AEREO: BRINGING THE NFL TO A "CLOUD" NEAR YOU

How Evolving Technology Demands Rapid Reevaluation of Legislative Protections in Light of Streaming Television Broadcasts

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INTRODUCTION

With the emergence of sports television beginning in the early 1960s, the National Football League and Major League Baseball both urged Congress to clarify the copyright laws that protected telecasts of live sports events. The two leagues sought specific copyright protection to ensure that they would have the right to authorize the retransmission of over-the-air broadcasts of their games.[1] Live sports telecasts today are, indeed, considered copyrighted works.[2] The Copyright Act provides that the copyright owner will have the exclusive right to control a "public performance" of the copyrighted work.[3] Accordingly, live sports telecasts—recorded simultaneously with their transmission—are considered protectable copyrighted works.[4] A commercial retransmission of a sports broadcast on a cable channel such as "ESPN Classic" would, therefore, require a copyright license.[5]

In today's modern age of technology, considering the significance these licenses is particularly relevant, as streaming video has become the new wave of media transmission, especially among young adults. As a clear example, Netflix stock rose from $53.91 per share in August of 2012 to nearly $450 per share in March of 2014.[6] Another well-known streaming television provider is Hulu.[7] And another, the focus of recent landmark litigation and this article, is a

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1. *See, e.g.*, *Copyright Law Revision: Hearing Before Subcomm. No. 3 of the H. Comm. of the Judiciary*, 89th Cong. 1826-30 (1965) (statement of Pete Rozelle, Commissioner of National Football League); *Copyright Law Revision: Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, 93rd Cong. 533-37 (1973) (statement of Bowie Kuhn, Commissioner of Major League Baseball).

2. 17 U.S.C. § 101 (2012) ("A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."). A copyright owner has the exclusive right over reproduction of the copyrighted work, preparation of derivative works based upon the copyrighted work, distribution of the copyrighted work, and "public performance" of the copyrighted work, among others. *See* 17 U.S.C. § 106 (2012).

3. § 101.

4. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).

5. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 709 (1984). For a discussion of licensing, see *infra* note 44.

6. ValueWalk Staff, *Netflix, Inc. (NFLX) Has All The Markings Of An Internet Utility*, VALUEWALK (Mar. 12, 2014, 3:30AM), http://www.valuewalk.com/2014/03/netflix-inc-nflx-value/. For current value and trends over a one-year or five-year period, see *Netflix, Inc.*, GOOGLE FINANCE, https://www.google.com/finance?q=NASDAQ:NFLX (last visited Mar. 3, 2015).

7. Hulu is an online streaming television provider with hundreds of available television shows for users to choose from. The service began as an ad-driven on-demand

company called Aereo, based out of Long Island, New York. Other emerging companies, such as FilmOn,[8] have struggled or received injunctions in copyright infringement lawsuits (specifically in the Ninth Circuit), while Aereo found protection within the Second Circuit, for a short time.[9] The discussion in this article follows the line of cases known colloquially as "*ABC v. Aereo*" or "*Aereo*" and the copyright and antitrust implications of that case.[10]

This article covers three major areas. Section I explains the factual and procedural background of the case, and the high-tech versus traditional media transition of the recent decade. Next, Section II explores the validity of the Copyright claims of the plaintiff-petitioners in the case, paying special attention to the perspectives of "public performance" elucidated by the Second Circuit and Supreme Court. Section III predicts future results of the same or similar cases, based on the authored opinions and relevant policy considerations. Finally, the article concludes by examining the possible impacts the Supreme Court decision will have on future technology, particularly at the intersection of intellectual property and antitrust.

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streaming video service. In 2010, the company announced a "premium service" option for users with expanded episodes, new seasons, and newly televised shows for streaming. Greg Sandoval, *Hulu Unveils $9.99 Premium Service*, CNET.COM (June 29, 2010, 10:44AM), http://www.cnet.com/news/hulu-unveils-9-99-premium-service/ ("[S]ubscribers of Hulu Plus get access to a full season's worth of their favorite TV shows—and even past seasons in some cases—and not just a handful of trailing episodes that the free-version of Hulu offers.") (internal quotation marks omitted).

8. FilmOn is an Internet-based television provider owned by FilmOn.TV Networks Inc. Alki David founded FilmOn.TV Networks in 2006. *See* Andrew McLaughlin, *FilmOn to Disrupt TV with New Streaming Channels*, DIGITALSPY, (Feb. 11, 2013, 11:38AM), http://www.digitalspy.com/media/news/a458001/filmon-to-disrupt-tv-with-new-streaming-channels.html.

9. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013). For a discussion of the new platforms for streaming video and the struggle of networks and broadcast television viewer decline, see 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 ("Those who only watch free broadcast television comprise a niche audience. In the third quarter of 2011, they totaled 5.8 million homes, down from 6.25 million homes in the third quarter of 2010. Over the past four weeks [in April of 2012], all four major networks said primetime viewing declined, according to Nielsen.").

10. Am. Broad. Companies, Inc. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012) ("*Aereo I*"), *aff'd sub nom.*, *WNET, Thirteen*, 712 F.3d 676, *cert. granted*, 134 S. Ct. 896 (Jan. 10, 2014); Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014); Am. Broad. Companies, Inc. v. Aereo, Inc., 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).

I. THE BATTLE OF *ABC V. AEREO*

A class of plaintiffs, including basic cable providers CBS, NBC, ABC, and FOX (the "Broadcasters"), filed suit against the defendant, Aereo, on March 1, 2012, in two separate complaints in the United States District Court for the Southern District of New York.[11] The plaintiffs alleged, *inter alia*, violations of their rights of public performance and reproduction under the Copyright Act.[12] The Broadcasters immediately moved for a preliminary injunction in order to bar Aereo from transmitting programs to its subscribers while the programs are still airing, claiming that those transmissions infringed the Broadcasters' exclusive right to publicly perform their works.[13] The district court denied the motion, and concluded that the plaintiffs were unlikely to prevail on the merits of the case, in light of the 2008 *Cablevision*[14] decision.[15] There, the Second Circuit held that the plaintiffs failed to show a likelihood of success, and although they demonstrated a probability of irreparable harm, they did not demonstrate that the "balance of hardships decidedly tip[ped] in their favor."[16]

The Second Circuit agreed, and affirmed the order of the district court denying the motion for a preliminary injunction.[17] The petitioners aggressively pursued claims that Aereo infringed the copyright owners' exclusive right to perform their works "publicly"[18] and filed a petition for writ of certiorari, which was granted on January 10, 2014.[19] The petition presented questions of copyright law that could profoundly affect standard notions of over-the-air broadcast television and cloud technology.[20] For decades, third parties, such as satellite operators and cable providers, have been required to obtain authorization to retransmit over-the-air broadcasts of television programs to public audiences.[21] The broadcast television industry has invested billions of dollars producing and assembling high-quality and creative entertainment and

11. *Aereo I*, 874 F. Supp. 2d 373.
12. *Id.* at 375; *see* 17 U.S.C. § 106 (2012).
13. *Aereo I*, 874 F. Supp. 2d 373.
14. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).
15. *Aereo I*, 874 F. Supp. 2d at 405.
16. *Id.*
17. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 896 (Jan. 10, 2014).
18. *See* 17 U.S.C. § 106(4) (2012).
19. Petition for Writ of Certiorari, Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 896 (Jan. 10, 2014).
20. *Id.*
21. *See id.*

news programming in reliance of this legal regime,[22] which "prevents retransmission services from free-riding on broadcasters' investments and provides broadcasters with incentives for further investment and innovation."[23]

Viewership for Super Bowl XLVIII, during which the Seattle Seahawks trounced the Denver Broncos, exceeded 111.5 million viewers, setting the record for the most-watched television event in United States history.[24] The Broadcasters believed the Second Circuit decision "threaten[ed] to upend this regime by blessing a business model that retransmits 'live TV' to paying customers without obtaining any authorization or payment to copyright owners."[25] One issue with the Broadcasters' argument, discussed herein, is the protection afforded to the Broadcasters by the Sports Broadcasting Act.[26] The Supreme Court ruling in favor of the Broadcasters could potentially open a floodgate of antitrust litigation by a group of companies large enough to take on the Broadcasters.

Conversely, Aereo believed it did not infringe the Broadcasters' exclusive reproduction or public performance rights.[27] Aereo provided a service where each consumer had access to a remotely located individual antenna that only received a broadcast signal when a user requested to tune to a particular

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22. For example, in order to keep pace with evolving online streaming networks such as Netflix and Hulu, HBO implemented a "watch free, anytime" application titled "HBOgo." Most of these streaming services have been incorporated as "apps" for mobile electronic devices. For more information on HBOgo and the future of streaming television, *see* Slate Video, *So You Can Get HBO Go Without Cable. Will It Ever Be Like Netflix?*, SLATE, (Nov. 2013), http://www.slate.com/articles/video/video/2013/11/hbo_go_without_cable_how_to_get_hbo_streaming_and_not_buy_cable.html.

23. Petition for Writ of Certiorari, *supra* note 19, at 1-2.

24. CBS/Associated Press, *Super Bowl 2014 Ratings Set New Record*, CBSNEWS, (Feb. 3, 2014, 5:00PM), http://www.cbsnews.com/news/super-bowl-2014-ratings-set-new-record/.

25. *See* Petition for Writ of Certiorari, *supra* note 19, at 2.

26. 15 U.S.C. § 1291 (2012). The Copyright Act generally shields Broadcasters' sports packages (like Sunday NFL football on the major networks) from antitrust lawsuits. The statute and potential impacts of this case will be discussed in greater detail in Section IV, *infra*.

27. Brief for Respondent, Aereo Inc. F/K/A Bamboom Labs, Inc. at 12, Am. Broad. Companies, Inc. v. Aereo, Inc., No. 13-461 (S. Ct. Dec. 12, 2013). Rumors have circulated that Aereo created this technology specifically in an effort to circumvent the federal copyright laws. *See*, *e.g.*, Katy Bachman, *Supreme Court Weights Whether Aereo is Simply Cirvumventing Copyright Law*, ADWEEK (Apr. 22, 2014, 3:39PM), http://www.adweek.com/news/technology/supreme-court-weighs-whether-aereo-simply-circumventing-copyright-law-157181.

channel.[28] The consumer used Aereo's equipment to create a unique copy of that programming, and the individual user could view their copy using an Internet-connected device shortly thereafter.[29] No other person could access that copy, other than the viewer who selected it.[30] The Supreme Court summarized the service as follows:

> First, when a subscriber wants to watch a show that is currently being broadcast, he visits Aereo's website and selects, from a list of the local programming, the show he wishes to see. Second, one of Aereo's servers selects an antenna, which it dedicates to the use of that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show. The antenna begins to receive the broadcast, and an Aereo transcoder translates the signals received into data that can be transmitted over the Internet. Third, rather than directly send the data to the subscriber, a server saves the data in a subscriber-specific folder on Aereo's hard drive. In other words, Aereo's system creates a subscriber-specific copy—that is, a "personal" copy—of the subscriber's program of choice. Fourth, once several seconds of programming have been saved, Aereo's server begins to stream the saved copy of the show to the subscriber over the Internet. (The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo's service is not before us.) The Subscriber can watch the streamed program on the screen of his personal computer, tablet, smart phone, Internet-connected television, or other Internet-connected device. The streaming continues, a mere few seconds behind the over-the-air broadcast, until the subscriber has received the entire show.[31]

Whether Aereo offers the kind of service Congress sought to prohibit when it revised the Copyright Act to define "public performance" to include retransmissions of over-the-air *television* broadcast transmissions to the public is the looming question for future courts after the recent Supreme Court decision. The Court opined: "Congress enacted new language that erased the Court's line between broadcaster and viewer, in respect to 'perform[ing]' a work. The amended statute clarifies that to 'perform' an audiovisual work

28. *See* Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2503 (2014) ("*Aereo III*").
29. *Id.*
30. *Id.*
31. *Id.*

means to 'show its images in any sequence or to make the sounds accompanying it audible.'"[32]

Notwithstanding the possible effects on large networks and, particularly, sports broadcasts, the Second Circuit originally endorsed Aereo's transmission of personally-selected, and individualized copies of time-shifted programming, holding that Aereo's retransmission of over-the-air television broadcasts to its subscribers was not a "public performance," because each Aereo subscriber received an *individualized transmission* streamed from an *individual subscriber-associated digital copy* of the broadcast transmission.[33] In so holding, the Second Circuit likened the present case to the *Cablevision* standard for "public performance" of *nearly simultaneous* recordings.[34] That jurisprudence clearly distinguished direct infringers from infringers who could be found secondarily liable for inducing or facilitating infringement.[35]

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32. *Id.* at 2505-06 (citing 17 U.S.C. § 101); *see* H.R. REP. NO. 94-1476, at 86-87 (1976) (defining audiovisual works as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds").

33. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 696 (2d Cir. 2013) ("*Aereo II*") (emphasis added). The court also noted "private transmissions—that is those not capable of being received by the public—*should not be aggregated*. It is therefore irrelevant to the Transmit Clause analysis whether the public is capable of receiving *the same underlying work or original performance of the work by means of many transmissions* . . . ." *Id.* at 689 (emphasis added). The Supreme Court flatly rejected the Second Circuit's reasoning:

> We do not see how the fact that *Aereo transmits via personal copies* of programs could make a difference. The Act applies to transmissions "by means of any device or process." And *retransmitting a television program using user-specific copies* is a "process" of transmitting a performance. . . . So whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.

Aereo III, 134 S. Ct. at 2509 (emphasis added). That tautological approach to determine whether the "performance" Aereo transmitted was "public" for the sake of the Transmit Clause analysis received a bitter reception from the dissent:

> A comparison between copy shops and video-on-demand services illustrates the point. A copy shop rents out photocopiers on a per-use basis . . . *the customer chooses* the content and activates the copying function; the photocopier does nothing except in response to the customer's commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy.

Id. at 2513 (Scalia, J., dissenting) (citing CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004)) (emphasis in original).

34. *Aero II*, 712 F.3d at 695.

35. *See Aereo III*, 134 S. Ct. at 2516 (Scalia, J., dissenting) ("And whatever soothing reasoning the Court uses to reach its result ('this looks like cable TV'), the consequence of

Where the Second Circuit, correctly and explicitly likened the DVR retransmissions in *Cablevision* to the Aereo retransmissions in the case at bar, the Supreme Court merely muddied the waters of who actually performs and "when" a public performance is actually occurring.[36] The Second Circuit in *Aereo II* stated:

> *Cablevision*'s holding that Cablevision's transmissions of programs recorded with its RS–DVR system were not public performances rested on two essential facts. First, the RS–DVR system created unique copies of every program a Cablevision customer wished to record. Second, the RS–DVR's transmission of the recorded program to a particular customer was generated from that unique copy; no other customer could view a transmission created by that copy. Given these two features, the potential audience of every RS–DVR transmission was only a single Cablevision subscriber, namely the subscriber who created the copy. And because the potential audience of the transmission was only one Cablevision subscriber, the transmission was not made "to the public."
>
> The same two features are present in Aereo's system. When an Aereo customer elects to watch or record a program using either the "Watch" or "Record" features, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy. *Thus, just as in* Cablevision, *the potential audience of each Aereo transmission is the single user who requested that a program be recorded*.[37]

As the Broadcasters phrased it, "In the Second Circuit's view, this technical detail renders Aereo's simultaneous transmissions to thousands of paying subscribers *private* [performance]."[38]

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its holding is that someone who implements this technology *'perform[s]' under that provision.* That greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work.") (emphasis in original).

36. *See Aereo II*, 712 F.3d at 689-90; *Aereo III*, 134 S. Ct. at 2516 (Scalia, J., dissenting) ("Perhaps the Court means to adopt (invent, really) a two-tier version of the Copyright Act, one part of which applies to 'cable companies and their equivalents' while the other governs everyone else.")

37. *Aereo II*, 712 F.3d at 689-90 (emphasis added).

38. Petition for Writ of Certiorari, *supra* note 19, at 2 (internal quotations omitted) (emphasis added).

Funny, that at the micro-level, the Broadcasters were actually quite right; their conclusion was probably accurate under previously controlling copyright case law. At the macro-level, the Broadcasters' conclusion provides little value to the economic concerns that result, because of Aereo's ability to retransmit those broadcasts. The latter concern was obviously the thrust of the Supreme Court's holding in *Aereo III*—as Justice Scalia titled it: "Guilt By Resemblance"[39]—that "Aereo's similarity to [community antenna television] systems informed its conclusion that Aereo performs, not that Aereo is a cable system."[40]

So, what are we left with? Whether *both* near-simultaneous and fully time-shifted retransmissions of copyrighted works through a cloud system, with independent, server-selected programming constitute a *public performance*.[41] How long is "long enough" for time-shifting under the current precedent? "Plaintiffs may have a viable argument that even Aereo's fully time-shifted retransmission of Plaintiffs' copyrighted works violates Plaintiffs' public performance right, the Court will not reach the issue at this preliminary stage of the litigation."[42] No one knows. And while the Supreme Court maneuvered around the issue in *Aereo III*, the Court will likely have to address that issue[43] some time in the near future.

The uncertainty surrounding the potential "*Aereo V*" decision, whether it involves the now-bankrupt Aereo[44] or some other company, alongside the lack of stability for similar business models for streaming providers of television programs creates not only problems for those businesses and broadcasters (and affiliates), but also illustrates potential antitrust implications in the future. The monopoly the Broadcasters are acquiring on sports telecasts cannot, and should not, go unnoticed. It appears, however, that only large-scale licensing—or else

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39. *Aereo III*, 134 S. Ct. at 2515.

40. Am. Broad. Companies, Inc. v. Aereo, Inc., 2014 WL 5393867, at *3 (S.D.N.Y. Oct. 23, 2014) ("*Aereo IV*") (citing *Aereo III*, 134 S. Ct. at 2506, 2510).

41. *See id.* at 8 ("But the Supreme Court was careful to limit its holding to the case . . . involving near-simultaneous retransmissions. On this point the Supreme Court was clear: 'The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo's service is not before us.'" (citing *Aereo III*, 134 S. Ct. at 2503)).

42. *Id.* at 9.

43. *Aereo III*, 134 S. Ct. at 2517 (Scalia, J., dissenting) ("But it is impossible to say how the issue will come out under the Court's analysis, since cable companies did not offer remote recordings and playback services when Congress amended the Copyright Act in 1976.") Further, the Supreme Court based its analysis almost exclusively on statutory interpretation of the Copyright Act. *See id.* at 2505-2510.

44. *See* Chris Welch, *Aereo Will Pay $950,000 to the TV Broadcasters that Put It Out of Business*, THEVERGE.COM, (April 21, 2015), http://www.theverge.com/2015/4/21/8461381/aereo-reaches-950000-settlement-broadcasters.

Congress—can change the landscape of streaming sports transmissions after *Aereo III*.

II. The Legal Landscape Before and After Aereo

The Broadcasters rely on the licensing revenues they receive from the cable and satellite companies that retransmit their signals to recoup their substantial investments in programming, to fund new shows, and to develop new delivery platforms.[45] This revenue model was built on top of an original model involving very few choices for consumers, at least in part because of the limited frequencies available for broadcast (like AM or FM radio, early television revenue came from advertising on a few channels, with few available broadcast frequencies).[46] As previously noted, many basic cable networks and other providers have now made substantial investments in developing Internet-based services, such as HBOGo, that obtain copyright licenses for the content made available to subscribers.[47]

Both the National Football League ("NFL") and Major League Baseball ("MLB") (hereinafter, collectively, the "Leagues") filed joint amicus briefs. Relying on case law from an unpublished decision from the United States District Court for the Western District of Pennsylvania[48] and a recent Second Circuit decision,[49] the Leagues argued:

> The decision below improperly departs from these well-settled legal principles, international commitments, and sound policy determinations. The panel majority concluded that Aereo may lawfully retransmit broadcast stations over the Internet to paying subscribers

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45. A license gives the licensor a limited right to use, display, perform, or duplicate some or all of the copyright owner's (or primary licensor's) work. For example, the NFL Network has an exclusive license with DirecTV and Dish Network. A cable provider like Comcast is excluded from showing NFL Network footage unless it entered into a licensing agreement with NFL Network. For a list of available licenses and a discussion of pricing, availability, necessity, and function, see *How To Apply for a Radio or Television Broadcast Station*, FEDERAL COMMUNICATIONS COMMISSION (Oct. 24, 2013), http://www.fcc.gov/guides/how-apply-radio-or-television-broadcast-station.

46. Cable, in its early years, can be likened to a regulatory-granted monopoly, because subscribers had only one choice of provider. While evolving models precipitate enormous revenue, consumer choice and pro-economic justifications should still be taken into consideration. This will be discussed in greater detail later in the article.

47. *See supra* note 22.

48. Twentieth Century Fox Film Corp. v. iCraveTV, Nos. 00-121, 00-120, 2000 WL 255989, at *9 (W.D. Pa. Feb. 8, 2000).

49. WPIX, Inc. v. IVI, Inc., 691 F.3d 275 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (U.S. 2013).

> without securing licenses from program or station owners. The court reached that conclusion solely because *Aereo uses thousands of dime-sized "mini-antennas" and subscriber-associated copies of programs to make individualized retransmissions to each subscriber*. As the dissent below explained, Aereo's "Rube Goldberg-like contrivance" is a "sham,"; it is neither technologically efficient nor innovative. There is no need for Aereo to use thousands of mini-antennas when one would suffice; nor is there any need to make thousands of copies of each program when one would also be sufficient. The sole and express purpose of Aereo's scheme is to avoid compensating the Leagues and other owners of the programming Aereo commercially exploits. According to the panel majority, when a service using Aereo's technology retransmits the same copyrighted broadcast of a program to thousands of paying subscribers, the service does not make a "public performance;" *it makes thousands of "private performances" that fall outside a copyright owner's exclusive right of public performance.* Under this theory, Aereo maintains that it may, for example, stream the Super Bowl 'live' to 50,000 subscribers and yet, because each subscriber has an individual antenna and a 'unique' copy of the broadcast, these are not 'public' but 'private' performances.[50]

The Leagues are correct about the holding of the previous Second Circuit case, but their reasoning is misplaced (and perhaps displaced) by their own concession that the technology takes a copyrighted work being widely disseminated to many *individual* viewers *qua* individuals.[51]

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50. Brief of National Football League and Major League Baseball as Amici Curiae Supporting Petitioners, at 9, Am. Broad. Companies, Inc. v. Aereo, Inc., No. 13-461 (S. Ct. Nov. 12, 2013) (internal citations omitted) (emphasis added).

51. Compare this position to the thought-provoking view elucidated by Columbia School of Law Professor Jane Ginsburg:

> The Second Circuit conflated "performance" with "transmission" – remember the "it" – and on the individualized model, there is only one member of the public who is capable of receiving *that transmission*. This reading does not work in terms of the statute. Moreover, the reading is wrong whether the source of the individualized transmission is a common source or is an individual source. The individual/common source distinction is a red herring because a reading of the statute that requires members of the public to receive *the same particular transmission* would exclude *all* asynchronous transmissions no matter how shared the source. If one member of the public receives an on-demand transmission of a performance of a given work at 12 o'clock, and another receives from the same transmission service an on-demand transmission of a performance of the same work at 1 o'clock, only one person can receive each on-demand transmission. Reading the statute to equate "transmission" with "performance" reads "different times" out of the statute. Once one recognizes that it is not possible for the two people to receive the *same transmission* "at different times," then it becomes clear that the "public" character of the transmission cannot turn on capacity to receive a

The counterargument raised by some commentators misplaces the analysis of "individual" with an argument about whether a "transmission" constitutes a "performance."[52] The issue is not whether transmission and performance are conflated on the Second Circuit's view (such a reading would be favorable, in light of emerging technologies), but whether *an individual* violates any of the copyright holder's "bundle" of rights when that user streams a live telecast of a sporting event via time-shifted, individualized streamed broadcasts like Aereo's,[53] and, consequently, whether Aereo or some other company, in some way facilitates that purported violation.[54]

The answer should clearly be "no," as no two users can stream the same telecast, from the same source, at the same time–and this happens all over the world. If "multiple" users (a statutorily relevant amount that is, on its face, ambiguous), were to stream the same game from the same source *to the same source*, which was *not* the function of Aereo, such a use might constitute copyright infringement of the right of reproduction and/or public performance. Indeed, the Court was forced to address whether the Second Circuit decision in *Cablevision* validated an individual consumer as the one who chose to "perform" a copyrighted work when he or she selected the streaming video or link.[55] The Court made no such determination.[56] Such a finding could have rendered the end-users of Aereo's service, and Aereo itself, shielded from

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> transmission. Rather, what makes a transmission, whether simultaneous or individualized on-demand, and whatever the number of source copies, "public" is its communication to "*members* of the public."

Jane C. Ginsburg, *WNET v. Aereo*: *The Second Circuit Persists in Poor (Cable)*Vision (April 23, 2013), http://www.mediainstitute.org/IPI/2013/042313.php (emphasis in original). However, once one recognizes that infringement *does not turn* on one member of the public, but *multiple* (at least, some ambiguous number greater than one or two), violation of the public performance right cannot be implicated. *See id.* In order to constitute public performance, the statutory and judicial emphasis rests on *members* of the public, i.e. some statutorily ambiguous number greater than "a few," that receive the transmission. *See id.* Therefore, respectfully, Professor Ginsburg's critique of the Second Circuit's decision was simply focused on the wrong statutory ambiguity vis-à-vis *performance* rather than *individual*.

52. *See id.*

53. *See id.*

54. As previously noted, the *Aereo III* and *Aereo IV* Courts never reached such a decision.

55. In oral argument, Deputy Solicitor General Malcolm L. Stewart conceded that, if the Court interprets the *Cablevision* decision as validating the individual consumer as the one who chooses to "perform" a copyrighted work, then "it's hard to see how [the Court] could rule in favor of [the Broadcasters'] position here." *See* Lyle Denniston, *Argument Analysis: Slipping Down the Digital Slope*, SCOTUSBLOG.COM (Apr. 22, 2014), http://www.scotusblog.com/2014/04/argument-analysis-slipping-down-the-digital-slope/.

56. *See* Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014).

copyright liability. But the Courts chose not to address those issues. Instead, *ivi*[57] remains good law.[58] "The upshot of *ivi*, which remains unchanged after *Aereo III*, is that 'if there were to be a compulsory license covering [Internet] retransmissions, it would have to come from newly-enacted legislation and not existing law.'"[59]

Before *Aereo III*, the Supreme Court had a chance to maintain its precedent and promote streaming technology. Now, effectively, the Courts have punted to Congress to change the current law—if or when such a change would occur remains to be seen.

A. *Fixation and Cloud Technology*

Let us now turn briefly to the "fixation" requirement of the Copyright Act.[60] The parties may have been able to raise this issue at the Supreme Court, however the arguments probably would have failed.

The Aereo "copies" *might* not meet the fixation requirement of a copyrightable work if they exist only in a cloud technology space momentarily. Such a conclusion would render the works not copyrightable (no reproduction rights violated), and also not sufficiently fixed to render the works a "public performance."[61] Yet, as noted above, the broad-reaching fixation requirement is almost certainly met in this case. Even so, both parties likely raised the argument and likely will again. If the Supreme Court addressed the issue at all, it would likely affirm its prior holdings that fixation for purposes of the Copyright Act is a relatively low bar, and find that Aereo's streaming transmissions meet the fixation requirement.[62]

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57. WPIX, Inc. v. IVI, Inc., 691 F.3d 275, 288 (2d Cir. 2012).

58. *See* Am. Broad. Companies, Inc. v. Aereo, Inc., 2014 WL 5393867, at *5 (S.D.N.Y. Oct. 23, 2014) (citing *WPIX*, 691 F. 3d at 288) (internal citations omitted)

59. *Id*.

60. The Copyright Act states, in relevant part: "Copyright protection subsists, in accordance with this title, in original works of authorship *fixed* in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . . . ." 17 U.S.C. § 102(a) (2012) (emphasis added).

61. *See* 17 U.S.C. § 106 (2012).

62. *But see* Geoffrey Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1363 (1997) (arguing that improvisational performers face obstacles seeking federal protection for their works, many of which are not fixed in permanent form); Jonathan Z. King, *The Anatomy of a Jazz Recording: Copyrighting America's Classical Music*, 40 COPYRIGHT L. SYMP. (ASCAP) 277, 310 (1997) (noting that improvisational jazz is incompatible with copyright law and the incompatibility creates inequities); Joi Lakes, *A Pas de Deux for Choreography*, 80 N.Y.U.

In the future, cloud technology will probably be deemed adequately fixed, if only serving as a placeholder for consumer-selected media.

B. *Licensing Cloud Technology and Antitrust Implications*

The League amici also argued, in a technologically unpersuasive muddle (for the Broadcasters and in opposition of Aereo's cloud technology) that Aereo would effectively eviscerate the laws surrounding television licensing:

> The decision below [in *Aereo II*] significantly alters that legal regime and disrupts the marketplace for licensing rights to broadcast television programming. A divided panel of the Second Circuit held that copyright licenses are unnecessary when a service uses 'mini antennas' and individual subscriber-associated copies of programs to retransmit broadcast programming. This judicially created loophole allows such services to avoid the force of the Leagues' copyrights in broadcasts of their games, eroding the value of one of the Leagues' most important assets.[63]

The policy argument elicited here likely found no sympathy from the Supreme Court. The League amici argued that preliminary injunctions rest on notions of equity and a balancing of harms to each party, stating "[t]he harm that a defendant may suffer should always be considered at the preliminary injunction stage and weigh the harm against the irreparable harm that the plaintiff may suffer during the pendency of the litigation."[64]

"Aereo's alleged harm, should a preliminary injunction issue, is its inability to operate its business, as well as its inability to exit the competitive landscape."[65] The barriers for entry into the competitive landscape become essentially mile-high, while the barriers to exit the competitive landscape rest in the factual findings of some court, sometime in the future. This actual, real harm should be balanced against the harm the Broadcasters would suffer if Aereo were allowed to operate until the final determination on the merits of the case. Aereo, and other streaming technology companies, would be able to enter a vastly monopolized landscape, particularly in regards to sports telecasts.

L. REV. 1829, 1859 (2005) (arguing that fixation requirement is constitutionally required but that choreographers should be given leeway because of difficulty of fixation).

63. Brief of National Football League and Major League Baseball as Amici Curiae in Support of Petitioners, *supra* note 50, at 1.

64. Brief of Amicus Curiae The Patent, Trademark, & Copyright Section of the Bar Association of the District of Columbia in Support of Neither Party at 16, Am. Broad. Companies, Inc. v. Aereo, Inc., No. 13-461 (S. Ct. March 3, 2014).

65. *Id.* at 13.

Thus, "if the Broadcasters can be sufficiently compensated monetarily, then the harm to Aereo would outweigh the harm to the Broadcasters."[66] Given the denial of such a finding in *Aereo IV*,[67] and the refusal to issue compulsory licensure or a § 512(a) safe harbor[68] for Aereo, the next company (if not Aereo) faces an uphill battle at the Supreme Court.

The Leagues receive revenue streams through advertising and licensing already.[69] Trying to obtain a monopoly on all available revenue streams might raise different antitrust concerns for the Court. However, the *Aereo III* Court did not make any reference to antitrust implications.[70] From a policy perspective, economists now would probably expect companies that follow Aereo's lead to tap into an otherwise untapped revenue stream, e.g., live-air streaming broadcasts.[71] Such a revenue stream for the Broadcasters, through compulsory or non-exclusive licensing, would probably create Sherman Act violations, and a litany of litigation.

On the other hand, if the Broadcasters try to push Aereo, and others, out of that market completely, companies could have an unjust enrichment claim against the Broadcasters, because *the NFL creates the revenue* from the NFL Network. The Broadcasters are being unjustly enriched at the expense of the

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66. *See id.*

67. Am. Broad. Companies, Inc. v. Aereo, Inc., 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).

68. 17 U.S.C. § 512(a) (2012) provides a "safe harbor" provision for "service provider[s]: offering a "transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." *See* § 512(k)(1) (emphasis added). A clear example would be a YouTube-type channel that streams approved video content from the copyright-holder to an end-user, once the user clicks on that video link.

69. *See* John A. Fortunato & Shannon E. Martin, American Needle v. NFL: *Legal Sponsorship and Implications*, 9 U. DENV. SPORTS & ENT. L.J. 73, 74 (2010) ("For sports leagues and teams the benefits are obvious. On entering into sponsorship agreements they add another major revenue stream to their business. For the sponsoring companies, they enter into sponsorship agreements with sports properties for a multitude of reasons, including brand exposure, brand image association, and the potential to influence consumer purchase behavior.").

70. Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2512 (2014).

71. See Adrianne Jeffries's article from last year on TheVerge.com, *Aereo is Dead, So What's Next for Television*: "Even if the law doesn't change, technology eventually will. The Supreme Court ruled that Aereo's technology wasn't new enough to require a change in the law, but most analysts agree that eventually television will be delivered over the internet. That means broadcasters will no longer have the same legal obligations since they won't be using the public airwaves—and when that happens, the law will have to adapt." *Id*. (June 25, 2014), http://www.theverge.com/2014/6/25/5842524/what-does-the-aereo-ruling-mean-for-television.

online streaming "networks," attempting to tap into the live-air sports streams, but ultimately being foreclosed from broadcasting an NFL game, for instance.[72] If the online streaming companies succeeded on such an argument, a court could rule that one or multiple Broadcasters disgorge all money, profit, or gains (for example, from the Super Bowl, or World Series), now or in the future. Such a ruling could have catastrophic effects on Broadcasters and radically shift the availability of NFL and MLB games, in particular, and ideally, live-streaming sportscasts, generally.

C. *The Dark Cloud Over Copyright Law*

Based on the Second Circuit precedent in *Cablevision*, and relevant policy considerations, it seemed clear that the Supreme Court would uphold the Second Circuit's ruling. The Second Circuit has made landmark Copyright decisions that have prompted drastic shifts in the legal regime or else Congressional action to avoid results inconsistent with the Copyright Act.[73] The *Aereo IV* case appears to follow in that tradition.

In *Cablevision*, owners of copyrighted programs brought action against a cable television company seeking declaratory judgment as to whether the cable company's digital video recorder ("DVR") system would violate their copyrights, as well as an injunction enjoining the company from making the

72. The Third Restatement of Restitution and Unjust Enrichment states, "[u]njust enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, §1, comment b (2000).

73. Take, as other examples, Salinger v. Random House, Inc., 811 F.2d 90, 95 (2d Cir. 1987) (where the Second Circuit created a *per se* rule under which, absent some extraordinary circumstances, unpublished copyright protected material could not be reproduced under the "fair use" principle). Congress amended the Copyright Act in 1992, probably as a result of *Salinger*, to include a sentence at the end of 17 U.S.C. § 107, which indicated that the fact that a work is unpublished "shall not itself bar a finding of fair use if such finding is made upon consideration" of all four fair-use factors. 17 U.S.C. § 107 (2012) Another example is the pre- and post-*Feist* progeny. *See* Feist Pubs., Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 362 (1991) (finding at least a modicum of originality is required for copyrightable subject matter; *mere* selection and arrangement would not, ordinarily, suffice). The Second Circuit successfully reasoned that *Feist* did not overturn the reasoning of a prior 1986 decision, *West Publ. Co. v. Mead Data Central*, 799 F.2d 1219, 1229 (8th Cir. 1986). Matthew Bender v. West, 158 F. 3d 674, 689 (2nd Cir. 1998), *cert. denied sub. nom. West v. Hyperlaw*, 526 U.S. 1154 (1999) (finding that West Publishing's case texts, citations, and internal pagination citations were not copyrightable). Thus began the advent of the epic law student—and indeed, law firm—struggle to choose among Westlaw, LexisNexis, or other legal research services.

DVR system available without copyright licenses.[74] The United States District Court for the Southern District of New York granted summary judgment in favor of the copyright owners.[75] The cable company appealed, and the Second Circuit reversed.[76] There, the court held that the cable company's embodiments of the copyrighted programs were not sufficiently "fixed" to meet the threshold under 17 U.S.C. § 102.[77] The court also held that the copies were "made" by the company's customers, rather than the company itself, and that the cable company was, therefore, not directly liable.[78] Finally, the court held that the playback DVR transmissions were not performances "to the public," and, therefore, did not infringe any exclusive right of performance under the Copyright Act.[79]

The Second Circuit view, if adopted by the Court, would have yielded the greatest economic return for future "cloud" pioneers, such as Aereo, Hulu, and Netflix, among others (discussed *infra*), but would have also placed an enormous tension at the intersection of the antitrust laws (particularly the Broadcasters' "exemption") and copyright laws. After *Aereo III*, it appears the law allows no room for near-simultaneous transmissions of real-time events.

D. The Court and the Cloud

Under Second Circuit precedent, then, it seemed clear that the Supreme Court would fashion a similar argument in the case of streaming or "cloud"[80] technology that exists almost simultaneously with a live broadcast. The Aereo transmissions, seemingly, (1) failed to violate any rights of reproduction by

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74. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 124 (2d Cir. 2008).

75. *Id.* at 123.

76. *Id.*

77. *Id.* at 130.

78. *Id.* at 131-32.

79. *Id.* at 139.

80. Cloud computing involves a network of computers (servers) or another communication network (such as the Internet), over which programs or applications are available to specified, multiple, or singular users at any given time. *See, e.g.*, Eric Knorr, *What Cloud Computing Really Means*, INFOWORLD, (2008), http://www.infoworld.com/d/cloud-computing/what-cloud-computing-really-means-031. Cloud computing allows users to store data or access applications virtually anywhere. *See id.* At oral argument in *Am. Broad. Companies, Inc. v. Aereo, Inc.*, the Supreme Court had some issue understanding "cloud" technology. *See generally* Denniston, *supra* note 55. A thorough understanding of new technologies would be integral to rendering the proper decision in cases such as *Aereo*. The gravity of "good lawyering" in the minutia of highly technical cases such as this cannot be understated, as the judiciary will be forced to contemplate, by definition, virtually incorporeal—or, at least, momentarily existing—subject matter.

maintaining a middle position between the copyrightable work and the end user; and (2) remained sufficiently selective and "private" as to not violate the "public performance" right of the possible copyright holder. Previous courts had struggled with those precise issues.

Before *Aereo III*, a circuit split had formed between the Tenth and Second Circuits.[81] A district court judge in Utah found that Aereo was a "provider" that engaged in copyright infringement of the Broadcasters' programs, that the Broadcasters would face irreparable harm unless granted a preliminary injunction, that the balance of hardships favored injunction, and that the public interest favored preliminary injunction.[82]

There are four elements for a preliminary injunction in a copyright cause of action.[83] A district court may issue a preliminary injunction "only if the plaintiff has demonstrated either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor."[84] Second, a plaintiff seeking a preliminary injunction must demonstrate "'that he is likely to suffer irreparable injury in the absence of' an injunction."[85] A court may not presume irreparable injury in the copyright context; rather the plaintiff must demonstrate actual harm that cannot be remedied later by damages should the plaintiff prevail on the merits.[86] Third, a district court "must consider the balance of hardships between the plaintiff and defendant and issue the injunction only if the balance of hardships tips in the plaintiff's favor."[87] Fourth and finally, "the court must ensure that 'the public interest would not be disserved' by the issuance of a preliminary injunction."[88]

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81. *See* Joe Flint, *Federal Court in Utah Sides with Broadcasters Against Aereo*, LATIMES.COM, (Feb. 19, 2014), http://articles.latimes.com/2014/feb/19/entertainment/la-et-ct-aereo-10th-circuit-20140219 (noting a District Court Judge in Utah declared Aereo's streaming technology infringing of the Broadcasters copyrights); Ted Johnson, *Aereo Loses Latest Effort to Prevent Judge From Halting Its Operations in Utah, Colorado*, VARIETY.COM (Mar. 7, 2014, 9:38AM), http://variety.com/2014/biz/news/aereo-loses-latest-effort-to-prevent-judge-from-halting-its-operations-in-utah-colorado-1201127756/ (noting the Tenth Circuit decision upholding the Utah District Court ruling).

82. Cmty. Television of Utah, LLC v. Aereo, Inc., 997 F.Supp.2d 1191 (D. Utah 2014).

83. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 684 (2d Cir. 2013).

84. Salinger v. Colting, 607 F.3d 68, 79 (2d Cir. 2010) (internal citation and quotation marks omitted).

85. *Id.* at 79–80 (quoting Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008)).

86. *Id.* at 80 (citing eBay Inc. v. MercExchange, LLC., 547 U.S. 388, 391 (2006)).

87. *Id.*

88. *Id.* (quoting *eBay*, 547 U.S. at 391).

Under Tenth Circuit law, where the Court affirmed the Utah District Court's ruling against Aereo, "[t]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."[89] The Utah court reasoned that irreparable harm to the Broadcasters could be demonstrated, not through monetary damages, but through the availability of licensing its copyrighted broadcasts—"intangible factors that supported a finding of irreparable harm."[90] The Court concluded:

> [I]rreparable harm findings are based on such factors as the difficulty in calculating damages, the loss of a unique product, and existence of intangible harms such as loss of goodwill or competitive market position.
>
> The parties dispute whether the financial harm to Plaintiffs during the pendency of this litigation is real or imminent. Aereo points to statements from Plaintiffs' executives to argue, essentially, that Aereo's infringement is a drop in the bucket for Plaintiffs. However, the court does not focus on financial harm in determining irreparable harm to the extent that it can be compensated with monetary damages. Rather, if Aereo were permitted to continue to infringe Plaintiffs' copyrights during the pendency of this litigation, Aereo's infringement will interfere with Plaintiffs' relationships and negotiations with legitimate licensees, impede and effect Plaintiff's negotiations with advertisers, unfairly siphon viewers from Plaintiffs' own websites, threaten Plaintiffs' goodwill and contractual relationships with Plaintiffs' licensed internet distributors, lose their position in the competitive marketplace for Internet content, and cause Plaintiffs to lose control of quality and potential piracy of its programming. *All of these potential harms are intangible factors that support a finding of irreparable harm.*
>
> Every court that has considered the question of whether unauthorized Internet streaming of television and other video programming causes irreparable harm to the copyright owners has concluded that it does. Plaintiffs have amply demonstrated . . . irreparable harm and this factor supports the issuance of a preliminary injunction.[91]

89. Heideman v. S. Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003).

90. Cmty. Television of Utah, LLC v. Aereo, Inc., 997 F.Supp.2d 1191, 1203 (D. Utah 2014) (internal quotation marks omitted).

91. *Id.* (citing Heideman, 348 F.3d at 1189 ; Fox Television Stations, Inc. v. FilmOn X LLC, 966 F.Supp. 2d 30, 49-50 (D.D.C. 2013); Fox Television Stations, Inc. v. BarryDriller Content Systems, 915 F.Supp.2d 1138, 1147 (C.D. Cal. 2012); WPIX, Inc. v.

The Utah District Court also reasoned that the "definitions in the Act contain[ed] sweepingly broad language and the Transmit Clause easily encompasse[d] Aereo's process of transmitting copyright-protected material to its paying customers."[92] The court also determined that Aereo used its devices or processes to "transmit a performance or display of Plaintiff's copyrighted programs to Aereo's paid subscribers, all of whom are members of the public, who receive it in the same place or separate places and at the same time or separate times."[93] Thus, the broadcasts by Aereo violated the Broadcasters' right of "public performance" reserved for owners or licensees of copyrighted works.

The public interest factor for granting a preliminary injunction in that case weighed heavily in favor of the Broadcasters, based on Third and Tenth Circuit jurisprudence. Such easily weighted public interest did not seem to be an issue upon Supreme Court review.[94]

The economic factors at issue in this case were, and are, immense. Now, the future of streaming television, streaming sportscasts, cloud technology as a business model, monopolizing sports television—these are all real risks after the Supreme Court ruling in *Aereo III*. And it would not be a stretch to assume that a multi-billion dollar sports industry may face a drastically different broadcasting landscape in 2020. That said, the Court granted the Broadcasters protection, for now.

Where the courts *did* analyze the "public interest" factor, the Utah District Court reasoned (and the Tenth Circuit likely agreed):

> In copyright cases, the Tenth Circuit has held that the public interest factor normally weighs in favor of the issuance of an injunction because the public interest is the interest in upholding copyright protections. The Third Circuit has stated that it is virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work. The public has an interest in continuing to receive unique, local programming provided by the Plaintiffs. Original local programming, covering local news, sports, and other areas of interest, costs millions of dollars to produce and deliver to the public and the

IVI, Inc., 765 F. Supp. 2d 594, 617-20 (S.D.N.Y. 2011)) (internal quotations omitted) (emphasis added).

92. *Cmty. Television of Utah*, 997 F.Supp. 2d at 1198.

93. *Id.* at 1198-99.

94. *See* Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014) ("*Aereo III*").

> public interest plainly lies in enjoining copyright infringement that threatens the continued viability of such local programming.[95]

Thus, the public interest favored injunction.[96] But that court evaluated no economic considerations.[97] The Utah court chose not to evaluate the Broadcasters' exemption to antitrust litigation, the incredibly high barriers to enter the sports broadcasting market, the incredibly low barriers to enter the streaming video market, or what economic impact the decision would (or could) have in light of those factors. That was a grave judicial mistake, and unfortunately one that the Supreme Court also seemed to make. The Supreme Court did not discuss any antitrust implications of affording the Broadcasters an almost exclusive monopoly to all live-air transmissions of sporting events.[98] And those rights are expressly exempted from antitrust laws because of the Sports Broadcasting Act, discussed *infra*.

Such policy considerations, coupled with the former precedent in the Second Circuit, make it likely that the only available argument remaining for cloud technology in the arena of streaming sports broadcasts, is an argument rooted in antitrust law: that the Broadcasters have established or are establishing an exclusive monopoly to that business.[99]

The future impacts of *Aereo III* are immense. The Court effectively (or ineffectively, rather) fashioned an argument construing 1976 congressional intent with regard to streaming cloud technology.[100] That argument was based on statutory interpretation, and uprooted decades of subsequent jurisprudence. Such an analysis simply seems inapposite, and the implications will be vast.

III. FUTURE IMPACTS AND CONSEQUENCES OF *ABC V. AEREO*

If Aereo had won the copyright case at the preliminary injunction level, the NFL threatened to move its games to cable network channels (ESPN, Fox Sports, etc.). By doing so, the Sports Broadcasting Act of 1961 ("SBA")

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95. *Cmty. Television of Utah*, 997 F.Supp. 2d at 1204 (internal citations and quotations omitted).

96. *See id.*

97. *See id.* at 1203. The court determined that economic loss, standing alone, would not constitute irreparable harm. *Id.* (citing Heideman v. S. Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003)). The court then evaluated *intangible* factors to determine that the Broadcasters would suffer irreparable harm. *See id.*

98. *See Aereo III*, 134 S. Ct. 2498.

99. For an explanation and analysis of the antitrust laws shielding the Broadcasters, and the potential effects of such laws (coupled with the recent Supreme Court ruling in *Am. Broad. Companies, Inc. v. Aereo, Inc.*), *see* discussion *infra* Part IV.

100. *See Aereo III*, 134 S. Ct. at 2505-2515.

exception would no longer apply and antitrust litigation would ensue from every angle. The SBA states, in relevant part:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the *sponsored telecasting* of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax . . . combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.[101]

In essence, the SBA "grants all the stated sports leagues an exemption from antitrust violations when entering into pooled-rights contracts."[102] "Of particular importance is the phrase 'sponsored telecasting,' which courts have construed to mean that the SBA only applies to *broadcast television* and *not* to cable or satellite."[103]

The inference can be made that streaming, unlicensed broadcasts of sporting events would fall outside of the Sports Broadcasting Act protection against the antitrust laws. Aereo's business models, and future models like it, would have found protection even without the SBA. By the very language of the statute, sponsored telecasts[104] are protected, but the Leagues have moved far, far away from over-the-air broadcast television envisaged by Congress in the original drafting of the SBA. Why, then, create rigid barriers from entry[105] into the sports telecasting market?[106] The only answer is that the Court is prompting Congress to act.

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101. 15 U.S.C. § 1291 (2012) (emphasis added).

102. Ariel Y. Bublick, *Are You Ready for Some Football?: How Antitrust Laws Can Be Used to Break Up DirecTV's Exclusive Right to Telecast NFL's Sunday Ticket Package*, 64 FED. COMM. L. J. 223, 233 (2011) (citing U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1347 (2d Cir. 1988)).

103. *Id.* (citation omitted) (emphasis added).

104. *See* 15 U.S.C. § 1291.

105. The entire line of *Aereo* cases question whether "this type" of near-simultaneous streaming broadcast of real time events would be a viable and legal business model under the copyright laws.

106. As stated earlier, some doubts exist as to the legitimacy of Aereo's business model and whether the business was designed with the intent to circumvent the copyright laws. *See, e.g.*, Celia Kang, *Justices Test Aereo on Copyright Issue but Raise Concerns*

A. *Invisible Cloud vs. Invisible Hand*

The original legislation surrounding broadcasting focused on over-the-air television broadcasts. The Leagues now televise events on multiple cable channels, provide exclusive television (cable or channel) packages for consumers, and stream live video. It seems not only plausible, but also probable, that a court could conclude many of the Leagues business maneuvers fall outside the "sponsored telecast" language of the statute. The Leagues seem to desire an end-around the statutory language on one hand, and sweeping protection on the other—protections that the Supreme Court continues to provide.[107]

Many different sports leagues rely on the practices of cable and satellite television. The current system has generated immense wealth for the Leagues and substantial income for Broadcasters and sports leagues alike. Yet, now, the SBA seems like a technological dinosaur. How could a court accurately construe the original statutory language, even contextually, to include live streaming or cloud recording as a "sponsored telecast" protected from the antitrust laws?[108] Again, the Court's decision in this case will not only shake the fabric of copyright law in the coming decades, but may stir up a great deal of antitrust litigation in the very near future.

That said, if the NFL is making an empty threat about moving all its games to cable channels, the emergence of new companies like Aereo could take *huge* chunks of profits from cable providers—either driving down prices of cable costs and licensing deals, which may be a good thing, or else inundating the

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About Harming Cloud Services, WASH. POST (Apr. 22, 2014), http://www.washingtonpost.com/business/technology/justices-test-aereo-on-copyright-issue-but-raise-concern-about-harming-cloud-services/2014/04/22/1035912a-ca40-11e3-93eb-6c0037dde2ad_story.html.

107. *See, e.g.*, Brain Fung and Celia Kang, *The Supreme Court Just Killed Aereo*, WASH. POST (Jun. 23, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/06/25/the-supreme-court-just-killed-aereo/ ("But the court left little hope for Aereo to maintain its business without paying the licensing fees cable companies do to retransmit broadcast program. The decision will fortify the businesses of broadcast networks, which fiercely fought Aereo in several courts over the past two years for what they said amounted to theft of their shows.").

108. *See* 15 U.S.C. § 1291. Whether viewed through the lens of an intentionalist, contextualist, or constructionist, the statutory language simply does not seem to embrace the notion of a live streaming sports telecast to a personal computer. Restructuring the language of the statute—or how Congress might adapt a future statute—is not addressed in this paper, but will likely have to be addressed in future scholarly articles after the *Aereo III* and *IV* decisions.

market with high-tech, streaming cloud technology.[109] The same shift occurred when cable television invaded the television market.[110] Cable provided a new model of television with subscription and advertising revenue. Now many cable providers stream shows to their websites. The business model for television is simply changing.

The next shift may facilitate substantial barriers preventing plug-in type cable technology expansion. In five or ten years, the Broadcasters could be suing companies like Aereo for exclusionary or predatory business practices (and, possibly, concerted refusals to deal), rather than what would, today, be the inverse. In any case, that economic evaluation is crucial to the future decisions of our federal courts, and with the ruling in *Aereo III*, it seems those considerations must be left for Congress.

B. *Antitrust Policies in the Age of Cloud Technology*

Should emerging streaming and cloud broadcasts of live sporting events be protected to promote the "progress of . . . the useful arts"[111] as elucidated by the Copyright Clause? Should the Broadcasters continue to be afforded the SBA protection from antitrust litigation in light of the barriers to enter the sports broadcasting market? Should streaming sports broadcasts be afforded some form of congressional protection, or does that simply beg the question about emerging streaming broadcasts raised above? The Supreme Court missed the long-term effects of its ruling. The Court's judgment could have afforded emerging technologies and their respective companies the right to enter an enormous economic market that has been shielded for far too long. The copyright laws did not clearly indicate anything to the contrary.[112]

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109. After *Aereo III* and *IV*, it seems unlikely which, if any streaming telecasts of sports events could or would survive legal analysis. *See* Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014) ("*Aereo III*"); Am. Broad. Companies, Inc. v. Aereo, Inc., 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014) ("*Aereo IV*").

110. *See* Talon Powers, Note, *If It's in the Game, Is It in the Game?: Examining League-Wide Licensing Agreements After* American Needle, 97 MINN. L. REV. 2352, 2372-76 (reviewing instances where the NFL licenses itself as a "collective entity" or the "League as a whole"); Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 78 (1981) (noting that Government attempts to regulate the cable industry began in the 1960s when federal regulators enacted rules to block cable television operations in large markets to protect broadcast television from upstart competitors).

111. U.S. CONST. art. I, § 8, cl. 8.

112. *See Aereo III*, 134 S. Ct. at 2517 (Scalia, J., dissenting) ("I share the Court's evident feeling that what Aereo is doing (or enabling to be done) . . . ought not be allowed. But perhaps we need not distort the Copyright Act to forbid it.").

Amici for the petitioners stated: "[t]he decision below significantly alters that legal regime and unsettles the marketplace for licensing rights to broadcast television programming."[113] Further, the amici asserted, "the Second Circuit's decision permits technological gimmickry that serves no valid purpose to nullify critically important copyright rights – rights that the Leagues fought hard to secure and that have become an integral part of their businesses during the past four decades."[114] Yet, as discussed throughout this article, the opposite economic argument may actually hold more weight.

Antitrust laws generally aim to protect consumer welfare and balance organizational economics.[115] The Broadcasters have had a monopoly on televised sporting events, in particular. The SBA[116] explicitly protects those Broadcasters from antitrust litigation. However, the SBA was designed to protect Broadcasters' packages of games (Sunday broadcasts of NFL games, for instance). When Congress enacted the SBA in 1961, individual games streamed to individual receptors on laptops could not have been fathomed, and clearly did not influence Congress' decision. The wording of the statute, as discussed, intimated that Broadcasters' sports packages (such as weekly games

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113. Brief of National Football League and Major League Baseball as Amici Curiae in Support of Petitioners, *supra* note 50, at 1.

114. *Id.* at 2.

115. *See, e.g.*, Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013). Wright and Ginsburg conclude:

> [Another] standard, if adopted, would inevitably reduce consumer and total welfare by shifting the focus of antitrust analysis from efficiency to more easily observed but misleading proxies for consumer welfare, to wit, the number of firms on offer in a market. While incorporating product variety, quality, and innovation into the standard welfare analysis is desirable when done correctly, no "new paradigm of the antitrust laws" is required to do that; modern antitrust analysis quite comfortably incorporates the tradeoffs between price and quality that consumers face. The flaw of the [other] standard is that it altogether rejects the economic approach to dealing with these tradeoffs and instead imposes a structural presumption that the number of firms or brands in competition is directly correlated with consumer welfare. This involves two major errors: by rejecting the economic approach, the [other] standard forgoes illumination as to why certain restraints arise in a particular market and, by imposing a structural presumption, it implicitly depends upon conclusions about welfare that are not justified either by theory or by evidence. In sum, the [other] standard would produce antitrust decisions uninformed by the contributions of modern industrial organization economics.

Id. at 2422-23. *See also* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

116. 15 U.S.C. § 1291 (2012) generally shields Broadcasters' "sponsored telecasts" from antitrust lawsuits.

or series) on live-air telecasts could find a safe harbor from the reach of the antitrust laws. If the statute still protects the Broadcasters' telecasts, then why shouldn't a streaming or cloud broadcast get a separate chance to enter the market?

C. *Clouding the Exemption or Clouding Innovation?*

Since the 1950s, what have the Leagues fought so hard to secure, other than a congressionally carved antitrust exemption? What if that exemption has simply been circumvented? If the copyright laws are intended to promote the progress of the useful arts,[117] even if that innovation "unsettles the marketplace" for sports broadcasting, why protect the Broadcasters over the innovators? The Supreme Court would seemingly be more sympathetic to the latter view rather than the former, which was raised by amici for the Broadcasters. However, that no longer appears to be the case.

The whole premise of the Copyright Clause is to reward innovators who create something revolutionary.[118] Aereo, FilmOn, Hulu, and similar streaming or cloud counterparts could dramatically shift the way humans experience sports television forever. Such a shift seems adequately revolutionary to deserve legal protection. In light of the previous Second Circuit jurisprudence, before *Aereo III*,[119] it seemed like Aereo would be a legally sound (or at very least, a legally *viable*) option by which that dramatic shift toward new, cloud technologies could occur. That shift is precisely the kind of shift the Copyright Clause aims to protect.

D. *The Death of Aereo*

Aereo recently filed Chapter 11 bankruptcy,[120] and sent a notice out to its former subscribers.[121] In the heartfelt letter, Founder Chet Kanojia stated: "We feel incredibly lucky to have had the opportunity to build something as meaningful and special as Aereo. With so many shifts and advances in

117. U.S. CONST. art. I, § 8, cl. 8. ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

118. *Id.*

119. Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

120. Chet Kanojia, *A Letter To Our Consumers: The Next Chapter*, (Nov. 2014), https://www.aereo.com/.

121. *Id*.

technology, there has never been a more perfect time to take risks, challenge the status quo and build something special."[122]

The company will pay the Broadcasters $950,000 over the copyright claims, which will essentially bring this legal saga to an end—for Aereo, at least.[123] However, the evolution of live-streaming television companies has never been more present.[124] And the need for rapidly evolving legislation and court-fashioned protections for that innovation has never been more sorely needed.

CONCLUSION

The Supreme Court did not necessarily decide that evolving technologies should not also get a bite at the apple. However, the SBA exemption is a long-standing precedent that has faced many attacks, and may still protect the Broadcasters. The question becomes: How can new technologies break through the economic barriers of near-simultaneous sports telecasts without licensure or Congressional mandate? Any hope appears unrealistic for companies in the world of cloud technology after *Aereo III*, and the market is virtually impenetrable.

It appears the Supreme Court simply refused to consider those economic effects when it rendered its decision in *Aereo III*. Or perhaps this technology is just *so new* that the legal adjustment will take a few tries (unsurprisingly, the same is probably the safest conclusion).

In any case, as a practical matter the world of streaming and cloud technology is still evolving, every hour of every day. New applications, inventions, and processes, as well as faster, clearer, and more-readily available media exists at our fingertips. The "tech" world lives in the background of our lives like a mixture of *Silicon Valley* and *Game of Thrones*,[125] each new startup and tech company vying for the next big thing, battling for largest army of intellectual property, and quietly sharpening the swords that protect their company's ideas. But is this arena realistically penetrable for the next "Aereo?" Not yet.

Legally, courts have maintained that a "public performance" must be sufficiently public (i.e. not viewed by a single or small group of viewers). Courts have also maintained a policy preference for downstream innovation in copyright law balanced against purposive upstream protections. In light of such

122. *Id*.

123. *See* Welch, s*upra* note 44.

124. *See id*.

125. Credit to George R.R. Martin, HBO, and the HBO original television series *Game of Thrones* for the following *Game of Thrones* allusions and references.

tendencies, the Supreme Court in *Aereo III* quite literally dissolved the company that looked to transform the entire landscape of streaming telecasts, and near-live retransmissions of sports telecasts to the world.

Whether Aereo intended to circumvent the copyright laws or not—it did so *effectively*. The purpose of the Copyright Act remains to promote innovation, and to subsequently protect that innovation. And just as every great house of Westeros vies for the Iron Throne, every great tech company wants to invent the next great innovation.

Similarly, here, just about everyone wants to watch their football or baseball team compete on the field, preferably with a cold drink, and a manageable cable bill. The television sports broadcasting world is rapidly changing, and the courts need to agree that the law must change with it. Aereo tried to bring the NFL to a technological "cloud" at its users' fingertips. Now, Aereo is all-but-gone, and the Broadcasters seem to have won. But the next tech startup is sharpening its sword, and when a company lives in the high tech world they either "win" or they "die"—and in this instance the company faced the latter fate.