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# **AEREO, SPORTS LEAGUES' FAVORITE COOKIE?: AN ANALYSIS OF ITS IMPACT ON PROFESSIONAL SPORTS LEAGUES' EXCLUSIVE RIGHTS, TECHNOLOGICAL INNOVATION, AND CONSUMER WELFARE**

CANDY P. REYES\*

## **I. INTRODUCTION**

The revenue for television networks from advertising in 2015 was \$71.1 billion, and is estimated to rise to \$81 billion by 2019.<sup>1</sup> It is also estimated that retransmission fees will provide the major broadcast networks almost \$3 billion in 2015 alone.<sup>2</sup> Retransmission fees are fees distributors (i.e., cable and satellite companies) pay broadcasters to carry their signals.<sup>3</sup> With astronomical figures associated with advertising and retransmission fees, the general business model of major broadcast networks is simple: sell advertisements and retransmission fees.<sup>4</sup> With this revenue, the major broadcast networks produce programs and

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\*J.D. Candidate, 2016, at Marquette University Law School. She would like to dedicate this Comment to her parents for their unconditional love and support in all she attempts, and to Watkins S. Williams and Medusa L. Williams for their patience and understanding during her law school journey. Candy would like to extend deep gratitude to Professor Paul Anderson for his insights during the writing process and continued guidance during her studies at Marquette, to Professor Matt Mitten for his thoughtful suggestions, and to Professor Kali Murray for fostering her interest in intellectual property. Lastly, she would like to thank the staff and editorial board of the *Marquette Sports Law Review* for their meticulous editing. Her Comment was a co-winner of the 2015 Anne Wall Brand Protection Award, given annually to the Marquette University Law School student who has written the best article on "sports brand protection."

1. *TV Advertising Revenue in the United States from 2015 to 2019*, STATISTA, <http://www.statista.com/statistics/259974/tv-advertising-revenue-in-the-us> (last visited Dec. 14, 2015).

2. *Id.*

3. Joe Flint, *Broadcast Networks Will Rake in Retransmission Fees, Report Says*, L.A. TIMES (Nov. 1, 2011, 12:24 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/11/broadcast-networks-retransmission-consent-fees.html>.

4. Jacob Marshall, Note, *Trading Rabbit Ears for Wi-Fi: Aereo, the Public Performance Right, and How Broadcasters Want to Control the Business of Internet TV*, 16 VAND. J. ENT. & TECH. L. 909,

purchase content, such as the ever-valuable live-sports broadcasting rights.<sup>5</sup> For example, in 2011, the National Football League (NFL) renewed its broadcasting rights deals with three major broadcast networks for a record-setting \$28 billion in fees over nine years.<sup>6</sup>

As the advertising and retransmission fee revenues of major broadcast networks increase, so too will broadcasting rights deals with professional sports leagues, which in turn will trickle down to consumers in the form of increased cable and satellite service costs. More and more consumers will then turn to the Internet as a less expensive alternative to cable or satellite service—unless an engineer develops a technology that enables viewers to watch and record live television on any device for a low cost, and perhaps names it Aereo.

Unfortunately, the Supreme Court recently concluded Aereo's technology violates the Transmit Clause of the Copyright Act of 1976 in *Aereo III*.<sup>7</sup> While it was anticipated that the Supreme Court ruling in *Aereo III* would better define the Transmit Clause, *Aereo III* only complicated matters related to "public performance" for future courts by limiting the scope of the Transmit Clause.<sup>8</sup> Regardless, technological advancements and silence from Congress should preclude courts from limiting the Copyright Act to hold Aereo-like services as copyright infringers. Given the increasing value of live-sports broadcasting rights, and the rapid rate at which technology advances, Congress, courts, major broadcast networks, and professional sports leagues must play with and not against technology.

This Comment examines the implications of the Supreme Court ruling in *Aereo III* on professional sports. Part II explains the technology behind Aereo. Part III discusses the history of United States copyright law and provides an overview of portions of the Copyright Act of 1976 relevant to Aereo's analysis. Part IV first provides an overview of the history that led to the Supreme Court decision and then discusses the Supreme Court ruling in *Aereo III*. Part V discusses the implications of *Aereo III* on professional sports. Finally, Part VI makes a recommendation to Congress, the major broadcast networks, and professional sports leagues.

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919–20 (2014).

5. *Id.* at 915–16.

6. Anthony Crupi, *NFL Hammers out Nine-Year Rights Renewals with NBC, CBS, Fox*, ADWEEK (Dec. 14, 2011), <http://www.adweek.com/news/television/nfl-hammers-out-nine-year-rights-renewals-nbc-cbs-fox-137128>.

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

8. Andrew Fraser, Note, *Television A La Carte: American Broadcasting Cos. v. Aereo and How Federal Courts' Interpretations of Copyright Law Are Impacting the Future of the Medium*, 20 B.U. J. SCI. & TECH. L. 132, 158 (2014).

## II. WHAT IS AEREO, AND HOW DOES IT WORK?

From 2012 to 2014, a large warehouse in Brooklyn, New York, housed thousands of antenna boards, each board containing approximately eighty individual antennas capable of receiving and transmitting broadcast television channels.<sup>9</sup> Though no longer in existence due to *Aereo III*,<sup>10</sup> the technology housed in the Brooklyn facility was known as Aereo.<sup>11</sup> In a letter to former Aereo consumers, Chaitanya “Chet” Kanojia, founder and CEO of Aereo, Inc., stated that his Aereo technology was “the first cloud-based, individual antenna and DVR that enabled [viewers] to record and watch live television on the device of [their] choice, all via the Internet.”<sup>12</sup>

Essentially, the Aereo system functioned as a standard television antenna, digital video recorder (DVR), and television streaming media device;<sup>13</sup> however, the major broadcast networks alleged that this system violated copyright law.<sup>14</sup> Specifically, the antennas received local, over-the-air broadcast channels, such as American Broadcasting Company (ABC), Columbia Broadcasting System (CBS), National Broadcasting Company (NBC), and Fox Broadcasting Company (FOX), which were then stored on Aereo’s cloud-based servers rather than on a device like a cable DVR service.<sup>15</sup> Subscribers were able to access the programs on the Internet through any Internet-capable device.<sup>16</sup> Through their devices, subscribers were able to flip through channels in a list-based fashion much like cable television, and less like the grid-based system on online streaming providers like Netflix.<sup>17</sup> Moreover, subscribers were able to record programs even while watching another channel, as well as fast-forward up to thirty seconds for commercials.<sup>18</sup>

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9. Tim Warnock, *What's in the Middle of an Aereo? Technology Versus the Copyright Act*, TENN. B. J., Sept. 2014, at 22, 23 (quoting WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676, 682 (2d Cir. 2013)).

10. *WP Aereo*, AEREO, <http://www.aereo.com/> (last visited Dec. 14, 2015).

11. Erin Geiger Smith & Ronald Grover, *Appeals Court Denies Broadcaster Request to Shut Aereo*, REUTERS (Apr. 1, 2013), <http://www.reuters.com/article/2013/04/01/us-aereo-court-idUSBRE9300B020130401>.

12. Jay Yarow, *After Raising \$100 Million to Blow up the TV Industry, Aereo Files for Bankruptcy*, BUS. INSIDER (Nov. 21, 2014), <http://www.businessinsider.com/aereo-files-for-bankruptcy-2014-11>.

13. Warnock, *supra* note 9, at 23.

14. Chloe Albanesius & Jamie Lendino, *Aereo: Everything You Need to Know*, PC MAG. (Apr. 22, 2014), <http://www.pcmag.com/article2/0,2817,2417555,00.asp>.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

## III. COPYRIGHT LAW REMAINS FAR BEHIND ADVANCING TECHNOLOGY

The Supreme Court has acknowledged the challenge advancing technology has presented, and continues to present, to past and current Copyright Acts.<sup>19</sup> Only Congress, however, is granted the power to amend the Copyright Act.<sup>20</sup> Unfortunately, in the race between Congress and technology, technology would be Usain Bolt—the fastest person in the world.<sup>21</sup> Historically, technology has consistently outdistanced the ability of Congress to respond to such technological advancements.<sup>22</sup> In recent years, advancements in Internet and technology have once again lapped Congress, leaving the scope of copyright law open for judicial interpretation without legislative guidance.<sup>23</sup> As detailed as Congress believes the Copyright Act to be, recent technology, such as Aereo, has proven that the Copyright Act remains far behind.

*A. Brief Historical Overview of Copyright Law*

At an early point in America's history, the Founders recognized the importance of legally protecting intellectual efforts. To foster innovation among inventors, the Copyright Clause of the United States Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>24</sup>

The first copyright law was enacted in 1790 as the Copyright Act.<sup>25</sup> The purpose of the current Copyright Act, last amended in 1976, is to protect "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>26</sup> In 1976, Congress found it imperative to answer the call of technological advancements, particularly in regards to communications media (e.g., motion

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19. See Warnock, *supra* note 9, at 22.

20. *Id.* at 23.

21. *Biography*, USAIN BOLT, <http://usainbolt.com/bio/> (last visited Dec. 14, 2015).

22. Warnock, *supra* note 9, at 22.

23. Daniela Cassorla, Note, *Copyright Cowboys: Bringing Online Television to the Digital Frontier*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 783, 808 (2014).

24. U.S. CONST. art. I, § 8, cl. 8.

25. U.S. COPYRIGHT OFFICE, BULLETIN NO. 3, COPYRIGHT ENACTMENTS 22 (1973), [http://copyright.gov/history/Copyright\\_Enactments\\_1783-1973.pdf](http://copyright.gov/history/Copyright_Enactments_1783-1973.pdf).

26. Copyright Act of 1976, 17 U.S.C. § 102(a) (2013).

pictures, sound recordings, etc.).<sup>27</sup>

Despite Congress's efforts to narrowly define public performance within the Copyright Act, technological advancements have historically led to judicial struggles with public performance rights. Much like in *Aereo*, broadcasters alleged that the then-novel community access television (CATV) technology in the 1950s violated copyright law.<sup>28</sup> The Supreme Court, however, rejected the broadcasters' efforts to hold CATV technology liable for the infringement of their public performance rights in two seminal cases: *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*<sup>29</sup>

In *Fortnightly*, the plaintiffs brought a copyright infringement action against the defendants for using CATV technology to receive, reproduce, and transmit television programs licensed by the plaintiffs to paying subscribers.<sup>30</sup> Recognizing that the Copyright Act of 1909 was enacted decades before technological innovation,<sup>31</sup> the Court held that the reception and distribution of television broadcasts by the CATV systems did not constitute a "performance" within the meaning of the Copyright Act, and thus did not amount to copyright infringement.<sup>32</sup> The Court also noted that the function of a CATV system was not different from the then-current technology.<sup>33</sup> The Court creatively utilized the following analogy to illustrate its reasoning: "If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set."<sup>34</sup>

In *Teleprompter*, creators and producers of copyrighted televised programs alleged "the defendants had infringed their copyrights by intercepting broadcast transmissions of copyrighted material and rechanneling these programs through various CATV systems to paying subscribers."<sup>35</sup> The Court held that active

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27. *United States Copyright Law*, HIST. COPYRIGHT, [http://www.historyofcopyright.org/pb/wp\\_fe548a29/wp\\_fe548a29.html](http://www.historyofcopyright.org/pb/wp_fe548a29/wp_fe548a29.html) (last visited Dec. 14, 2015).

28. *See id.*

29. *See* Daniel Brenner, "Gently Down the Stream": When Is an Online Performance Public Under Copyright?, 28 BERKELEY TECH. L.J. 1167, 1169 (2013) (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974)).

30. *Fortnightly Corp.*, 392 U.S. at 393–94.

31. *Id.* at 395–96.

32. *Id.* at 402.

33. *Id.* at 400.

34. *Id.*

35. *Teleprompter Corp.*, 415 U.S. at 396–97.

importation of a distant signal did not violate copyright law because it simply extended the market.<sup>36</sup> Dissatisfied with the Supreme Court decisions in *Fortnightly* and *Teleprompter*, Congress amended the Copyright Act in 1976 to include the Transmit Clause in hopes of addressing advancements in technology.<sup>37</sup>

*B. An Overview of Relevant Portions of the Copyright Act of 1976*

The Copyright Act of 1976 (Copyright Act) grants exclusive rights to copyright owners for life plus fifty years for new works published after January 1, 1978.<sup>38</sup> Under section 106(4), copyright owners are granted the exclusive right to perform or authorize the performance of the following copyrighted works

publicly: “Literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.”<sup>39</sup> Important to the public performance of copyrighted works are (1) the Public Place Clause and (2) the Transmit Clause.<sup>40</sup>

The Public Place Clause defines both “publicly” and “perform.”<sup>41</sup> According to section 101, perform means “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”<sup>42</sup> Moreover, public is defined as follows:

(1) to perform or display 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 or otherwise communicate a performance or display 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 or display receive it in the same place or in

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36. *Id.* at 410–12.

37. Thomas M. Cramer, Note, *The Copyright Act and the Frontier of “Television”: What to Do About Aereo*, 67 VAND. L. REV. EN BANC 97, 103–04 (2014).

38. *United States Copyright Law*, *supra* note 27.

39. Copyright Act of 1976, 17 U.S.C. § 106(4) (2013).

40. *See* Cassorla, *supra* note 23, at 789.

41. 17 U.S.C. § 101.

42. *Id.*

separate places and at the same time or at different times.<sup>43</sup>

The second clause of the definition of public is known as the Transmit Clause.<sup>44</sup> Furthermore, the definition of “transmit” is important to the definition of public in regards to public performance. Section 101 defines transmit as a communication “by any device or process whereby images or sounds are received beyond the place from which they are sent.”<sup>45</sup>

### C. The Two Types of Copyright Infringement

While copyright owners are granted exclusive rights, their rights are not unlimited as some works are in the public domain.<sup>46</sup> Copyrighted works in the public domain may be reproduced for a “fair use” without the consent of the owner.<sup>47</sup> Under section 107, the fair use of copyrighted work is not an infringement of copyright for the following purposes: criticism, comment, news reporting, teaching, scholarship, or research.<sup>48</sup> Conversely, the exclusive rights set forth in section 106 of the Copyright Act protect copyrighted works that are not in the public domain.<sup>49</sup> To protect these exclusive rights, section 501 states, “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author.”<sup>50</sup>

Under copyright law, there are two basic types of copyright infringement: direct and secondary.<sup>51</sup> Direct infringement occurs when an actor directly violates an exclusive right of a copyright owner.<sup>52</sup> A direct infringement claim requires the plaintiff to show (1) he or she is the owner of the allegedly infringed copyright material, and (2) his or her exclusive rights in the copyright were violated.<sup>53</sup> Secondary infringement may be implicated under contributory

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43. *Id.*

44. Brad M. McBride, *Omission by “Particular Transmission”: Preventing the Circumvention of the Transmit Clause*, 18 UCLA J. L. & TECH. 1, 10 (2014).

45. 17 U.S.C. § 101.

46. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

47. *Id.*

48. 17 U.S.C. § 107.

49. *See* 17 U.S.C. § 106.

50. 17 U.S.C. § 501(a).

51. *See generally Sony Corp.*, 464 U.S. at 419–20.

52. *See generally Sony Corp.*, 464 U.S. 417.

53. Stephanie N. Horner, Comment, *DMCA: Professional Sports Leagues’ Answer to Protecting Their Broadcasting Rights Against Illegal Streaming*, 24 MARQ. SPORTS L. REV. 435, 446 (2014).



infringement or vicarious infringement.<sup>54</sup> Generally, however, secondary infringement occurs when the activities of a direct infringer are aided by secondary acts of another.<sup>55</sup> For instance, if a person makes a photocopy of a copyrighted manuscript using a copy machine, the person may be directly infringing the exclusive rights of the copyright owner, whereas the copy machine manufacturer may be secondarily infringing the exclusive rights of the copyright owner.<sup>56</sup>

#### IV. ANALYSIS

On June 25, 2014, the Supreme Court ruled that Aereo infringed the exclusive rights of major television networks by streaming their respective content to paying subscribers without permission.<sup>57</sup> Past judicial attempts at defining public performance rights provided two approaches that guided the courts in *Aereo*.<sup>58</sup> The first approach, adopted by the courts in *Aereo I*, and *Aereo II*, scrutinizes the totality of the circumstances of the public performance and emphasizes the overall outcome.<sup>59</sup> The second approach, adopted by the Supreme Court in *Aereo III*, focuses on the retransmission of the televised programs to determine whether the retransmission is a public performance.<sup>60</sup>

As it is currently written, the Copyright Act of 1976 poorly defines public performance. As a result, courts have little legislative guidance when determining whether an action constitutes a public performance, as exemplified in *Aereo III*. This Section provides an analysis of the significant events that led up to the Supreme Court decision in *Aereo III*.

##### *A. The Events That Led up to the Supreme Court*

Much of the reasoning from *Aereo I* and *Aereo II* relied largely on *Cablevision*, an earlier case regarding a Remote Storage Digital Video Recorder

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54. *Id.* at 452.

55. *Am. Broad. Cos., Inc. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting).

56. *Id.* at 2513.

57. Richard Wolf, *Supreme Court Rules Against Aereo in Internet TV Fight*, USA TODAY (June 25, 2014), <http://www.usatoday.com/story/news/nation/2014/06/25/supreme-court-tv-internet-aereo-copyright/10022797>.

58. Cramer, *supra* note 37, at 112.

59. Cassorla, *supra* note 23, at 802; *see Am. Broad. Cos. v. AEREO, Inc. (Aereo I)*, F.Supp. 2d 373 (S.D.N.Y. 2012); *see also WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676 (2d Cir. 2013).

60. *See id.*

(RS-DVR) system.<sup>61</sup> For this reason, this subsection provides an overview of *Cablevision*, then discusses the decisions from *Aereo I* and *Aereo II*.

### 1. The Second Circuit Court of Appeals' Ruling in *Cablevision*

In *Cablevision*, the Second Circuit had to determine whether Cablevision's RS-DVR system constituted a public performance under the Transmit Clause.<sup>62</sup> Essentially, the RS-DVR technology recorded the plaintiffs' copyrighted programming and stored the recordings on a server.<sup>63</sup> While on the server, the recordings were stored in a buffer until a customer tried to record the initial recorded programming.<sup>64</sup> Once the customer inputted his or her request to record the programming, the initial recording moved from one buffer to another.<sup>65</sup> The recording then moved onto a hard disk allocated to the customer and was available to the customer on his or her home cable RS-DVR system.<sup>66</sup>

The plaintiffs challenged Cablevision's RS-DVR system on the grounds that the technology created an infringing public performance.<sup>67</sup> The Second Circuit held that Cablevision's RS-DVR technology did not infringe the plaintiffs' public performance rights.<sup>68</sup> The court reasoned that because each RS-DVR transmission of the recorded content is made to a single customer using a single unique copy produced by that customer, the transmission was not a public performance.<sup>69</sup> The fact that thousands or millions of customers would view a particular program was not important to the Second Circuit.<sup>70</sup> Instead, the court focused solely on who would receive the single transmission of the recorded content and whether a unique copy generated the single transmission.<sup>71</sup>

### 2. *Aereo I*

ABC and other major broadcasters brought a class action suit against Aereo

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

62. John M. Gatti & Crystal Y. Jonelis, *Second Circuit Deals Blow to Rights of Broadcasters Under the Copyright Act*, 25 NO. 7 INTELL. PROP. & TECH. L. J. 16, 17 (2013).

63. Krista Consiglio, Note, *Aereo and FilmOn: Technology's Latest Copyright War and Why Aereo Should Survive*, 71 WASH. & LEE L. REV. 2557, 2579 (2014).

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. *Cablevision*, 536 F.3d 121, 140 (2d Cir. 2008).

69. *Id.* at 139.

70. Gatti & Jonelis, *supra* note 62.

71. *Id.*

on March 1, 2012.<sup>72</sup> The plaintiffs moved for a preliminary injunction on the theory that Aereo's technology publicly performed the plaintiffs' copyrighted works under the Transmit Clause, thereby infringing the plaintiffs' exclusive rights under section 106 of the Copyright Act.<sup>73</sup> The court determined that Aereo's technology actually involved individual antennas assigned to a single subscriber allowing the subscriber to receive broadcasts independently.<sup>74</sup>

The district court then found *Cablevision* controlling through its detailed analysis of the case.<sup>75</sup> The court first determined that Aereo's technology was materially identical to the RS-DVR technology in *Cablevision* in the following ways: (1) both technologies create a unique copy of a television program and save it to a unique location assigned only to that subscriber; (2) the transmission made by both technologies is from a unique copy; and (3) the transmission is made only to the subscriber who requests it.<sup>76</sup> Additionally, the court noted that the RS-DVR technology in *Cablevision* was more problematic than Aereo's technology because the RS-DVR technology in *Cablevision* created multiple copies through a single stream of data, whereas each copy by Aereo's technology was created from a separate stream of data, making it more individualized.<sup>77</sup>

Next, the court addressed the plaintiffs' attempt to distinguish *Cablevision*. Primarily, the plaintiffs argued that Aereo's technology was dissimilar to *Cablevision* because subscribers view the copies made by the RS-DVR technology at a later time (i.e., "time-shift"), whereas Aereo's technology allowed subscribers to watch the copies as they were being broadcast, and thus not time-shift.<sup>78</sup> The plaintiffs further argued Aereo's technology fell directly within the Transmit Clause, as Aereo was "engaged in a 'quintessential public performance' because it use[d] a device or process to communicate performances of [the plaintiffs'] copyrighted work to members of the public."<sup>79</sup>

The district court found the plaintiffs' arguments to be flawed for several reasons. First, the court stated the plaintiffs' attempt to apply significance to facts the *Cablevision* court did not rely on, namely the use of time-shifting, as

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72. Aereo I, 874 F. Supp. 2d 373, 376 (S.D. N.Y. 2012).

73. Consiglio, *supra* note 63, at 2581.

74. *Id.*

75. Aereo I, 874 F. Supp. 2d at 385.

76. *Id.* at 386.

77. *Id.* at 387.

78. *Id.* at 385.

79. *Id.* at 392.

material factors in determining a public performance was defective.<sup>80</sup> Second, the court found the plaintiffs' argument was inconsistent with the reasoning of *Cablevision* because, in both cases, the transmission of the television program was made from a unique copy that was previously created by a single subscriber and accessible only to that subscriber despite the subscriber watching the television program as it is broadcasted or after it is broadcasted.<sup>81</sup> Lastly, the court stated that if the plaintiffs' argument regarding the Transmit Clause was correct, the Second Circuit in *Cablevision* would have ruled otherwise.<sup>82</sup>

In the end, the district court ruled in favor of Aereo, reasoning that the plaintiffs failed to demonstrate a likelihood of success in establishing Aereo's technology constituted a public performance under the Transmit Clause.<sup>83</sup>

### 3. *Aereo II*

Shortly after the district court delivered its decision, the plaintiffs appealed the district court's denial of a preliminary injunction.<sup>84</sup> The Second Circuit's opinion consisted of an overview of relevant portions of the Copyright Act followed by an analysis of *Cablevision* as it applied to Aereo's technology.<sup>85</sup> According to the Second Circuit, *Cablevision* established the following four factors the court must consider in determining whether a service constitutes a public performance: (1) the potential audience of the individual transmission; (2) transmissions that are not capable of being received by the public (i.e., private transmissions) should not be aggregated (combined so it is viewed as one transmission); (3) an exception to the aforesaid is that private transmissions generated from the same copy of work should be aggregated; and (4) "any factor that limits the *potential* audience of a transmission is relevant' to the Transmit Clause analysis."<sup>86</sup>

Guided by these factors, the Second Circuit analyzed the technical aspects of Aereo's technology, concluding that Aereo's service did not constitute a public performance.<sup>87</sup> First, the Second Circuit found that, like *Cablevision*, the potential audience of an individual transmission was a single Aereo subscriber,

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80. *Id.* at 388.

81. *Id.* at 389.

82. *Id.* at 392.

83. *Id.* at 405.

84. *Aereo II*, 712 F.3d 676, 696 (2d Cir. 2013).

85. *Consiglio*, *supra* note 63, at 2583.

86. *Aereo II*, 712 F.3d at 689 (quoting *Cablevision*, 536 F.3d 121, 137 (2d Cir. 2008)).

87. *Id.* at 696.

and thus was not public within the meaning of the Copyright Act.<sup>88</sup> Next, the Second Circuit rejected the plaintiffs' argument that private transmissions should be aggregated to determine whether the transmissions are public performances. Instead, the Second Circuit reasoned, as it did in *Cablevision*, that it is unnecessary to aggregate the private transmissions because the "relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not . . . the underlying work or the particular performance of that work being transmitted."<sup>89</sup> In other words, the Transmit Clause focuses on the potential audience of the transmission and not the substance of the work being transmitted.

Moreover, the Second Circuit rejected the plaintiffs' third argument that because Aereo's transmissions were generated from the same copy, the transmissions should be aggregated.<sup>90</sup> According to the Second Circuit, this argument fails for two reasons.<sup>91</sup> First, an Aereo user has the volitional control over both the "program [the user] wishes a copy to be made of [as well as] when and how that copy is played."<sup>92</sup> Second, each copy of a program is associated to the user and is generated from a single antenna assigned to the user who requested the copy to be made.<sup>93</sup> Thus, the transmissions should not be aggregated since the transmissions were not generated from the same copy.<sup>94</sup>

Lastly, the Second Circuit found factors that limit the potential audience of a transmission from Aereo's technology relevant to the Transmit Clause analysis.<sup>95</sup> For instance, the Second Circuit emphasized that Aereo's technology, particularly the user-assigned antennas, limited the potential audience of a transmission to one Aereo customer, and thus did not create a public performance.<sup>96</sup> The Second Circuit further noted that Aereo, in fact, developed its technology to circumvent the Transmit Clause to avoid copyright liability.<sup>97</sup>

Judge Denny Chin dissented, strongly stating that Aereo should be

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88. *Id.* at 689–90.

89. *Id.* at 691.

90. *See id.* at 692.

91. *Id.*

92. *Id.*

93. *Id.* at 693.

94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.* at 694.

enjoined<sup>98</sup> because “Aereo’s ‘technology platform’ [was] . . . a sham.”<sup>99</sup> The dissent emphasized that *Cablevision* was distinguishable in that the cable company in *Cablevision* paid for a license to retransmit content to its subscribers, while Aereo had no such license.<sup>100</sup> Specifically, the dissent asserted that Cablevision subscribers “already had the ability to [watch] television programs in real-time through their *authorized* cable subscriptions, and the [RS-DVR] service . . . was a supplemental service.”<sup>101</sup> Conversely, Aereo’s technology had no authorization whatsoever.<sup>102</sup>

The dissent further contended that the majority decision disregarded the plain meaning of the Copyright Act, the Copyright Act’s legislative history, and past decisions of the court.<sup>103</sup> The dissent found that given the dictionary definition of public, “a transmission to anyone other than oneself or an intimate relation” is not private.<sup>104</sup> Under this definition, the dissent found Aereo’s transmission of television programs to be a public performance despite its use of a unique recorded copy that limits the potential audience to a single subscriber.<sup>105</sup>

Finally, the dissent expressed its concern with the majority’s disregard of earlier case law wherein the court recognized that the retransmission of copyrighted television programming through a live internet stream constituted a public performance,<sup>106</sup> particularly in *WPIX, Inc. v. ivi, Inc.*<sup>107</sup> Similar to Aereo, ivi’s service streamed live copyrighted content over the Internet to paying subscribers who were allowed to record, pause, fast-forward, and rewind the stream.<sup>108</sup> The plaintiffs in *WPIX* argued that ivi must follow Federal Communications Commission (FCC) regulations regarding cable broadcasts because it operated as a cable company.<sup>109</sup> Alternatively, ivi argued that its business model fell within the definition of a cable company entitled to a compulsory license to make secondary transmissions of copyrighted works under section 111 of the Copyright Act, but not the FCC’s definition regarding

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98. *Id.* at 705 (Chin, J., dissenting).

99. *Id.* at 697.

100. *Id.*

101. *Id.*

102. *Id.*

103. Gatti & Jonelis, *supra* note 62, at 18.

104. *Aereo II*, 712 F.3d at 698 (Chin, J., dissenting).

105. *Id.* at 699.

106. *Id.* at 703–04.

107. *See generally* *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012).

108. Consiglio, *supra* note 63, at 2584.

109. *Id.*

cable broadcasts; therefore, ivi did not have to comply with FCC regulations.<sup>110</sup> Ultimately, the Second Circuit affirmed the judgment of the district court that Congress did not intend section 111 to include Internet retransmissions; thus, the ivi system constituted a public performance.<sup>111</sup> As part of its reasoning, the Second Circuit noted the absence of a preliminary injunction would be a detriment to the television industry, as it would encourage other Internet services to retransmit copyrighted programming without authorization.<sup>112</sup>

In his dissent, Judge Chin concluded that the Second Circuit majority effectually denied major broadcasters a licensing fee for Aereo's activities and provided a framework for others to circumvent copyright law.<sup>113</sup> Quite interestingly, Judge Chin served as the district judge in *Cablevision* who granted summary judgment for the major networks, which the Second Circuit overturned.<sup>114</sup> Judge Chin also delivered the opinion of the Second Circuit in *WPIX*.<sup>115</sup>

### *B. The Supreme Court's Approach in Aereo III*

The major broadcasters were given two blows from the district court and the Second Circuit. After the Second Circuit denied rehearing en banc, the Supreme Court granted certiorari.<sup>116</sup>

#### 1. The Majority's Opinion

In the opinion delivered by Justice Breyer, the 6–3 majority in *Aereo III* held that Aereo's service violated the Transmit Clause.<sup>117</sup> The majority's analysis largely relied on the 1976 amendments to the Copyright Act, much like the Second Circuit majority in *Aereo II*.<sup>118</sup> To determine whether Aereo infringed the plaintiffs' exclusive public performance right, the Court addressed two issues: (1) whether Aereo did perform copyrighted programming; and (2) if yes, whether it performed to the public.<sup>119</sup>

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110. *Id.* at 2585.

111. *Id.*

112. *Aereo II*, 712 F.3d 676, 704 (2d Cir. 2013) (Chin, J., dissenting) (quoting *WPIX*, 691 F.3d at 286).

113. *Id.* at 705.

114. Consiglio, *supra* note 63, at 2583–584.

115. *WPIX*, 691 F.3d at 277.

116. *Aereo III*, 134 S. Ct. 2498, 2504 (2014).

117. *Id.* at 2511.

118. *Id.* at 2506.

119. *Id.* at 2504.

Critical to this analysis, the Court first determined *who* performed the copyrighted works—Aereo or the single Aereo subscriber.<sup>120</sup> The Court began by noting that the language of the Copyright Act does not explicitly state when an entity performs and when it simply acts as an equipment provider.<sup>121</sup> The majority held that an entity with technology like Aereo does, in fact, perform when the Copyright Act is “read in light of its purpose.”<sup>122</sup> The majority reasoned that Aereo’s activities were identical to the CATV providers’ activities in *Fortnightly* and *Teleprompter*, which now constitutes a public performance under the 1976 amendment of the Copyright Act,<sup>123</sup> and therefore the majority concluded that Aereo did perform.<sup>124</sup>

The majority next considered whether Aereo’s performance was public within the meaning of the Transmit Clause.<sup>125</sup> The majority rejected Aereo’s argument that a transmission to only one subscriber means it does not transmit a performance publicly.<sup>126</sup> The majority explained the language of the Transmit Clause clearly conveys Congress’ intent despite the lack of a definition for “the public.”<sup>127</sup> According to the majority, “to transmit a performance . . . means to communicate contemporaneously visible images and contemporaneously audible sounds of the work”<sup>128</sup> regardless of the number of transmissions.<sup>129</sup> Additionally, “‘the public’ . . . [means] ‘any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.’”<sup>130</sup> In essence, the Court found that under the Transmit Clause, a performance is transmitted when an entity communicates contemporaneously perceptible images and sounds to multiple people who are not family or social acquaintances, in any place, no matter the number of transmissions made.<sup>131</sup> The Court reversed the judgment of the Second Circuit holding that Aereo violated the plaintiffs’ exclusive right by performing the copyrighted works

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120. Rebecca Giblin & Jane C. Ginsburg, *We (Still) Need to Talk About Aereo: New Controversies and Unresolved Questions After the Supreme Court’s Decision*, 38 COLUM. J.L. & ARTS 109, 117 (2015).

121. *Aereo III*, 134 S. Ct. at 2504.

122. *Id.*

123. *Id.* at 2506.

124. *Id.* at 2507.

125. Giblin & Ginsburg, *supra* note 120, at 118.

126. *Aereo III*, 134 S. Ct. at 2509.

127. *Id.*

128. *Id.* at 2508.

129. *Id.* at 2509.

130. *Id.* at 2510.

131. *Id.*



publicly, as the terms are defined in the Transmit Clause.<sup>132</sup>

## 2. The Dissent

The dissent argued that Aereo “[did] not ‘perform’ at all” for several reasons.<sup>133</sup> First, the dissent emphasized a fundamental difference between *Aereo* and past suits against equipment manufacturers and service providers—past suits against equipment manufacturers and service providers involved secondary infringement claims and not direct infringement claims.<sup>134</sup> For instance, movie studios attempted to block the sale of Sony’s Betamax videocassette recorder (VCR) by arguing that Sony was liable under secondary infringement because Sony’s customers were making unauthorized copies.<sup>135</sup> Despite Aereo arguably being an equipment manufacturer and service provider like Sony, the major broadcasters claim that Aereo directly infringed their public performance right.<sup>136</sup>

Furthermore, the dissent stated that the facts in *Aereo* did not meet the volitional-conduct doctrine, which is significant in determining direct infringement cases.<sup>137</sup> The volitional-conduct doctrine states, “[a] defendant may be held directly liable only if it has engaged in volitional conduct that violates the [Copyright] Act.”<sup>138</sup> Put simply, the party who actually engages in copying is the only one who directly infringes.<sup>139</sup> The volitional-conduct doctrine, however, does not excuse a party from liability, but simply directs the proper analytical claim (i.e., direct infringement or secondary infringement).<sup>140</sup> Although the dissent concedes that a performance was made under the Aereo technology, the question of *who* performed was uncertain, which is an important aspect in determining direct infringement under the volitional-conduct doctrine.<sup>141</sup>

To demonstrate its interpretation, the dissent analogized direct infringement and secondary infringement to a video-on-demand service and

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132. *Id.* at 2511.

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

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Fox Broad. Co. v. Dish Network, LLC*, 723 F.3d 1067, 1074 (9th Cir. 2013); *see also* *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

140. *Aereo III*, 134 S. Ct. at 2514 (Scalia, J., dissenting).

141. *Id.* at 2512.

copy shop, respectively.<sup>142</sup> In a video-on-demand service, the service provider selects the content (e.g., Netflix selects the options available to watch by subscribers), and thus performs.<sup>143</sup> As a result, the service provider may be liable for direct infringement of the copyright owner's exclusive public performance right.<sup>144</sup> Alternatively, in a copy shop, the customer chooses the content and activates the copying function; the photocopier simply responds to the user's input, and thus may be liable for secondary infringement of the copyright owner's exclusive public performance right.<sup>145</sup> According to the dissent, Aereo was akin to a copy shop because an Aereo subscriber selected the program and activated the viewing function; the Aereo system only responded to the subscriber's input and thus may be liable under secondary infringement.<sup>146</sup> In sum, the dissent asserted that Aereo does not perform because it does not select the content. Therefore, Aereo cannot be held directly liable for infringing the plaintiffs' public performance rights.<sup>147</sup>

The dissent also criticized the majority's cable-look-a-like syllogism (i.e., Congress amended the Copyright Act to overrule the cable system cases; Aereo resembled a cable system; therefore, Aereo performed).<sup>148</sup> First, the dissent stated that the majority reached its decision based solely on a single report issued by a committee of one of the two Houses of Congress.<sup>149</sup> As Justice Scalia stressed, "[l]ittle else need be said here about the severe shortcomings of that interpretative methodology."<sup>150</sup> Second, the dissent asserted that the majority failed to account for material differences between Aereo and the cable systems in *Fortnightly* and *Teleprompter*, such as the latter, which transmitted a full range of broadcast signals to subscribers at all times, whereas Aereo transmitted only specific programs selected by the user at the time that the user selected them.<sup>151</sup> Lastly, the dissent found it unsettling that the majority disregarded the established volitional-conduct doctrine used to determine direct liability and argued that the majority instead invented a broad ad hoc rule that applies only to cable systems and its look-a-likes.<sup>152</sup>

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142. *Id.* at 2513.

143. *See id.*

144. *Id.*

145. *Id.*

146. *Id.* at 2514.

147. *Id.*

148. *Id.* at 2515.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 2516.

V. THE IMPLICATIONS OF *Aereo III* ON PROFESSIONAL SPORTS

As Justice Scalia conceded in his dissent, unauthorized transmission of copyrighted content should not be allowed as it negatively impacts copyright owners.<sup>153</sup> However, maximizing the public's benefit from innovation is also a concern of the Copyright Act.<sup>154</sup> Merging both copyright protection and public concern is necessary to not only carry out the purpose of the Copyright Act but also to benefit broadcasters and consumers. Therefore, Congress must determine which should be given more weight—copyright protection that grants exclusive rights to producers of live sports events or public concern for low cost access to live-sports broadcasts.

*A. Professional Sports Leagues Would Move Exclusively to Pay Television*

Professional sports leagues were rightfully concerned with Aereo's technology because it had the potential to significantly decrease their live-sports broadcasting rights revenue. Future technology similar to, or more advanced than, Aereo's threatens broadcasters with a loss of billions of dollars in retransmission fees.<sup>155</sup> This substantial loss of revenue could prevent the broadcasters from bidding on expensive live-sports broadcasting rights.<sup>156</sup> If the Supreme Court had ruled in favor of Aereo, then the rights to live-sports broadcasts would have moved to pay-television as the professional sports leagues threatened.<sup>157</sup> As a result, consumers would be faced with the choice of paying the extra cost for pay-television channels or finding an alternate low-cost method of watching their favorite team, such as illegal streaming.<sup>158</sup>

Although it seems professional sports leagues would win either way as the producers of live-sports events, their threat also seemed to be a mere bluff to cover their concerns with (1) viewership ratings and (2) decreased bargaining power. Imagine having to pay extra each month for a network you would not

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153. *Id.* at 2517.

154. Bradley Ryba, Comment, *Aerevolution: Why We Should, Briefly, Embrace Unlicensed Online Streaming of Retransmitted Broadcast Television Content*, 13 J. MARSHALL REV. INTELL. PROP. L. 577, 591 (2014).

155. *Id.*

156. *Id.*

157. Jason Dachman, *Aereo Ruling in Review: Impact on Sports Rights and What's Next for Broadcasters*, SPORTS VIDEO GROUP (June 26, 2014), <http://sportsvideo.org/main/blog/2014/06/aereo-ruling-in-review-impact-on-sports-rights-and-whats-next-for-broadcasters>.

158. Brian Fung, *What the Aereo Decision Means for TV Watchers*, WASH. POST (June 25, 2014), <https://www.washingtonpost.com/blogs/the-switch/wp/2014/06/25/what-the-aereo-decision-means-for-tv-watchers>.

otherwise watch or, even worse, to pay a pay-per-view fee just to watch your favorite team play a regular season game. According to a report by Experian Marketing Services, the number of American households that no longer have cable or satellite service has increased by 44% in the past four years.<sup>159</sup> Additionally, approximately 18.1% of the households have a Netflix or Hulu account in place of cable or satellite service.<sup>160</sup> Thus, professional sports leagues are rightfully concerned with viewership ratings if they move to pay-television. A decrease in viewership may correlate to a decrease in bargaining power because broadcasters and cable networks rely on program ratings in their business model, thus potentially resulting in less revenue for live-sports broadcasting rights.

While the Supreme Court ruling in *Aereo III* alleviated some of the professional sports leagues' concerns, it merely acts as a Band-Aid for a cut that will worsen as technology advances. This decision will not dishearten engineers from developing technology that circumvents copyright law as *Aereo* did, but instead, may force them to be more creative.

### *B. Television May Be Served A La Carte*

Shortly after the Supreme Court ruled in *Aereo III*, Tom Wheeler, Chairman of the FCC, announced a rulemaking proceeding that would provide online video providers access to programming only cable and satellite operators currently possess.<sup>161</sup> Although Wheeler has not provided details about the rule, Wheeler suggests the result would give consumers the ability to choose the programs they desire to purchase in an a la carte manner.<sup>162</sup> A report from the FCC explained that an a la carte offering would be a cheaper alternative to a monthly cable package, which would be a win for consumers.<sup>163</sup> However, major networks and cable providers strongly voiced their opinion against a la carte television, as it would decrease their revenue.<sup>164</sup> Of particular importance to the major networks and cable providers is the revenue that stems from

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159. Adrienne Zulueta, *More Households Ditching Cable, Satellite TV*, ABC NEWS (Apr. 21, 2014), <http://abcnews.go.com/Business/household-cable-cord-cutting-rise/story?id=23411056>.

160. *Id.*

161. Eriq Gardner, *FCC Proposes Treating Online Video Providers Akin to Cable*, HOLLYWOOD REP. (Oct. 29, 2014), <http://www.hollywoodreporter.com/thr-esq/fcc-proposes-treating-online-video-744756>.

162. See Tom Wheeler, *Tech Transitions, Video, and the Future*, FED. COMM. COMMISSION (Oct. 28, 2014, 2:48 PM), <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

163. Fraser, *supra* note 8, at 153.

164. *Id.* at 152.

retransmission fees.<sup>165</sup> As The Walt Disney Company stated, “Broadcasters must maintain the rights to control the retransmission of their signals over all distribution platforms, including the Internet, and to negotiate for compensation for distribution of such signals.”<sup>166</sup>

Regardless of the opinion of major networks and cable providers, an a la carte system could drive sports leagues to keep their live-sports broadcasting rights, and broadcast games on their respective television network. As a result, sports leagues would be able to price fix their live-sports broadcasting rights value by setting the price of each game or season, which has the potential to be more or less beneficial to consumers.

## VI. SOLUTION

Given the technological climate today, Aereo seems as though it served as the sacrificial lamb in a ritual requesting Congress to amend the Copyright Act for the common good of the public.

### *A. As the Dissent Suggests, Congress Must Act*

Within the past two decades, the judiciary has limited the scope of copyright law rather than expanded it,<sup>167</sup> proving the Copyright Act is inadequate and vulnerable to exploitation.<sup>168</sup> As the dissent in *Aereo III* asserts, only Congress is able to amend the Copyright Act to both provide for current and emerging technology, as it has done in the past, and also avoid erroneous application of the law that would go against the underlying purpose of the Copyright Act—to foster innovation.<sup>169</sup> The range of issues Congress would need to review is beyond the scope of this Comment. Nonetheless, in light of judicial frustrations with filling in the holes of the Copyright Act, Congress should at least address public performance rights under the Transmit Clause because it causes significant effects on the broadcast industry and innovation.<sup>170</sup>

While the effects of recent rulings involving Aereo and Aereo-like technology have not been considerably felt yet, *Aereo III* serves as an omen of what is to come. Without legislative guidance, future courts determining public performance rights in regards to Aereo-like technology may adopt a hybrid

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165. Gardner, *supra* note 161.

166. *Id.*

167. Fraser, *supra* note 8, at 152.

168. Giblin & Ginsburg, *supra* note 120, at 127.

169. Consiglio, *supra* note 63, at 2603.

170. Cassorla, *supra* note 23, at 810–11.

standard between the volitional-conduct doctrine and the ad hoc *Aereo III* framework that compares technology to past cable service cases.<sup>171</sup> Consequently, the line between direct infringement and secondary infringement of public performance rights may be blurred.<sup>172</sup> To prevent this, Congress should amend the Transmit Clause by providing (1) a clear definition of the public that encompasses current and future technology and (2) a framework for determining whether a technology has infringed public performance rights.

According to the majority, the size of the potential audience is important in determining whether a performance is to the public—specifically that the performance is presented to a *large* number of people.<sup>173</sup> Rather than emphasize the size of the audience, however, Congress should provide a definition of the public that stresses whether the receiver of the transmission is a member of the public.<sup>174</sup> In doing so, the public performance right could adapt to evolving technology because the focus would be who received the performance and not the size of the audience.<sup>175</sup>

To ensure the definition of the public is applied properly, Congress should also include a framework for Transmit Clause analysis. For instance, if the volitional-conduct doctrine is mandated for Transmit Clause analysis, courts could first identify that the user of the technology directly conducts the alleged infringing act and then determine the service provider's liability through secondary infringement principles.<sup>176</sup> As a result, the distinction between direct and secondary infringement will be strengthened as they relate to public performance rights.<sup>177</sup>

### *B. The Industry Can and Must Adapt to Technology*

In a time where watching programs is not limited to television, major broadcasters and professional sports leagues should integrate emerging technology as they wait for Congress to amend the Copyright Act once again. As more and more Americans cut the cord from cable and satellite service, even more products and services are being introduced to supplant cable and satellite service.<sup>178</sup> Sports fans have even found a way to watch games without cable

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171. Gibling & Ginsburg, *supra* note 120, at 127.

172. *Id.* at 150.

173. *Id.* at 141; *see also* *Aereo III*, 134 S. Ct. 2498, 2509 (2014).

174. Gibling & Ginsburg, *supra* note 120, at 141.

175. *Id.* at 141–42.

176. *Id.* at 150.

177. *Id.*

178. Amber Hunt, *For Millions of Cord Cutters, Cable TV Fades to Black*, USA TODAY (Aug. 24,

service; though, as one sports fan who cut the cord from cable stated, “[it is] a suitable workaround that . . . is legal but would likely be frowned upon by [professional sports league] bigwigs.”<sup>179</sup>

By adapting to emerging technology, major broadcasters and professional sports leagues can add an additional revenue stream, as well as avoid the illegal usage of their exclusive rights under the Copyright Act (i.e., internet piracy and streaming). For example, Major League Baseball (MLB) has created MLB Advanced Media (MLBAM) to capitalize on the potential revenue from all media. Under MLBAM, MLB.TV oversees the broadcasting of MLB’s sporting events online.<sup>180</sup> In 2012, MLB.TV generated approximately \$250 million in revenue from content subscriptions alone, proving there is a market for watching sporting events online.<sup>181</sup>

While professional sports leagues are bound by current live-sports broadcasting rights deals, professional sports leagues should consider restructuring future licensing deals to leave open the possibility of an a la carte option. In doing so, major broadcasters and professional sports leagues could maximize their profits that result from live-sports broadcasting rights deals with major broadcasters and provide what current television consumer habits show consumers and sports fans crave—options on how to watch the programs he or she wants to watch.

## VII. CONCLUSION

In recent years, the price of live-sports broadcasting rights has risen to the billions, and has proven to be extremely valuable to professional sports leagues and major broadcast networks alike. As the resulting cost of cable and satellite service increases, so too will the threat of consumers moving to the cheaper alternative of Internet streaming. Emerging technology, such as Aereo, is now in the place cable television once was in the 1970s. Just as the courts urged Congress to reshape copyright law to include cable technology then, *Aereo III* should serve as an alert to both Congress and courts. Congress should once again rewrite copyright law to include Aereo-like technology, as well as anticipated future technology to uphold the purpose of the Copyright Act. Moreover, courts should strike an appropriate balance between the scope of exclusive rights under the Copyright Act and technological innovation. As the dissent in *Aereo III*

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2014), <http://www.usatoday.com/story/money/personalfinance/2014/08/24/for-millions-of-cord-cutters-cable-tv-fades-to-black/14513495>.

179. *Id.*

180. Horner, *supra* note 53, at 437.

181. *Id.*

suggested:

[T]he proper course is not to bend and twist the [Copyright] Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade . . . "just as it so often has . . . in the past."<sup>182</sup>

To professional sports leagues, *Aereo III* offers a small win against technology. If professional sports leagues want to continue to have exclusive rights to each broadcast market (i.e., over-the-air broadcasts, cable broadcasts, satellite broadcasts, and Internet broadcasts) to maximize their live-sports broadcasting revenues, the leagues must embrace Aereo-like technology, as the Internet seems to be the future of television for consumers.<sup>183</sup> By doing so, professional sports leagues will maximize their revenue stream, as well as provide affordable means for consumers to watch their favorite teams.

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182. *Aereo III*, 134 S. Ct. 2498, 2518 (2014) (Scalia, J., dissenting).

183. Steven J. Vaughan-Nichols, *Aereo Loses Battle, Cord-Cutters May Win War*, ZDNET (Nov. 22, 2014), <http://www.zdnet.com/article/aereo-loses-battle-cord-cutters-may-win-war>.