University of Cincinnati Law Review

Volume 82 | Issue 2 Article 12

August 2018

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Recommended Citation
Colin P. Pool, *Don't Kill Innovation: Why the Second Circuit's "One Copy-One User" Doctrine Should Protect Internet Streaming of Broadcast Television*, 82 U. Cin. L. Rev. 635 (2018)
Available at: https://scholarship.law.uc.edu/uclr/vol82/iss2/12

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DON'T KILL INNOVATION: WHY THE SECOND CIRCUIT'S "ONE COPY-ONE USER" DOCTRINE SHOULD PROTECT INTERNET STREAMING OF BROADCAST TELEVISION

*Colin P. Pool**

The world of 7:30 on Tuesday nights, that's dead. A stake has been driven through its heart, its head has been cut off, and its mouth has been stuffed with garlic. The captive audience is gone.
–David Fincher, Executive Producer, *House of Cards*.[1]

I. INTRODUCTION

The way people watch television is changing. The modern viewer wants "to be able to decide [what they] want to watch . . . and have it just appear," and technology is quickly making that desire a reality.[2] Yet, much as they have done in the past, content owners are attempting to litigate[3] (or legislate[4]) new innovations out of existence rather than adapt to the changing digital marketplace, and the consumer is suffering.[5] An example of this phenomenon is at the heart of several recent conflicting federal court decisions.

On March 14, 2012, Aereo, "a new Internet based television solution for consumers," launched exclusively in the New York metropolitan area.[6] The service gives consumers access to the programming of twenty-eight over-the-air broadcast television channels on their Internet-enabled devices (such as iPhones and iPads), allowing them to watch

* Associate Member, 2012–2013 *University of Cincinnati Law Review*. The author would like to thank Timothy K. Armstrong for his assistance.

1. Robert Abele, *Playing with a New Deck*, DGA QUARTERLY (Winter 2013), *available at* http://www.dga.org/Craft/DGAQ/All-Articles/1301-Winter-2013/House-of-Cards.aspx.

2. Mat Honan, *Why You Shouldn't Buy a TV This Year. Again*, WIRED.COM (Dec. 27, 2012, 2:42 PM), http://www.wired.com/gadgetlab/2012/12/watch-and-wait-ts_column.

3. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984); A&M Records, Inc. v. Napster, 239 F.3d 1004 (9th Cir. 2001).

4. *See, e.g.*, The Audio Home Recording Act of 1992, Pub. L. 102-563, 106 Stat. 4237 (codified as amended in scattered sections of 17 U.S.C.).

5. *See* LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 75–76, 188–99 (2004); Republican Study Committee, *RSC Policy Brief: Three Myths About Copyright Law and Where to Start to Fix It* (Nov. 16, 2012) (this publication was officially withdrawn but is available at http://torrentfreak.com/strict-copyright-law-hurts-innovation-and-consumers-republicans-say-121118).

6. *Aereo Announces $20.5M Series A Financing Led by IAC; New Technology Platform Allows Consumers Access to Live TV Over the Internet*, MARKETWIRE (Feb. 14, 2012), http://www.marketwire.com/press-release/aereo-announces-205m-series-a-financing-led-iac-new-technology-platform-allows-consumers-nasdaq-iaci-1619629.htm [hereinafter *Aereo Announces $20.5M Series A Financing*].

Published by University of Cincinnati College of Law Scholarship and Publications, 2018

live television "on the go."[7] Reviews were positive, describing the service's "thoughtful, clean user interface" and its "startlingly good" video quality.[8] The service attracted numerous high-profile investors and looked to become a "transformative technology."[9]

Yet Aereo did all of this without asking for permission from the television networks, prompting a copyright infringement lawsuit before the service even launched.[10] The networks alleged that the service was an unauthorized retransmission of their copyrighted content, and thus was unlawful under section 106 of the Copyright Act of 1976.[11] They asked the court for an injunction against the continued operation of the service, but the Southern District of New York denied this request.[12] The Second Circuit affirmed the trial court's reasoning and denied the plaintiffs' interlocutory appeal of the decision.[13] The Second Circuit then denied an en banc rehearing[14] and petitioned the Supreme Court for certiorari.[15]

Soon after the Southern District of New York's ruling, "Aereokiller,"[16] a rival company, launched a service functionally identical to Aereo's in four media markets.[17] Five days later, the Fox network filed suit in the Central District of California, alleging copyright infringement and requesting injunctive relief.[18] Aereokiller relied heavily on the Southern District of New York's *Aereo* decision as a defense, but the Central District of California was not persuaded. Stating that Second Circuit precedent does not apply in the Ninth

7. Katherine Boehret, *Aereo Shines with Limited Live TV on the Go*, WSJ.COM (July 18, 2012, 2:00 PM), http://online.wsj.com/article/SB10001424052702303612804577533070691481182.html.

8. *Id.*

9. *Aereo Announces $20.5M Series A Financing*, *supra* note 6.

10. Complaint, Am. Broad. Co., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12CV01540), 2012 WL 676194. The complaint was filed on March 1, 2012, almost two weeks before the service's official launch date. The following networks were plaintiffs: ABC, CBS, NBC, Telemundo, and WNET. *Id.*

11. *Id.* at ¶¶ 25, 31–33. For a detailed explanation of the relevant copyright statutes, *see infra* Part II(B).

12. *Am. Broad. Co.*, 874 F. Supp. 2d at 405.

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

14. WNET, Thirteen v. Aereo, Inc., 722 F.3d 500 (2d Cir. 2013).

15. Petition for Writ of Certiorari, Am. Broad. Cos. v. Aereo, Inc., No. 13-461 (2013).

16. Aereokiller's original name was BarryDriller.com, which was intended as a joke directed at one of Aereo's primary investors, Barry Diller, chairman of IAC/InterActiveCorp. Mr. Diller sued BarryDriller.com over the use of the name and won a preliminary injunction, prompting the renaming of the service. *See* Diller v. Barry Driller, Inc., No. CV 12-7200 ABC (Ex), 2012 WL 4044732, at *1, 10 (C.D. Cal., Sept. 10, 2012). Aereokiller's service is now known as FilmOn X. *See* Fox Television Stations, Inc. v. FilmOn X, L.L.C., No. 13-758 (RMC), 2013 WL 4763414 (D.D.C., Sept. 5, 2013).

17. Second Amended Complaint for Injunctive Relief and Damages ¶¶ 1, 3–4, Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (No. CV 12-6921-GW(JCx)), 2012 WL 7151080.

18. *Id.* at ¶ 12.

Circuit, the court found for the plaintiffs and ordered the entry of a preliminary injunction against Aereokiller within the Ninth Circuit.[19]

Recently, two additional federal courts have weighed in. The United States District Court for the District of Columbia ruled against Aereokiller (in an opinion which largely follows the same reasoning as the Central District of California's),[20] but the District of Massachusetts ruled in favor of Aereo (in an opinion which basically agrees with the Second Circuit).[21]

This flurry of litigation has resulted in an interesting situation: one technology with several competing decisions regarding its legality. The conflict between the courts centers on what constitutes a "public performance" under copyright law and under what circumstances, if any, a "private performance" can be transmitted to a viewer. The split outcome leaves the technology in geographic limbo—available in some locations but not others—and leaves many consumers without access to a useful service.

This Note will examine the controversy. Part II offers explanations of the technology, the applicable copyright law, and prior decisions interpreting the "public performance" right of copyright owners. Part III examines two of the competing decisions in depth. Parts IV and V will discuss the jurisprudential and policy questions the cases raise and will conclude that the Second Circuit's interpretation serves the best interests of both consumers and innovation.

II. BACKGROUND

A. The Technology

An understanding of various television transmission and recording technologies is critical to an understanding of the legal issue discussed in this Note. Standard over-the-air television stations broadcast their signals over publicly owned electromagnetic frequencies, and their programming is freely available to anyone with an antenna and a

19. Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138 (C.D. Cal. 2012). *See also id.* at 1141 ("Courts should not issue nationwide injunctions where the injunction would not issue under the law of another circuit. 'Principles of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area. Courts in the Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of such sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping.'") (quoting U.S. v. AMC Entm't, 549 F.3d 760, 773 (9th Cir. 2008)).

20. Fox Television Stations, Inc. v. FilmOn X, L.L.C., No. 13-758 (RMC), 2013 WL 4763414 (D.D.C., Sept. 5, 2013).

21. Hearst Stations, Inc. v. Aereo, Inc., No. 13-11649 (NMG), 2013 WL 5604284 (D. Mass., Oct. 8, 2013).

television.[22] However, the vast majority of viewers actually receive broadcast television programming through cable or satellite television providers,[23] who are required by law to pay license fees for the right to retransmit this programming to consumers.[24]

Since the advent of the videocassette recorder (VCR), consumers have been able to record television shows for later "time-shifted" viewing.[25] The VCR's modern iteration, the digital video recorder (DVR), allows consumers to record programs to hard disk instead of videotapes.[26] A more recent innovation, the "remote storage digital video recorder" (RS-DVR), moves the data storage to a cable television provider's servers. For the consumer, the end result is the same: users can select whether to record a show already in progress (and thus rewind, pause, etc.) or to schedule the recording of a program to be viewed later. But instead of the program being stored on and transmitted from the viewer's set-top box, the program is stored on and transmitted from the cable provider's servers.[27] Another new technology, the "Slingbox," allows a user to transmit the output of a video source such as a DVR over the Internet so that the consumer can watch television on an Internet-enabled device away from the television, a process called "place-shifting."[28]

The Aereo/Aereokiller technology[29] builds on the usefulness of the Slingbox by removing the need for the hardware. Aereo's website allows its customers to select whether to "watch" or "record" available television shows from a programming guide that lists both currently-

22. Greg Sandoval, *TV Networks Say Aereo Is "Indeed a Retransmitter"—and Must Pay*, CNET.COM (May 30, 2012, 11:53 AM), http://news.cnet.com/8301-1023_3-57443751-93/tv-networks-say-aereo-is-indeed-a-retransmitter-and-must-pay.

23. *Zero TV Doesn't Mean Zero Video*, NIELSEN.COM (Mar. 11, 2013), http://www.nielsen.com/us/en/newswire/2013/zero-tv-doesnt-mean-zero-video.html.

24. *See* 17 U.S.C. § 111(d) (2012).

25. The recording of television programming for time-shifted viewing was held to be a "fair use" under the Copyright Act in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

26. Jonathan Strickland & James Bickers, *How DVR Works*, HOWSTUFFWORKS.COM, http://www.howstuffworks.com/dvr.htm (last visited July 7, 2013).

27. A detailed technical description of the operation of an RS-DVR can be found in *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d. 607, 612–16 (S.D.N.Y. 2007), *rev'd sub nom*, Cartoon Network, LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

28. *Placeshifting*, SLINGBOX.COM, http://www.slingbox.com/get/placeshifting (last visited Oct. 29, 2013).

29. Aereokiller claims its technology is "better and more legally defensible than Aereo's." Defendant Aereokiller LLC's Opposition to Plaintiffs' Application for Preliminary Injunction; Supporting Memorandum of Points and Authorities at 1, Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (No. CV 12-6921-GW(JCx)). However, it is unclear how exactly they differ, and in their respective litigations the two systems are described in functionally identical ways.

airing shows and shows which will air later.[30] Selecting "watch" allows the user to watch the show "live" on her chosen Internet-enabled device, while "record" schedules a recording of a show which is either airing currently or will air later.[31] To the user, the system is equivalent to an RS-DVR accessed through the Internet.[32]

However, Aereo's underlying technology is quite different from an RS-DVR. Aereo maintains a large bank of antennas at its headquarters, each about the size of a dime.[33] When a user makes a "watch" request, the user's device directs one of Aereo's antennas to tune to the requested programming, and the antenna's output signal is encoded into data that can be transmitted over the Internet.[34] The data is then stored in a directory on Aereo's servers, as well as transmitted to the user's device.[35] The directory data is only retained after the show has ended if the user is "recording" the show.[36] Each user is assigned a unique antenna and directory: "[n]o two users are assigned a single antenna at the same time . . . [and] the data obtained by a particular antenna while allocated to a particular user is not 'shared' with or accessible by any other Aereo user."[37] Additionally, each antenna functions independently rather than functioning collectively or with the assistance of a shared metal substructure.[38] Thus, each user's viewing experience is completely independent from that of every other user.

B. The 1976 Copyright Act

The Copyright Act of 1976[39] provides copyright owners with a "bundle" of exclusive rights in their work,[40] which includes, "in the case of . . . motion pictures and other audiovisual works, [the right] to perform the copyrighted work publicly."[41] Section 101 of the Copyright Act defines "'perform' . . . in the case of a motion picture or other audiovisual work, [as] show[ing] its images in any sequence or to make

30. Am. Broad. Co., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 377 (S.D.N.Y. 2012).

31. *Id.*

32. *Id.*

33. *Id.* at 379.

34. *Id.* at 378.

35. *Id.*

36. *Id.* at 379.

37. *Id.* at 378.

38. *Id.* at 381.

39. Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

40. WILLIAM PATRY, 3 PATRY ON COPYRIGHT § 8.1 (2013). Other rights include the right to reproduce the work, distribute the work, and produce derivative works based on the work. 17 U.S.C. § 106.

41. 17 U.S.C. § 106(4).

the sounds accompanying it audible."[42] It further defines "[t]o perform . . . a work 'publicly'" as

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit[43] or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[44]

Since the typical Aereo user is not "performing" the work to a substantial number of persons outside of her social circle as required by clause (1), whether Aereo's transmission of programming to its customers constitutes an infringement hinges on the interpretation of clause (2) of the public performance definition, the "transmit clause." The legislative history asserts that the definition of "transmit"

> is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance . . . are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of [the public performance right].[45]

This language still requires the transmission to reach the "public," but the legislative history indicates a preference for a broad understanding of when a performance is "public."[46]

C. Applying the "Public Performance" Definition

Courts have generally agreed that when the public at large is viewing

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42. 17 U.S.C. § 101.

43. "To transmit" is defined as "to communicate [a performance] by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.*

44. *Id.*

45. H.R. REP. NO. 94-1476, at 64 (1976); S. REP. NO. 94-473, at 61 (1975).

46. H.R. REP. NO. 94-1476, at 63 (1976)

> [P]ublic performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

Id.

or will be able to view the work, the public performance right is infringed. For example, in *National Football League v. McBee & Bruno's*, the Eighth Circuit found that no public performance had taken place when four friends intercepted and viewed the satellite feed of an NFL game.[47] Though the court recognized that the defendants may be liable for a violation of the Communications Act for intercepting the feed, they could not be liable for infringing the public performance right because their "performance" of the football game was not open to the public, even though it took place in a restaurant.[48] On the other hand, a business playing music for the entertainment of customers is engaged in a public performance because the public is able to hear the music.[49]

But what about a business that utilizes private viewing rooms or booths? The Third Circuit tackled this question in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*[50] The defendant, Maxwell's Video Showcase, operated an "in-store rental" business where customers could view video cassettes in small private booths: the customer would select a video to watch and enter the room, at which point an employee would place the video in a VCR and transmit the signal to the customer's booth.[51] While the business was open to the public, only those who rented it could access each individual booth.[52] The plaintiffs argued that this activity infringed their public performance rights and the Third Circuit agreed, finding that "[t]he services provided by Maxwell's are essentially the same as a movie theatre, with the additional feature of privacy. . . . Simply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's is unquestionably open to the public."[53] In support of its holding, it cited Professor Nimmer's leading copyright treatise, which eerily predicted the problem the defendant's business would present: "one may anticipate the possibility of theaters in which patrons occupy separate screening rooms, for greater privacy . . . . These too should obviously be regarded as public performances within the underlying rationale of the Copyright Act."[54]

Two years later, in *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, the Third Circuit faced a case with very similar facts.[55] The difference

47. Nat'l Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 733 (8th Cir. 1986).

48. *Id.*

49. *See e.g.*, Blue Seas Music, Inc. v. Fitness Surveys, Inc., 831 F. Supp. 863 (N.D. Ga. 1993); Broad. Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991).

50. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984).

51. *Id.* at 156–57.

52. *Id.* at 157.

53. *Id.* at 159.

54. *Id.* (quoting MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.14(C)(3) (2012)).

55. Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986).

in *Aveco* was that the defendant did not transmit a video feed to its viewing booths, but rather let its customers take rented videos—or videos they had brought from home—into the booths and operate the VCR themselves.[56] The Third Circuit found these facts to be indistinguishable from its holding in *Redd Horne* and again held that the plaintiff's public performance right had been infringed.[57] The Seventh Circuit subsequently followed *Redd Horne* and *Aveco* in a similar case.[58]

An interesting wrinkle in the facts of these cases was introduced in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors (PREI)*.[59] There, the customers could rent videodiscs at a hotel lobby gift shop and take them back to their rooms to view.[60] The only distinction between these facts and those in *Aveco* was that the "viewing rooms" were hotel rooms. The Ninth Circuit found this distinction to be determinative: "[t]he plain language and the legislative history together lead us to conclude that hotel guest rooms are not 'public' for purposes of the Act . . . . While the hotel may indeed be 'open to the public,' a guest's hotel room, once rented, is not."[61]

Two years later, the Northern District of California found a hotel room video rental system to be factually distinguishable from that in *PREI*. In that case, *On Command Video Corporation v. Columbia Pictures Industries, Inc.*, the plaintiffs sought a declaratory judgment that their technology did not infringe the defendants' copyrights, while the defendants counterclaimed for copyright infringement.[62] The plaintiff's system involved a bank of video cassette players (VCP) controlled by a computer.[63] Each VCP contained a videotape of a film, and hotel guests could request playback of a tape via their television.[64] Upon such a request, the tape would begin playing and the system would transmit the video to the guest's television.[65] The court found that, since hotel rooms were not public places for copyright purposes, infringement could only be found under the transmit clause.[66] It found

56. *Id.* at 61.

57. *Id.* at 63–64.

58. *See* Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1012–13, 1020 (7th Cir. 1991).

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

60. *Id.* at 279.

61. *Id.* at 280–81.

62. On Command Video Corp. v. Columbia Pictures Indus., Inc., 777 F. Supp. 787, 788 (N.D. Cal. 1991).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 789.

the system to be "directly under the language of the definition. [It] 'communicate[d]' the motion picture 'images and sounds' by a 'device or process' . . . from a central console in a hotel to individual guest rooms, where the images and sounds [were] received 'beyond the place from which they [were] sent.'"[67] It also held that while hotel guests were not in a public place when viewing the videos, they were "nonetheless members of 'the public.' . . . This is because the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, [was] a commercial, 'public' one regardless of where the viewing [took] place."[68] Since the transmission reached members of the public, infringement was found under the transmit clause.

The requirement that the public at large be the ultimate audience for a "transmission" is applied to large-scale transmissions as well. In *David v. Showtime/The Movie Channel, Inc.*, the defendants argued that they were not liable for copyright infringement because they were transmitting signals only to local cable providers for retransmission and not to the viewing public.[69] However, the Southern District of New York rejected this argument, stating that "Congress intended the definition of [public performance] to encompass each step in the process by which a protected work wends its way to [the public]" and that "[i]t made little difference . . . whether [the defendants] intended to route the protected work to the public's living rooms through a local cable company or through a transmitter atop a mountain."[70] The D.C. District Court followed the *David* court and reached the same conclusion on nearly identical facts in *National Cable Television Association v. Broadcast Music, Inc.*[71] The Second Circuit used the same "wends its way to the public" reasoning in *National Football League v. PrimeTime 24 Joint Venture*, where a satellite carrier was found liable for copyright infringement when it uplinked transmission signals captured in the United States and transmitted those signals to subscribers in Canada.[72]

D. The Second Circuit's Cablevision Decision

The above cases basically agree that when the same copy of a work is transmitted or otherwise made available to multiple people or the public

67. *Id.* at 789–90.

68. *Id.* at 790.

69. David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 758 (S.D.N.Y. 1988).

70. *Id.* at 759.

71. Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc., 772 F. Supp. 614, 651 (D.D.C. 1991).

72. Nat'l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 11–13 (2d Cir. 2000).

at large, then a public performance has taken place. But what if a unique copy is transmitted to multiple unique users? Charged with determining the legality of an RS-DVR system, the Second Circuit tackled this question in its best-known "transmit clause" case, *Cartoon Network, LP, LLLP v. CSC Holdings, Inc.* (the *Cablevision* case).[73] The defendant, a cable television provider, wanted to market an RS-DVR service to its subscribers, and the plaintiffs, producers of copyrighted television content, alleged that Cablevision's use of this system directly infringed their copyrights.[74] The trial court agreed with the plaintiffs, finding that Cablevision's system infringed the plaintiffs' public performance rights by transmitting copies of the plaintiffs' works to consumers who requested them.[75]

Cablevision argued that, even though the streaming of programming to consumers at their request was a "performance," the work was performed by the consumer and not by them, because the customer requested the performance.[76] They also argued that these transmissions were not "to the public," and therefore not infringing, because they "emanate[d] from a distinct copy of a program uniquely associated with one customer's set-top box and intended for that customer's exclusive viewing in his or her home."[77] The trial court rejected these arguments, stating that "Cablevision would transmit *the same program* to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback" and that therefore Cablevision's acts were within the Copyright Act's transmit clause.[78] It also relied in part on *On Command Video Corp.*, "which held that when the relationship between the transmitter and the audience of a performance is commercial, the transmission is to the public."[79]

The Second Circuit disagreed with the trial court's analysis, finding that Cablevision's RS-DVR playback did not involve a transmission "to the public."[80] The court noted that, while the statute does not define "to the public," "[i]t does explain that a transmission may be 'to the public . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at

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

74. *Id.* at 123.

75. *Id.*

76. *See* Twentieth Century Fox Film Corp. v. Cablevision Systems Corp., 478 F. Supp. 2d. 607, 622 (S.D.N.Y. 2007).

77. *Id.*

78. *Id.* at 623.

79. *Cablevision II*, 536 F.3d at 126 (internal quotations omitted).

80. *Id.* at 134.

the same time or at different times.'"[81] And although this language indicates that it does not matter that the

> potential recipients of the transmission are in different places, or that they may receive [it] at different times[, t]he implication from this same language . . . is that it is relevant, in determining whether a transmission is made to the public, to discern who is *"capable of receiving" the performance being transmitted.* The fact that the statute says "capable of receiving the performance," instead of "capable of receiving the transmission," underscores the fact that a transmission of a performance *is itself a performance.*[82]

Therefore, because only *one* subscriber is capable of receiving any *one* RS-DVR transmission (or "performance"), such transmissions are not "public."[83]

The Second Circuit found the trial court's conclusion that it must "consider not the potential audience of a particular transmission, but the potential audience of the underlying work (i.e., 'the program') whose content is being transmitted"[84] to be untenable:

> Doubtless the *potential* audience for every copyrighted audiovisual work is the general public. As a result, any transmission of the content of a copyrighted work would constitute a public performance under the district court's interpretation. But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after "performance."[85]

The plaintiffs also argued that Cablevision was transmitting the same "performance" of the work in its normal broadcast to its customers and in its transmission to its RS-DVR customers: that is, "the performance of the work that occurs when the [television station] transmits that content to Cablevision . . . ."[86] The Second Circuit found that this argument read new language into the Copyright Act: "according to plaintiffs, when Congress says that to perform a work publicly means to transmit . . . a performance . . . to the public, they really meant 'transmit . . . the "original performance" . . . to the public.'"[87] This view could not be correct, the court reasoned, because it "obviates any possibility of a purely private transmission."[88]

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81. *Id.*
82. *Id.* (emphasis added).
83. *Id.* at 135.
84. *Id.*
85. *Id.* at 135–36.
86. *Id.* at 136.
87. *Id.*
88. *Id.*

> Assume that HBO transmits a copyrighted work to both Cablevision and Comcast. Cablevision merely retransmits the work from one Cablevision facility to another, while Comcast retransmits the program to its subscribers. Under plaintiffs' interpretation, Cablevision would still be transmitting the performance to the public, solely because Comcast has transmitted the same underlying performance to the public. Similarly, a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public. We do not believe Congress intended such odd results. Although the transmit clause is not a model of clarity, we believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission. Thus, HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO.[89]

The Second Circuit thus concluded that because "each RS-DVR transmission is made to a given subscriber using a copy made by that subscriber" and the potential audience of each copy's transmission is one household, "such a transmission is not 'to the public,'" and therefore not an infringement of the public performance right.[90] In doing so, it explicitly rejected the holding of *On Command Video Corp.* that *any* commercial transmission is "to the public . . . as it completely rewrites the language of the statutory definition."[91] It also found *On Command* and the Third Circuit's decision in *Redd Horne* to be factually distinguishable because in those cases successive transmissions to different viewers were made using a single "master copy" of a given work, instead of each unique viewer receiving a unique transmission from a unique copy of the work.[92] It too cited Professor Nimmer's treatise as support: "*if the same copy* . . . of a given work is repeatedly played (i.e. 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance."[93]

The Southern District of New York later adopted this reading of the clause in *In re Cellco Partnership*, where the American Society of Composers, Authors, and Publishers (ASCAP) claimed that it was owed public performance royalties for the transmission of ringtones to cellular

89. *Id.*

90. *Id.* at 138.

91. *Id.* at 139 (internal quotation marks omitted).

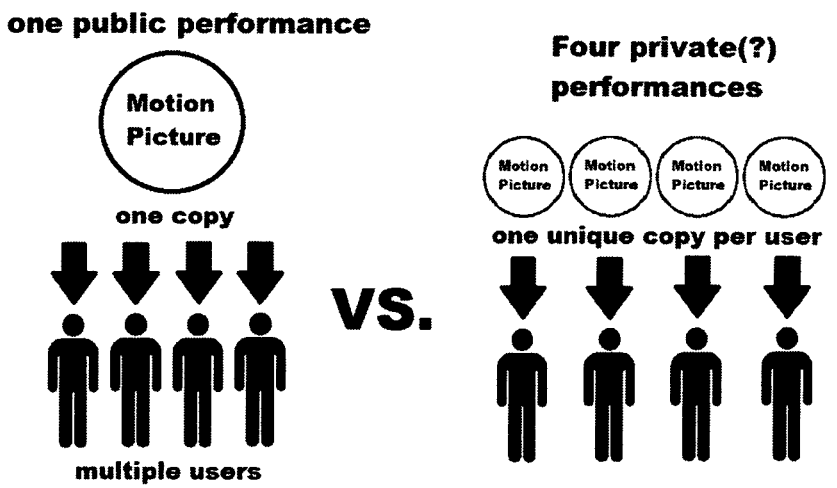
92. *Id.* at 138–39.

93. *Id.* at 138 (quoting MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.14 (2012)) (internal quotation marks omitted).

phones.[94] The court held that ASCAP failed to prove that a public performance had taken place, finding that the potential audience of the ringtone transmission was a single customer, and this type of transmission was exempted from copyright liability.[95]

In *Warner Brothers Entertainment v. WTV Systems, Inc.*, the defendant argued that, in light of *Cablevision*, its Internet DVD-streaming service did not infringe the plaintiff's public performance right.[96] However, the Central District of California determined that the defendant's activity was outside the holding of *Cablevision* because the defendant used the same copy of a DVD to stream its content to multiple customers.[97] The court instead found that the defendant's activity was within the holdings of *Redd Horne* and *On Command* and was therefore a public performance.[98]

The following visual aid may help some readers understand the distinction between the Second Circuit's "one copy-one user" theory and the "one copy-multiple user" theory:



III. THE COMPETING OPINIONS

Even though five federal courts have now considered the controversy at the heart of this Note, for the sake of brevity, only the Second Circuit and Central District of California cases will be fully considered in this Part. Some explanatory remarks regarding the D.C. District and the

94. *In re* Cellco P'ship, 663 F.Supp.2d 363 (S.D.N.Y. 2009).

95. *Id.* at 371–74.

96. Warner Bros. Entm't, Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1003 (C.D. Cal. 2011).

97. *Id.* at 1011, n.7.

98. *Id.*

District of Massachusetts cases will be included in the footnotes where relevant.

A. WNET, Thirteen v. Aereo, Inc. *(2d Cir.)*

The Southern District of New York denied the plaintiffs' request for a preliminary injunction against Aereo, finding that they were unlikely to succeed on the merits of their copyright infringement claim because the Aereo system was within *Cablevision*'s holding.[99] The Second Circuit essentially agreed with the trial court on all points. It began with thorough discussions of the "transmit clause" and *Cablevision*, and found *Cablevision* to establish "four guideposts that determine the outcome of this appeal."[100]

> First and most important, the Transmit Clause directs courts to consider the potential audience of the individual transmission. If that transmission is "capable of being received by the public" the transmission is a public performance; if the potential audience of the transmission is only one subscriber, the transmission is not a public performance, except as discussed below. Second . . . private transmissions . . . 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. Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work. In such cases, these private transmissions *should* be aggregated . . . . Fourth and finally, "any factor that limits the *potential* audience of a transmission is relevant" to the Transmit Clause analysis.[101]

With these "guideposts" in mind, the court applied *Cablevision* to the Aereo technology and found that, like in *Cablevision*, the potential audience of each Aereo transmission was a single user.[102] Therefore, the Aereo system was within the holding of *Cablevision*.

The court then addressed the plaintiffs' various attempts to distinguish Aereo's technology from *Cablevision*. First, the plaintiffs argued that Cablevision had a license for its initial transmission of copyrighted programming to the public, whereas Aereo had no license.[103] The court found this was immaterial, as a license is only required for "public" performances; if a performance is private, no

99. Am. Broad. Co., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 405 (S.D.N.Y. 2012).

100. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 689 (2d Cir. 2013).

101. *Id.* (citations omitted).

102. *Id.* at 689–90.

103. *Id.* at 690.

license is required.[104] Next, the plaintiffs argued that discrete transmissions should be aggregated to determine whether they constitute a public performance, but the court stated that *Cablevision* explicitly rejected this approach: "Plaintiffs are asking us to . . . focus[] on the potential audience of the . . . work . . . not [that] of the particular transmission. . . . [They also] provide no reason why Aereo's multiple, audience-of-one transmissions . . . should be aggregated but not Cablevision's . . . ."[105] The plaintiffs next argued that *Cablevision*'s holding was confined to technologies analogous to a VCR, but the court found no support for such a proposition.[106]

The plaintiffs then argued that the RS-DVR broke the chain of retransmission to the public in a way the Aereo system does not: "that Aereo's copies are merely a device by which Aereo enables its users to watch nearly live TV, while Cablevision's copies, by contrast, could only serve as the source for a transmission of a program after the original transmission . . . had finished."[107] The court found this argument lacking, first because the user exercises the same control over the playback in the Aereo system as it did in *Cablevision*'s RS-DVR, and second because each individual user receives an entirely unique transmission from start to finish due to Aereo's antenna system.[108] The plaintiffs argued that this finding effectively elevated form over substance—companies could now engineer systems that exploited the loophole created by *Cablevision*—but the court pointed out that this was arguing that *Cablevision* was wrongly decided, not that *Cablevision* was distinguishable.[109]

Finally, the plaintiffs argued that the legislative history indicated that Aereo's transmissions were "public," but the court pointed out that *Cablevision* had already rejected that finding: "[I]f Congress intended all transmissions to be public performances, the Transmit Clause would not have contained the phrase 'to the public.'"[110] While the court acknowledged that "unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public

104. *Id.*

105. *Id.* at 691.

106. *Id.*

107. *Id.* at 692.

108. *Id.* at 692–93.

109. *Id.* at 693–94.

110. *Id.* at 694. The District of Massachusetts found for Aereo for essentially this reason: "Aereo responds that it is transmitting private rather than public performances per *Cablevision*. . . . [Its] interpretation is a better reading of the statute because the 'canon against surplusage' requires this Court to give meaning to every statutory term if possible." Hearst Stations, Inc., v. Aereo, Inc., No. 13-11649 (NMG), 2013 WL 5604284, at *6 (D. Mass., Oct. 8, 2013).

performances and its intent that some transmissions be classified as private," it nevertheless found that the language of the statute and the legislative history compelled a finding that Aereo's transmissions were not public performances.[111] Therefore, the trial court did not abuse its discretion in denying the plaintiffs' request for an injunction.[112]

Writing in dissent, Judge Chin[113] essentially agreed with the plaintiffs' arguments and described Aereo's technology platform as "a sham. . . . [A] Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law."[114] He believed that "by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act."[115]

In July 2013, the Second Circuit denied an en banc rehearing to the plaintiffs.[116] Judge Chin also filed a dissent to this denial, which utilized much of the same reasoning as his prior dissent, but added that he believed *Cablevision* to have been wrongly decided, and even if it was not wrongly decided, it should not be extended.[117] In support of both dissents, he cited the Central District of California's *BarryDriller* opinion,[118] to which this Note now turns.

B. Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC *(C.D. Cal.)*

The Central District of California stated at the outset that, while the Aereokiller technology is likely within *Cablevision*'s holding, *Cablevision* is not the law in the Ninth Circuit, and the Ninth Circuit's precedents weighed against adopting that holding.[119] The court explained that the Second Circuit's reading of the statute is not the only possible reading and that the statute "does not by its express terms require that two members of the public receive the performance from the same transmission."[120] The court believed that the statute was concerned only with the performance of the underlying work

111. *WNET, Thirteen*, 712 F.3d at 695.

112. *Id.* at 696.

113. Judge Chin was the trial court judge in *Cablevision I* who found against Cablevision.

114. *Id.* at 697 (Chin, J., dissenting).

115. *Id.* at 696.

116. WNET Thirteen v. Aereo, Inc., 722 F.3d 500 (2d Cir. 2013) (denying rehearing en banc).

117. *Id.* at 506–12 (Chin, J., dissenting).

118. *Id.* at 504 n.11, 507 (Chin, J., dissenting); WNET v. Aereo, at 698, 703 (Chin, J., dissenting).

119. Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138, 1143 (C.D. Cal. 2012).

120. *Id.* at 1144.

> irrespective of which copy of the work the transmission is made from. Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission.* People are interested in watching the *performance* of the *work.* And it is the public performance of the copyrighted work with which the Copyright Act, by its express language, is concerned.[121]

In other words, to the court, a performance is public if the copyrighted work reaches the public, not if the transmission itself reaches the public.

The court also found the *Aereo* and *Cablevision* courts' reasoning "that the defendant was providing a service equivalent to what individuals could lawfully do for themselves" to be misplaced in light of other parts of the Copyright Act.[122] In the 1976 Act, "Congress found that 'cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . copyright royalties should be paid by cable operators to the creators of such programs.'"[123] Likewise, the court believed that the creators of copyrighted programs were entitled to copyright royalties from Aereokiller's retransmissions.[124]

In short, the court found that because Aereokiller "sen[t] out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent," it infringed the plaintiffs' public performance right and thus the plaintiffs were likely to succeed on the merits of their copyright infringement claim.[125]

IV. ANALYSIS: WHY THE SECOND CIRCUIT GOT IT RIGHT

Faced with these competing decisions, future courts that examine this or similar issues will have to choose which to follow. This Part argues that the Second Circuit's "one copy-one user" doctrine is not only a

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121. *Id.* at 1144–45.

122. *Id.* at 1145.

123. *Id.* at 1146.

124. *Id.*

125. *Id.* (quoting Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 282 (9th Cir. 1989)) (internal quotation marks omitted). The D.C. District essentially agreed:

> The Court finds that the provisions of the 1976 Act that protect Plaintiffs' work are clear: FilmOn X's service violates Plaintiffs' "exclusive right . . . to perform the copyrighted work publicly." By making available Plaintiffs' copyrighted performances to any member of the public who accesses the FilmOn X service, FilmOn X performs the copyrighted work publicly as defined by the Transmit Clause: FilmOn X "transmit[s] . . . a performance . . . of the work . . . to the public, by means of any device or process.' . . . Even assuming *arguendo* that the 1976 Act contains any ambiguity, the legislative history confirms Congress's intent that the Transmit Clause *and* § 106(4) be applied broadly.

Fox Television Stations, Inc. v. FilmOn X, L.L.C., No. 13-758 (RMC), 2013 WL 4763414, at *13–14 (D.D.C., Sept. 5, 2013).

preferable reading of the statute, but also better policy. Unless Congress clarifies that truly private performances/transmissions are indeed legal under the act, then the *Aereo* decision should be followed. This Part also briefly addresses why one particular legislative solution should not be adopted.

A. "One Copy-One User" Is Good Law

The transmit clause—and the Copyright Act in general—is not a "model of clarity."[126] One reason for this is that Congress tends to revise copyright law by allowing the content industries to negotiate among themselves to decide what they want the law to be and then present their proposals to Congress.[127] This not only takes the end user out of the thought process but also results in legislation written by lawyers, for lawyers—a group not known for valuing clarity.[128] Another reason is that the entire idea of copyright "has taken shape around the model of a book communicated to the public by multiplication of copies," and not "communication . . . by performance or representation."[129] As such, the law has historically had trouble adapting to new technologies.[130]

In the absence of a Supreme Court ruling on the subject,[131] we are left to guess at what Congress intended when they wrote the transmit clause in the 1970s. The confusion centers on the final half of the clause: "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."[132] The language allows for four distinct possibilities for members of the public to view a performance: (1) in the same place at the same time; (2) in separate places at the same time; (3) in the same place at separate times; and (4) in separate places at separate times.[133] The first two alternatives are easily illustrated by

126. Cartoon Network, LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 136 (2d Cir. 2008).

127. For a thorough examination of this particular style of legislative "sausage-making," see JESSICA LITMAN, DIGITAL COPYRIGHT (2006).

128. *See id.* at 31–32.

129. Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. Pa. L. Rev. 469, 473 (1955).

130. *See* Jeffrey Malkan, *The Public Performance Problem in* Cartoon Network LP v. CSC Holdings, Inc., 89 Or. L. Rev. 505, 506 (2010).

131. The Supreme Court denied certiorari to Cablevision. Cable News Network, Inc. v. CSC Holdings, Inc., 129 S. Ct. 2890 (2009). It granted certiorari to *WNET v. Aereo* on January 10, 2014, and held oral arguments on April 22, 2014. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/american-broadcasting-companies-inc-v-aereo-inc/ (last visited May 1, 2014).

132. 17 U.S.C. § 101.

133. Malkan, *supra* note 130, at 514.

common scenarios: the first by a group of people watching a live performance simulcast to a movie theater,[134] the second by a standard television broadcast. The third possibility was the scenario in *Redd Horne*. But what about the fourth?

Jeffrey Malkan hypothesized that what Congress envisioned in the fourth possibility was the so-called "celestial jukebox," a service that gives consumers access to chosen media on demand.[135] Malkan argues that the RS-DVR produces content on demand and thus falls into this definition; because of this, *Cablevision*—and by extension *Aereo*—was wrongly decided.[136] Malkan attributes the error to the Second Circuit's misreading of the statute:

> [T]he transmit clause specifies that "members of the public" must be "capable of receiving the performance," not "capable of receiving the transmission." [The *Cablevision* court] thought that the words "performance" and "transmission" were interchangeable in this context because the statute imposes liability on anyone who transmits an unauthorized performance to the public. But even though the transmit clause refers . . . to "the performance created by the act of transmission," a transmission and a performance remain, technically and legally, two distinct things. The difference between them is that a transmission is the medium through which a performance is delivered "to the public." This is why there may be more than one transmission of the same performance, that is, why members of the public may receive a public performance at "different times."[137]

Malkan's theory is persuasive, but still problematic, because it does not address a central question: how can a "private" performance exist under this reading? Perhaps Congress did intend to eliminate any possibility of a commercial entity "privately" transmitting a copyrighted work, but then why specify that the definition applies when a transmission is "to the public," and to "members of the public?" As the District of Massachusetts pointed out, the "rule against surplusage" requires courts to give effect to this language.[138]

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134. The Metropolitan Opera frequently simulcasts its performances to theaters as part of its "Live in HD" series. *2013–14 Live in HD Season Schedule*, THE METROPOLITAN OPERA, http://www.metoperafamily.org/metopera/liveinhd/LiveinHD.aspx (last visited Sept. 8, 2013). Bands such as Phish have also simulcast their concerts to movie theaters. Troy Carpenter, *Phish Concert to Be Simulcast in Theaters*, BILLBOARD.COM (May 25, 2004, 12:00 AM), http://www.billboard.com/biz/articles/news/1436791/phish-concert-to-be-simulcast-in-theaters.

135. Malkan, *supra* note 130, at 543. The term "celestial jukebox" was coined by Prof. Paul Goldstein in his 1994 book *Copyright's Highway: From Gutenberg to the Celestial Jukebox*. Such technologies are called "interactive services" by the Copyright Act. 17 U.S.C. § 114(j)(7).

136. Malkan, *supra* note 130, at 544.

137. *Id.* at 536 (footnotes omitted).

138. Hearst Stations, Inc., v. Aereo, Inc., No. 13-11649 (NMG), 2013 WL 5604284, at *6 (D. Mass., Oct. 8, 2013).

Consider the following scenario: A person attaches an .mp3 file of a copyrighted song[139] to an email and sends it to five people. The recipients' email client allows audio file playback to be streamed directly from the email server rather than requiring the intermediate step of downloading the file to the user's hard drive. In this situation, assuming he did not have the copyright holder's permission, the initial sender of the email has infringed the copyright holder's distribution right. That's the easy question. The harder question is whether the email provider infringed the public performance right by streaming the audio file to the recipients. It has "transmitted" the work "by means of [a] process" to "members of the public capable of receiving the performance" in "separate places" at "separate times," so the situation appears to fit the definition. But is this really what Congress intended? What if the email was sent to 100 people?

Now consider a different scenario. Five unrelated people separately upload the exact same recording of a song to the same cloud-based storage service. This service also allows audio file playback to be streamed directly from its servers rather than requiring the file to be first downloaded to a device. When the individual users stream the audio, is the storage service publicly performing the song? Again, the situation seems to fit a strict reading of the transmit clause.

It could be argued that the above scenarios are distinguishable from a true "celestial jukebox" service like Spotify or Rhapsody because those services provide a large database of copyrighted works for the consumer to choose from, whereas the above scenarios depend on an individual user first uploading something he already owns to a server. Congress only intended, this argument goes, to reach the conduct of "celestial jukebox" services, and not the streaming described in the above scenarios. But where is this distinction in the statute's definition of a public performance?

If this distinction is read into the statute, an absurd result is created by an RS-DVR. A cable provider would be liable for infringement for operating an RS-DVR service as described in *Cablevision*. It would not, however, be liable if the customer first recorded a copy of a television show to the customer's own set-top box and *then* uploaded the copy to the cable provider's servers for storage and later streaming. The two situations are functionally identical, yet the intermediate step through

139. Recordings of musical works embody two copyrights: that of the underlying musical composition (the "circle c" right) and that of the sound recording itself (the "circle p" right). *See* 17 U.S.C. §§ 401, 402. Sound recording copyrights are treated differently for the purposes of the public performance right, *see* 17 U.S.C. § 106(6), but this hypothetical still holds true if we consider that the public performance right in the underlying musical composition is being infringed, rather than the performance right of the sound recording.

the consumer's set-top box somehow makes it a "private" performance. Likewise, a Slingbox is legal because the video stream originates from the user's equipment, but Aereo is "not" legal because the stream originates instead from Aereo's servers. These are distinctions without a difference. If a transmission is linchpin, then why would Congress be concerned only with whose equipment the copy of the video originated from?[140]

The "one unique copy per user" interpretation of the clause is preferable because it properly takes into account who is "capable of receiving the performance." If only one user can access a copy of a work, the audience for that copy is clearly not "the public." It should not matter then whether the user is the one who uploads the copy to the server or if she requests that a service provider makes the copy on her behalf. If a user can legally access the copy—whether by purchasing a copy of the work, or by purchasing a cable subscription that provides access to the work, or by virtue of the work being broadcast over public airwaves—then companies should be able to provide access to that copy to a unique user at her request. The mere fact that a service provider has discovered a way to monetize an otherwise fair or legal use should not by itself defeat the fairness or legality of the use.[141]

Malkan and the Central District of California were correct in pointing out that this is not the only possible reading of the statute. However, the Copyright Act does not exist solely to protect the rights of copyright holders, because the Constitution commands that it must "promote the Progress of Science."[142] Implicit in the requirement of the progression of science is that the public has access to the "ideas" embodied in

140. Web commentary has also identified this problem with the Central District of California and D.C. Districts' rulings:

> The only real difference between someone watching a TV show remotely online using an antenna in their own home with a Slingbox and doing what the [Aereo and Aereokiller] services do is in where "the box" and "the antenna" are placed. That's it. That means the real difference is merely the length of the wire between the TV and the antenna/recording device. If the cable is long (i.e., the antenna and recording device are at a different location), suddenly, according to these two courts, it's a "public performance." If the cable is short, it's not. That doesn't make any logical sense at all.

Mike Masnick, *As Expected, TV Networks Win Copyright Ruling Against Alki David's Name-Changing TV Streaming Service*, TECHDIRT.COM (Sept. 6, 2013, 1:41 PM), http://www.techdirt.com/articles/20130906/02041524425/as-expected-tv-networks-win-copyright-ruling-against-alki-davids-name-changing-tv-streaming-service.shtml.

141. *See* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

142. U.S. CONST., art. I, § 8, cl. 8. In this context, "Science" broadly means "knowledge and learning." JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI, & MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 23 (3d. ed. 2010).

copyrighted "expression."[143] It is thus not unreasonable to resolve a statutory ambiguity in the Copyright Act in favor of ease of access to cultural information—i.e., television programming—even at the supposed expense of a copyright holder. This is ultimately why the Second Circuit's reasoning should be adopted rather than the Central District of California's.

However, there is further justification for rejecting the *BarryDriller* holding. The court stated that *Cablevision* was not the law in the Ninth Circuit and that the Second Circuit's "one user-one copy" theory was in tension with Ninth Circuit precedent.[144] However, it cites only to the *On Command* decision for this proposition and, as discussed earlier, that decision is actually consistent with the "one user-one copy" theory adopted by the Second Circuit because in *On Command* the infringing transmissions originated from a single "master copy" of the work. The *Cablevision* decision differs only in that the *On Command* court held that *any* commercial relationship between audience and transmitter is "to the public." The *BarryDriller* court answered this criticism by stating that the Second Circuit's "one copy-one user" distinction is only relevant "if one focuses on whether the transmission is publicly performed. Precedent in the Ninth Circuit instead properly looks at public performance of the copyrighted work."[145] But again, it cites to no other Ninth Circuit precedent that holds as such, and in fact the Central District of California had previously found in *Warner Brothers v. WTV Systems* that the Second Circuit's "one copy-one user" theory was consistent with the holdings in *On Command* and *Redd Horne*.[146] The *BarryDriller* holding essentially reads the possibility of a private performance out of the statute, which, as discussed above, is not an ideal interpretation of the transmit clause.

B. "One Copy-One User" Is Good Policy

Broadcast television networks receive revenue from selling

143. *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

144. Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138, 1144–45 (C.D. Cal. 2012).

145. *Id.*

146. Warner Bros. Entm't, Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1003, 1011 n.7 (C.D. Cal. 2011).

advertisements,[147] and cable television networks (e.g., ESPN, CNN) are no different.[148] The price each network can command for its adtime is determined by how many viewers are watching and, to a lesser extent, the demographics of those viewers.[149] This has been the business model for television since its inception.[150]

With such an entrenched history, it is understandable that networks have an interest in maintaining the status quo. However, the status quo is changing, whether the networks like it or not. A simple look at demographic trends among television viewers illustrates this. The most watched American broadcast network is CBS,[151] the network with the oldest average viewership.[152] Overall, the median age of the broadcast television audience is increasing over time.[153] Cable/satellite television is taking a large share of the broadcast audience,[154] but an increasing number of cost-conscious viewers are "cutting the cord" and eliminating these services too.[155] Such viewers are still watching TV shows, but they are watching via Internet-based video services like HuluPlus or Netflix.[156] The conclusion to draw from these facts is that older viewers are still watching traditional television, but that generation is being replaced by one that is less interested in traditional television viewing, and this media fragmentation creates difficulty for the networks. After all, they cannot command a high price for adtime if they cannot prove that people are watching their content and its associated advertising during broadcasts.

The television networks, and for that matter, the film industry and the

147. WALTER S. MCDOWELL, BROADCAST TELEVISION: A COMPLETE GUIDE TO THE INDUSTRY 45–66 (2006).

148. Cable television networks receive additional revenue by licensing their programming to cable and satellite providers. Kimberly Shumway, *TV Business Model Explained*, SUITE101.COM (Aug. 24, 2009), http://suite101.com/article/tv-business-model-explained-a189874.

149. MCDOWELL, *supra* note 147, at 54–56.

150. *Id.* at 46–50.

151. Nellie Andreeva, *2011–2012 Season Network Rankings: Fox Still on Top but Down, NBC in Third, CW Falls*, DEADLINE.COM (May 24, 2012, 4:49 PM), http://www.deadline.com/2012/05/2011-12-season-network-rankings-fox-still-on-top-but-down-nbc-in-third-cw-falls/.

152. Andy Fixmer, *From CBS, Advertisers Get the Older Viewers They Want*, BUSINESSWEEK.COM (Sept. 6, 2012), http://www.businessweek.com/articles/2012-09-06/from-cbs-advertisers-get-the-older-viewers-they-want.

153. Andreeva, *supra* note 151.

154. Eric Deggans, *Cable Ratings Bode Ill for Broadcast Networks*, THE COLUMBUS DISPATCH (Mar. 13, 2013, 7:32 AM), http://www.dispatch.com/content/stories/life_and_entertainment/2013/03/13/cable-ratings-bode-ill-for-broadcast.html.

155. Heather Struck, *Is 2013 the Year to Cut the Cable Cord?*, REUTERS.COM (Jan. 9, 2013, 12:23 PM), http://www.reuters.com/article/2013/01/09/us-moneypack-family-entertainment-idUSBRE9080X020130109.

156. *See* Rebecca Greenfield, *Fear of a Cord-Never Generation*, THEATLANTICWIRE.COM (Feb. 12, 2013), http://www.theatlanticwire.com/technology/2013/02/fear-cord-never-generation/62033/.

recording industry, would like to maintain the predigital status quo. New technology brings new unknowns, and the past behavior of these industries shows that they are terrified of the unknown. The VCR provides a clear example. After Sony developed the Betamax in the early 1970s, they were sued by Universal and Disney on a theory of contributory copyright infringement: by giving consumers the ability to record television programming and/or copy films, the theory goes, Sony was liable for their customers' infringement.[157] The film industry spoke about the technology in apocalyptic terms. Jack Valenti, then head of the Motion Picture Association of America, testified before Congress that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone."[158] He argued:

> One does not have to be trained in sophisticated marketing and creative judgment to understand the devastation on the after-theater marketplace caused by the hundreds of millions of tapings that will adversely impact on the future of the creative community in this country. It is simply a question of basic economics and plain common sense.[159]

The Supreme Court, in a 5–4 decision, found for Sony, ruling that the VCR was capable of substantial noninfringing uses, and therefore that a permanent injunction against the technology was inappropriate.[160] Despite this decision, the film industry and the "after-theater marketplace" were not "devastated." In fact, the home video market that resulted from the VCR's continued existence is a major revenue generator for the American film industry.[161] It is startling to think that the film industry came within one Supreme Court vote of successfully suing the lucrative home video market out of existence due to fear of the unknown. Instead, they were forced into a new paradigm, and they figured out how to not only survive but thrive.

By contrast, we can examine the recording industry in the aftermath of the Ninth Circuit decision which outlawed Napster.[162] It is no secret

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157. LESSIG, *supra* note 5, at 75.

158. *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) (statement of Jack Valenti, President, Motion Picture Ass'n of America).

159. *Copyright Infringements (Audio and Video Recorders): Hearing on S. 1758 Before the S. Comm. on the Judiciary*, 97th Cong. 459 (1982) (statement of Jack Valenti, President, Motion Picture Ass'n of America).

160. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

161. DVD sales are the most profitable form of distribution for movie studios. *See How Movie Studios Make Money*, BLOOMBERG BUSINESSWEEK (Sept. 13, 2012), http://www.businessweek.com/articles/2012-09-13/how-movie-studios-make-money; Edward Jay Epstein, *#3 How Studios Make Money*, HOLLYWOOD DEMYSTIFIED, http://www.edwardjayepstein.com/Demyst3.htm (last visited July 7, 2013).

162. A&M Records, Inc. v. Napster, Inc., 239 F. 3d 1004 (2001).

that the industry has hit hard times since the advent of file sharing,[163] and it would seem that the industry's legal victories have had little to no success in engineering a recovery.[164] Many have speculated that the industry's failure to adapt to the new digital paradigm, and its attempt to sue the new technology out of existence, had a chilling effect on innovation and contributed heavily to the industry's problems.[165]

Professor Michael A. Carrier's survey of investors, CEOs, and other players in the technology industries bears this out. A record label official told Carrier "that 'even the threat of a lawsuit . . . really does slow down investment in the space.' This respondent was 'sure' there were 'quite a few' innovative services that 'never came to life' because of 'the threat of potential lawsuits from content owners.'"[166] The respondents universally acknowledged that the *Napster* decision "'put such a chilling effect on everything,'" and "concluded that 'from 2000 to 2010, even to this day, there really hasn't been new innovation in digital music other than iTunes.'"[167] Another lamented that "[i]t is 'inherently hard to quantify' the 'new disruptive technologies we're losing' because . . . 'for every one [that gets shut down], there are ten new ideas that never get developed . . . because people don't see it as an area where they ought to be investing their time and money.'"[168] Venture capitalists also see the problem:

> One venture capitalist (VC) explained that [after *Napster*] the market "became a wasteland" with "no music deals getting done." Another noted that *Napster* "cast a pall over companies getting funded." A third explained that "there was no venture capital going into music companies because there was a lot of debris from companies strewn about." In fact, "the graveyard of music companies was just overflowing." After *Napster*, it was "a scorched earth kind of place" in which "nobody touched anything." As a result, there was a "lost decade after the *Napster* decision." . . . There is "no question" that the copyright lawsuits "chased away innovators." . . . Another respondent similarly concluded that "today, if you go to a VC and tell them you have a business you want to

163. "Sales of recordings dropped from a high of $14.6 billion in 1999 back to $8.5 billion in 2008 (a decrease of over 40 percent)." GEOFFREY P. HULL, THOMAS HUTCHISON, & RICHARD STRASSER, THE MUSIC BUSINESS AND RECORDING INDUSTRY 29 (3d. ed. 2011).

164. "In the end, the [RIAA's] lawsuit campaign has had little impact on the amount of copyrighted music that is illegally downloaded." STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE 188 (2010).

165. *See, e.g., id.*

166. Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 35 (2013) (footnotes omitted).

167. *Id.* at 40.

168. *Id.*

build around digital music, very very few would listen."[169]

Though media companies may be more comfortable in the status quo, maintaining the status quo is not always good for business. The motion picture companies were forced to adapt to a new paradigm after *Sony* and found themselves making even more money. Meanwhile, the recording industry may have succeeded in outlawing file-sharing technology, but in the process they also killed digital music innovation and potential new income streams. The lesson here is clear: litigation kills innovation, "the lifeblood of the economy.... [And g]iven the fragile state of the economy, we should tread lightly before tampering with this powerhouse of economic growth."[170]

Professor Josh Lerner's study of the effects of the *Cablevision* decision on cloud computing investment reinforces this idea. Lerner found that venture capital investment in cloud computing "increased significantly in the U.S. relative to the EU after the *Cablevision* decision."[171] Additionally, decisions that constrict allowable uses under copyright law can have a negative effect on the economy because "in the 21st century... what copyright leaves unregulated—the 'fair use economy'—is as economically significant as what it regulates."[172] Courts should take this lesson to heart as the Aereo/Aereokiller litigation continues. The Second Circuit's reading of the statute is not only legally sound, but it will also do less damage to innovation. When new technologies are within a reasonable interpretation of the law, courts should get out of the way of progress and stop "protecting" industries from the unknown. The Constitution requires copyright to "promote the Progress of Science," not to maintain the status quo. The content industries, like every other, must adapt or die.

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169. *Id.* at 42–44 (footnotes omitted).

170. *Id.* at 49.

171. Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* 1, *available at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf (last visited July 7, 2013).

172. COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 5 (2010), *available at* http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf.

> The research indicates that the industries benefiting from fair use and other [copyright] limitations and exceptions make a large and growing contribution to the U.S. economy. The fair use economy in 2007 accounted for $4.7 trillion in revenues and $2.2 billion in value added, roughly 16.2 percent of U.S. GDP. It employed more than 17 million people and supported a payroll of $1.2 trillion. It generated $281 billion in exports and rapid productivity growth.

Id. at 29.

C. A Final Note on Legislative Solutions

Given the ambiguity of the Copyright Act, it would not be improper to suggest a legislative solution to this problem. Writing the "one copy-one user" doctrine itself into the act would not be ideal, as the rapid pace of technological change may make it irrelevant, or the doctrine may not be broad enough to encompass some new unforeseen technology. What would be preferable is for Congress to clarify that truly private performances/transmissions are legal under the act, and/or to clarify the definition of "to the public."

One solution Congress should *not* pursue was proposed in a 2011 student comment from the Touro Law Review.[173] This commentator proposed that to "adequately compensate the copyright owners for their potential loss in revenue due to the widespread usage of the RS-DV-R system," Congress should adopt legislation similar to the Audio Home Recording Act of 1992 (AHRA), which was intended to help compensate copyright owners of prerecorded music by imposing per-device royalty payments on digital audio tape (DAT) recorders.[174] This naïve solution misunderstands the actual purpose and impact of the AHRA: the death of consumer DAT technology.

Anyone familiar with DAT knows that it never saw widespread use outside of the recording studio. This is because content owners threatened litigation against the manufacturers of DAT recorders and forced them to implement digital rights management schemes into the technology that largely inhibited their functionality.[175] Furthermore, the protracted legal wrangling that culminated in the AHRA delayed the introduction of the technology to American consumers by six years, which sealed its fate.[176] Because the technology never got off the ground, no significant royalties were ever generated by the act.[177]

If similar legislation were to be enacted around cloud-based television technologies, the results could be similarly devastating. Should Congress get involved in this area, it should enter on the side of the users and not on the side of the content industries. Consumers' preferences are changing; it is time the industries were forced to change along with them and adapt to the new paradigm.

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173. Justin M. Jacobson, *Cablevision's Remote DV-R System and a Solution for the Digital-Recording Age*, 27 TOURO L. REV. 461 (2011).

174. *Id.* at 498–99.

175. WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 84–85 (2004).

176. *Id.* at 86.

177. "The total amount of royalties peaked at $5.5 million in 2000, and since then has been hovering around $3.5 million per year—roughly .03 percent of the total amount of revenue that American consumers pay each year for musical recordings." *Id.* at 87.

V. CONCLUSION

The ultimate fate of the Aereo/Aereokiller technology is uncertain. Even if the legal controversy is settled in favor of its continued lawful existence, it is too early to tell whether it will be a hit with consumers. It would be a shame, however, if the technology is killed by the courts before it even gets a chance to succeed or fail on its own merits. By ruling as it did, the Second Circuit properly ruled on the side of consumers and innovation.

We cannot yet see the future of television, but all indicators point to a strong Internet presence. The "one copy-one user" doctrine allows cloud-based transmission services to continue to develop unimpeded. Ultimately, Congress should revise the Copyright Act to remove the ambiguities that permit the reading adopted in the decisions that ruled against Aereokiller. In the absence of such legislative action, the other circuits should adopt the Second Circuit's *Aereo* holding. The content industries do not need Congress to hold their hands. They should be forced to adapt to the times and find business models that serve the changing wants and needs of consumers. This will properly "promote the Progress of Science."

> There has grown up in the minds of certain groups in this country the notion that just because a man or corporation has made a profit out of the public for a number of years, the government and the courts are charged with guaranteeing such profit in the future, even in the face of changing circumstances and contrary public interest. This strange doctrine is supported by neither statute nor common law. Neither individuals nor corporations have any right to come into court and ask that the clock of history be stopped, or turned back, for their private benefit.
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> –Robert A. Heinlein, author, 1939.[178]

178. ROBERT A. HEINLEIN, *Life-Line*, *in* THE PAST THROUGH TOMORROW 25 (1967).