

# AEREO: FROM WORKING AROUND COPYRIGHT TO THINKING INSIDE THE (CABLE) BOX

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## INTRODUCTION

On-demand, on-the-go programming is the new normal in the retail marketplace for digital entertainment. As mobile-device makers and other innovators jockey to meet consumer demand for maximum choice and flexibility, courts are continually challenged with figuring out how, if at all, the exclusive rights of copyright owners map onto new time- and space-shifting technologies.<sup>1</sup> Several

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1. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (involving time-shifting with a VCR); *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008) (involving time-shifting with a RS-DVR); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (involving space-shifting with peer-to-peer file-sharing software); *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072 (9th Cir. 1999) (involving space-shifting with a portable MP3 player); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013) (involving space-shifting with an “online ‘storage locker’”); *UMG Recordings, Inc.*

doctrinally difficult cases in this area have involved streaming-media technologies, which implicate the “Transmit Clause” of copyright law’s public performance right.<sup>2</sup> The first of them to end up in the Supreme Court was *American Broadcasting Cos., Inc. v. Aereo, Inc.*, which pitted the owners of copyrights in over-the-air, local television broadcasts against a technology company that enabled retransmission of those broadcasts in near real time to Internet users on an individualized basis.<sup>3</sup> Aereo’s copyright odyssey took the company from the courts, to the Copyright Office, and back to the courts, including a last stop in federal bankruptcy court.<sup>4</sup> What began as an innovator’s story about the uncertainty of working *around* copyright’s technology-neutral definition of “perform publicly”<sup>5</sup> became a story about the frustration of working *within* copyright’s technology-specific definition of “cable system.”<sup>6</sup> Shuttered by the district court on remand from the Supreme Court’s decision in favor of ABC,<sup>7</sup> Aereo is a case study in how pro-consumer innovation can get squeezed when courts combine a very broad view of copyright’s

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v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (involving space-shifting with an online storage locker).

2. See *WPIX, Inc. v. ivi, Inc. (ivi II)*, 691 F.3d 275 (2d Cir. 2012) (involving streaming of over-the-air TV broadcast signals); *Cablevision*, 536 F.3d 121 (involving streaming of time-shifted video programming by cable subscribers); *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003) (involving streaming of AM/FM radio broadcast signals by AM/FM radio stations).

3. See *Am. Broad. Cos. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2511 (2014) (holding that Aereo publicly performs the plaintiffs’ copyrighted works when its subscribers receive retransmissions of those works over the Internet using Aereo’s system).

4. Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES, Nov. 22, 2014, at B2.

5. See 17 U.S.C. § 101 (2012) (“To perform . . . a work ‘publicly’ means . . . to transmit or otherwise communicate a performance . . . of the work . . . 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.”).

6. See *id.* § 111 (“A ‘cable system’ is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”).

7. See *Am. Broad. Cos. v. Aereo, Inc. (Aereo IV)*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*1 (S.D.N.Y. Oct. 23, 2014) (granting ABC’s motion for a preliminary injunction).

exclusive rights with a very narrow view of its exceptions and limitations.

### I. WORKING AROUND THE LAW

Aereo's initial argument was that its web-based retransmissions of ABC's copyrighted content did not implicate the public performance right at all.<sup>8</sup> The legal foundation for that argument was the Second Circuit's 2008 decision in *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*.<sup>9</sup> Interpreting the Transmit Clause, the Second Circuit held in *Cablevision* that a cable company does not publicly perform copyrighted works when its subscribers use its remote-storage digital video recording (RS-DVR) function to time shift programming for later playback.<sup>10</sup> The RS-DVR's innovation was to move stored, time-shifted programming from hard drives installed in subscribers' set-top cable boxes to subscriber-specific portions of servers located at Cablevision's facilities.<sup>11</sup> The shift from local to remote digital storage is functionally inconsequential for cable subscribers.<sup>12</sup> With both architectures, subscribers choose which programming they want to record for later viewing; they set the system to record that programming; and they control the timing of playback.<sup>13</sup>

Cartoon Network argued that relocating the storage of time-shifted programming from hard drives in users' set-top boxes to hard drives on Cablevision's server was legally consequential, even if it wasn't functionally so. The theory was that playback from Cablevision's remote storage facility to a subscriber's home TV is not a copyright-neutral private performance of the recorded program by that user, as it would be if the program were stored locally, but a copyright-triggering public performance of the program by Cablevision.<sup>14</sup> The Second Circuit disagreed, focusing on the fact that exactly one Cablevision subscriber is capable of receiving the playback transmission of time-shifted programming from that subscriber's remote hard drive: "Because each RS-DVR playback transmission is made to a single subscriber using a single unique

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8. *Aereo III*, 134 S. Ct. at 2508.

9. 536 F.3d 121 (2d Cir. 2008).

10. *Id.* at 140.

11. *Id.* at 124.

12. *Id.* at 125.

13. *Id.*

14. *Id.* at 136.

copy produced by that subscriber, we conclude that such transmissions are not performances ‘to the public,’ and therefore do not infringe any exclusive right of public performance.”<sup>15</sup> Relying on *Cablevision*’s interpretation of what it means to perform a copyrighted work publicly, Aereo designed a cloud-based signal retransmission system to facilitate only copyright-neutral, private performances by its subscribers. Each subscriber controlled a dedicated dime-sized antenna that could be activated to retransmit a slightly time-shifted broadcast signal—to that subscriber only—when the subscriber ordered the system to tune in to a particular program.<sup>16</sup> Just as the location of the subscriber’s hard drive (local vs. remote) didn’t matter for *Cablevision*, Aereo hypothesized, the location of the subscriber’s antenna (local vs. remote) shouldn’t matter for it. Under *Cablevision*, as long as a single subscriber initiates and receives the transmission of a copy of a copyrighted program made by and for that subscriber, the owner of the equipment the subscriber uses to make the transmission does not publicly perform the program.<sup>17</sup>

In much the same way that second-generation peer-to-peer file-sharing services were designed, with *A&M Records v. Napster* in mind, to avoid secondary liability for infringement of the reproduction and distribution rights, Aereo’s service was designed, with *Cablevision* in mind, to avoid direct infringement of the public performance right.<sup>18</sup> Dismayed by such legal engineering, Aereo’s critics faulted the service for attempting to take advantage of a purported loophole created by *Cablevision*’s interpretation of the public performance right. Judge Chin, dissenting from the Second Circuit’s decision in favor of Aereo, called the service “a sham” and “a Rube Goldberg-like contrivance.”<sup>19</sup> Justice Roberts, at oral

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15. *Id.* at 139.

16. The slight time delay in the retransmission of the signal occurred because the retransmission was being made from a buffer copy of the program. If *Cablevision*’s holding is read as being limited to the time-shifted playback of subscriber-made copies, this design feature arguably brought the system’s “watch now” feature into alignment with *Cablevision*.

17. *Cablevision*, 536 F.3d at 139.

18. See Jordan Crook, *Streaming TV Startup Aereo Files Appeal in Network Case, Cites Cablevision Precedent*, TECHCRUNCH (Oct. 22, 2012), <http://techcrunch.com/2012/10/22/streaming-tv-startup-aereo-files-appeal-in-network-case-cites-cablevision-precedent/> (discussing Aereo’s reliance on *Cablevision* in the design of its system).

19. *WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting). As the district court judge in *Cablevision*, Judge Chin

argument in the Supreme Court, similarly accused Aereo of trying to work an angle: “[T]here’s no technological reason for you to have 10,000 dime-sized antenna[s], other than to get around the copyright laws.”<sup>20</sup> Among scholars, Jane Ginsburg and Rebecca Giblin worried that a victory in the case for Aereo would encourage a perverse trend of “Aereoization,” in which entrepreneurs design technically inefficient content-delivery systems with the strategic aim of avoiding copyright liability.<sup>21</sup> Dan Burk took a more sanguine view of Aereo’s effort to design a system to avoid the reach of copyright.<sup>22</sup> Invoking the patent law concept of “inventing around” patent claims, Burk concluded that allowing latitude for “technological avoision” à la Aereo might be good policy, insofar as it has the potential to drive innovation in content reproduction and delivery—a domain in which copyright owners invested in incumbent technologies may lack adequate incentives to break new ground.<sup>23</sup> Unfortunately for Aereo, the Supreme Court majority couldn’t get past what comes across in the opinion as a gut feeling that Aereo was too clever by half.

## II. THE (CABLE) BOX OPENS

In the Supreme Court, *Aereo* was argued and ultimately decided as a case about cable TV and cable-related amendments to the 1976 Copyright Act. ABC argued that Aereo was less an Internet innovator than a cable imitator and, as such, should be covered by

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had granted summary judgment for Cartoon Network, a decision that was reversed by the Second Circuit. *Cablevision*, 536 F.3d at 124. He was subsequently elevated to the Second Circuit.

20. Transcript of Oral Argument at 31, *Aereo III*, 134 S. Ct. 2498 (2014) (No. 13-461).

21. See Rebecca Giblin & Jane C. Ginsburg, *We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the “Transmit” Clause* 21-22 (Columbia Law Sch., Working Paper No. 480, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443595) (coining the term “Aereoization” to describe a process by which businesses design their systems, in keeping with the Second Circuit’s reasoning in *Cablevision* and *Aereo II*, to “sufficiently mimic free consumer uses” that they escape legal liability for publicly performing copyrighted works); see also Julie Borna, Note, *Aereo: Cutting the Cord or Splitting the Circuit?*, 22 *COMMLAW CONSPECTUS* 287, 315 (2014) (arguing that Aereo should not be permitted to “bypass copyright laws”).

22. See Dan L. Burk, *Inventing Around Copyright*, 109 *NW. U. L. REV.* 64 (2014).

23. *Id.* at 74-76 (suggesting that inventing around copyright, in some cases, might lead to useful innovation and not just inefficient, liability-circumventing design).

1976 amendments to the definition of “perform publicly” that were intended by Congress to bring cable retransmissions of over-the-air TV broadcasts within the scope of the public performance right.<sup>24</sup> Not surprisingly, ABC wanted to have its cake and eat it too on the question of the functional similarity between Aereo’s “watch now” service and cable retransmissions. On the one hand, ABC argued, Aereo was too much like a cable system to escape the reach of the public performance right in § 106(4) of the Copyright Act.<sup>25</sup> On the other hand, it urged, Aereo was not enough like a cable system to qualify for the compulsory retransmission license in § 111.<sup>26</sup> In a nutshell, ABC wanted a holding that Aereo is like cable when it comes to the statutory duty to pay but not like cable when it comes to the statutory right to pay less than market rates.

ABC’s stance was obviously asymmetric, considering the policy quid pro quo underlying the 1976 amendments that brought cable retransmissions within the scope of § 106(4).<sup>27</sup> Those amendments superseded two judicial decisions, *Teleprompter Corp. v. Columbia Broadcasting System* and *Fortnightly Corp. v. United Artists Television, Inc.*, which had held that cable retransmissions of over-the-air broadcasts were not remunerable “public performances” because CATV providers were more like viewers than broadcasters.<sup>28</sup> At the same time as Congress repudiated *Teleprompter* and *Fortnightly* by adding the Transmit Clause to the definition of “perform publicly,” thus allowing copyright owners to capture revenue from cable retransmissions, it created the compulsory license in § 111 to give newly burdened cable operators relief from the prohibitive transaction costs associated with market-based licensing of retransmitted content.<sup>29</sup> The legislative history of the

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24. Transcript of Oral Argument, *supra* note 20, at 3.

25. *Id.*

26. *Id.* at 6.

27. See *E. Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 132 (2d Cir. 1982) (“Congress drew a careful balance between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers.”).

28. See *Aereo III*, 134 S. Ct. 2498, 2504-05 (2014) (discussing *Teleprompter* and *Fortnightly* and explaining that Congress amended the Copyright Act in 1976 largely to reject the holdings in those two cases).

29. The legislative history of the Copyright Act of 1976 explains why the two amendments were coupled. See H.R. REP. NO. 94-1476, at 89 (1976) (“In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to

1976 Copyright Act makes it clear that the two amendments were a package deal intended to strike a balance between copyright owners and cable-system operators for the ultimate benefit of the public.<sup>30</sup> ABC, however, wanted the amendments viewed in isolation from each other.

Aereo's initial position in the case was that its service was not enough like a cable system, architecturally speaking, to bring its retransmissions within the scope of the public performance right.<sup>31</sup> It pointed out, ultimately to no avail, that cable systems receive broadcast content in a single feed and continuously retransmit that content to each customer, regardless of whether the customer has tuned in or not.<sup>32</sup> This technical detail was legally irrelevant in the majority's view, even though it is completely germane to the question of who initiates a content retransmission and thereby "performs" the retransmitted work.<sup>33</sup> Cable systems, Aereo argued, initiate cable retransmissions to all subscribers and thereby publicly perform the retransmitted programs; Aereo's users, by contrast, initiate Aereo retransmissions only to themselves and thereby privately perform the programs.<sup>34</sup>

The majority ultimately agreed with ABC.<sup>35</sup> Its opinion, which focuses anachronistically on copyright law's evolving treatment of cable systems, is a doctrinally unsatisfying shortcut in a case that demanded a careful parsing of the Transmit Clause and a direct reckoning with the Second Circuit's reasoning in *Cablevision*.

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the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee [will] establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry . . .").

30. See *E. Microwave, Inc.*, 691 F.2d at 132 (discussing the balance Congress struck and stating that "[t]he public interest . . . lies in a continuing supply of varied programming to viewers").

31. See Transcript of Oral Argument, *supra* note 20, at 28 (arguing that Aereo is an equipment provider and not a cable system).

32. *Id.*

33. See *Aereo III*, 134 S. Ct. at 2507 ("[T]his sole technological difference between Aereo and traditional cable companies does not make a critical difference here."). *But see id.* at 2512 (Scalia, J., dissenting) (asserting that volitional conduct by the defendant is necessary for direct infringement and that Aereo's viewers, not Aereo, engaged in volitional conduct with respect to choice of programming on Aereo's system).

34. Transcript of Oral Argument, *supra* note 20, at 28.

35. *Aereo III*, 134 S. Ct. at 2511 (majority opinion).

Instead of producing a rigorous statutory analysis that could serve as a useful guide to lower courts deciding future public performance cases, the Court expediently tethered Aereo to an established, legally assimilated technology and attempted to limit the case to its facts, particularly with respect to its implications for the burgeoning cloud-computing industry.<sup>36</sup> The majority held that Aereo, as a service functionally indistinguishable from cable, publicly performed the copyrighted works it retransmitted, even though each transmission was initiated by and delivered to a single user by means of equipment controlled exclusively by that user.<sup>37</sup> In a scathing dissent, Justice Scalia criticized the majority's reasoning as "[g]uilt [b]y [r]esemblance."<sup>38</sup>

The majority's "walks like a duck and quacks like a duck" rationale suggested that Aereo might fall within the definition of a "cable system" in § 111, making it eligible for the compulsory retransmission license. At oral argument, Justice Sotomayor wanted to explore that possibility: "Why aren't they a cable company?" she asked ABC's counsel.<sup>39</sup> "I look at the definition of a cable company, and it seems to fit. . . . We say they're a cable company, they get the compulsory license."<sup>40</sup> The logic is perfectly straightforward—only that isn't how the case came out. The majority's opinion held only that Aereo is *impossible to differentiate from* a cable system for purposes of § 106(4), not that it *is* a cable system for purposes of § 111.<sup>41</sup> The Justices left for another day and another court the question of whether the former necessarily implies the latter.

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36. Other commentators share my dim view of the opinion and its value for deciding future cases. See, e.g., Matthew Sag, *The Uncertain Scope of the Public Performance Right After American Broadcasting Companies v. Aereo, Inc.* 12 (Loyola Univ. Chi. Sch. of Law Pub. Law & Legal Theory Research Paper, Paper No. 2014-017), available at <http://ssrn.com/abstract=2529047> ("The majority's 'looks like a cable system' approach makes the public performance right almost incomprehensible."); see also Ira Steven Nathenson, *Aereo's Errors*, 2 J. INT'L & COMP. L. 171, 193 (2014) (arguing that the majority's opinion is "unnecessary, unsound, and unwise").

37. See *Aereo III*, 134 S. Ct. at 2511.

38. *Id.* at 2515 (Scalia, J., dissenting).

39. Transcript of Oral Argument, *supra* note 20, at 4-5.

40. *Id.*

41. See *Aereo III*, 134 S. Ct. at 2506 (majority opinion) (stating that "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach").



## III. THE (CABLE) BOX CLOSES

Following the Supreme Court's decision, Aereo suspended operations<sup>42</sup> and, in a last-ditch effort to save itself, pivoted quickly on the issue of its affinity with cable. In a letter to the district court concerning next steps in the litigation, Aereo argued that the Supreme Court's decision amounted to a holding that it was, as a matter of law, a cable system.<sup>43</sup> As such, Aereo asserted its right to a § 111 license.<sup>44</sup> The move, as the district court would later describe it, was Aereo's effort to make lemonade from the lemons it had been given by the Supreme Court.<sup>45</sup> Aereo promptly filed statements of account and royalty fees with the Copyright Office, claiming entitlement to a § 111 license.<sup>46</sup> The Copyright Office declined to process the filings, citing *WPIX, Inc. v. ivi, Inc.*, a case in which the Second Circuit—in an opinion written by Aereo's dissenter, Judge Chin—held that § 111's definition of “cable system” does not cover an Internet service that streams broadcast TV signals to a nationwide audience.<sup>47</sup> On remand in the district court, ABC moved for a preliminary injunction, which it won in a decision that relied heavily on *ivi*.<sup>48</sup> Shortly thereafter, Aereo filed for bankruptcy.<sup>49</sup>

The outcome in *Aereo* was the predictable result of a copyright system that hardwires a lack of balance between rights and

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42. Emily Steel, *Stung by Supreme Court, Aereo Suspends Service*, N.Y. TIMES, June 29, 2014, at A20.

43. Letter from Bruce P. Keller to the Honorable Alison J. Nathan (July 9, 2014), available at [http://www.tellusventure.com/downloads/federal/scotus/joint\\_letter\\_to\\_nathan\\_9jul2014.pdf](http://www.tellusventure.com/downloads/federal/scotus/joint_letter_to_nathan_9jul2014.pdf) (“Under the Second Circuit’s precedents, Aereo was a provider of technology and equipment with respect to the near-live transmissions at issue in the preliminary injunction appeal. After the Supreme Court’s decision, Aereo is a cable system with respect to those transmissions.”).

44. *Id.*

45. See *Aereo IV*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*3 (S.D.N.Y. Oct. 23, 2014) (“Doing its best to turn lemons into lemonade, Aereo now seeks to capitalize on the Supreme Court’s comparison of it to a CATV system . . .”).

46. See Letter from Jacqueline C. Charlesworth, Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office, to Matthew Calabro (July 16, 2014), available at [http://www.nab.org/documents/newsRoom/pdfs/071614\\_Aereo\\_Copyright\\_Office\\_letter.pdf](http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf) (acknowledging the Copyright Office’s receipt of Aereo’s statements of account and associated royalty and filing fees for the § 111 license).

47. See *ivi II*, 691 F.3d 275 (2d Cir. 2012) (holding that *ivi* is not a “cable system” under § 111).

48. *Aereo IV*, 2014 WL 5393867 at \*4-5.

49. See Steel, *supra* note 4.

exceptions—giving a broad, technology-neutral scope to the former and a narrow, technology-specific scope to the latter.<sup>50</sup> This dynamic holds in both policy making and judicial decision making. As Julie Cohen has observed, “[c]opyrights have a protean quality, expanding into every avenue of potential profit,” whereas “copyright limitations generally have not demonstrated a parallel capacity to evolve as technologies change.”<sup>51</sup> The Transmit Clause and § 111 were incorporated simultaneously into copyright law to mediate, and strike a balance in, “the cable-copyright controversy.”<sup>52</sup> The Transmit Clause, however, sweeps much more broadly than § 111 does in terms of covered technology. It is clear from the legislative history of the 1976 Act that Congress added the Transmit Clause to capture for copyright owners markets created by whatever new technologies might emerge for delivering content at a distance.

The definition of “transmit”—to communicate a performance or display “by any device or process whereby images or sound are received beyond the place from which they are sent”—is broad enough to include *all conceivable forms and combinations* of wires and 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 or display 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 clauses (4) or (5) of section 106.<sup>53</sup>

The amendment that brought cable TV retransmissions within the scope of § 106(4) proactively brought the Internet, and streaming, along with it.

The legislative history of § 111, by contrast, is much more tightly focused on existing technology: “For the most part,” the House Report explains, “the section is directed at the operation of

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50. See, e.g., *WPIX, Inc. v. ivi, Inc. (ivi I)*, 765 F. Supp. 2d 594, 603-04 n.10 (S.D.N.Y. 2011) (“Compulsory licenses are exceptions to the copyright laws, and . . . we generally construe the exceptions narrowly . . . .” (internal quotation marks omitted)); *CBS Broad., Inc. v. EchoStar Commc’ns Corp.*, 265 F.3d 1193, 1209 (11th Cir. 2001) (stating that the statutory license in § 119 for secondary transmissions of TV broadcast signals by satellite carriers is a narrow exception to the generally applicable public performance right). See generally *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000), *aff’d*, 533 U.S. 483 (2001) (invoking the canon to narrowly construe an exception in 17 U.S.C. § 201(c) to copyright’s default ownership rules).

51. JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 242 (2012).

52. H.R. REP. No. 94-1476, at 48, 89 (1976).

53. *Id.* at 64 (emphasis added).

cable television systems.”<sup>54</sup> Notwithstanding this specificity, the definition of “cable system” in § 111 leaves some room for post-1976 technological developments:

A “cable system” is a facility . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.<sup>55</sup>

The generality of both the word “facility” and the phrase “other communications channels” arguably evinces congressional intent *not* to limit the reach of § 111 to the 1976 state of the art in signal retransmission.<sup>56</sup> Moreover, the requirement in § 111(c) that the secondary retransmitter’s carriage of signals be “permissible under the rules . . . of the Federal Communications Commission” need not be read, as the Copyright Office has narrowly read it, to mean that the retransmitter must be affirmatively regulated by those rules.<sup>57</sup> The

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54. *Id.* at 88.

55. 17 U.S.C. § 111(f)(3) (2012).

56. The Copyright Office has insisted that “other communications channels” should not be understood “to include ‘future unknown services.’” *ivi II*, 691 F.3d 275, 284 (2d Cir. 2012). The statutory language is superfluous, however, if it cannot be read to include any new technologies. At the Copyright Office’s behest, Congress amended the Copyright Act in 1988 to create a new compulsory license for satellite carriers and again in 1994 to expressly include microwave retransmissions within the scope of § 111. *Id.* at 281-82. Such technology-specific amendments arguably were not needed in light of § 111’s inclusion of the catch-all phrase “other communications channels.” Reading that phrase to encompass post-1976 technologies, the Eleventh Circuit held in 1991 that a satellite carrier *was* a “cable system” entitled to the § 111 license. *See Nat’l Broad. Co. v. Satellite Broad. Networks, Inc. (SBN)*, 940 F.2d 1467, 1469 n.3 (11th Cir. 1991) (“A question arises whether a transmission via satellite is one through ‘other communications channels.’ We think so. The legislative history shows that in considering the Copyrights Act, Congress understood that the development of satellites promised a new channel for communicating in the future.”). The Eleventh Circuit found the Office’s exclusionary reasoning “unpersuasive.” *Satellite Broad. & Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344, 346 (11th Cir. 1994). Notwithstanding that holding, the Copyright Office issued a rule in 1992 that excluded satellite carriers from § 111. *Id.* In 1994, giving *Chevron* deference to that rule, the Eleventh Circuit reversed its earlier decision. *Id.* at 348.

57. 17 U.S.C. § 111(c)(1); *see ivi I*, 765 F. Supp. 2d 594, 608 (S.D.N.Y. 2011), *aff’d*, 691 F.3d 275 (2d Cir. 2012) (explaining the Copyright Office’s position that the compulsory license and FCC regulations go hand-in-hand, so that the license is available only to entities regulated by the FCC). *But see SBN*, 940 F.2d at 1471, *superseded by regulation, as stated in Satellite Broad. & Commc’ns Ass’n*

Second Circuit acknowledged in *ivi* that the definition of “cable system” in § 111 does not foreclose a reading that would cover a service that retransmits signals over the Internet.<sup>58</sup>

In spite of the leeway left for new technology in the statutory text, the Copyright Office has chosen to interpret § 111 to categorically exclude Internet services, no matter the lengths to which those services go to prevent piracy and to limit the geographic reach of their retransmissions.<sup>59</sup> In 2000, implicitly conceding that the definition of “cable system” in the statute *could* be read to include Internet retransmitters, the Register of Copyrights pushed for an amendment to “clarify” that the § 111 statutory license did not apply to broadcast retransmissions over the Internet.<sup>60</sup> The amendment, which was included in legislation to reauthorize the statutory license for satellite carriers in § 119, was removed from the bill before it passed.<sup>61</sup> Congress thereby left ajar a door that the Copyright Office wanted to see definitively closed.

The reasons for the Copyright Office’s position on Internet retransmissions are intimately aligned with the technical concerns and financial interests of copyright owners. One impetus for the failed amendment was the Office’s perception—post-Napster—that the Internet is just not a safe place for copyrighted content.<sup>62</sup> The overarching motivation, however, was the Office’s long-held institutional belief, approaching an article of faith, that “the [Copyright Act] should be interpreted in a way that best compensates copyright owners.”<sup>63</sup> In keeping with this revenue-maximization

*of Am.*, 17 F.3d at 348 (interpreting “permissible” under FCC regulations to mean simply that “no rule or regulation forbade it”).

58. See *ivi II*, 691 F.3d at 280.

59. See *ivi I*, 765 F. Supp. 2d at 604 (“It is the unwavering opinion of the Copyright Office that a distributor of broadcast programming over the Internet does not qualify for a compulsory license as a cable system under Section 111.”).

60. *Id.* at 610 (internal quotation marks omitted).

61. *Id.*; see also *ivi II*, 691 F.3d at 282 n.7 (stating that the amendment was removed from the legislation “[f]or indiscernible reasons”).

62. See *ivi I*, 765 F. Supp. 2d at 611 (“The Office’s principal concern was the perceived lack of ability to control the geographic scope of Internet retransmissions[, which] raise[s] the possibility of piracy . . . .”); U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 181 (2008) [hereinafter SHVERA REPORT], available at <http://copyright.gov/reports/section109-final-report.pdf> (citing “serious questions about signal security” as a reason for excluding Internet retransmissions from the scope of § 111).

63. SHVERA REPORT, *supra* note 62, at 109; see also *ivi I*, 765 F. Supp. 2d at 612 (stating the Copyright Office’s position that expanding the statutory license to

principle, the Office has called for the outright elimination of the § 111 and § 119 statutory licenses, arguing that the transaction costs associated with clearing copyrights are not unduly burdensome and can be minimized through privately ordered solutions.<sup>64</sup> It is thus not surprising that the Office, whenever it has been called upon to do so, has construed the scope of § 111 in a vanishingly narrow way.<sup>65</sup>

As the governmental entity charged with administering statutory licenses, the Copyright Office has enjoyed considerable judicial deference with respect to its interpretation of § 111—perhaps more than it deserves.<sup>66</sup> It has always been consistent in its position that Internet services retransmitting over-the-air broadcast signals fall outside the definition of “cable system,” but it has been less than consistent in its explanation for why that is so. As a general rule, it has said, “new systems” should be eligible for the § 111 license if they are “substantially similar to those systems that already use Section 111.”<sup>67</sup> What, then, is substantial similarity to existing cable systems? *ivi* explains, at least, what it is *not*. Relying heavily on documents from the Copyright Office, the district court concluded that *ivi*’s system was “vastly different” from existing cable systems for two reasons: it did not limit its retransmissions to local markets, and it “refuse[d] to comply with the rules and regulations of the FCC.”<sup>68</sup> One might infer from *ivi* that a new system *would* be substantially similar to cable if it were to limit its retransmissions to local markets and comply with FCC regulations for cable systems

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include Internet retransmitters would “wrest control away from program producers” and “leav[e] content owners with relatively little bargaining power in the distribution of broadcast programming”).

64. See SHVERA REPORT, *supra* note 62, at 70 (“It is now time to phase out Section 111 and Section 119 so that copyright owners can negotiate market rates for the carriage of programming retransmitted by MVPDs.”).

65. See Paul Glist, *Cable Copyright: The Role of the Copyright Office*, 35 EMORY L.J. 621, 628, 636 (1986) (arguing that the Office willfully construes § 111 narrowly and that it has frustrated reasonable use of the compulsory license by cable operators).

66. See *ivi II*, 691 F.3d at 279 (applying *Chevron* deference to the Copyright Office’s decision about eligibility for the § 111 license). *But see* *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 490 (3d Cir. 2003) (declining to decide whether *Chevron* or *Skidmore* deference should apply to the Copyright Office’s interpretation of the § 114 statutory license); *Cablevision*, 536 F.3d 121, 129 (2d Cir. 2008) (applying only *Skidmore* deference to a Copyright Office report on the Digital Millennium Copyright Act).

67. See SHVERA REPORT, *supra* note 62, at 181.

68. *ivi I*, 765 F. Supp. 2d at 604.

under the Communications Act.<sup>69</sup> As it turns out, however, those are not sufficient conditions for eligibility in the eyes of the Copyright Office.

Years before *ivi* was litigated, the Copyright Office had already decided in the case of Capitol Broadcasting Company (CBC) that not even secure, localized signal retransmission and full compliance with FCC rules governing cable systems could bring an Internet service within the scope of § 111.<sup>70</sup> CBC, aware of the Office's concerns about signal security and localization, had designed a three-tiered security system to ensure that the signals it retransmitted over the Internet would not travel beyond the local markets for which they were intended.<sup>71</sup> The bespoke system, CBC explained in comments to the Copyright Office in 2007, was "the functional equivalent of in-market 'intranet' security arrangements widely used to restrict access to private, internal Internet communications."<sup>72</sup> The measures CBC proposed to implement were, in fact, *more* secure than those then in use by cable and satellite retransmitters.<sup>73</sup> The Copyright Office conceded that CBC's system was "tightly secured and walled off from the open Internet," but that didn't matter: "Massive signal security," the Office wrote in a report to Congress, "does not immunize the system from the potential pitfalls of a distribution model that essentially relies on the Internet. Once a secure system is 'cracked,' content leakage will ensue and massive unauthorized redistribution will occur."<sup>74</sup>

For an Internet service aspiring to a § 111 license, the *de facto* position of the Copyright Office is that nothing less than perfect security will do when it comes to signal localization; however, perfect security is impossible in any system, whether the

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69. See *ivi II*, 691 F.3d at 284 (summarizing the Copyright Office's position that "the compulsory license applies only to localized retransmission services regulated as cable systems by the FCC" (internal quotation marks omitted)).

70. See SHVERA REPORT, *supra* note 62, at 194 ("[T]he Office does not recommend expanding the existing licenses to encompass CBC's system at this time.").

71. See CAPITOL BROADCAST CO., INC., COMMENTS OF CAPITOL BROADCASTING COMPANY, INCORPORATED 5-10 (2007), available at <http://www.copyright.gov/docs/section109/comments/capitol-broadcasting.pdf> (explaining, in detail, the technical elements of CBC's three-layer security system, which consisted of (1) geocoding and credit card validation; (2) continuous location verification using a patent-pending USB antenna to receive local FM radio signals; and (3) signal-encryption and digital-rights-management software).

72. *Id.* at 5.

73. *Id.*

74. See SHVERA REPORT, *supra* note 62, at 193.

retransmitted content is delivered via the Internet or coaxial cable. Relying primarily on the security rationale, the Copyright Office interpreted § 111 narrowly in CBC's case.<sup>75</sup> In doing so, it furthered the policy of revenue maximization for copyright owners and left a new system that was, to use the district court's word, "meticulously" designed for compliance with § 111 to fend for itself on the retransmission market.<sup>76</sup> The district court in *ivi*, distinguishing *ivi*'s service from CBC's, expressly declined to say whether it found the Copyright Office's rationale for rejecting CBC's service "underwhelming."<sup>77</sup> The suggestion, of course, is that the court *did* find the Office's rationale underwhelming. But *ivi* was not CBC, and it was *ivi*'s system, with all its warts, that was then before the court.<sup>78</sup>

In light of the Copyright Office's position on CBC, there was really no chance that it would approve Aereo's application for a § 111 license. Aereo's only hope lay in the district court, which could justifiably have decided the case differently on remand. If "substantial similarity" to existing systems is the key to § 111 eligibility, then there was ample basis in the Supreme Court's opinion for a holding that Aereo should be considered a "cable system." The Supreme Court's holding was predicated almost entirely on the proposition that Aereo's system was indistinguishable in every way that matters from traditional cable systems.<sup>79</sup> To the extent that Aereo's architecture differed from that of traditional cable systems, the Supreme Court held that "those differences [were] not adequate to place Aereo's activities outside the scope of the Act."<sup>80</sup> The Act, of course, includes § 111 as surely as it includes § 106(4), and the legislative history of the Transmit Clause establishes an inextricable and reciprocal policy link between them: with liability

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75. *Id.* at 193-94 ("[A] copyright owner should be allowed to assess the risks of putting its content on the Internet and negotiate private licenses . . .").

76. *ivi I*, 765 F. Supp. 2d 594, 613 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275 (2d Cir. 2012) ("CBC offered a meticulous explanation of its business model.").

77. *Id.* at 613 n.26.

78. *See id.* (comparing *ivi* with CBC and stating that "even if one were to object to the Office's conclusion in regards to CBC, in no way does it follow that *ivi*'s activity is permissible").

79. *See Aereo III*, 134 S. Ct. 2498, 2506 (2014) ("Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach."); *id.* at 2507 (stating that Aereo's system bears such an "overwhelming likeness" to cable systems that it is "for all practical purposes a traditional cable system"); *id.* at 2511 (concluding that Aereo's activities are "highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*").

80. *Id.* at 2511.

comes access to an exception. Moreover, *ivi*, which the Copyright Office invoked as the basis for denying Aereo's application for a § 111 license, is distinguishable on its facts. *Ivi* was held to be "vastly different" from existing cable systems.<sup>81</sup> It served customers nationwide and refused to comply with requirements for cable systems in the Communications Act and its implementing regulations.<sup>82</sup> The district court on remand in *Aereo* nevertheless concluded that *ivi* was "binding precedent,"<sup>83</sup> citing (among other factors) the Office's familiar concerns about signal localization and security on the Internet—concerns that ring somewhat hollow in light of the "meticulous" technical measures rejected by the Copyright Office in *CBC*'s case.<sup>84</sup>

Fifteen years ago, the Copyright Office failed in its effort to have Congress amend the Copyright Act to expressly exclude Internet retransmission services from the scope of § 111. Subsequent events have shown, however, that the amendment was not needed to accomplish that exclusionary goal. Although Congress has never said no to the compulsory license for Internet retransmission, the Copyright Office has never said anything else.<sup>85</sup> Putting aside the pro-consumer, pro-innovation policy rationale for creating statutory licenses, the Office has shown considerable determination over the long haul to keep such exceptions inelastic in the face of new technologies.<sup>86</sup> *Aereo* is just the latest casualty.

#### IV. REWORKING THE LAW?

It is too late for *Aereo* to benefit from any change in law that may come on the heels of its judicial defeats.<sup>87</sup> But changes are

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81. *ivi I*, 765 F. Supp. 2d at 604.

82. *Id.* at 613 n.26.

83. *Aereo IV*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*5 (S.D.N.Y. Oct. 23, 2014).

84. *ivi I*, 765 F. Supp. 2d at 613.

85. It has said, however, that a closed, proprietary system that uses the Internet Protocol (IP) to retransmit broadcast signals is within the scope of the § 111 license, even though the system is not governed by the Communications Act and is "quite different" from a traditional cable system. *See* SHVERA REPORT, *supra* note 62, at v, 194, 199 (describing AT&T's U-verse service). Go figure.

86. For example, the Office was deeply critical of the Eleventh Circuit's holding in *SBN* that satellite retransmitters were "cable systems" within the meaning of § 111. *See ivi I*, 765 F. Supp. 2d at 607.

87. *See* Greg Kumparak, *Aereo to Be Pieced Out and Auctioned Off to the Highest Bidder*, TECHCRUNCH (Dec. 27, 2014), <http://techcrunch.com/2014/12/27/>



possible, if only in theory. The courts have not seen fit to disturb the Copyright Office's position on the narrow scope of the § 111 license, but Congress could either amend § 111 to expressly include Internet retransmissions, as it did in 1994 for microwave retransmissions, or it could create a completely new statutory license, as it did in 1988 for satellite retransmissions.<sup>88</sup> Either course, however, would simply follow the existing pattern of technology-specific policy making on the exceptions side of the copyright balance. Neither would fulfill the more far-sighted goal of making copyright exceptions sufficiently elastic to support and incentivize the development of new technologies for disseminating copyrighted works.<sup>89</sup>

The FCC could also intervene to address the communications regulatory obstacles confronting services like Aereo. Following Aereo's defeat in the Supreme Court, Chairman Tom Wheeler proposed to change the definition of multichannel video programming distributor (MVPD) to include services like Aereo that retransmit signals over the Internet.<sup>90</sup> Such a change on the communications-law side would guarantee retransmission consent and program access with respect to the signals of local broadcasters.<sup>91</sup> It would not, however, bring Internet retransmission services within the scope of the § 111 license, leaving them to their

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aereo-to-be-pieced-out-and-auctioned-off-to-the-highest-bidder/ (reporting on the bankruptcy liquidation of Aereo's assets).

88. See Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, § 3, 108 Stat. 3477, 3480 (amending "the definition of 'cable system' by inserting 'microwave,' after 'wires, cables,,'""); Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (adding § 119).

89. While public dissemination of copyrighted works is no longer a requirement for copyright protection, it has always been and remains an important goal of the copyright system. See, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT* 175 (2001) ("Copyright makes sense as an incentive if its purpose is to encourage the dissemination of works, in order to promote public access to them.").

90. See Tom Wheeler, *Tech Transitions, Video, and the Future*, OFFICIAL FCC BLOG (Oct. 28, 2014, 2:48 PM), <http://www.fcc.gov/blog/tech-transitions-video-and-future>; see also Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2078-80 (Jan. 15, 2015) (to be codified at 47 C.F.R. pt. 76).

91. See *Draft Rulemaking Notice on Redefining MVPD Won't Revolutionize OTT Access to Content, Industry Officials Say*, WARREN'S CONSUMER ELEC. DAILY, Oct. 30, 2014 (reporting that the proposed rules would enable Internet services to take advantage of program access and retransmission consent rights vis-à-vis local broadcasters).

own devices to navigate the market for the copyrighted content carried on retransmitted broadcast signals.<sup>92</sup>

Absent some legislative intervention to remove the copyright obstacles confronting services like Aereo, those services will be forced to compete for content with incumbent service providers—i.e., cable and satellite—that derive significant competitive advantage from the narrow copyright exceptions they managed to secure when *they* were the new kids in town. Under the post-*Aereo* copyright regime, putting aside communications-law considerations, Internet retransmitters are required to compensate copyright owners at whatever rate the market will bear, assuming copyright owners choose to license their content to such providers at all. Cable and satellite systems, by contrast, have guaranteed access to the same content at statutory licensing rates. The law’s differential treatment of newcomers and incumbents in the retransmission market squeezes innovation that would increase consumer choice and public access to copyrighted programming.

#### CONCLUSION

Thinking inside the box of the compulsory license was no solution for Aereo in a copyright system that tempers elastic, technology-neutral rights with inelastic, technology-specific exceptions.<sup>93</sup> If there is a policy moral to Aereo’s story, it is that the Copyright Act needs to strike a better balance between rights and exceptions, so that new technologies for disseminating content can bring rewards not only for copyright owners but also for technology innovators and the public. Given the rapid growth in “zero-TV”<sup>94</sup>

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92. See *id.* (asserting that changes to the Copyright Act would still be needed to provide compulsory access to underlying copyrighted programs).

93. Fair use is the notable exception to this rule. See Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 382, 384 (2005) (arguing that the fair use doctrine gives courts flexibility and space to make difficult policy decisions about copyright scope); see also Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 140 (1999) (describing fair use, with its unclear boundaries, as a “muddy entitlement[]”).

94. A “zero-TV” household is defined by Nielsen as one in which residents forego traditional cable TV and satellite subscriptions in favor of streaming video online, via mobile devices, including laptops, tablets, and smartphones. See AJ Marechal, *Nielsen Offers Focus on ‘Zero-TV’ Homes*, VARIETY (Mar. 11, 2013, 6:10 PM), <http://variety.com/2013/digital/news/nielsen-offers-focus-on-zero-tv-homes-1200006928/> (reporting that the number of “zero-TV” homes grew from around two million in 2007 to over five million in 2013).

households, it makes no sense to have statutory copyright licenses and the telecommunications regulations they reference tied to outmoded content-delivery technologies. The Second Circuit said in 1982, and it remains true today, that “[t]he public interest . . . lies in [delivering] a continu[ous] supply of [diverse] programming to viewers.”<sup>95</sup> *How* that programming is delivered—by coaxial cable or satellite or the Internet—shouldn’t matter under copyright law. Copyrights are technology neutral, and so should copyright exceptions be. Absent greater symmetry between rights and exceptions in the legal architecture of copyright, the technologists who design cheaper, faster, and more user-friendly ways of delivering programming to viewers will be boxed out, just like Aereo was. Under the current regime, it is the public that ultimately pays the price of the law’s failure to accommodate innovation.

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95. *E. Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 132 (2d Cir. 1982).

