*, 2013 U.S. Dist. LEXIS 126543, at *50–51.

¹⁰⁹ *Sony Corp. of Am.*, 464 U.S. at 431–33.

¹¹⁰ Fred von Lohmann, *Fair Use As Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 853 (2008) (describing, albeit in the fair use context, the difficulty in predicting the ultimate danger of disruptive innovations).

¹¹¹ *See, e.g., ABC, Inc.*, 874 F. Supp. 2d at 398–400.

¹¹² *See, e.g.,* Ronald J. Krotoszynski, Jr., *The Irrelevant Wasteland: An Exploration of Why Red Lion Doesn't Matter (Much) in 2008, the Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Regulating Access to Spectrum*, 60 ADMIN. L. REV. 911, 914–16 (2008).

¹¹³ Stelter, *supra* note 50.

dollars from networks.¹¹⁴ Hence, the advertising problem may not be as related to Aereo-like services as much as it is related to changing viewing habits.¹¹⁵

Regardless of its cause, that recent decline in advertising revenue has made networks more dependent upon retransmission fees, which Aereo-like services could drastically affect.¹¹⁶ Although costly and time consuming upfront, MVPDs could build and utilize systems of mass antennas in the same manner as Aereo and FilmOn.¹¹⁷ If MVPDs provided a similar individualized user interface to viewers, their transmissions of networks' content could also be private performances.¹¹⁸ Hence, cable providers would no longer need to enter into costly retransmission fee agreements and networks would lose billions of dollars.¹¹⁹

However, such a radical transition for MVPDs is only speculation.¹²⁰ More realistically, MVPDs will only use Aereo-like services as a bargaining chip in negotiating retransmission fees.¹²¹ This would decrease the high cost of these fees for MVPDs, thereby reducing the networks' profits.¹²² Nevertheless, although networks are usually weary of new technology, they have typically, with appropriate assistance, been able to reach profitable deals with MVPDs after new technologies emerge.¹²³

2. Modern Family

Ultimately, it is unknown whether Aereo will cost networks a substantial amount of revenue, however it is unlikely that the networks' current business model

¹¹⁴ See Sam Thielman, *Is Cable Finally Getting Parity With Broadcast? Both are Changing*, ADWEEK (May 19, 2013, 11:07 PM), <http://www.adweek.com/news/television/cable-finally-getting-parity-broadcast-149624>; Lisa Richwine & Liana B. Baker, *U.S. Broadcast TV Ratings Slide Pressures Ad Rates at 'Upfronts'*, REUTERS (May 12, 2013, 10:07 AM), <http://www.reuters.com/article/2013/05/12/us-advertising-idUSBRE94B06S20130512>.

¹¹⁵ See, e.g., Brian Stelter, *As TV Ratings and Profits Fall, Networks Face a Cliffhanger*, N.Y. TIMES (May 12, 2013), http://www.nytimes.com/2013/05/13/business/media/tv-networks-face-falling-ratings-and-new-rivals.html?pagewanted=all&_r=0.

¹¹⁶ *Id.*

¹¹⁷ Andy Fixmer, Alex Sherman, & Jonathan Erlichman, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, BLOOMBERG (Oct. 25, 2013, 11:00 PM), <http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Joe Flint, *Having an Aereo Service Won't Necessarily Solve Retransmission Dilemma*, L.A. TIMES (Oct. 25, 2013, 4:39 PM), <http://articles.latimes.com/2013/oct/25/entertainment/la-et-st-fall-tv-directv-aereo-charter-time-warner-cable-20131025>.

¹²¹ See, e.g., *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 398 (S.D.N.Y. 2012).

¹²² *Id.*

¹²³ Scott Collins, *Big 4 Broadcast Networks Feel Good About Fall, Thanks to 'DVR Lift'*, L.A. TIMES (Oct. 21, 2013, 6:00 AM), <http://articles.latimes.com/2013/oct/21/entertainment/la-et-st-fall-tv-scorecard-20131021> (reporting how the DVR has helped increase broadcast network viewership); *In the Matter of Amendment of the Commissions Rules Related to Retransmission Consent*, 26 F.C.C. Rcd. 2718, 2719 (2011) (noting that the networks benefit from costly and contentious MVPDs retransmission consent negotiations).

will be sustainable in the Internet age of television.¹²⁴ Aereo-like services can force networks to come to grips with this transition and pressure them to develop new profitable Internet business models.¹²⁵

Increasingly, many viewers are turning to new ways of watching content, such as mobile streaming on-the-go or binge-watching at home.¹²⁶ It is likely that eventually most households will have only one Internet-connected television, along with mobile devices to receive content inside and outside the home.¹²⁷ Still, a significant number of cable customers watch primarily, or even entirely, broadcast television channels.¹²⁸ Aereo-like services, supplemented with a service like Netflix, could be a cost-effective method for viewers to conveniently receive their favorite entertainment content, without unnecessary and costly cable channels or extra physical devices.¹²⁹

Furthermore, the mere presence of Aereo-like services may benefit consumers regardless of their choice to cut the cord on cable.¹³⁰ Aereo-like services could encourage increased and more convenient access to television content through *a la carte* channels and mobile viewing.¹³¹ Additionally, the low cost of these services should compel MVPDs to reconsider their costs to consumers and subsequently compel networks to reconsider their costs to MVPDs.¹³²

3. Aereo-like Services Could Just Be the Cordless Cable System

Although, for now, the balance of interests may weigh in favor of Aereo-like services, one must never forget about the paramount interests of free quality television.¹³³ If broadcast networks cannot work out new profitable business models, the networks will have to make sacrifices to their programming.¹³⁴ This threat to the

¹²⁴ Ken Auletta, *CBS, Time Warner Cable, and the Disruption of TV*, NEW YORKER (Aug. 19, 2013), <http://www.newyorker.com/online/blogs/currency/2013/08/cbs-time-warner-cable-and-the-disruption-of-tv.html> (explaining that video on demand and mobile viewing have disrupted business models that MVPDs and networks believed were “impregnable”).

¹²⁵ *See id.*

¹²⁶ Shalini Ramachandran & Amol Sharma, *Cable Fights to Feed ‘Binge’ TV Viewers: Comcast, Verizon FiOS Vie With Netflix, Amazon for Rights to Show Complete Series*, WALL ST. J. (Sept. 20, 2013, 8:09 PM), <http://online.wsj.com/news/articles/SB10001424127887324807704579083170996190590>.

¹²⁷ Brief for the Consumer Fed’n of Am. and Consumers Union as Amici Curiae Supporting Appellees at 9–10, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² Ken Auletta, *Can Aereo Disrupt The TV Business?*, NEW YORKER (Feb. 19, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/02/can-aereo-disrupt-the-tv-business.html> (noting Aereo as a cheaper alternative to the expensive vast array of options of cable).

¹³³ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–55 (1984) (explaining the public interest in access to television).

¹³⁴ Cecilia Kang, *As Users Flock to iTunes, Hulu and Netflix, TV Stations Struggle to Survive*, WASH. POST (Apr. 23, 2012), http://www.washingtonpost.com/business/technology/as-users-flock-to-itunes-hulu-and-netflix-tv-stations-struggle-to-survie/2012/04/23/gIQAqc9Cct_story.html (reporting the decline in quality and use of free broadcast television).

quality and availability of free television alone could warrant some regulations for Aereo-like services in the future.¹³⁵

ivi's early plight is illustrative of how these congressional regulations should equally promote both Aereo-like services and broadcast networks.¹³⁶ Although ivi's argument that it was entitled to a compulsory license was unpersuasive, a revised license could be a pragmatic solution to balance the public and private interests in television.¹³⁷

However, Congress, the FCC, and the Copyright Office are all trending toward the elimination of the compulsory license.¹³⁸ The compulsory license certainly does have problems when applied to Internet services, primarily that the FCC cannot regulate Internet content.¹³⁹ Content owners and policy makers also have concerns about Internet security of their content, especially because a compulsory license does not allow networks to choose who gets to use their content.¹⁴⁰ Still, these new online services, with little negotiating ability and great apprehension from networks, could have use for a compulsory license.¹⁴¹

Indeed, this new purpose is analogous to Congress's original intent for the compulsory license.¹⁴² Congress anticipated the importance of public television access and it created the compulsory license to promote cable systems, at a time when they had little negotiating ability with networks.¹⁴³ That same rationale applies to Aereo-like services that allow users to view broadcasts at times and locations most convenient to them.¹⁴⁴ Still, if completely unregulated, these services could essentially replace MVPDs and hinder the availability of free quality television.¹⁴⁵ However, heavy regulations could easily destroy Aereo-like services' profits and business, thereby halting the Internet television revolution.¹⁴⁶ The next section will discuss a balanced approach to regulation that should help foster both types of services.

¹³⁵ *See id.*

¹³⁶ *See* WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 287–88 (2d Cir. 2012).

¹³⁷ *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 320 (2013) (explaining that although Congress acts responsibly when it discretely adjusts copyright law, in the age of the Internet, more frequent and timely changes are needed).

¹³⁸ U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT: A REPORT OF THE REGISTER OF COPYRIGHTS 40–48 (Aug. 29, 2011), *available at* <http://www.copyright.gov/reports/section302-report.pdf> [hereinafter STEL ACT] (noting that the compulsory license may soon serve little purpose, but also recognizing the practical importance of amending the license to comport with digital television technology).

¹³⁹ *Id.* at 46.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 282 (2d Cir. 2012).

¹⁴³ *Id.*

¹⁴⁴ *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 681–82 (2d Cir. 2013).

¹⁴⁵ *Fox TV Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 U.S. Dist. Lexis 126543, at *49–52 (D.D.C. Sept. 5, 2013).

¹⁴⁶ *See* ABC, Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 402–03 (S.D.N.Y. 2012) (illustrating that an injunction would cause Aereo to lose employees, investors, and, customers). Accordingly, heavy regulations on Aereo-like services would also negate their purpose of spending their resources upfront to specifically abide by the law. *See* WNET, 712 F.3d at 693–94.

IV. PROPOSAL

The high stakes for public television, and the inconsistencies of courts addressing Aereo-like services, are a call for congressional regulation.¹⁴⁷ Still, the great uncertainty as to the true effects of these services should warrant congressional action only if required to assist public television after new business strategies appear ineffective.¹⁴⁸ This section will first explain the actions that networks can take to ensure public television is not immediately harmed. It will then present the various steps that Congress must take to ensure that the networks can withstand any future threats to their new business model. It will conclude by addressing this approach's legal and practical advantages over other alternative congressional courses of action.

A. Networks Go Live Online

Considering that Congress should use restraint when dealing with new technologies, prior to congressional action, broadcast networks should first attempt new business solutions to overcome Aereo-like services.¹⁴⁹ The networks' most sensible solution is to offer all their channels live over the public airwaves and free online on a Hulu-like website and mobile apps.¹⁵⁰ Networks could further create a separate high-definition pay option that allows users to record and archive live shows.¹⁵¹ Considering that networks' basic online services would be free, while Aereo-like basic services require a subscription, presumably few consumers would have any reason to pay for Aereo-like services.¹⁵² Nielsen could work with networks to quickly enable a way to track these online viewers, like it has planned for Aereo.¹⁵³

¹⁴⁷ See, e.g., *WNET*, 712 F.3d at 694–95 (noting that technological developments have created tension between Congress' previous views that MVPDs must pay retransmission fees but that certain other transmissions still must be classified as private).

¹⁴⁸ See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that Copyright law balances creators' incentives for work with the general benefits derived by the public from those works). Due to current uncertainty of Aereo-like services' impact, Congress may not, right now, be effectively able to balance those interests. See *id.*

¹⁴⁹ See, e.g., H.R. Res. 175, 112th Cong. (2011) (expressing the need to continue deregulatory and free-market practices concerning technology).

¹⁵⁰ See S. REP. 102-92, at 41–44 (1992) (finding that Congress must enact the must-carry provision in the Cable Television Consumer Protection And Cable Television Act to ensure the continued availability of free television). Networks' proposition to move to pay-only television would cost them billions of dollars of steadily growing retransmission fees and force Congress to act sooner than it should, thereby detracting from Congress' ability to effectively evaluate the market concerning broadcast networks and Aereo-like services. *Id.* Ideally, Aereo-like services will quickly compel networks to develop these live online models on their own. See Alex Barinka & Joshua Fineman, *CBS May Create Its Own Internet-TV Service to Challenge Aereo*, BLOOMBERG (Mar. 28, 2014 10:32 AM), <http://www.bloomberg.com/news/2014-03-28/cbs-may-create-its-own-internet-tv-service-to-challenge-aereo.html>.

¹⁵¹ *Compare FilmOn Subscriptions*, FILMON, <https://www.filmon.com/subscriptions> (last visited Apr. 13, 2014) (offering high definition and several recording options for live shows), *with Hulu Plus: Frequently Asked Questions*, HULU <http://hulu.com/plus> (last visited May 19, 2014) (offering the ability to view previously broadcasted content in high definition without a user recording option).

¹⁵² *Id.*

¹⁵³ See Brian Stelter, *supra* note 46.

Increased access on Internet-connected devices could also raise viewership, thus making advertising more valuable.¹⁵⁴

B. Congress Acts for Legal Clarity that Promotes Networks' Market Sustainability

While the networks' transition to live online television would eliminate Aereo-like services' consumer market utility and increase access to public television, it would still do little to alleviate the hostility in MVPD retransmission consent negotiations.¹⁵⁵ Any sudden loss of retransmission revenue for networks could drastically affect the quality of free television, so Congress must be prepared to act once this harm becomes certain.¹⁵⁶ Considering that the Transmit Clause applies to all copyrighted content, Congress should act narrowly and not change any language in that clause itself.¹⁵⁷ Instead, Congress should clarify that it intends for the Copyright Act to apply to each and every television service by eliminating compulsory licensing and amending retransmission consent.¹⁵⁸

1. Clearly Require All Services To Pay Networks

Congress should first eliminate the current MVPD compulsory licensing scheme, thereby requiring all MVPDs to negotiate directly with broadcast networks.¹⁵⁹ This would provide networks more control over their content and eliminate any ambiguity as to which services must pay for that content.¹⁶⁰

In addition to eliminating compulsory licensing, Congress should amend the Cable Television Consumer Protection and Competition Act or pass new legislation, requiring each Internet television service to also negotiate directly with networks.¹⁶¹ The act should also require all MVPDs to pay networks separately to offer network

¹⁵⁴ See *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1344 (S.D. Fla. 2011); Henry Pruitt, *Hulu's Impact on Television and Copyright Law*, 10 VA. SPORTS & ENT. L.J. 221, 243–44 (2010) (noting the potential for Hulu to utilize a system similar to Google AdWords, wherein the advertiser can track how many viewers clicked on a certain advertisement).

¹⁵⁵ See *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 398 (S.D.N.Y. 2012).

¹⁵⁶ *Id.* Considering that Congress has consistently recognized the importance of access to free television, a substantial and imminent financial threat to that interest should require congressional action. See *id.*

¹⁵⁷ See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (applying the Transmit Clause to VTR tapes); *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 281–82 (9th Cir. 1989) (applying the Transmit Clause to motion picture retransmissions within a hotel); *In re Cellco P'ship*, 663 F. Supp. 2d 363, 371–72 (S.D.N.Y. 2009) (applying the Transmit Clause to the transmission of musical ringtones to cellphones). In the past, Congress has worked narrowly to regulate new services, while leaving the Transmit Clause unmodified. See 47 U.S.C. § 325(b) (2013) (establishing retransmission consent to still include MVPD transmissions within public performances, but outside the scope of the compulsory license).

¹⁵⁸ See STEL ACT, *supra* note 138, at 45–47.

¹⁵⁹ See STEL ACT, *supra* note 138, at 107 (discussing direct licensing as a replacement for the current section 111, 119, and 122 compulsory licensing scheme).

¹⁶⁰ See STEL ACT, *supra* note 138, at 107. Eliminating the compulsory license allows networks to decide which, if any, services should use their content. *Id.* at 107.

¹⁶¹ See 47 U.S.C. § 325(b) (2012).

content both online and through cable or satellite.¹⁶² To promote, but avoid negative consequences of DVR services, Congress should clearly state that viewers have the right to freely record and archive only over-the-air content, but cannot share that content with others, unless otherwise permitted by the content owner.¹⁶³

By eliminating both the compulsory license and legal loopholes, Congress can help assure that networks can always have complete control over who uses their content.¹⁶⁴ Since networks can choose how their Internet business model will work, they could decide to aid the growth of their pay model by not negotiating with any third parties, or could conversely decide not to offer a pay option and leave that task solely for third parties.¹⁶⁵

Consequently, Aereo-like services will no longer need to use inefficient methods to attempt to evade copyright liability.¹⁶⁶ While Aereo's current system is novel, it presents high-energy costs and otherwise unnecessary copies of networks' content.¹⁶⁷ Congress' revised retransmission consent statute would make clear that it has no loopholes, thereby preventing entrepreneurs from wastefully developing Aereo-like services.¹⁶⁸ Instead of Aereo-like systems, they can focus solely on methods involving efficient Internet reception and delivery of content.¹⁶⁹

After modifying retransmission consent, Congress could include a limited-in-time provision in that act that caps the amount that MVPDs would need to pay networks if they only display network content online.¹⁷⁰ This cap could reflect the

¹⁶² *Id.*

¹⁶³ Brief for the United States as Amici Curiae at 15–19, *CNN, Inc. v. CSC Holdings, Inc.*, 557 U.S. 946 (2009) (discussing the economic and consumer value of DVR and cloud DVR services). This new provision allowing only archiving, and not sharing, of networks' over-the-air content, will close any legal loophole for Aereo-like services' mass antenna systems to operate. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting) (describing Aereo as a "sham" and "Rube Goldberg-like" invention engineered solely to avoid Copyright law).

¹⁶⁴ See 17 U.S.C. § 111(e) (2012).

¹⁶⁵ *Id.*

¹⁶⁶ See *WNET*, 712 F.3d at 697 (Chin, J., dissenting).

¹⁶⁷ See 4 WILLIAM PATRY, PATRY ON COPYRIGHT § 14:28 (2013) [hereinafter PATRY ON COPYRIGHT] (advocating the Second Circuit's rationale for not holding Aereo infringing, because Aereo engineered its service according to previous court rules, however recognizing that Aereo's system is unduly costly and wasteful); Shalini Ramachandran & Amol Sharma, *Electricity Use Impedes Aereo's March*, WALL ST. J. (Oct. 28, 2013 7:50 PM), <http://online.wsj.com/news/articles/SB10001424052702304470504579163383906312194>.

¹⁶⁸ See PATRY ON COPYRIGHT, *supra* note 167, § 14:28.

¹⁶⁹ *Id.*

¹⁷⁰ See STEL ACT, *supra* note 138, at 121–22 (recognizing the utility of Internet video distribution to increase consumer choice, encourage innovation, and expand copyright owners' licensing opportunities). While content providers are most likely aware of these benefits of online content, a cap on the amount of online retransmission fees should expedite MVPDs' focus on online content. See *id.* at 121. Additionally, comparing online television to the market for online music services, networks offering free and paid content online would not deter certain consumers from still watching that same content through their select online "MVPD" provider. See, e.g., Bobby Owsinski, *The Implications of iTunes Radio That Everyone's Missed*, FORBES (Sept. 20, 2013, 9:00 AM), <http://www.forbes.com/sites/bobbyowsinski/2013/09/20/the-implications-of-itunes-radio-that-everyones-missed/> (reporting a survey in which nearly half of Pandora, Spotify, iHeart Radio and Slacker users said they would switch to iTunes Radio based solely upon Apple's name). Therefore, even Aereo-like services that switch to licensed online reception of content may be able to maintain their current customers or receive new customers based upon many factors like simplicity of use and interface design. See *id.*

amount the specific MVPD currently pays for cable or satellite retransmission consent.¹⁷¹ This reduced consent price would serve as an incentive for MVPDs to move all their content online to avoid paying both online and cable and satellite consent costs.¹⁷² This cap could also momentarily encourage Aereo-like services to continue to operate and find innovative ways to deliver content.¹⁷³

2. Secure Free Over-the-air Television Content

Finally, Congress should provide mandates to ensure that broadcast networks' content remains free over-the-air.¹⁷⁴ Considering that retransmission consent agreements have historically favored networks, for this provision to work effectively, it should have drastic consequences for a network that attempts to move its content solely online or solely as a pay service.¹⁷⁵ This provision could condition networks' use of the new retransmission act on their continued distribution of free content over-the-air.¹⁷⁶ If a network chooses to forego over-the-air transmissions, that network could no longer seek retransmission consent fees pursuant to this new statute.¹⁷⁷

Collectively, all these provisions seek to both increase access to network television content, while ensuring that over-the-air content will always remain in place.¹⁷⁸ While not all consumers will have access to online content, this transition for networks together with these congressional regulations will ensure that networks will always provide free, quality, over-the-air content without worrying about threats from digital services.¹⁷⁹ On the contrary, consumers who wish to take advantage of networks' content online will have multiple options for viewing content live and recording content of their choice to watch later.¹⁸⁰

¹⁷¹ See STEL ACT, *supra* note 138, at 121. The cap could, for example, be 75 percent of the total costs that the specific MVPD pays for cable or satellite delivery of content. *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* The cap would not apply to Aereo-like services, but they could offer MVPDs' use of the cap in negotiating retransmission fees with networks, similar to the manner some MVPDs have offered Aereo-like services nonpayment of fees in negotiations with networks. See *id.* Congress should be content if a network decides to forgo negotiations with Internet services, if networks have their content live online. See *id.*

¹⁷⁴ See Television Consumer Freedom Act of 2013, S. 912, 113th Congress § 4 (2013) (conditioning the networks' broadcasting spectrum licenses on their continuance of transmitting identical content over-the-air and to MVPDs).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* The proposed Television Consumer Freedom Act would not go far enough to protect the public's interest in free over-the-air television. See *id.* In fact, with the increasing use of online content, stripping networks of their over-the-air broadcasting licenses could make this content entirely unavailable. *Id.*

¹⁷⁸ See, e.g., Tim Arango, *Broadcast TV Faces Struggle to Stay Viable*, N.Y. TIMES (Feb. 27, 2009), <http://www.nytimes.com/2009/02/28/business/media/28network.html?pagewanted=all> (noting that broadcast networks must change their business architecture to stay viable going forward).

¹⁷⁹ *Id.* Networks' switch to focus their profits on Internet delivery of content should ensure a more profitable future that could essentially subsidize free over-the-air television. See Pruitt, *supra* note 154.

¹⁸⁰ See, e.g., WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 682–83 (2d Cir. 2013).

C. The Best Balance of Legal Certainty, Networks' Rights, and Public Television Access

Some may feel that the Congressional revisions to retransmission consent and the over-the-air requirement for networks would be too much interference in the free market.¹⁸¹ Still, this comment's proposal is meant to strike a compromise between a total laissez faire approach and prompt and heavy regulation, to ensure legal certainty.¹⁸²

While networks may be in the best position to promptly address their own concerns over Aereo-like services through new business initiatives, these initiatives would still do little to clarify each party's legal rights.¹⁸³ Congress declaring that consumers can freely record over-the-air content and that all services must pay networks for their content should provide clear rules for courts to apply.¹⁸⁴ These rules, aimed to offer strong protection to networks, should produce legal consistency, whereas current lesser regulations have resulted in several conflicting court decisions.¹⁸⁵

Alternatively, in light of those seemingly necessary strong protections, a drastic congressional mandate that networks must keep their content over-the-air to utilize the retransmission consent statute is probably warranted.¹⁸⁶ While extra incentives for networks to remain over-the-air could work to some extent, without as much interference as this mandate, those incentives would not offer the most protection for the important continued availability of free television.¹⁸⁷ Considering the strong protections that Congress will offer to complying networks, this mandate is not a Hobson's choice for networks.¹⁸⁸ Therefore, this requirement again represents a

¹⁸¹ See, e.g., H.R. Res. 175, 112th Cong. (2011) (expressing the need for the government to leave new technology largely unregulated).

¹⁸² See, e.g., Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 997 (D. Minn. 2003) (noting that Congress has unequivocally expressed, in 47 U.S.C. § 230(b), that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."). *But see* Consumer Choice in Online Video Act, S. 1680, 113th Congress § 666 (2013) (proposing exempting Aereo-like services from paying retransmission fees to broadcast networks).

¹⁸³ See John Eggerton, *Walden Sees Aereo as Potential Marketplace Disruptor*, BROAD. & CABLE (May 23, 2013 4:30 PM), <http://www.broadcastingcable.com/news/washington/walden-sees-aereo-potential-marketplace-disruptor/61444> (reporting that although Aereo's legal victories surprised Representative Walden, the chair of the House Communications Subcommittee, he does not want the government stepping in unless the market fails).

¹⁸⁴ See, e.g., WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 282–83 (2d Cir. 2012) (addressing the difficulty in determining congressional intent for the compulsory license).

¹⁸⁵ See Petition for Writ of Certiorari at 25, ABC, Inc., v. Aereo, Inc., NO. 13-461 (U.S. Oct. 11, 2013), 2013 WL 5616728, at *25. Conflicting court decisions under the recently ambiguous Transmit Clause resulted in FilmOn being enjoined from operating anywhere outside the Second Circuit, while Aereo could operate anywhere outside the Tenth Circuit. *See Id.* There could also be additional uncertainty for legal liability for consumers that utilize Aereo-like services. *Id.*

¹⁸⁶ See S. REP. 102-92, at 69–70 (1992) (expressing substantial government interest in promoting public television, especially for those who cannot afford to pay to receive programming, for education and entertainment).

¹⁸⁷ See *id.* Networks may find it more profitable to move to an all pay or all Internet service, rather than take advantage of certain incentives. *Id.*

¹⁸⁸ *Id.* Networks could either choose to receive strong protection from the government, or choose to expose their content to possibly some public use without authorization. *Id.* Congress

compromise that produces clear and consistent results for networks and the public, whereas mere incentives alone could likely create legal and business uncertainty for MVPDs, Internet services, and networks.¹⁸⁹

V. CONCLUSION

Although Aereo-like services increase access to public television content, they also pose a substantial future threat to the television ecosystem and the availability and quality of free television. Nevertheless, technological change and legislative inaction should prevent courts from holding these services as copyright infringers. Therefore, once harm to public television becomes imminent, and after networks have attempted new business solutions, Congress must enact new retransmission consent legislation. That legislation must promote the expansion of networks' content online and ensure the continued broadcasts of that content over the free airwaves. These actions by networks and Congress will increase access to free television and ensure that the networks have a workable and profitable business model for the digital world.

would not be stating that a service or person would have a right to the content of a previously over-the-air network, but merely that they do not need to negotiate for certain content. *Id.* Networks may be able to secure their content so that no service or individual could access it without consent; therefore, retransmission consent revenue would be networks' only loss. *Id.* Congress should include temporal parameters and limitations as to how users can utilize content, to ensure some copyright protections for the previous networks' content. *Id.*

¹⁸⁹ *See id.* Networks have clear notice that, due to their public importance, Congress has and will treat them differently than other services. *Id.* Complying networks would receive vast legal protection, while a network that no longer broadcasts over-the-air may receive less protection than MVPDs. *Id.*