

Aereo, Unlicensed Retransmissions, and Emerging Technologies: The Case for Congressional Action

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ABSTRACT: In American Broadcasting Companies v. Aereo, Inc., the Supreme Court addressed a growing split among lower federal courts regarding the copyright liability of a business that retransmitted broadcast television programs to its subscribers for a monthly fee without obtaining a license or paying royalties. In holding that Aereo violated exclusive public performance rights, guaranteed to copyright holders by the Copyright Act, the Court overturned the Second Circuit's interpretation of the Copyright Act's Transmit Clause. The Court's holding relied on Aereo's substantial similarity to cable television to conclude that Aereo's system "performed" "to the public" under the Transmit Clause. This Comment argues that the Court's decision in Aereo provided little guidance regarding other service providers and could threaten the development of new technologies. The uncertain state of the law after Aereo requires action by Congress to provide more guidance. A comprehensive overhaul of the Copyright Act would best address the problems in applying the Copyright Act to modern technology, as exemplified by the Aereo litigation.

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I. INTRODUCTION.....	1790
II. THE SPLIT AMONG FEDERAL COURTS.....	1791
A. <i>THE COPYRIGHT ACT AND THE PUBLIC PERFORMANCE RIGHT</i>	1791
B. <i>THE TRANSMIT CLAUSE</i>	1792
C. <i>AEREO AND UNLICENSED RETRANSMISSIONS OF BROADCAST TELEVISION</i>	1793
D. <i>THE SECOND CIRCUIT APPROACH TO THE TRANSMIT CLAUSE</i>	1794
E. <i>FEDERAL DISTRICT COURTS' REJECTION OF THE SECOND CIRCUIT INTERPRETATION</i>	1796
III. THE <i>AEREO</i> DECISION.....	1797
A. <i>THE AEREO MAJORITY: AEREO VIOLATES EXCLUSIVE PUBLIC PERFORMANCE RIGHTS</i>	1798
B. <i>THE AEREO DISSENT: "GUILT BY RESEMBLANCE"</i>	1802
IV. <i>AEREO</i> AND THE FUTURE OF COPYRIGHT LAW.....	1803
A. <i>THE AEREO ANALYSIS AND POSSIBLE EFFECTS ON OTHER TECHNOLOGY</i>	1804
B. <i>THE CASE FOR CONGRESSIONAL ACTION</i>	1807
V. CONCLUSION.....	1810

I. INTRODUCTION

In *American Broadcasting Companies v. Aereo, Inc.*, (“*Aereo*”) the Supreme Court resolved a split among federal courts over whether unlicensed retransmissions of broadcast television programs over the Internet violated copyright holders’ exclusive public performance rights.¹ *Aereo*, a television retransmission business that launched in early 2012 and attracted millions of dollars in investment, had spread rapidly across the United States and prompted litigation in several circuits regarding the copyright implications of its system.² By holding that *Aereo* infringed protections guaranteed to copyright holders, the Supreme Court overturned the Second Circuit’s interpretation of the Transmit Clause of the Copyright Act.³ The decision was a death knell to *Aereo* and other businesses that were built around

1. See generally *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

2. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013), *rev’d*, *Aereo*, 134 S. Ct. 2498. *Aereo*’s customers pay a monthly fee to receive transmissions of network “broadcast television programs over the [I]nternet.” *Id.*

3. *Aereo*, 134 S. Ct. at 2511 (overturning the Second Circuit’s decision in *WNET* that *Aereo* did not “perform” copyrighted works “publicly” in violation of the Copyright Act).

retransmitting broadcast television programs to subscribers over the Internet.⁴

This Comment explores the *Aereo* decision and its potential effects. Part II examines the relevant portions of the Copyright Act and the split in authority between the Second Circuit Court of Appeals and federal district courts outside the Second Circuit regarding whether unlicensed retransmissions by Aereo-like services violated copyright holders' exclusive public performance rights. Part III discusses the *Aereo* decision, which resolved the lower courts' disagreement over the proper interpretation of the Copyright Act and its Transmit Clause. Part IV explores the potential effects of the *Aereo* decision, its potential impact on other technologies, and the broader issues underlying the Aereo litigation. Part V concludes by arguing that Congress should perform a comprehensive update of the Copyright Act to address changes in technology.

II. THE SPLIT AMONG FEDERAL COURTS

This Part discusses the portions of the Copyright Act at issue in the Aereo litigation, including the exclusive public performance right guaranteed to copyright holders and the Transmit Clause. It then explores Aereo and its business model, the Second Circuit's interpretation of the Transmit Clause as allowing Aereo to retransmit programs without violating exclusive public performance rights, and the rejection of the Second Circuit approach by federal district courts outside the Second Circuit.

A. THE COPYRIGHT ACT AND THE PUBLIC PERFORMANCE RIGHT

The Copyright Act of 1976 gives copyright holders several exclusive rights in their copyrighted work.⁵ As the Supreme Court has explained, these protections aim “to secure a fair return for an author's creative labor” while “stimulat[ing] artistic creativity for the general public good.”⁶ One right the

4. See Mike Snider, *Aereo Shuts Down Just Days After Court Decision*, USA TODAY (June 28, 2014, 1:18 PM), <http://www.usatoday.com/story/tech/personal/2014/06/28/aereo-ceo-shuts-down-service/11619083/> (reporting that Aereo's CEO announced that the company will pause operations indefinitely in the wake of the Supreme Court decision). Other businesses, such as FilmOn X, that used systems modeled after Aereo will also be affected by the Court decision. See *infra* Part II.E.

5. See Copyright Act of 1976, 17 U.S.C. § 106 (2012) (giving copyright holders the exclusive right to reproduce or make copies of copyrighted work; to create derivative works stemming from the copyrighted work, to distribute copies of the copyrighted work to the public; to publicly perform the copyrighted work; to publicly display the copyrighted work, or, “in the case of sound recordings,” to publicly perform the work via audio transmissions); see also Shyamkrishna Balganesh et al., *Judging Similarity*, 100 IOWA L. REV. 267, 272 (2015) (discussing copyright owners' exclusive rights).

6. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (internal quotation marks omitted); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (discussing the purposes of the Copyright Act and noting that “[c]reative work is to be

Copyright Act guarantees is the exclusive right to perform the work publicly.⁷ The statute defines “performing a work publicly” as (1) performing a work in a public location or at a “place where a substantial number” of people have gathered; or (2) “to transmit . . . a performance or display of the work . . . by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”⁸

B. THE TRANSMIT CLAUSE

The latter definition of a “public performance,” known as the Transmit Clause, protects copyright holders against retransmissions of their works without their permission. This definition of “public performance” did not appear in the 1909 version of the Copyright Act; however, when Congress passed the 1976 Copyright Act, it broadened the definition of “public performance” by adding the Transmit Clause.⁹ Congress passed the 1976 Copyright Act in response to changes in technology, specifically the emergence of cable television, and included the Transmit Clause in order to abrogate Supreme Court decisions interpreting the 1909 Copyright Act to mean that cable companies did not “perform” copyrighted works by transmitting broadcast television to subscribers.¹⁰ In addition to adding the Transmit Clause to bring cable retransmissions within the scope of copyright holders’ exclusive performance right, the 1976 Copyright Act established a

encouraged and rewarded,” with the ultimate goal to “promot[e] broad public availability of literature, music, and the other arts”).

7. 17 U.S.C. § 106(4) (“[I]n the case of literary, musical, . . . and motion pictures and other audiovisual works, [the copyright owner has the right] to perform the copyrighted work publicly.”).

8. *Id.* § 101. This express definition is unlike the terms “license” and “ownership” in the Act, both were left undefined. Christopher M. Newman, *A License Is Not a “Contract Not to Sue”: Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1108 (2013).

9. See *WNET, Thirteen v. Aereo Inc.*, 712 F.3d 676, 685 (2d Cir. 2013) (noting that the “1909 Copyright Act . . . lacked any analog to the Transmit Clause”).

10. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014); *WNET*, 712 F.3d at 685 (noting that the legislative history behind the Transmit Clause shows Congress “intended in part to abrogate” the Supreme Court’s *Fortnightly* and *Teleprompter* decisions, thereby bringing cable retransmissions “within the scope of the public performance right”); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 44 (D.D.C. 2013) (stating that Congress passed the 1976 Copyright Act partly in response to the fact that “the cable television industry ha[d] not been paying copyright royalties” to retransmit broadcast television signals); see also *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 412–15 (1974) (recognizing that the cable television industry had evolved so that it competed more effectively with broadcast television, but finding no copyright infringement by cable companies); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401–02 (1968) (holding that cable television companies did not “perform” copyrighted works by making broadcast television signals available).

compulsory license system for cable retransmissions systems that establishes royalty rates payable to copyright holders.¹¹

C. AEREO AND UNLICENSED RETRANSMISSIONS OF BROADCAST TELEVISION

Aereo, launched in early 2012, transmitted network broadcast television programs over the Internet to subscribers for a monthly fee.¹² It did not acquire licenses from copyright holders or pay royalties to transmit the television programs.¹³ While Aereo originally served only the New York City area, it quickly expanded into other markets around the country.¹⁴ Aereo's success in attracting millions of dollars in investments propelled its rapid growth.¹⁵

The Aereo system provided its subscribers the functionality of a television with a remote Digital Video Recorder ("DVR") and a Slingbox.¹⁶ Aereo subscribers used the system by logging into their account on Aereo's website where they saw a listing of broadcast television programs that they could choose to "Watch" or "Record."¹⁷ Choosing "Watch" played the selected program with a brief delay compared to live television, while choosing "Record" saved "a copy of the [selected] program for later viewing."¹⁸ Aereo users could watch the "programming on a variety of devices," such as computers, smartphones, and electronic tablets.¹⁹

To provide these services, Aereo used "thousands of individual antennas to receive broadcast television channels."²⁰ When a user selected to "Watch" or "Record" a program, the Aereo server assigned an individual antenna for

11. See 17 U.S.C. § 111(c) (requiring licensing for secondary transmissions to the public by a cable system of a performance or work made by a broadcast television station); see also *id.* § 111(d) (establishing a system whereby cable systems with retransmissions "subject to statutory licensing under" Section 111(c) make royalty payments to copyright owners).

12. *WNET*, 712 F.3d at 680. Aereo offered networks disseminated via traditional antenna-based broadcasting technology over the public airwaves, such as ABC. *Id.* at 682; see also *Aereo*, 134 S. Ct. at 2503; Hiawatha Bray, *Aereo's Internet TV Service Is So Good It's Scary*, BOS. GLOBE (May 30, 2013), <http://www.bostonglobe.com/business/2013/05/29/aereo-internet-service-good-scary/sGECft4KQwmT1Ip4ZVbYxN/story.html> (stating that Aereo provides access to 22 channels, including "the major national networks—ABC, CBS, NBC, Fox, PBS, and [the] CW").

13. *WNET*, 712 F.3d at 680.

14. See *id.*; Sarah Frier, *Aereo's \$38 Million Helps Fund Expansion and Social TV Efforts*, BLOOMBERG (Jan. 8 2013, 8:29 PM), <http://go.bloomberg.com/tech-deals/2013-01-08-aereo-38-million-helps-fund-expansion-and-social-tv-efforts/>.

15. See Frier, *supra* note 14 (noting that Aereo's expansion was "fueled by a \$38 million financing round").

16. *WNET*, 712 F.3d at 682. A Slingbox is a device that connects a user's cable or satellite system to the Internet, which enables the user to watch live and recorded programs from mobile devices connected to the Internet. *Id.*

17. *Id.* at 681.

18. *Id.*

19. *Id.* at 681–82.

20. *Id.* at 682.

the user to receive the requested broadcast for the duration of the program.²¹ The Aereo system used the signal from the individually assigned antenna to create a unique copy of the requested program for the user, which the system saved to Aereo's centralized hard drive in the user's individual directory that was accessible over the Internet.²² In other words, Aereo utilized cloud computing technology to make user directories of recorded programs available on any compatible device.²³ Whether the user chose to "Watch" or "Record" a program, the user did not watch the program directly from the antenna.²⁴ Rather, the subscriber would view the unique copy of the program that the system saved in the subscriber's directory.²⁵ In providing these services, Aereo did not acquire licenses from copyright holders or pay royalties to transmit the broadcast television programs it provided to its subscribers.²⁶

D. THE SECOND CIRCUIT APPROACH TO THE TRANSMIT CLAUSE

In *WNET, Thirteen v. Aereo, Inc.*, the Second Circuit confronted the issue of whether Aereo's unlicensed transmissions of broadcast television programs violated copyright owners' exclusive public performance rights.²⁷ Centering their arguments on the Transmit Clause's definition of a "public performance," a group of businesses in the television broadcast industry (and copyright holders of television programs) sued to enjoin Aereo from its allegedly unlawful capture of broadcast television signals and subsequent retransmissions to its subscribers.²⁸

In considering the suit against Aereo, the Second Circuit analyzed the technical aspects of the Aereo system and found three notable details: (1) Aereo assigned a single antenna to each customer so that no two customers used the same antenna at the same time; (2) "the signal received by each antenna [was] used to create an individual copy of the program in the [subscriber's] personal directory" so that the system created separate copies of a program for different customers even when they watch the same program; and (3) when a user watched a program, he watched the individual copy the system created specifically for him, meaning that "[e]ach copy of a

21. *Id.*

22. *Id.* at 682–83.

23. *Id.* at 681–82; see also Cullen Kiker, *Amazon Cloud Player: The Latest Front in the Copyright Cold War*, 17 J. TECH. L. & POL'Y 235, 240 (2012) ("Cloud computing allows both the storage of data and the execution of programs to occur in a location physically separate from the user's computer.").

24. *WNET*, 712 F.3d at 682.

25. *Id.*

26. *Id.* at 680, 683.

27. *Id.* at 684.

28. *Id.* at 680.

program is only accessible to the user who requested that the copy be made . . . [such that] no other Aereo user can ever view that particular copy.”²⁹

In light of the characteristics of Aereo’s services, the Second Circuit held that Aereo did not infringe copyright holders’ exclusive performance rights because Aereo’s transmissions of broadcast programs were not “public performances.”³⁰ In reaching this conclusion, the Second Circuit relied heavily on its earlier decision in *Cartoon Network LP v. CSC Holdings, Inc.* (“*Cablevision*”),³¹ from which it discerned “four guideposts” to guide its Transmit Clause analysis: (1) whether a performance is “to the public” under the Transmit Clause turns on “the potential audience of the individual transmission,” meaning that a transmission with a potential audience of a single subscriber “is not a public performance”; (2) the court should not aggregate distinct private transmissions to find the existence of a public performance, making it “irrelevant . . . whether the public is capable of receiving the same underlying work . . . by means of many transmissions”; (3) the court should, however, aggregate private transmissions when the transmissions come “from the same copy of the [underlying] work”; and (4) the court should consider “any factor that limits the *potential* audience of a transmission.”³²

Applying the *Cablevision* factors to the facts in *Aereo*, the court noted that its *Cablevision* holding “rested on two essential facts.”³³ *Cablevision*’s system both “created unique copies” of recorded programs and used the unique copy to transmit the program to a single customer.³⁴ The court found that the Aereo system possessed the same two essential features, because the Aereo system created a unique copy of a program for each user and generated the transmission to the user from that unique copy.³⁵ Accordingly, the Second

29. *Id.* at 682–83.

30. *Id.* at 696.

31. *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008). In *Cablevision*, the Second Circuit rejected claims of illegal reproduction and public performances of copyrighted works by a cable company offering a remote storage digital video recorder system (“RS-DVR”) to its customers. *Id.* at 124. In holding that the RS-DVR system did not violate copyright holders’ exclusive public performance rights because the playback transmissions were not “to the public,” the court interpreted the Transmit Clause as requiring a court to consider “who precisely is ‘capable of receiving’ a particular *transmission* of a performance.” *Id.* at 135 (emphasis added). The court concluded that because the potential audience of “each RS-DVR playback transmission [was] a single subscriber using a single unique copy” of the program, the RS-DVR transmissions were not “to the public” under the Transmit Clause. *Id.* at 139.

32. *WNET*, 712 F.3d at 689 (citations omitted) (internal quotation marks omitted).

33. *Id.* The court noted that because of “these two features [of the *Cablevision* system], the potential audience of every RS-DVR transmission was only a single . . . subscriber.” *Id.* Accordingly, *Cablevision* transmissions were not “to the public.” *Id.* at 690.

34. *Id.* at 689.

35. *Id.* at 690. The court rejected the plaintiffs’ efforts to distinguish the facts of *Cablevision* based on *Cablevision* having had a license to transmit copyright holders’ programs in the first place. *Id.* The court also rejected the plaintiffs’ argument that the court should aggregate

Circuit concluded that Aereo's transmissions were not "public performances" under the *Cablevision* framework and, thus, did not violate copyright holders' exclusive public performance rights.³⁶

E. FEDERAL DISTRICT COURTS' REJECTION OF THE SECOND CIRCUIT
INTERPRETATION

In suits against other Aereo-like businesses, several federal district courts considered the copyright implications of similarly unlicensed retransmissions of television broadcasts and disagreed with the Second Circuit's holding in *WNET, Thirteen v. Aereo*.³⁷ In *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, the District Court for the Central District of California faced essentially the same issue as the Second Circuit in *Aereo*—whether the defendant, who utilized a "technologically analogous" service to Aereo,³⁸ violated the plaintiffs' exclusive public performance rights by transmitting television programs to customers over the Internet.³⁹ Similarly, in *Fox Television Stations, Inc. v. FilmOn X LLC*, the District Court for the District of Columbia confronted the issue of whether a service modeled after the Aereo system, which let its customers watch or record television programs on mobile devices, violated the exclusive rights of copyright holders.⁴⁰

Both courts held that the defendants' Aereo-copycat systems infringed copyright holders' exclusive public performance rights.⁴¹ Noting that the "[d]efendants' unique copy transmission argument based on *Cablevision* and *Aereo* [was] not binding in the Ninth Circuit,"⁴² the *BarryDriller* court held that the defendant's transmissions to customers violated exclusive public

separate transmissions to determine whether the transmissions collectively constitute a public performance. *Id.* at 691 (noting that under *Cablevision*, the court must view Aereo's transmissions as independent performances so that "the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted").

36. *Id.* at 696. The Second Circuit later denied the plaintiff copyright holders' petition for a rehearing of the case en banc. *WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 722 F.3d 500, 501 (2d Cir. 2013).

37. See *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 33 (D.D.C. 2013) (noting that after careful consideration, the court was not bound by Second Circuit decisions); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1143–46 (C.D. Cal. 2012) (stating that since the Ninth Circuit had not adopted Second Circuit law, the court was not inclined to follow *Cablevision*). *Contra* *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 38–39 (D. Mass. 2013) (denying a preliminary injunction against Aereo because "Aereo presents the more plausible interpretation" of the Copyright Act).

38. *BarryDriller*, 915 F. Supp. 2d at 1140. The defendant's system, similar to Aereo, used individual antennas to allow customers to watch or record television broadcasts. *Id.* at 1140–41.

39. *Id.* at 1143.

40. *FilmOn X*, 966 F. Supp. 2d at 34–37.

41. *Id.* at 33; *BarryDriller*, 915 F. Supp. 2d at 1143.

42. *FilmOn X*, 966 F. Supp. 2d at 41 (quoting *BarryDriller*, 915 F. Supp. 2d at 1146).

performance rights.⁴³ The *BarryDriller* court rejected the Second Circuit's interpretation of the Transmit Clause in favor of an approach based on "the performance of the copyrighted *work*," rather than the "performance" of a transmission.⁴⁴ The court reasoned that people want to watch a "work," not a "transmission," and that the technological mechanics of the system should therefore be less important than the basic fact of a consumer's access to copyrighted programming.⁴⁵

The *FilmOn X* court also rejected the Second Circuit's interpretation of the Transmit Clause after examining its language and legislative history, finding that the defendant's service of retransmitting copyrighted programming for public consumption plainly violated exclusive public performance rights.⁴⁶ The court noted that the legislative history showed Congress intended that the Transmit Clause be applied broadly, and it used the language any "device or process" to cover "any sort of transmitting apparatus," including the plaintiff's system of individualized antennas.⁴⁷ Both district courts granted injunctions against the defendants' services, although the injunctions were limited in geographic scope due to the contrary law in the Second Circuit.⁴⁸

III. THE AEREO DECISION

In *Aereo*, the Supreme Court resolved the growing split among the lower federal courts.⁴⁹ In a 6–3 decision, the Court sided against Aereo and the Second Circuit's interpretation of the Copyright Act, holding that Aereo's

43. *BarryDriller*, 915 F. Supp. 2d at 1143.

44. *Id.* at 1144.

45. *See id.* (stating that people generally do not "gather around their oscilloscopes to admire the sinusoidal waves of a . . . transmission"). The court criticized the Second Circuit's interpretation of the Transmit Clause because it did not follow the express language of the statute, which is concerned with the public performance of a copyrighted "work." *Id.* Accordingly, "*Cablevision's* focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute." *Id.* at 1145.

46. *FilmOn X*, 966 F. Supp. 2d at 46–48. The court explained that FilmOn X's system clearly violated exclusive public performance rights under the language of the Transmit Clause because it "transmits (i.e., communicates from mini-antenna through servers over the Internet to a user) the performance (i.e., an original over-the-air broadcast of a work copyrighted by one of the Plaintiffs) to members of the public (i.e., any person who accesses the FilmOn X service through its website or application)." *Id.* at 46–47.

47. *Id.* at 48 (quoting H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677) (internal quotation marks omitted).

48. *Id.* at 51–52; *BarryDriller*, 915 F. Supp. 2d at 1148. The *BarryDriller* court issued an injunction against the defendant's service, applying only in the Ninth Circuit. *BarryDriller*, 915 F. Supp. 2d at 1148. The *FilmOn X* court granted a nationwide injunction, except as to the Second Circuit. *FilmOn X*, 966 F. Supp. 2d at 51–52.

49. *See generally* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014). Copyright law is a particularly ripe area for circuit splits. *See, e.g.*, Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1123 (2015).

system violated exclusive public performance rights.⁵⁰ Justice Breyer's majority opinion stressed the similarity between Aereo and the cable television systems Congress "sought to bring within the scope of the Copyright Act" by amending it to include the Transmit Clause.⁵¹ In a strongly worded dissent joined by Justices Thomas and Alito, Justice Scalia criticized the majority's makeshift "looks-like-cable-TV" standard for being likely to create mass confusion regarding service provider copyright liability.⁵²

A. *THE AEREO MAJORITY: AEREO VIOLATES EXCLUSIVE PUBLIC PERFORMANCE RIGHTS*

The *Aereo* majority viewed the case as presenting two questions: (1) did Aereo "perform" by transmitting television programs to subscribers; and (2) if Aereo performed, did it perform "publicly"?⁵³ To answer the first question, the Court looked to the purposes of the Copyright Act and the Transmit Clause.⁵⁴ The Court noted that Congress amended the Copyright Act in 1976, creating the Transmit Clause, partly to abrogate two Court decisions concluding cable companies did not "perform" copyrighted works under the Act by transmitting broadcast television to cable customers.⁵⁵

In those cases, *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, the Supreme Court drew a line between broadcasters and viewers of television programming and found that cable companies were more like viewers.⁵⁶ In *Fortnightly*, the Court had explained that cable companies "ha[ve] little in common with . . . broadcasters" because cable companies "simply carry, without editing, whatever programs they receive," do not originate any programs of their own, and merely receive programs already released for public consumption and carry them via private channels to more viewers.⁵⁷ Cable companies thus ensured clear reception of broadcast signals that might otherwise be scattered or unavailable by placing antennas and using cables to carry the signals

50. *Id.* at 2503.

51. *Id.* at 2510–11.

52. *Id.* at 2512 (Scalia, J., dissenting).

53. *Id.* at 2504 (majority opinion).

54. *Id.*

55. *Id.* at 2505–06 ("In 1976 Congress amended the Copyright Act in large part to reject the Court's holdings in *Fortnightly* and *Teleprompter*."). In *Fortnightly Corp. v. United Artists Television, Inc.*, the Supreme Court held that a cable television company that retransmitted television programs to subscribers did not "perform" the copyrighted works under the 1909 Copyright Act by merely making broadcast television signals available to its customers. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400–02 (1968). Similarly, in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, the Court found no copyright infringement by cable companies, while noting that it was the role of Congress, rather than the courts, to regulate the changing communications industry. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 412–16 (1974).

56. *Aereo*, 134 S. Ct. at 2505.

57. *Fortnightly*, 392 U.S. at 400–01.

received to their subscribers' television sets.⁵⁸ The Court in *Fortnightly* and *Teleprompter* viewed cable companies' activities as merely "enhanc[ing] the viewer's capacity to receive the broadcaster's signals," and reasoned that cable companies did not become performers merely by providing "amplifying equipment."⁵⁹

In *Aereo*, the Supreme Court used the legislative history behind the Transmit Clause to recognize that Congress's main objective in amending the Copyright Act in 1976 was to bring cable television transmissions within the reach of the Copyright Act.⁶⁰ More specifically, Congress amended the Copyright Act to "erase[] the . . . line between broadcaster and viewer."⁶¹ It achieved this goal by adding the Transmit Clause to cover transmissions from cable television systems and creating a compulsory licensing scheme, all with the purpose of "bring[ing] the activities of cable systems within the scope of the Copyright Act."⁶² From the history of the 1976 amendments to the Copyright Act, the Court concluded that Aereo "performed" because its "activities [were] substantially similar to those of the [cable] companies that Congress amended the Act to reach."⁶³ Like cable systems, Aereo was in the business of providing a service that allowed subscribers to watch copyrighted television programs nearly simultaneously with their network broadcast.⁶⁴ Due to the similarities between Aereo and the cable systems that had provoked the amendments to the Copyright Act, the Court rejected Aereo's argument that it was merely an equipment provider.⁶⁵

The Court likewise rejected the notion that Aereo's subscribers, who activated the Aereo system by choosing to watch or record a program, "performed," rather than Aereo itself.⁶⁶ While the dissent found dispositive the fact that Aereo's system remained inactive until a subscriber prompted a transmission, the *Aereo* majority felt "this sole technological difference

58. See *Aereo*, 134 S. Ct. at 2504 (discussing the cable television system at issue in *Fortnightly*).

59. *Id.* at 2505 (quoting *Fortnightly*, 392 U.S. at 398–400) (internal quotation marks omitted); see also *Fortnightly*, 392 U.S. at 400 (reasoning that because an individual could achieve the same result as a cable television retransmission by "erect[ing] an antenna on a hill, [stringing] a cable to his house, and install[ing] the necessary amplifying equipment," it should make no difference that an antenna system for receiving signals was "erected . . . not by its users but by an entrepreneur").

60. *Aereo*, 134 S. Ct. at 2505–06. "Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended . . . to cover." *Id.* at 2506.

61. *Id.* at 2505.

62. *Id.* at 2506.

63. *Id.*

64. *Id.*

65. *Id.* at 2506–07 (noting that although Aereo's equipment may "serve a 'viewer function'" and may resemble "equipment a viewer could use at home," the same could be said "of the [cable company] equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*").

66. *Id.* at 2507.

between Aereo and traditional cable companies [did] not make a critical difference,” considering “Aereo’s overwhelming likeness to the cable companies targeted by the 1976 [Copyright Act] amendments.”⁶⁷ The Court noted that user involvement in operating a service provider’s equipment and choosing the content transmitted could play a role in the analysis of whether a service provider performs “[i]n other cases involving different kinds of service or technology providers.”⁶⁸ In Aereo’s case, however, its substantial similarity to cable companies compelled the conclusion that it “performed,” rather than merely acted as an equipment supplier.⁶⁹

After concluding that Aereo “performed” within the meaning of the Copyright Act, the Court moved on to its second question—whether Aereo performed “publicly.” The Transmit Clause expanded the definition of a public performance to include “transmit[ing] . . . a performance . . . by means of any device or process.”⁷⁰ Aereo argued that its activities did not satisfy this definition of a public performance because each Aereo transmission created a new “performance,” and each performance or transmission could be received by only one Aereo subscriber.⁷¹ The Court accepted *arguendo* Aereo’s view that the “performance” Aereo transmitted was the performance created by the individual transmission of the uniquely copied programs associated with a particular viewer.⁷² The Court nevertheless found that even under Aereo’s view of the relevant “performance,” Aereo’s transmissions were “to the public,” in violation of the Transmit Clause.⁷³

In reaching this conclusion, the Court again emphasized the purposes of the Copyright Act and the Transmit Clause to reach cable companies. The Court viewed the “behind-the-scenes” way Aereo functioned as unimportant.⁷⁴ In the Court’s view, Aereo’s technological features did not separate it from cable systems “[i]n terms of the [Copyright] Act’s purposes.”⁷⁵ Aereo’s commercial objective remained the same as cable companies—to provide network broadcast programming to a group of paying customers—and Aereo’s system of creating individual transmissions did not affect the viewing

67. *Id.*

68. *Id.*

69. *Id.* (noting that Aereo’s similarity to cable companies, “considered in light of Congress’s basic purposes in amending the Copyright Act,” convinced the Court that any user involvement did not make a significant difference).

70. *See* Copyright Act of 1976, 17 U.S.C. § 101 (2012).

71. *Aereo*, 134 S. Ct. at 2508. Aereo asserted that “the performance it transmits is the *new* performance created by its act of transmitting,” which “comes into existence when Aereo streams the sounds and images of a broadcast program to a subscriber’s screen.” *Id.*

72. *Id.*

73. *Id.*

74. *Id.* Aereo’s system assigned each subscriber an individual antenna, made a personal copy of programs a subscriber requested, and streamed the content of the copy to only that subscriber. *Id.* Aereo argued that these features meant it did not transmit any performance “to the public.” *Id.*

75. *Id.*

experience of Aereo subscribers.⁷⁶ The Court noted that under Aereo's theory, cable companies could adopt similar individual retransmission technology and thereby continue the same commercial activities while avoiding copyright liability.⁷⁷

Further, the Court reasoned that the Transmit Clause contemplates that a transmission of a performance can occur "through a *set* of actions," which encompasses multiple transmissions to individual subscribers.⁷⁸ Thus, contrary to Aereo's view, a transmission of a performance can occur through one or multiple transmissions of a work.⁷⁹ The Transmit Clause covers transmissions accomplished "by means of any device or process," and the Court viewed Aereo's transmission of personal copies to individual subscribers as one such "process" of transmitting a performance contemplated by the Clause.⁸⁰ Accordingly, "when Aereo streams the same television program to multiple subscribers, it 'transmit[s] . . . a performance' to all of them."⁸¹ Aereo's individual transmissions of the same program to many subscribers was the functional equivalent of a public performance to many viewers, in the Court's view.⁸² The Court thus held that Aereo transmitted copyrighted works "to the public" within the meaning of the Transmit Clause.⁸³

Several amicus briefs suggested that a decision against Aereo would have devastating effects by "stifl[ing] technological innovation and imperil[ing] billions of dollars of investments in cloud-storage services."⁸⁴ In response to these concerns, the Court emphasized its belief that its "limited holding" would not hinder the development or use of new technologies.⁸⁵ The Court noted that its decision against Aereo would not impact services where a user

76. *Id.* at 2508–09.

77. *Id.* at 2509.

78. *Id.* The Court noted that Aereo's arguments relied on the premise that transmitting a performance "means to make a single transmission." *Id.* The Court disagreed with this narrow interpretation of the language of the Transmit Clause as applying to only transmissions accomplished through a single transmitting event, noting as an example that "one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once." *Id.*

79. *Id.*

80. *Id.* (quoting the Transmit Clause, Copyright Act of 1976, 17 U.S.C. § 101 (2012)) (internal quotation marks omitted); *see also* Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 48 (D.D.C. 2013) (reasoning that retransmissions using systems like Aereo's still fall under the Transmit Clause because the legislative history of the Clause shows that "Congress intended 'device or process'" to cover "any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented" (emphasis omitted) (quoting H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677)).

81. *Aereo*, 134 S. Ct. at 2509 (alteration in original).

82. *See id.*

83. *Id.* at 2510.

84. *See id.* at 2518 (Scalia, J., dissenting) (noting the concerns of Aereo and several amici, including the Software Alliance).

85. *Id.* at 2510 (majority opinion).

pays for remote storage of legally acquired content (such as cloud-based storage services), but only affects those services where a user pays principally to receive transmissions of copyrighted works.⁸⁶ The Court declined, however, to decide how the Transmit Clause and Copyright Act apply to any technology other than that used by Aereo, stating that “[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.”⁸⁷

After addressing concerns about the effects of its decision on other technology, the Court reiterated that it found Aereo highly similar to the cable television systems the 1976 Amendments to the Copyright Act sought to reach.⁸⁸ Any differences between Aereo and those services did not insulate Aereo from the Copyright Act because they concerned only the technological details of Aereo’s operations, rather than the nature of its services.⁸⁹ The Court thus reversed the decision of the Second Circuit and held that Aereo violated copyright holders’ exclusive public performance rights by transmitting copyrighted content to its subscribers.⁹⁰

B. THE AEREO DISSENT: “GUILT BY RESEMBLANCE”

The *Aereo* dissent rejected the Court’s “looks-like-cable-TV” analysis and concluded that Aereo did not “perform” under settled jurisprudence regarding service provider liability.⁹¹ The dissent began by explaining the difference between direct and secondary copyright infringement.⁹² Secondary infringement occurs “when a defendant ‘intentionally induc[es] or encourag[es]’ infringing acts by others or profits from such acts ‘while declining to exercise a right to stop or limit [them],’” whereas direct infringement occurs “only if the defendant *itself* ‘trespassed on the exclusive domain of the copyright owner.’”⁹³ As the dissent explained, direct infringement has a “volitional-act requirement demand[ing] conduct directed to the plaintiff’s copyrighted material.”⁹⁴ This requirement of a volitional infringing act becomes especially relevant, the dissent noted, when

86. *Id.* at 2510–11.

87. *Id.* at 2511 (alteration in original) (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 34, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2014 WL 828079, at *34) (internal quotation marks omitted).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2512 (Scalia, J., dissenting).

92. *Id.*

93. *Id.* at 2512–13 (alteration in original) (citation omitted).

94. *Id.* at 2512. The dissent traces this requirement of a volitional act that violates the Copyright Act to the Act’s requirement of a “performance” of specific copyrighted material. *Id.*

the defendant operates a “user-controlled system.”⁹⁵ Direct liability for equipment manufacturers and service providers usually depends on whether it is the defendant or its customers who selects the content, because direct liability depends on “‘some aspect of volition’ directed at the copyrighted material.”⁹⁶ Traditionally, it is the act of volition toward the copyrighted material that determines who “performs” the material.⁹⁷ In the dissent’s view, Aereo did not “perform” because it did not choose the content its users receive.⁹⁸ Accordingly, the dissent concluded that Aereo cannot be held liable under a direct infringement theory.⁹⁹

The dissent viewed the Court’s conclusion that Aereo performs as a “syllogism” based on “[g]uilt [b]y [r]esemblance” to cable systems.¹⁰⁰ Justice Scalia criticized the Court’s reasoning for relying on “isolated snippets of legislative history,” failing to account for the technical differences between Aereo and the cable systems considered in pre-Transmit Clause cases, and relying on the purported legislative purpose of the 1976 Copyright Act amendments, rather than the statute as written.¹⁰¹ The dissent also observed that the Court’s decision “disrupt[ed] settled jurisprudence” that employed a “bright-line test of volitional conduct directed at a copyrighted work” by using an “ad hoc rule for cable-system lookalikes” without giving any criteria regarding what makes a service sufficiently similar to cable systems.¹⁰² As a consequence of the Court’s ad hoc reasoning, the dissent warned that courts will spend years sorting out which technologies receive “the traditional volitional-conduct test and which get the Aereo treatment.”¹⁰³

IV. AEREO AND THE FUTURE OF COPYRIGHT LAW

The Court’s holding that Aereo infringed upon broadcasters’ exclusive public performance rights by transmitting copyrighted works to its paying subscribers properly recognized both the purposes of the 1976 Copyright Act

95. *Id.* at 2513.

96. *Id.* The dissent noted that “[e]very Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted [the] rule” requiring a volitional act directed to the copyrighted material. *Id.* at 2512.

97. *Id.* at 2513 (noting that in the context of an “automated, user-controlled system,” the volitional act requirement will usually “come down to who selects the copyrighted content: the defendant or its customers”).

98. *Id.* at 2514. The dissent noted, for example, that Aereo did not “provide a prearranged assortment of movies and television shows” to subscribers. *Id.* Rather, it assigned individual antennas to subscribers who “call all the shots.” *Id.*

99. *Id.* at 2514–15 (“[T]hat degree of involvement is not enough for direct liability.”).

100. *Id.* at 2515. The dissent explained the Court’s reasoning as “boil[ing] down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts; (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs.” *Id.* (footnote omitted).

101. *Id.* at 2515–16.

102. *Id.* at 2516.

103. *Id.* at 2517.

amendments and the broader goals of basic copyright protections.¹⁰⁴ When technology changes make the language of the Copyright Act appear open to several interpretations, courts should interpret the statute “in light of [its] basic purposes.”¹⁰⁵ The broadcast television industry expends and invests billions of dollars in the creation of programming, and Aereo’s technology appeared designed to exploit broadcasters’ copyrighted works and free-ride on their investments.¹⁰⁶ Such a business model plainly interferes with the broadcasters’ “fair return” on their “creative labor.”¹⁰⁷

In *Aereo*, all Justices seemed to agree that Aereo’s activities should somehow be prohibited.¹⁰⁸ The Court split, however, on how Aereo’s service and technology fit into the existing Copyright Act framework and whether it was the Court’s role to close an apparent loophole in the current state of the copyright law. This Part explores the questions raised by the Court’s analysis and holding in *Aereo*. Subpart A explores the analytical issues created by the *Aereo* decision and its possible effects on other technology. Subpart B examines the broader issues underlying the *Aereo* litigation, including a perceived loophole in the law, and the Court’s decision to address it. This Part concludes by advocating for action from Congress to provide a comprehensive update to the Copyright Act in order to address changes in technology.

A. THE AEREO ANALYSIS AND POSSIBLE EFFECTS ON OTHER TECHNOLOGY

Although the dissent criticized the majority for employing an ad hoc “cable-TV-lookalike” analysis, the Court did engage in an in-depth textual analysis of the relevant provisions of the Copyright Act.¹⁰⁹ The Court, like the lower courts that considered the copyright implications of Aereo or analogous services, struggled to discern the relevant “performance” and the meaning of

104. See *supra* note 6 and accompanying text (discussing the purposes of copyright protections, including securing a fair return on creative labor and stimulating creativity).

105. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1983) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)) (internal quotation marks omitted).

106. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 699 (2d Cir. 2013) (Chin, J., dissenting) (arguing that Aereo participated in public performance, thereby “engaging in copyright infringement”), *rev’d*, *Aereo*, 134 S. Ct. 2498; Mary Rasenberger & Christine Pepe, *Copyright Enforcement and Online File Hosting Services: Have Courts Struck the Proper Balance?*, 59 J. COPYRIGHT SOC’Y U.S.A. 627, 631 (2012) (stating that copyright holders are finding it increasingly difficult to exercise their copyright rights and “are seeing their profits diverted to service providers who pay nothing for the ability to host and make copyrighted content available”).

107. See *supra* note 6 and accompanying text.

108. See *Aereo*, 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) to the Networks’ copyrighted programming ought not to be allowed.”).

109. See *id.* at 2516 (noting “the Court’s ad hoc rule for cable-system lookalikes”).

“to the public” for purposes of applying the Transmit Clause to Aereo.¹¹⁰ In the end, the Court resorted to the history surrounding the 1976 Copyright Act amendments and the Transmit Clause to conclude that Aereo violated public performance rights.¹¹¹ But by resting its decision on legislative history, instead of a reading of the statutory text, and bolstering its conclusion with broad comparisons to the cable television concerns of the 1970s, the Court illustrated the difficulties that courts face in applying the Transmit Clause to new technology.¹¹² While Congress explicitly sought to encompass cable television systems within the Copyright Act,¹¹³ analyses of emerging technologies requires courts to make fact-intensive judgments about the particular technology at issue to decide how it fits into the Copyright Act’s existing framework.¹¹⁴ The last major overhaul of the Copyright Act occurred nearly 40 years ago in 1976, in response to issues raised by analog technology.¹¹⁵ As courts continue to address new technologies using the decades-old parameters of the Copyright Act and its cable-oriented Transmit Clause, these fact-intensive judgments are destined to produce widely varying results.

The Court indicated some facts it considered relevant to the public performance analysis, such as user involvement in operating equipment and selecting content, but the Court ultimately relied on Aereo’s similarity to cable systems to reach its final conclusion, making the precedential value of those considerations debatable. For example, the Court noted that in other cases the extent of user involvement may bear on whether a service provider “performs,” but that the similarities with cable systems made Aereo users’ involvement “not critical here.”¹¹⁶ Similarly, in analyzing whether Aereo transmits “to the public,” the Court recognized the technological differences

110. The Second Circuit appeared to assume that Aereo “performed” and focused on whether Aereo’s transmissions were “to the public.” See *WNET*, 712 F.3d at 688–89. The Second Circuit concluded that the Transmit Clause requires courts to consider the potential audience of an individual transmission, and that it should not aggregate private transmissions unless the transmissions come from the same copy of the underlying work. *Id.* at 689. It thus viewed each Aereo transmission as an independent performance. See *id.* at 691. The United States District Court for the Central District of California, in contrast, granted a preliminary injunction against a defendant with a “technologically analogous” service to Aereo, noting that analyzing the Transmit Clause requires focusing on the “public performance of the copyrighted work,” rather than individual transmissions. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1140, 1145 (C.D. Cal. 2012).

111. See *supra* Part III.A.

112. See *supra* Part III.A.

113. See *Aereo*, 134 S. Ct. at 2510.

114. See *id.* at 2516–17 (Scalia, J., dissenting).

115. See *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 44 (2013) (statement of Rep. Robert Goodlatte) (noting that the last major revision of the Copyright Act occurred in 1976 for the analog era).

116. *Aereo*, 134 S. Ct. at 2507.

between Aereo and cable systems but brushed those differences aside, explaining that “these differences do not distinguish Aereo’s system from cable systems” in a meaningful way.¹¹⁷ Without more explicit guidance on what makes a technology *too* similar to cable systems, the Court’s mode of analysis is difficult to apply to other technologies.¹¹⁸

The Court addressed concerns regarding the effect of its decision on other technologies by emphasizing that its “limited holding” should not discourage new or different technologies.¹¹⁹ The Court declined to answer with more specificity how the Transmit Clause would apply to other technologies, and left those questions for other cases.¹²⁰ Thus, the Court appeared concerned with avoiding a broad holding, while recognizing the justifiable worry regarding the effects of its decision on other technology, including cloud computing. However, the lack of guidance from the Court about what made Aereo too similar to cable retransmissions threatens to undermine the viability of other technologies; for although the Court expressed its desire not to discourage new technology, entrepreneurs may abandon viable technology offerings due to their uncertainty about how courts will treat services after *Aereo*. As the dissent pointed out, the Court did not make clear what attributes of Aereo’s service drove the Court’s decision.¹²¹ For example, was the access to live broadcast television important?¹²² What impact will users’ ability to direct the capture and storage of broadcasts have on future decisions?¹²³

Without clarification, risk-averse technology creators would be justified in abandoning new technologies, rather than face the uncertain risk of copyright liability. With the Court’s apparent unwillingness to provide the

117. *Id.* at 2508. The Court noted that “the behind-the-scenes way” Aereo worked did not distinguish it from cable companies in terms of its commercial objective or its subscribers’ viewing experience. *Id.* at 2508–09.

118. *See id.* at 2516 (Scalia, J., dissenting) (“Making matters worse, the Court provides no criteria for determining when its cable-TV-lookalike rule applies.”).

119. *Id.* at 2510 (majority opinion).

120. *Id.* at 2510–11.

121. *Id.* at 2516 (Scalia, J., dissenting) (criticizing “the Court [for] provid[ing] no criteria for determining when its cable-TV-lookalike rule applies”).

122. *Id.* at 2517.

123. *Id.* at 2516–17. The dissent offered possible criteria for applying the “cable-TV-lookalike” rule. *Id.* Under one view, any service that offers access to live television could qualify as a cable-lookalike. *Id.* The dissent rejected this view because it would require only that a system involve mandatory time-shifting. *Id.* Under another view, any automated system “that captures and stores live television broadcasts at a user’s direction” could qualify as a cable-lookalike. *Id.* at 2517. The dissent stated that this view cannot be correct because it would capture remote storage DVRs. *Id.* Finally, the dissent noted the Government’s view that “any entity that ‘operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers’” is too similar to cable television for copyright purposes. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 87, at 20). The dissent noted that this view cannot be correct because it would embrace Internet providers and many “other entities that quite obviously do not perform.” *Id.*

guidance needed to ease this uncertainty, congressional action has become all the more necessary. After all, Aereo designed its system of individual copies and transmissions in a concerted effort to comply with the law (or, in broadcasters' view, to skirt the law), and its success and rapid growth attracted millions of dollars in investment.¹²⁴ While the Court's holding comports with the broader purpose of copyright law to recognize copyright holders' investments and encourage creative works, the Court's lack of guidance about what made Aereo's service impermissible may imperil other services and disincentivize investment in new technologies.

B. THE CASE FOR CONGRESSIONAL ACTION

As the Aereo litigation developed, lower courts and commentators viewed Aereo as exploiting a "loophole" in the law. The loophole, created by the Second Circuit's decision regarding DVR systems in *Cablevision*¹²⁵ and based on Aereo's use of unique copies and individual transmissions, drew a broad recognition that Aereo and similar businesses were unfairly skirting the Copyright Act.¹²⁶ In the buildup to the Supreme Court's decision, the case was discussed as implicating the very survival of broadcast television.¹²⁷ Lower courts addressing Aereo-like services had noted that the broadcast industry was increasingly dependent on revenues from retransmission licensing, and that businesses like Aereo cut into these vital revenue streams.¹²⁸ Aereo and

124. See 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:28 (2014) (noting that although the engineering behind the systems in both *Cablevision* and *WNET* "was unnecessarily wasteful, duplicative, and . . . costly," the systems were engineered to comply with the law as set out by the Second Circuit); Rasenberger & Pepe, *supra* note 106, at 639–40 (noting that the Second Circuit's *Cablevision* decision allowed retransmitters to comply with the Transmit Clause by creating temporary unique copies and generating each user's transmission from a unique copy).

125. See, e.g., *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting) (noting that "there is no technologically sound reason" for using "thousands of individual dime-sized antennas," as opposed to a single main antenna, and that the Aereo system is plainly "over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law"), *rev'd*, *Aereo*, 134 S. Ct. 2498; Rasenberger & Pepe, *supra* note 106, at 639–44 (noting that the Second Circuit's *Cablevision* decision created a technological loophole based on unique copies and individual transmissions, and that retransmitters have started using "new technologies . . . created solely in an attempt to circumvent the copyright laws by positioning themselves under the expanding umbrella of the *Cablevision* holding").

126. Rasenberger & Pepe, *supra* note 106, at 631 (stating that copyright holders are finding it increasingly difficult to exercise their copyright rights and "are seeing their profits diverted to service providers who pay nothing for the ability to host and make copyrighted content available").

127. See *Aereo*, 134 S. Ct. at 2518 (Scalia, J., dissenting) (noting that American Broadcasting Companies, Inc. had asserted "that nothing less than 'the very existence of broadcast television as we know it' [was] at stake" (quoting Brief for Petitioners at 39, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2014 WL 768315, at *39)).

128. See *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 502 (2d Cir. 2013) (Chin, J., dissenting) (noting that the Second Circuit's decision in *Aereo* had "already had a significant impact on the entertainment industry" with industry experts expecting other businesses that retransmit television broadcasts to pursue reductions or an elimination of retransmission fees);

amici, on the other hand, emphasized the implications of the case in stifling innovation and imperiling investments in cloud computing.¹²⁹

The *Aereo* dissent recognized the possible loophole in the law, but argued that it was the role of Congress, not the Court, to close such loopholes.¹³⁰ Congress, the dissent noted, can address loopholes “in a much more targeted, better informed, and less disruptive fashion than the [Court’s] “looks-like-cable TV” analysis accomplished.¹³¹ The Court’s analysis and the questions left unanswered suggested to the dissent that this area of the law calls for the kind of policy-making that is better suited to Congress than the courts.¹³² The Court refused to say how its analysis of *Aereo* applies to other technologies.¹³³ Instead, it merely stepped in to reject the Second Circuit’s loophole based on unique copies and individual transmissions—at least in the context of services that are too analogous to cable television. Under the *Aereo* decision, it remains unclear what technological features matter when analyzing alleged infringements of public performance rights and what qualities make a service too similar to cable television.

Regardless of whether the Court should step in to close loopholes in the law, *Aereo* makes abundantly clear that it is time for Congress to provide more guidance and coherent policy regarding copyright liability in the digital age. As the dissent noted, it is Congress’s responsibility to determine whether “the Copyright Act needs an upgrade.”¹³⁴ The Court’s decision in *Aereo*, expressly limited to the overwhelmingly cable-analogous system before it, does not provide sufficient guidance for courts considering other services and technology.¹³⁵ The *Aereo* litigation and the split in federal courts that developed shows the difficulty in applying a clause aimed at cable television

Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30, 50 (D.D.C. 2013) (noting that the plaintiff broadcasters had supported their asserted harms with uncontroverted evidence, “including a sworn declaration from a senior executive at Fox who states that cable companies have *already* referenced businesses like FilmOn X [an *Aereo*-like service] in seeking to negotiate lower fees”); Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012) (“Revenues from retransmission consent licensing have become increasingly important to the broadcast industry, and are used to fund the development and acquisition of broadcasting programming.”). In their petition for writ of certiorari to the Supreme Court, broadcasters stated that they have made significant investments in developing lawful, licensed Internet delivery systems that pay to retransmit programming, while relying on retransmission fees “to recoup their substantial investments in programming.” Petition for Writ of Certiorari at 3, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2013 WL 5616728, at *3.

129. *Aereo*, 134 S. Ct. at 2517 (Scalia, J., dissenting). The dissent noted that if *Aereo* is not liable under a secondary liability theory or for reproduction infringement, then “what we have before us must be considered a ‘loophole’ in the law.” *Id.*

130. *Id.*

131. *Id.* (internal quotation marks omitted).

132. *See id.* at 2517–18.

133. *Id.* at 2511 (majority opinion).

134. *Id.* at 2518 (Scalia, J., dissenting).

135. *See supra* Part IV.A.

to the technology of today. Technology has changed substantially in the nearly 40 years since Congress last comprehensively overhauled the Copyright Act, and it has become increasingly difficult for courts to determine the relevant “performance” or the meaning of “to the public” in analyzing claims based on the exclusive public performance right. This state of affairs requires the policy-making power of Congress, not the legal judgment of the Courts, to arrive at a satisfactory solution.¹³⁶ Congress should step in to upgrade the Copyright Act to give courts more guidance in this area of the law.

In creating a much-needed update to the Copyright Act, Congress could use one of two possible methods: it could provide more clarification within the existing statutory scheme to provide a framework for current technologies, or it can perform a more comprehensive overhaul of the Copyright Act to unfasten it from the technologies of previous generations. The Digital Millennium Copyright Act, which inserted several new sections into the Copyright Act that address infringement problems related to the Internet and digital works,¹³⁷ provides an example of the first method. The Act responded to concerns regarding the copyright liability of Internet service providers by creating a “safe harbor” provision in the Copyright Act that protects Internet providers from copyright liability for a third-party user’s actions.¹³⁸ The Act also addressed the perceived need to prevent copying and piracy of digital works by adding provisions to the Copyright Act, such as Section 1201, which prohibits “circumvent[ing] a technological measure that effectively controls access to a [copyrighted] work.”¹³⁹ Thus, the Digital Millennium Act addressed certain pressing issues related to copyright liability in the digital age within the framework of the 1976 Copyright Act. In the wake of *Aereo*, Congress could again make targeted modifications to the Copyright Act to provide guidance on the copyright liability of service providers for actions that implicate exclusive public performance rights.

Alternatively, Congress could perform a comprehensive overhaul of the Copyright Act to detach the law from the technology of previous generations. While Congress has responded to changes in technology with modifications to the Copyright Act targeted to particular emerging problems, much of the Copyright Act dates back to 1976.¹⁴⁰ The *Aereo* litigation showed the difficulty in applying the Copyright Act’s public performance protections to new technology, and, in the eyes of the dissent, suggested an alarming collapse of

136. See *Aereo*, 134 S. Ct. at 2517–18 (Scalia, J., dissenting).

137. 1 WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 4:17 (2011).

138. *Id.*; see also Copyright Act of 1976, 17 U.S.C. § 512(a) (2012) (providing that an Internet service provider will not be liable for copyright infringement for content transmitted via the provider’s system or network if five conditions are met).

139. Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2012); 1 HOLMES, *supra* note 137, § 4:17.

140. *The Register’s Call for Updates to U.S. Copyright Law*, *supra* note 115, at 6 (statement of Maria A. Pallante) (“[A] major portion of the current copyright statute was enacted in 1976.”).

the distinction between direct and secondary liability for service providers.¹⁴¹ As *Aereo* showed, the meaning of terms such as “performance” and “to the public” in the Copyright Act are difficult to apply to emerging technology.¹⁴² Indeed, as one commentator has pointed out, such “formerly meaningful categories [of conduct described in the Copyright Act, such as] ‘public performance’ and ‘reproduction-and-distribution’ . . . are no longer mutually exclusive, or even genuinely meaningful,” and adapting copyright law to the digital age “requires abandoning the old categories developed for the analog world.”¹⁴³ Thus, the shortcomings of the current Copyright Act in the digital era require more fundamental, comprehensive reform to the Copyright Act.¹⁴⁴ The *Aereo* litigation provides a vivid testament to the pressing need for congressional action to update copyright protections, as well as the need to unfasten the Act from the technology of previous generations. The time has come for a comprehensive overhaul of the Copyright Act.

V. CONCLUSION

In *Aereo*, the Supreme Court resolved a growing split among federal courts regarding the copyright implications of *Aereo*’s unlicensed retransmissions of copyrighted broadcast television over the Internet to its subscribers. In deciding that *Aereo*’s transmissions violate copyright holders’ public performance rights, the Court relied on the history and purposes of the 1976 Copyright Act amendments and *Aereo*’s similarity to cable television systems. While this outcome recognizes the purposes of copyright protections by preventing *Aereo* from free-riding on broadcasters’ investment in their programs, the lack of guidance concerning what made *Aereo* too similar to cable television could threaten other technologies. The state of the law requires policy-making action from Congress in response to the substantial

141. See *Aereo*, 134 S. Ct. at 2514–16 (Scalia, J., dissenting) (explaining that “[t]he distinction between direct and secondary liability would collapse” under the Court’s analysis, thereby “greatly disrupt[ing] settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work”); see also *supra* Part III.B.

142. See *supra* text accompanying note 112. As one author noted, this result contradicts one goal of a copyright system. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 8 (2010) (stating that “[a] copyright system is designed to produce an ecology that nurtures the creation, dissemination, and enjoyment of works”).

143. Jonah M. Knobler, *Performance Anxiety: The Internet and Copyright’s Vanishing Performance/Distribution Distinction*, 25 CARDOZO ARTS & ENT. L.J. 531, 594 (2007); see also *The Register’s Call for Updates to U.S. Copyright Law*, *supra* note 115, at 6 (statement of Maria A. Pallante) (stating that copyright “law is showing the strain of its age,” while calling for Congress to approach problems “comprehensively . . . as part of a more general revision of the [Copyright Act]”). The Register of Copyrights has called for Congress to start “think[ing] about the next great copyright act, which” must “be more forward thinking and flexible.” *Id.* at 7.

144. See *The Register’s Call for Updates to U.S. Copyright Law*, *supra* note 115, at 6 (statement of Maria A. Pallante) (noting that under the current state of copyright law “good faith businesses do not have clear roadmaps [and] courts do not have sufficient direction,” while stating that the problems “are numerous, complex, and . . . affect every part of the copyright ecosystem”).

changes in technology that have occurred since the adoption of the 1976 Copyright Act. The difficulty in applying the statute to modern technology, as exemplified by the *Aereo* case, calls for Congress to step in to provide a comprehensive overhaul of the Copyright Act.