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

Andrew Fraser

I. INTRODUCTION

Somewhere in Brooklyn, a large warehouse holds a bundle of over one thousand rabbit-ear antennas.[1] In many ways these antennas resemble the ones that rested on top of generations of older television sets before the advent of cable, except for one small fact—these rabbit-ear antennas are each roughly the size of a dime.[2] It is ironic that this ancient, seemingly outdated piece of television technology might signal the medium's newest direction, but with Aereo at the helm, this may actually be the case. Aereo is a technology platform currently available exclusively in New York City that airs live broadcast television through the Internet to a subscriber's mobile device, computer, or web-enabled television.[3] When an Aereo subscriber wishes to watch a broadcast, he or she instructs an assigned Aereo antenna to capture signals from the public airwaves and to transmit them over the Internet to the subscriber's mobile device.[4] No two subscribers ever use the same antenna at the same time, and Aereo also offers DVR recording technology, so subscribers can watch shows live or recorded.[5] With this incredible merging of both old and new technology, Aereo could have an enormous impact on the way consumers watch television, assuming that it can first survive what promise to be some intense legal challenges.

In March of 2012, all of the major networks and their New York area

[1] Vanessa Grigoriadis, *Blow up the Box*, N.Y. MAG., May 21 2012, at 38, 40.

[2] Kristen McCallion, *"Technological Gimmickry" or a Novel Non-Infringing Use?*, INTELL. PROP. MAG., June 2012, at 69.

[3] *Id.*

[4] *Id.*

[5] *Id.*

affiliates filed suit against Aereo,[6] alleging that the service is liable for willful copyright infringement. According to the networks, Aereo had reproduced and distributed public performances of their television programs.[7] All of the networks sought a preliminary injunction to prevent Aereo from providing subscribers with its services.[8] At the core of this lawsuit was the networks' fear that they would lose their hold on a large chunk of their valuable viewing audience if Aereo were able to continue and expand.[9] If the networks lost too much of their viewing audience, they would be unable to negotiate with advertisers, or effectively negotiate retransmission agreements with companies that license their content.[10] In fact, Fox executive Sherry Brennan testified that cable companies will either demand huge concessions or refuse to pay retransmission fees—which are fees that local broadcast networks charge for access to their signal—altogether based on Aereo's refusal to do so.[11]

It should come as no surprise that Aereo threatens to upend the world of television so completely. After all, the man behind the company, Barry Diller, has done it before. Diller, Aereo's chief investor, remade television in the late 1960s when he was Vice President of Programming for ABC by introducing concepts like the "movie of the week" and the mini-series.[12] In 1986, he built Fox, the country's fourth network, with Rupert Murdoch.[13] Now Diller is at it again. The question is: what might it mean for the world of television if Aereo succeeds? Matt Bond, Executive Vice President of Content Distribution for NBC Universal, claims that "with a fairly small investment, cable systems and satellite broadcasters could mirror Aereo's individual antenna set up and offer broadcast channels to subscribers for free."[14] Others have predicted that Diller could take Aereo and bundle it with Netflix, YouTube, and other online streaming sources to compete directly with current cable and satellite packages.[15] This could push cable providers or similar companies like Aereo to provide "a la carte" offerings where viewers would only have to pay for the

[6] The list includes ABC, Disney, CBS, NBC, Fox, Universal, Universal Network Television, Telemundo, and WNJU-TV.

[7] *Id*. at 69-70.

[8] *Id*. at 69.

[9] American Broadcasting Cos. v. Aereo, 2012 WL 2848158 (S.D.N.Y. July 2012).

[10] *Id*. at 397-98.

[11] *Id*. at 398.

[12] Grigoriadis, *supra* note 1, at 40.

[13] *Id*.

[14] Adi Robertson, *Aereo Under Fire: why NBC, ABC, CBS, and Fox Want to Shut Down the Internet TV Service*, VERGE (May 11, 2012), http://www.theverge.com/2012/5/11/3013831/aereo-legal-complaints-nbc-abc-cbs-fox.

[15] *See* Grigoriadis, *supra* note 1, at 114.

channels they wish to watch.[16]

While the consequences Aereo could have on the television industry might seem like they have arrived without precedent, this is not the case. Diller and Aereo were able to avoid a preliminary injunction in July of 2012[17] and are now set to expand to over one hundred new markets in the following year.[18] This expansion is facilitated by the way federal courts have interpreted U.S. copyright laws over the decades, coupled with rapid advances in technology. These two forces have led to the slow erosion of the current cable format, giving technology like Aereo's the power to push cable providers and consumers into a new age of television which could ultimately offer the viewing public more choices at a lower price.[19] The networks, cable providers, and others entrenched in the current television system will understandably try to push back against this technology.[20] While the major broadcast networks may feel that litigation is necessary, they should be primarily focused on developing their own technology so that they can compete with companies like Aereo moving forward. Meanwhile, absent specific direction from Congress, federal courts should continue to interpret copyright law in a way that promotes innovation.

This is an exciting time for any avid media consumer. After all, the access to unique original content has never been so convenient and affordable. Part II of this Note briefly describes the legal history that led to the *American Broadcasting Cos. v. Aereo* decision. Part III examines the decision itself. Part IV explores different forms of streaming television that have led to the decline of the current cable model. Part V, through a look at the *WPIX, Inc. v. ivi, Inc.* case, considers some of the legal issues Aereo might face as it expands. Part VI argues that Aereo will make an a la carte television model a viable option for consumers. Lastly, Part VII concludes with a brief look at some of the latest developments in the Aereo litigation.

II. CASES THAT LED TO AMERICAN BROADCASTING COS. V. AEREO

A. Fortnightly & Teleprompter Corp.—Courts' General Reluctance to Impede

[16] *See id*.

[17] The court's holding in this case will be explained in greater detail in Part III *infra*.

[18] McCallion, *supra* note 2, at 69.

[19] *See* Fred Schruers, *IAC's Aereo Beckons the Cord Cutters as Broadcasters Gird for Battle*, WRAP COVERING HOLLYWOOD, (Mar. 14, 2012), http://www.thewrap.com/media/article/iacs-aereo-beckons-cord-cutters-barry-diller-sees-great-fight-36253 (stating that Aereo's service costs only twelve dollars per month and that it gives customers the ability to cut their cable cords).

[20] *See id*. (describing how cable companies and major networks constitute Aereo's major opposition and how the concept of "cord-cutting" makes executives very nervous).

Technological Innovation Without Specific Instruction from Congress

Though the Copyright Act of 1976 superseded the holdings in both *Fortnightly Corp. v. United Artists Television, Inc.*[21] and *Teleprompter Corp. v. Columbia Broad Sys., Inc.*,[22] the two decisions shed some light on how judges have viewed federal copyright law and thus deserve some attention. *Fortnightly* involved a community antenna ("CATV") that served a number of television sets in a mountainous area of West Virginia that would not have been able to receive television service otherwise.[23] United Artists held the copyright to several motion pictures that it had licensed to the five major broadcast networks at the time. However, at no point had Fortnightly, the company responsible for the CATV, received a license from United Artists.[24] United Artists claimed that Fortnightly was retransmitting rather than simply receiving its material without authorization.[25] Writing for a majority of the Court, however, Justice Stewart upheld the town's use of the CATV under the Copyright Act of 1909, reasoning that the CATV performed a function more similar to viewing (or receiving) than to broadcasting (or transmitting).[26] Six years later in *Teleprompter Corp.*, the Supreme Court extended its analysis in *Fortnightly* to apply to a CATV that received distant signals that ordinary rooftop antennas could not receive.[27]

Although the Copyright Act of 1976 rendered both of these decisions obsolete, they nonetheless illustrate courts' tendencies—at least in some instances—to interpret laws in a "technology-sympathetic" way.[28] Courts have been reluctant to allow new distribution systems to be blocked by copyright until Congress has clearly spoken on the issue.[29] With this in mind, *Aereo* and *Cartoon Network LP, LLLP v. CSC Holdings, Inc. Cablevision*[30] may become today's *Fortnightly* and *Teleprompter Corp.*—courts may continue to interpret

[21] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 407-08 (1968).

[22] Teleprompter Corp. v. Columbia Broad Sys., Inc., 415 U.S. 394, 410, 415 (1974).

[23] *Fortnightly*, 392 U.S. at 391-92.

[24] *Id*. at 393.

[25] *See id*.

[26] *Id*. at 399.

[27] *Teleprompter Corp*., 415 U.S. 394 (1974).

[28] *See* Daniel L. Brenner & Stephen H. Kay, *ABC v. Aereo, Inc.: When is Internet Distribution a "Public Performance" Under Copyright Law?*, 24 INTELL. PROP. & TECH. L.J. 12, 15 (2012) ("Policy-wise, [these]…decisions can be viewed as technology-sympathetic—allowing new distribution systems to develop without being blocked by copyright.").

[29] *See Fortnightly*, 392 U.S. at 402 (declining the Solicitor General's invitation to render a compromise decision in the case that would . . . "accommodate [the] various competing considerations of copyright law . . . [because t]hat job is for Congress.").

[30] *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

copyright laws in a way that will allow new distribution systems to develop until Congress speaks directly on the issue.

B. Sony Corp. of America v. Universal City Studios—Public Performance, Fair Use, and the Struggle to Control Original Content

Before examining the specifics of the *Sony Corp. of America v. Universal City Studios* decision, some background information on basic copyright law is necessary. In *Sony*, Universal City Studios' argued that Sony was liable for contributory infringement.[31] Contributory infringement is the imposition of liability for infringement on a party who has not itself engaged in the infringement, but has made it possible for others to do so.[32] In response, Sony claimed that they were engaged in a fair use of the copyrighted material.[33] Fair use is a defense to copyright infringement, and requires a court to consider:

> (1) the purpose and character of the use. . .; (2) the nature of a copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[34]

Sony also claimed that when consumers used its VTR to record programming, consumers were engaged in a private, rather than a public performance.[35] While copyright law states that copyrighted material cannot be performed, displayed, or transmitted to the public without a license, there is no such requirement for a private performance.[36] All of these doctrines come together to serve copyright law's primary purpose—"[t]o promote the [p]rogress of [s]cience and [the] useful [a]rts,"[37] by encouraging artistic innovation, while guarding against a permanent monopoly for content owners.[38]

In order to understand the groundwork for *Aereo*, one needs to begin by traveling back to the mid-1980s to examine how the Supreme Court viewed the copyright issues surrounding another piece of now-outdated technology: the

---

[31] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984) (Stating that Universal Studios "alleged that some individuals had used [Sony's] Betamax . . . to record some of [Universal Studios'] copyrighted works" and that, therefore, Sony should be held liable).

[32] HOWARD B. ABRAMS, THE LAW OF COPYRIGHT, § 14:48 (2012).

[33] *See Sony* 464 U.S. at 425.

[34] ABRAMS, *supra* note 32, at § 15:3.

[35] *Sony*, 464 U.S. at 425.

[36] *See* ABRAMS, *supra* note 32, at § 5:195.

[37] U.S. CONST. art. I, § 8, cl. 8.

[38] ABRAMS, *supra* note 32, at § 1:3.

VCR (at the time called the "VTR"). Sony was one of the first electronics companies to manufacture and sell home video tape recorders.[39] Consumers primarily used this technology for "time-shifting" purposes, meaning that they would record a program in order to view it at a later time.[40] Universal City Studios ("Universal"), and Walt Disney Productions ("Disney") brought suit, claiming that Sony's sale of the recording equipment to the general public made the electronics company contributorily liable for copyright infringement. Universal and Disney argued that customers would use the device to record programming over which Universal and Disney held valid copyrights.[41] After a district court found for Sony and the Ninth Circuit reversed, the Supreme Court held that home-use recordings of broadcasts over the public airwaves were a fair use of copyrighted works and did not constitute copyright infringement.[42] The Court also noted that the networks broadcasted the material free to the public at large and that the character of the activity was private in nature.[43]

While the *Sony* decision is important because it affirmed the legality of early VCR technology—which, with its recording features, was an ancient predecessor to Aereo and its DVR function—the decision also laid some important legal groundwork that one can indirectly observe in the *Aereo* decision. First, the Supreme Court in *Sony* recognized that if Universal and Disney were granted an injunction or allowed to collect royalties from Sony, this would enlarge the scope of the studios' and networks' monopoly on material that is not copyrightable.[44] This idea—that there are certain limits to the control networks and studios have over how consumers may view certain material—underlies the district court's decision in *Aereo*. After all, if the networks could require Aereo to pay them royalties, consumers would likely not be able to purchase Aereo's platform for such an affordable price.

Second, the *Sony* Court's note that the material was broadcast free to the public at large is also relevant to Aereo's legal situation. Barry Diller believes Aereo has a strong argument based on the Communications Act of 1934, which requires a broadcaster, who receives a free license, to agree to operate in the public convenience and interest.[45] In essence, Aereo is simply taking advantage of something that is already free. It is selling the right to use an antenna which picks up a broadcast that is already available to the public free

[39] *See* Andrew W. Bagley & Justin S. Brown, *The Broadcast Flag: Compatible with Copyright Law & Incompatible with Digital Media Consumers*, 47 IDEA 607, 628 (2007).

[40] *Sony*, 464 U.S. at 423.

[41] *Id*. at 419-420.

[42] *Id*. at 417-18.

[43] *Id*. at 425.

[44] *Id*. at 421.

[45] 47 U.S.C. § 151-620 (2012); Grigoriadis, *supra* note 1, at 114.

of charge.[46] According to Diller, this is "the foundation of broadcasting. Every person has a right to receive a broadcast signal without any intermediary between that broadcasting of the signal and the receipt of it by a person."[47] Thus, based on the Court's language in *Sony* and Congress's language in the Communications Act, the networks would not have a case against a consumer privately receiving a free transmission of their broadcast.

Third, the private nature of the recording activity that the *Sony* Court describes is a component of the *Aereo* decision. In *Sony*, Justice Stevens stated that recording material over the public airwaves for private use could not constitute copyright infringement absent a likelihood of harm.[48] Similar language appears in the Southern District of New York's opinion, as Judge Nathan reasoned that Aereo is not engaged in a public performance.[49] She concluded instead that Aereo creates a unique copy of each television program for a subscriber because the program assigns each subscriber a specific antenna and the subscriber's request to watch a program is saved to a unique directory on Aereo's hard disks assigned to that subscriber.[50] This distinction between public and private behavior plays an important role in both cases, albeit in a more complex way in *Aereo*. If a court found that Aereo was engaged in a public performance in which a CATV was used to pass along a broadcast signal to the general public, the platform would not be able to survive under copyright law.[51] Because of past decisions like *Sony*, this distinction between private and public behavior in copyright law is significant.

Finally, the *Sony* and *Aereo* suits likely came to the courts under very similar circumstances. Just as broadcast networks today worry about reduced viewership due to platforms like Aereo lessening the networks' negotiating power with advertisers,[52] networks and production companies like Universal and Disney likely had similar concerns in the 1980s when the VCR emerged on the scene.[53] The consumer's ability to use the "time-shifting" device to record television programming and watch it at a later date allowed for the

[46] Grigoriadis, *supra* note 1, at 114.

[47] *Id*.

[48] *Sony*, 464 U.S. at 425.

[49] American Broadcasting Cos. v. Aereo, 874 F. Supp. 2d 373, 396 (S.D.N.Y. 2012).

[50] *Id*. at 386.

[51] *Id*. at 397 (The plaintiffs contended that Aereo's antennas function collectively as a single antenna and as a result, they would infringe the plaintiffs' copyrights).

[52] *See Id*. at 397-98 (noting that Aereo's activities may damage a plaintiff's relationships with content providers and advertisers).

[53] *See Sony*, 464 U.S. at 425 (noting that at trial, the respondent networks offered opinion evidence concerning "the future impact of the unrestricted sale of VTR's on the commercial value of their copyrights.").

possibility that viewers might fast-forward through commercials,[54] thus making advertising slots less valuable to potential advertisers. While the Court in *Sony* did mention the potential harm to the network, it ultimately decided the case based on an interpretation of the Copyright Act that was relatively favorable to those trying to push the technological envelope.[55] On a basic level, the Southern District of New York applied the same principles in *Aereo*. While it noted the harm that Aereo could cause the broadcast networks and the cable companies, it ultimately decided against an injunction based on a reading of the Copyright Act that was favorable to the technology platform.[56]

[54] *Id*. at 423.

[55] *See* Chet Kanojia, *Innovation, Progress and Consumer Choice*, AEREO BLOG (Dec. 20, 2012), http://blog.aereo.com/ (noting that "every time new technology emerges, so do attempts to block those innovations," but in *Sony*, the Court held that recording television programming for private viewing was "fair use," and that but for that case, a consumer would have to pay every time he tried to record a broadcast).

[56] *See Aereo*, 874 F. Supp. 2d at 404-05.

C. Cartoon Network LP, LLLP v. CSC Holdings, Inc.—Private Performances and the Importance of the Transmit Clause

While *Sony* produced foundational elements of copyright law for the entertainment industry, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* ("*Cablevision*")[57] is a more contemporary Second Circuit decision on which the *Aereo* court relied to deny the broadcast networks' request for a preliminary injunction.[58] One cannot understand the *Aereo* court's reasoning without a firm knowledge of the facts and holding in *Cablevision*. Cablevision is a cable provider that, in 2006, created a new Remote Storage DVR System ("RS-DVR") that allowed its customers who did not "have a stand-alone DVR to record cable programming on central hard drives maintained by Cablevision at 'remote' locations."[59] Customers could "then receive playback of those programs on their home television sets."[60] Several copyright holders, including Cartoon Network, sued Cablevision claiming that the RS-DVR directly infringed upon their exclusive rights to reproduce and publicly perform their copyrighted works.[61]

Cablevision, like *Aereo*, implicated two of the rights the Copyright Act grants to copyright holders: the right to reproduce a copyrighted work and the right to perform a copyrighted work publicly.[62] In *Cablevision*, the district court initially found: (1) that by buffering the data that makes up a given work, Cablevision reproduced the work in copies and thus infringed the copyright holder's reproduction right; (2) that Cablevision was directly liable for creating the playback copies of the copyrighted work; and (3) that Cablevision violated the Copyright Act by engaging in the unauthorized public performance of Cartoon Network's and other channels' works through the playback of its RS-DVR copies.[63] On appeal, however, the Second Circuit reversed these three determinations.[64] The Second Circuit's resolution of the third issue—whether Cablevision was engaged in a public performance—put in place much of the law that Judge Nathan relied upon in the *Aereo* decision.[65]

---

[57] 536 F.3d 121, 124 (2d Cir. 2008).

[58] *See generally Aereo*, 874 F. Supp. 2d at 382.

[59] *Cablevision*, 536 F.3d at 124. "DVR" stands for Digital Video Recorder System.

[60] *Id*.

[61] *Id*.

[62] 17 U.S.C. § 106(1), (4) (2012).

[63] *Cablevision*, 536 F.3d at 127, 132, 135.

[64] *See id*. at 130, 132, 139.

[65] *See* American Broadcasting Cos. v. Aereo Inc., 874 F. Supp. 2d 373, 382 (S.D.N.Y. 2012) (stating that "at issue [in the Aereo case] is the applicability of the Second Circuit's decision in *Cablevision*, which held, *inter alia*, that Cablevision's Remote Storage DVR ('RS-DVR') system did not infringe the plaintiffs' public performance right under the Copyright Act.").

The Second Circuit noted that under the Copyright Act, copyright owners have the exclusive right, "in the case of. . .motion pictures and other audiovisual works, to perform the copyrighted work publicly."[66] If Cablevision were engaged in a public performance it would therefore be liable for violating the Copyright Act, but if it were not engaged in a public performance its RS-DVR would be within the boundaries of copyright law. The court went on to note that Section 101 of the Copyright Act explains that to perform or display a work "publicly" means to (1) perform or display it at a place that is open to the public or (2) transmit or otherwise communicate the performance to the public by means of a device or process, whether members of the public receive the performance in the same or in separate places, and at the same or at different times.[67] In *Cablevision*, the parties both agreed that the second part of the statute, commonly known as the "transmit clause," was at issue.[68] Ultimately, the court's decision depended on how it chose to interpret the clause.

The district court held that the RS-DVR constituted a public performance because Cablevision was transmitting the same program to members of the public who were simply receiving the same performance at different times depending on when they watched the RS-DVR playback.[69] For the district court, the key to determining whether a particular transmission was "to the public" was the potential audience of the underlying work, rather than the potential audience of a particular transmission.[70] Put another way, it held that Cablevision merely transmitted the same "original" underlying performance to different subscribers at different times.[71] Yet the Second Circuit held that this could not be the case.[72] Instead, it reasoned that Congress was referring to the performance created by the act of transmission when speaking of "transmitting a performance to the public."[73] Otherwise, Cablevision's liability would depend in part on the actions of companies or individuals it had no interaction with. This is because even after Cablevision transmitted a copyrighted work to another party, it could still be held liable if that party chose to publicly perform the underlying work.[74] The Second Circuit's narrow reading of the transmit

[66] *Cablevision*, 536 F.3d at 134 (quoting 17 U.S.C. § 106(4) (2006)).

[67] *Id*.

[68] *See id*.

[69] *Id*. at 135.

[70] *Id*.

[71] *See id*.

[72] *Cablevision* 536 F.3d at 135 (stating that the Second Circuit cannot reconcile the district court's approach to the public performance inquiry with the language of the transmit clause).

[73] *Id*. at 136.

[74] *Id*. (Clarifying this point, the Second Circuit gave this hypothetical—"Assume that HBO transmits a copyrighted work to both Cablevision and Comcast. Cablevision merely

clause in *Cablevision* distinguished between the audience of a single transmission and the audience of an entire underlying work. This interpretation further loosened the networks' hold on their copyrighted content and opened the door for other novel content-based platforms like Aereo to succeed in federal court.

III. AMERICAN BROADCASTING COS. V. AEREO—THE DECISION

On July 11, 2012, Judge Nathan of the Federal District for the Southern District of New York delivered a fifty-two page opinion affirming the validity of Aereo's use. Relying primarily on *Cablevision*, Judge Nathan denied the major broadcast networks' request for a preliminary injunction.[75] The court held that Aereo's performance was non-public because, like Cablevision, Aereo's system created unique user requested copies that are transmitted only to the particular user that created them.[76] The court explicitly rejected the networks' argument that Aereo's mass of antennas functioned as one CATV, stating that "*Cablevision* has held that a public performance does not occur merely because a number of people are transmitted the same television program."[77] In fact, since the court determined that each Aereo antenna functions independently, Aereo may actually have a stronger case than Cablevision against the accusation of engaging in a public performance. While Cablevision created multiple copies from a single stream of data, each copy made by Aereo's system comes from a separate stream.[78]

Meanwhile, the networks attempted to cabin *Cablevision's* holding to "time-shifting" devices.[79] While Aereo does involve time-shifting DVR technology, the networks argued that the service's "live watch" option, which allows subscribers to watch television live on a mobile device, causes it to fall outside the scope of *Cablevision*.[80] The district court quickly dismissed this argument, pointing to the fact that there is no indication that the Second Circuit found any information concerning time-shifting important in *Cablevision*. The court declared it irrelevant whether a user watches a program through Aereo's service as it is being broadcast or after the initial broadcast ends because the

retransmits the work from one Cablevision facility to another, while Comcast retransmits the program to its subscribers. Under the plaintiffs' interpretation, Cablevision would still be transmitting the performance to the public, solely because Comcast has transmitted the same underlying performance to the public.").

[75] American Broadcasting Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 375 (S.D.N.Y. 2012).

[76] *Id*. at 385-86.

[77] *Id*. at 387.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 375.

fact remains that the transmission is made from a unique copy previously created by that user."[81]

The district court, however, concluded its opinion by discussing the irreparable harm the networks could face if Aereo were to continue its operations. Judge Nathan acknowledged that Aereo would likely damage the networks' ability to negotiate with advertisers by drawing viewers away from traditional distribution channels.[82] She also noted that Aereo's services will damage the broadcast networks' ability to negotiate retransmission agreements with cable providers as these companies will demand more concessions from the networks to make up for their decline in viewership.[83] Networks such as ABC, CBS, and NBC all have invested substantial amounts of money to stream their content over their own websites in an attempt to promote goodwill among viewers and to engage in market research.[84] If allowed to expand, Aereo could render these programs obsolete.[85] Finally, the broadcast networks asserted that cable companies may abandon their current practice of licensing content from broadcast networks altogether in favor of adopting a content service like Aereo's.[86] So while the economic impact Aereo could have on the broadcast networks and cable companies was clear, it was not enough for the Southern District of New York to issue a preliminary injunction.[87] It is always possible that Congress could recognize this potential impact and overrule the district court's decision by statute, if it finds the effects of Aereo's service undesirable.

IV. LAWFUL FORMS OF STREAMING THAT HAVE WEAKENED THE CABLE MODEL

In addition to the generally technology-friendly ways in which courts have

[81] *Aereo*, 874 F. Supp. 2d at 389.

[82] *Id*. at 397.

[83] *Id*. at 398.

[84] *Id*. at 399.

[85] *See id*. (noting that Aereo would likely harm these streaming initiatives in which plaintiffs have invested substantial sums of money and that additionally, plaintiffs use these streaming options for marketing and demographic research and to build good will).

[86] *Id*.

[87] A preliminary injunction is appropriate in a copyright case when: (1) the plaintiff demonstrates a likelihood of success on the merits; (2) the plaintiff demonstrates that he is likely to suffer irreparable injury in the absence of an injunction; (3) the balance of hardships between the plaintiff and the defendant tips in the plaintiff's favor; *and* (4) the public interest would not be disserved by the issuance of a preliminary injunction. Salinger v. Colting, 607 F.3d 68, 77 (2d Cir. 2010). In *Aereo*, the district court held that plaintiffs were unlikely to succeed on the merits.

interpreted federal copyright laws over the years,[88] the established television system is undergoing such serious changes because an influx of new technology has emerged on the scene during the last decade. These technological changes have forced numerous entities from start-up entrepreneurs to high-level executives to think creatively about content distribution. Perhaps the closely related music industry's major foundational changes during the early part of the millennium finally made studio heads and network executives realize that they would have to change the way they had traditionally delivered content to consumers. Broadcast networks, and even some cable networks, are now offering many of their programs streaming for free on their websites shortly after the original air dates.[89] Many cable providers directly offer consumers what they want when they want it through various video on-demand services[90] and some channels even offer free streaming video feeds of events through services such as the WatchESPN option that ESPN provides on its website.[91] Despite these various choices, the most well-known and best-regarded streaming service is Hulu.

A. Hulu—Legal, Successful Streaming

Launched in 2007, Hulu has become one of the most successful video-streaming sites on the Internet. In August of 2009, it was the fourth most visited website, totaling 488 million visits during that month alone.[92] Perhaps the most impressive aspect of Hulu's service is its content. The site offers television shows from NBC, FOX, ABC, Sony, Warner Bros., and many other networks and studios.[93] Hulu also strikes a remarkable balance between the interests of the copyright owner, the video website, and the user. The user must watch advertisements during the video broadcast at specific intervals, the Hulu website itself earns a substantial commission from advertisers eager to promote their products on the site, and a portion of this commission goes to the

[88] *See generally* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984); Teleprompter Corp. v. Columbia Broad Sys., Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

[89] Abigail De Kosnik, CONVERGENCE CULTURAL CONSORTIUM PIRACY IS THE FUTURE OF TELEVISION, 1, 4 (2010), http://convergenceculture.org/research/c3-piracy_future_television-full.pdf.

[90] *Id.*

[91] *Information about WatchESPN*, ESPN, http:// espn.go.com/watchespn/about. (visited Nov. 3, 2012).

[92] Tony Shen, *Hulu: The Successful Copyright Licensing Model*, MARTINDALE LEGAL LIBRARY (Oct. 30, 2009), *available at* http://www.martindale.com/internet-law/article_Sheppard-Mullin-Richter-Hampton-LLP_827718.htm.

[93] *Id.*

copyright owner (in this case the network, studio, or production company).[94] Though the copyright-owning networks and studios likely preferred the traditional television system to the Hulu model, increasingly serious infringement and online piracy forced them into accepting this shift.[95] The Hulu model is primarily the result of advances in digital technology, the expansion of the Internet's bandwidth capabilities, the popularization of compression technology, and other technological advancements that have made online piracy more prevalent.[96]

It is difficult to predict just how Aereo's expansion might affect Hulu. In many ways, the two platforms serve the same function—they both offer consumers streaming content, most of which comes from the major broadcast networks. This similarity makes it unlikely that Diller and other Aereo heads would choose Hulu as a possible platform to bundle with Aereo in a cable-like package intended to rival Time Warner, Comcast, Fox, Cablevision or other current providers. Aereo could, however, choose to bundle its services with Hulu's "plus" option, which greatly expands Hulu's content and only costs $7.99 per month.[97] While Hulu might have superior content because it provides consumers with programming that goes beyond the basic broadcast networks, Aereo's live streaming option coupled with its DVR service provides it with advantages of its own—namely the ability to allow customers to record programming or watch live television. It is also important to point out that Hulu is free, while Aereo costs subscribers twelve dollars per month.[98] Ultimately, it is difficult to tell whether the two companies will be able to function together or if one will survive and excel to the detriment of the other.

B. Netflix—A Challenge to Established Content Distribution

While Hulu had an immediate impact on the world of online-streaming content, perhaps no other streaming service has evolved to meet market demands over an extended period of time quite like Netflix.[99] Founded in 1997, the company originally offered an online DVD rental service that shipped discs to users through the mail.[100] Netflix eventually updated its

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] HULU PLUS, http://www.hulu.com/plus- (last visited Jan. 17, 2013).

[98] *See* McCallion, *supra* note 2, at 69.

[99] *See* Michael Liedtke, *Netflix Expands Internet Viewing Option*, SFGATE.COM (Jan. 13, 2008) http://web.archive.org/web/20080115195018/http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/01/13/financial/f090113S93.DTL (explaining how Netflix began by offering subscribers DVD rentals, then offered a limited online library, and then expanded that library).

[100] Jeffrey M. O'Brien, *The Netflix Effect*, WIRED Dec. 2002, *available at*

business to offer customers an option to stream videos of selected titles over the Internet.[101] Shortly after this transition, the company struck a deal with the premium channel Starz Entertainment that allowed Netflix subscribers to watch many mainstream movies on demand.[102] Netflix had previously only offered niche programming, largely because premium cable services like HBO, Showtime, and Starz had traditionally paid huge sums of money in order to lock up the exclusive rights to air Hollywood movies after they had left theaters.[103] The deal with Starz therefore marked a major victory for Netflix. Netflix has continued to pursue contracts with other content-rich channels and companies. Most recently in late 2012, Netflix's chief content officer, Ted Sarandos negotiated a content deal with Disney that was widely hailed as a landscape-shifting victory for Netflix throughout the entertainment industry.[104] Netflix currently has over thirty million subscribers across the globe who, for $7.99 per month, can access thousands of movies and television shows over the Internet on a multitude of devices such as computers, Xbox 360s, Nintendo Wiis, Playstation 3s, iPads, iPhones, Apple TVs, and Google TVs.[105]

Netflix's content expansion presents a threat to the established television industry in much of the same way as Aereo does. For example, Sarandos believes that the Disney deal will prove that Netflix represents a real alternative to premium cable channels as well as a possible solution to online piracy.[106] He also hopes that the Disney deal will show Time Warner—which has a film output deal with HBO until 2014—that Netflix can be a viable alternative to premium cable channels.[107] Sarandos added that he would bid for Time Warner content in the future with the hope of outbidding HBO.[108] Yet, since Netflix negotiates with content holders and contracts for their original content—like Hulu—the legality of Netflix's business scheme has not come under fire.[109] As Netflix increases and strengthens its content, its $7.99 per

http://www.wired.com/wired/archive/10.12/netflix.html?pg=1&topic=&topic_set=.

[101] *See* Liedtke, *supra* note 99.

[102] Dawn Chmielewski, *More Mainstream Movies for Netflix Online*, L.A. TIMES (Oct. 1, 2008), http://latimesblogs.latimes.com/entertainmentnewsbuzz/2008/10/more-mainstream.html.

[103] *Id*.

[104] Georg Szalai, *Netflix's Ted Sarandos Calls Disney Content Deal a 'Game Changer,'* HOLLYWOOD REP. (Dec. 5, 2012), http://www.hollywoodreporter.com/news/netflix-ted-sarandos-discusses-disney-deal-398156.

[105] *Netflix Revolutionizes the way People Watch TV shows and movies*, NETFLIX.COM, https://signup.netflix.com/MediaCenter/Overview.

[106] Szalai, *supra* note 104.

[107] *Id.*

[108] *Id.*

[109] GEORGE B. DELTA & JEFFERY H. MATSUURA, LAW OF THE INTERNET § 5.05 (3rd ed.

month subscription fee becomes a more attractive alternative to a pricey cable bill.[110] With this in mind, it is no surprise that some have floated the possibility that Diller could bundle Aereo with Netflix in a package that could rival that of a standard cable provider.[111] Diller has remained silent on this possibility but has acknowledged that as the Aereo platform gains notoriety it may be bundled with other content platforms.[112] It remains unclear what Diller's intentions are when it comes to bundling Aereo with other services, but a combination of Aereo and Netflix remains an intriguing possibility.

C. Slingbox—Aereo's Placeshifting Relative

While Netflix represents a potential future companion for Aereo, Slingbox looks more like Aereo's forerunner. The device is a small black box, created by the company Sling Media, which allows viewers to watch their home DVRs or cable boxes from anywhere in the world simply by using a laptop, or a television, and an internet connection.[113] Originally marketed to sports fans who wished to watch their favorite teams while out of town on vacation or business, the device has since expanded.[114] Like Aereo, Slingbox uses placeshifting technology—which simply means that the "place" of the broadcast shifts to wherever the viewer may be—to allow its customers to watch live television around the globe.[115] While Sling Media originally intended for customers to use its technology for personal viewing, many of the over 500,000 Slingbox users have begun to charge others from different cities and countries a fee to use their Slingbox accounts.[116] Sling Media has worked

2013) ("For example, Netflix has entered into licensing agreements with major television content providers to permit streaming of their video content catalogs through the Netflix online system.").

[110] See, e.g. *DIRECTV*, VERIZON.COM, http://www.verizon.com/home/directv/#packages (last visited Nov. 10, 2013) (monthly cable fee from $64.99); *FiOS TV*, VERIZON.COM, http://www.verizon.com/home/fiostv/ (last visited Nov. 10, 2013) (monthly cable fee from $49.95); *Xfinity TV*, COMCAST.COM, http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html (last visited Nov. 10, 2013) (monthly cable fee from $29.95).

[111] *See* Grigoriadis, *supra* note 1, at 114 (proposing that Diller could "take Aereo and bundle it with Netflix and some YouTube offerings, various webisodes, and put it together and say, this is $33, versus a Time Warner package for $133").

[112] *See id.* (Noting that Diller has stated "Aereo is a platform, and once that platform is established, you may offer other things alongside that platform.").

[113] *Web TV: Is Slingbox-Hosting Legal?*, NEWSWEEK (Dec. 16, 2008), http://www.newsweek.com/web-tv-slingbox-hosting-legal-83485.

[114] Andrew Russell, *Placeshifting, The Slingbox, and Cable Theft Statutes; Will Slingbox use Land you in Prison?*, 81 TEMP. L. REV. 1239, 1239 (2008).

[115] *Id.*

[116] *Web TV*, *supra* note 113.

with content providers such as Disney, which uses Slingbox to forward video during post-production from processing machines to offsite employees.[117] Disney notwithstanding, other prominent television channels and professional sports leagues have threatened to file suit, alleging copyright infringement.[118]

The legal implications of placeshifting remain largely uncertain.[119] No court has offered a definitive ruling on whether placeshifting constitutes fair use and while some commentators have considered Slingbox a possible fair use, others vehemently disagree.[120] Congress has attempted to clarify its position on placeshifting and considered multiple bills such as the Digital Transition Content Security Act that aim to protect copyright owners from infringements resulting from new technology like Slingbox.[121] Many of these bills, however, would likely eliminate placeshifting technology like Slingbox and Aereo altogether if passed into law.[122] There are currently two federal statutes that guard against cable television theft and could potentially limit the possibilities of placeshifting: 47 U.S.C. § 605 and 47 U.S.C. § 553.[123] Congress enacted Section 605 as a part of the Communications Act of 1934 to stop illegal signal interception.[124] Section 553 states that "no person shall intercept or receive any communications service offered over a cable system."[125] However, Section 605 contains a private use exception, which makes it clear that "the manufacture, sale, and home use of earth stations are legal activities."[126] For now, Slingbox seems equipped to survive charges of copyright infringement because, like Aereo, it is designed so that only one computer can access one Slingbox at a time. As a result, Sling Media can argue that it is engaged in a private, rather than a public performance under current copyright law.[127]

Since courts are still largely unsure of how to view placeshifting technology, it is likely that Aereo and Slingbox will face many of the same legal issues in the future. The hybrid nature of Aereo's technology, which combines qualities of a DVR, a placeshifting device, and a retransmission service, make it a unique content platform that could eventually lead to more copyright decisions

---

[117] Russell, *supra* note 114, at 1246-47.

[118] *Id*. at 1239-40.

[119] Carson S. Walker, *A La Carte Television: A Solution to Online Piracy?*, 20 COMMLAW CONSPECTUS 471, 485 (2011).

[120] *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001).

[121] Jessica L. Talar, *My Place or Yours: Copyright, Place-Shifting, & The Slingbox: A Legislative Proposal*, 17 SETON HALL J. SPORTS & ENT. L. 25, 26 (2007).

[122] *Id*.

[123] Russell, *supra* note 114, at 1247.

[124] *Id*. at 1247-48.

[125] 47 U.S.C. § 553 (2012).

[126] 130 Cong. Rec. 27,986 (1984) (statement of Rep. Rose).

[127] Talar, *supra* note 121, at 32.

affecting a wider range of digital television platforms in the future.[128] At the moment, the key for Aereo, Slingbox, and every other placeshifting device is to make sure that their services constitute a private use, under federal law;[129] only then will these services gain protection under the private use exception pursuant to 47 U.S.C. § 605.[130] If Aereo expands its services across the United States, Aereo's coexistence with Slingbox will be interesting to see. Though both services offer the advantages of placeshifting technology, Slingbox will allow sports fans to watch their favorite teams when traveling or abroad, while Aereo will offer viewers a chance to watch their local broadcast channels in a convenient way at an affordable price.[131] With this in mind, it is conceivable that both services could carve out their own separate niches in the digital entertainment universe.

V. OTHER ISSUES AEREO COULD FACE IN COURT— POTENTIAL PROBLEMS FOR THEPLATFORM

A. WPIX, Inc. v. ivi, Inc.—The Decision

Several years after the emergence of Slingbox, a new company arrived on the scene touting technology more simple than that of Sling Media and content more expansive than that of Hulu.[132] A Seattle start-up business originally founded in 2007, ivi was designed to capture over-the-air broadcasts of programming from television networks such as ABC, CBS, CW, FOX, NBC, Telemundo, and Univision, and non-commercial programming like PBS:[133] ivi would then stream these broadcasts over the Internet to subscribers who downloaded the ivi TV player.[134] Additionally, the service captured signals transmitted by these broadcast stations in Seattle, New York, Chicago, and Los Angeles and allowed subscribers located anywhere in the United States to watch these area-specific networks.[135] In 2010 the television stations listed above, the producers of programming shown on these stations, and Major

[128] Walker, *supra* note 119, at 487.

[129] *Id*. at 486.

[130] *Id*.

[131] *See* Russell, *supra* note 114, at 1239; Walker, *supra* note 119, at 486.

[132] Eriq Gardner, *Watch Out, Hulu. Meet the New Napster of Television*, HOLLYWOOD REP (Dec. 21, 2010, 11:04 AM), http://www.hollywoodreporter.com/blogs/thr-esq/watch-hulu-meet-napster-television-64269.

[133] Eriq Gardner, *Appeals Court Affirms Injunction Against TV Streamer ivi*, HOLLYWOOD Rep (Aug. 27, 2012, 2:07 PM), http://www.hollywoodreporter.com/thr-esq/ivi-aero-tv-streamer-court-365631; *see* WPIX, Inc. v. ivi, Inc., 765 F.Supp.2d 594, 598 (S.D.N.Y. 2011).

[134] *ivi, Inc*., 765 F. Supp. 2d at 598.

[135] *Id*. at 598-99.

League Baseball filed a lawsuit against ivi.[136] The plaintiffs sought a preliminary injunction to prevent further retransmissions of their copyrightable content by the new media platform.[137] It was undisputed that the plaintiff television networks held valid copyrights and that ivi was engaged in a public performance of their works, but ivi argued that it was still legally able to stream the content because it was a "cable system" under Section 111 of the Copyright Act[138] and was thus entitled to a compulsory license.[139] Yet ivi also argued that it was *not* a cable system under the Communications Act—because if this were true the company would be required to "secure retransmission consent from the affected broadcasters."[140] Through this strategy, ivi essentially hoped to gain protection under one statute while avoiding responsibility under the other.

The District Court for the Southern District of New York found ivi's argument unpersuasive, and on February 22, 2011, enjoined ivi from further infringing the broadcast networks' and producers' exclusive rights under copyright law.[141] Judge Buchwald noted that "[n]o technology . . . has been allowed to take advantage of Section 111 to retransmit copyrighted programming to a national audience while not complying with the rules and regulations of the FCC and without the consent of the copyright holder."[142] Judge Buchwald also pointed out that a period of congressional inaction has marked the decade since the Copyright Office rejected the applicability of Section 111 to internet retransmissions, insinuating that Congress would have

---

[136] Lauren Lynch Flick & Cydney Tune, *A Look at the Decision Enjoining ivi TV From Streaming Broadcast Content on the Internet*, PILLSBURY WINTHROP SHAW PITTMAN LLP ADVISORY, at 1 (March 3, 2011), http://www.pillsburylaw.com/publications/a-look-at-the-decision-enjoining-ivi-tv-from-streaming-broadcast-content-on-the-internet.

[137] *Id*.

[138] Section 111 defines "cable system" as:

> 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.

17 U.S.C. § 111(f)(3) (2012).

[139] *ivi Inc*., 765 F. Supp. 2d at 599-601 (noting that if a service is identified as a "cable system" under the Copyright Act, it would be able to pay the Copyright Office $100 per year in exchange for a compulsory license which would entitle it to use and profit from the copyrighted works of others).

[140] Flick & Tune, *supra* note 136, at 2.

[141] *Id*. at 1-2.

[142] *ivi, Inc*., 765 F. Supp. 2d at 602.

acted if it had disagreed with this interpretation.[143] Ultimately, Judge Buchwald concluded that ivi's position required a definition of a cable system that was "so remarkably simple and broad" that it proved to be unworkable.[144] Under this interpretation, "anyone with a computer, internet connection, and TV antenna can become a 'cable system' for purposes of Section 111."[145]

The remainder of the opinion sets out the four necessary factors for a preliminary injunction and explains why ivi's activity should be enjoined.[146] With respect to the copyright owners' likelihood of success on the merits, the court found that the Copyright Act and the Communications Act were meant to work in tandem with one another and that internet television distribution is not equivalent to cable system distribution because it is national rather than local.[147] As a result, the networks were likely to prevail on the merits.[148] Next, the court examined whether the networks would suffer irreparable harm if the court failed to grant an injunction.[149] Since ivi would devalue the networks' copyrighted programming and hurt their ability to negotiate with advertisers, the court concluded that the plaintiffs would suffer irreparable harm.[150] In terms of the balance of hardships, the court found that any damage that would result from enjoining ivi's business would result from the business' infringement in the first place, and as a result, should not be entitled to consideration.[151] Finally, the court found that an injunction would best serve the public interest because it would allow copyright owners to control and protect their original content and the revenue it generates.[152] In short, because these four elements all weighed strongly against ivi, the court had little trouble in deciding to enjoin the online TV service.[153]

In August of 2012, the Second Circuit affirmed the district court's ruling in the ivi case.[154] Judge Chin delivered a fairly narrow ruling that does not necessarily indicate how the Circuit would rule when it reviews the *Aereo* case.[155] In less extreme language than the district court's decision, Chin noted

[143] *Id*. at 616.

[144] *Id*.

[145] *Id*. at 617.

[146] *Id*. at 617-22; *see supra* note 87 and accompanying text (describing the four requirements).

[147] Flick & Tune, *supra* note 136, at 2-3.

[148] *Id*.

[149] *Id*. at 3.

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594, 622 (S.D.N.Y. 2011).

[154] Gardner, *Appeals Court*, *supra* note 133.

[155] *Id*.

that "it is simply not clear whether a service that retransmits live television over the Internet constitutes a cable system."[156] While the panel of judges strongly asserted that ivi and similar companies present irreparable harm to broadcast networks and that the networks would likely succeed on the merits of their claim, the opinion ultimately did not offer many hints as to the future of Aereo.[157]

B. Similarities and Differences Between ivi and Aereo

Though it is true that ivi is Aereo's close technological relative, the two platforms still have substantial technological differences that have led the two companies' respective legal teams to adopt vastly different arguments in court.[158] Perhaps the most important difference is that Aereo relies on many antennas that each capture over-the-air signals which are sent to individual users.[159] This allows Aereo to argue that it is engaged in a private performance of the broadcast networks' copyrighted work and is thus protected under 47 U.S.C. § 605. However, ivi can make no such claim, which is likely why its legal team had to adopt the more tenuous argument that its technology constituted a cable system under Section 111 of the Copyright Act.[160]

Another key difference between the two platforms is that while Aereo is currently engaged in local retransmissions of content, ivi was retransmitting broadcast signals nationwide.[161] The Southern District of New York's opinion specifically noted that "statutory licenses are not intended to permit a company . . . to take broadcast signals from four major cities. . .and make them available to everyone in the United States, regardless of geographic location."[162] This is something that Aereo must keep in mind as it attempts to expand its technology across the country. When Aereo first announced that it would be offering its initial service in New York, it said that it would expand "a step at a time, a market at a time."[163]

This is potentially an important distinction that could save Aereo from a legal fate similar to ivi's. If Aereo can continue to focus on local markets as it expands gradually, it may be able to take advantage of the legal opening left by

[156] *Id*. (quoting WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 280 (2d Cir. 2012)).

[157] *Id*.

[158] *Compare* WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594 *with* American Broadcasting Cos. v. Aereo, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

[159] *Aereo*, 874 F. Supp. 2d at 378.

[160] *See* Gardner, *Appeals Court*, *supra* note 133.

[161] Eriq Gardner, *Aereo, ivi and the Legal Road that Will Determine the Future of TV Cord-Cutting*, HOLLYWOOD REP., (Feb. 15, 2012 2:14 PM), http://www.hollywoodreporter.com/thr-esq/aereo-ivi-tv-chord-cutting-291395.

[162] *ivi, Inc*., 765 F. Supp. 2d at 615.

[163] Gardner, *Aereo, ivi*, *supra* note 161.

the Southern District of New York in the *ivi, Inc.* opinion.[164] The more Aereo expands, however, the more it will inevitably begin to look like it is retransmitting broadcast signals nationwide.[165] This remains one of the least-settled legal issues in store for Aereo, and while it seems clear that courts will look unfavorably upon any attempt to retransmit local broadcast channels to a national audience, the scope of Aereo's service may nonetheless test the limits of what constitutes a "local" broadcast. Furthermore, Aereo was able to initially avoid a preliminary injunction by relying on the Second Circuit's precedent in *Cablevision*;[166] if the legality of the media platform is challenged in other circuits as Aereo continues to expand, another court may take an entirely different viewpoint.[167]

VI. A LA CARTE TELEVISION

A. How Might Aereo Make It Possible?

Assuming that Aereo and similar innovators survive the various legal challenges broadcast networks throw at them, the innovators will significantly alter the way we watch television.[168] The possible change that has garnered the most speculation and excitement from entrepreneurs, academics, and television "junkies" around the world is Aereo's potential to topple the existing cable television format.[169] Aereo's success could give way to an a la carte option that would allow consumers to pick and choose the television channels they purchase and to pay accordingly.[170] Such a scenario might sound like a slice of science fiction, but networks fear Aereo precisely because it is completely capable of creating such dramatic change.

Today, the business side of broadcast television revolves around advertising; that is, the networks must rely on Nielsen ratings[171] in order to monetize their

---

[164] *Id.*

[165] *See id.*

[166] *See* American Broadcasting Cos. v. Aereo, 874 F. Supp. 2d 373, 396 (S.D.N.Y. 2012).

[167] Eriq Gardner, *Aereo Expands Digital TV Service Nationally*, HOLLYWOOD REP, (Jan. 8, 2013, 11:18 AM), http://www.hollywoodreporter.com/news/aereo-expands-digital-tv-service-409769.

[168] Gardner, *Aereo, ivi*, *supra* note 161.

[169] *See* Robertson, *supra* note 14 (explaining how the networks fear that if Aereo does not pay for service, nobody else will want to either).

[170] Walker, *supra* note 119, at 487.

[171] Nielsen ratings track viewing behavior down to the second by integrating audience measurement across TVs, PCs, and mobile phones. *Television Measurement* , NIELSEN, http://www.nielsen.com/us/en/nielsen-solutions/nielsen-measurement/nielsen-tv-measurement.html (last visited Apr. 9, 2013).

programming and negotiate with advertisers.[172] If Aereo is allowed to continue with its current business model, it will damage the networks' ability to negotiate with these advertisers by drawing viewers away from traditional broadcast channels such as ABC, CBS, NBC, and FOX.[173] In fact, with Aereo's subscription fee at just twelve dollars per month, many network executives worry that consumers might "cut the cord" on cable altogether in favor of combining Aereo's services with Netflix, Hulu or some other content platform.[174] Matt Bond, Executive Vice President of Content Distribution at NBC Universal, has said that "any economically rational cable operator . . . will use [Aereo] as leverage in upcoming retransmission negotiations"[175] FOX's Sherry Brennan confirmed Bond's prediction, saying that "cable companies have already referenced Aereo when discussing lowering their retransmission fees."[176] The bottom line is that the broadcast networks and cable companies stand to lose so much business if Aereo succeeds that they would be forced to change their model to ensure that they remain competitive in the marketplace.[177] The most logical change would be to replace the current bundling model with an a la carte option, as some providers such as DirectTV have already suggested.[178]

However, the idea of a la carte television is not completely new.[179] The Federal Communications Commission ("FCC") first considered moving to an a la carte based system in 2004, when it called cable industry representatives to Washington D.C. to explain FCC skepticism regarding such a model.[180] The FCC explained to the representatives that the congressional requests to study a

---

[172] American Broadcasting Cos. v. Aereo, 874 F. Supp. 2d 373, 397-98 (S.D.N.Y. 2012).

[173] *Id*.

[174] Brian Stelter, *New Service Will Stream Local TV Stations in New York*, NY TIMES, (Feb. 14, 2012, 10:58 AM) http://mediadecoder.blogs.nytimes.com/2012/02/14/new-service-will-stream-local-tv-stations-in-new-york/.

[175] Robertson, *supra* note 14.

[176] *Id*.

[177] *See* Derek Thompson, *The End of TV and the Death of the Cable Bundle*, THE ATLANTIC, (July 12, 2012, 1:54 PM), http://www.theatlantic.com/business/archive/2012/07/the-end-of-tv-and-the-death-of-the-cable-bundle/259753/ (stating that DirectTV thinks that online streaming is eating away at the ratings of MTV and Comedy Central, and has demanded that Viacom give consumers the right to select channels a la carte).

[178] *Id*.

[179] *See generally* FCC, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2004); [hereinafter "FCC, Report"]; FCC, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2006) [hereinafter "FCC, FURTHER REPORT"].

[180] Michael Grebb, *FCC: Why No a La Carte Cable?*, WIRED (July 30, 2004), *available at* http://www.wired.com/science/discoveries/news/2004/07/64399.

la carte options reflected the nation's goal of making communications and media available to all Americans at affordable rates.[181] Established networks and cable providers claimed that a la carte television was "one of the worst ideas [they had] ever heard."[182] Yet smaller companies and operators in rural cable systems such as Bennett Hooks, the chief executive of the Buford Media Group, were more willing to try.[183] Despite this support, the FCC's report ultimately concluded that a la carte television would only financially benefit those consumers who would purchase less than nine channels per year.[184] Since the average household watched roughly seventeen channels, the FCC found that a la carte programming would actually increase most families' monthly cable bills while offering consumers less choice in terms of content.[185]

Less than two years after the initial report, however, the FCC revised its original opinion in a document known as the "Further Report," claiming that an a la carte offering would, in fact, represent a cheaper alternative to purchasing a standard monthly cable package.[186] The Further Report explained that consumers could shave up to thirteen percent off their cable bills if a la carte purchasing were an option.[187] Between 2004 and 2006, Kevin Martin replaced Michael Powell as FCC Chairman.[188] The impetus behind the Further Report was primarily Martin's desire to correct the errors involved in the prior findings.[189] Most notably, the Further Report concluded that current cable subscribers would only see their costs increase if they purchased twenty channels through an a la carte system, rather than the previously reported nine.[190] The FCC's about-face was met with mixed opinion. While the Parents Television Council said that the Further Report "confirms common sense," the

---

[181] *See* Walker, *supra* note 119, at 487-8 (quoting FCC, REPORT, *supra* note 178, at 3) ("[A]t the heart of Congressional requests for the FCC to study a la carte services for cable subscribers is our nation's goal of making available communications and media technologies to all Americans at affordable rates.").

[182] Grebb, *supra* note 180.

[183] *Id*.

[184] FCC REPORT, *supra* note 179, at 6.

[185] *See id*.

[186] *Id*.; *see also* Leslie Cauley, *Study: A La Carte Cable Would be Cheaper*, USA TODAY, (Feb. 9, 2006, 2:42 PM), http://usatoday30.usatoday.com/money/media/2006-02-09-cable_x.htm.

[187] FCC, FURTHER REPORT, *supra* note 179, at 4.

[188] *See* Biography of Michael K. Powell, FCC, http://transition.fcc.gov/commissioners/previous/powell/biography.html; Biography of Kevin J. Martin, FCC, http://transition.fcc.gov/commissioners/previous/martin/biography.html.

[189] Cauley, *supra* note 186.

[190] FCC FURTHER REPORT, *supra* note 179, at 4.

National Cable & Telecommunications Association claimed that the new findings did not reflect "the reality of the marketplace."[191] Meanwhile, others have speculated that an a la carte system could increase licensing fees while making it harder for a new channel to enter the market.[192]

Aereo's technology platform is especially intriguing in that it would likely push cable providers to offer a la carte options without government coercion. Cable companies like TimeWarner and Comcast would be forced to provide viewers with a la carte options at affordable rates. Otherwise, they would risk losing viewers to a combination of companies like Aereo and Netflix that offer viewers movies, television shows, and live TV, all at a much lower price than a current cable package.[193] Regardless of whether the fear that a la carte television will increase prices is well-founded or not, with Aereo as an alternative, cable companies will not have the option of raising prices if they wish to continue to compete in the current market.[194] Additionally, reports also suggest that Aereo has been "moving towards positioning its service as one that would" eventually offer "an a la carte menu" of broadcast and cable channels.[195] In December of 2012, Aereo signed a deal with Bloomberg TV, making Bloomberg the first cable network it will offer on its service.[196]

B. What Will the Model Look Like?

With an a la carte option looking more and more probable, the next question is "what will such a service look like?" The simplest model would likely result from users purchasing their television channels from Aereo's service itself. In this scenario, customers would simply choose channels directly from Aereo's menu and be charged accordingly.[197] Aereo has already experimented with various pricing structures ranging from a one-dollar daily rate to a twelve-dollar monthly plan, and an eighty-dollar yearly subscription.[198] At this early stage of the company's life it is plausible that an a la carte payment structure could be next. In addition to this relatively simple a la carte model, some within the entertainment industry have already speculated about the different

---

[191] Cauley, *supra* note 186.

[192] Holly Phillips, *I Want My MTV But Not Your VH1: A La Carte Cable, Bundling, and the Potential Great Cable Compromise*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 321, 330, 335 (2008).

[193] *See* Stelter, *supra* at note 174.

[194] *See id*.

[195] Gardner, *Aereo Expands*, *supra* note 167.

[196] Shalini Ramachandran, *Aereo Adds First Cable Channel: Bloomberg TV*, WALL ST. J., Dec. 13, 2012, *available at* http://online.wsj.com/news/articles/SB10001424127887323981504578177630291954460.

[197] *See* Gardner, *Aereo Expands*, *supra* note 167.

[198] *Id*.

models the cable companies, networks themselves, or other content platforms may adopt in the wake of Aereo's offerings.[199]

Under the first possible model, the cable companies would offer "tiered channel packages" to consumers.[200] This model would allow subscribers to pick from a range of highly specific pre-packaged groups of channels and to pay accordingly.[201] The Canadian company Bell has already adopted such a model according to an "edict from [the] country's broadcast regulator,"[202] and Comcast has experimented with the idea in the United States by conducting a trial of "MyTV Choice" in parts of Connecticut, Massachusetts, and Vermont.[203] This plan allows subscribers to purchase a basic bundle of channels called "Get Started" for only twenty-five dollars; users can then add additional "theme packages" onto this base for ten dollars a piece.[204] The criticism of this system is that, "as a whole, it is not a true a la carte" offering, as the cable companies are still bundling selected channels.[205] Others claim that since the base package still requires subscribers to bundle broadband and phone services, the consumer is ultimately only able to save very little money.[206] Nevertheless, if implemented in a way that can save subscribers money, tiered packages represent a kind of middle ground between the established cable system and a la carte offerings that could benefit both the cable companies and the consumer.[207]

Under a second possible model, cable companies would be relieved of their "middleman capacity" and customers would deal directly with the channels themselves.[208] This option is obviously anathema to the cable companies because they would be stuck paying for unused programming and "would

---

[199] *See* Walker, *supra* note 119, at 489 (stating that several different models for a la carte television have been proposed after the FCC's Further Report).

[200] Karl Bode, *Comcast Trials 'A La Carte' TV Tiers That Aren't A La Carte*, DSLREPORTS., (Oct. 7, 2011, 4:22 PM), http://www.dslreports.com/shownews/Comcast-Trials-A-La-Carte-TV-Tiers-That-Arent-A-La-Carte-116482.

[201] *Id.*

[202] Walker, *supra* note 119, at 489; David Lazarus, *Give Us A La Carte Channel Pricing*, LA TIMES, (July 13, 2012), http://articles.latimes.com/2012/jul/13/business/la-fi-lazarus-20120713.

[203] Bode, *supra* at note 200.

[204] *Id.*

[205] Walker, *supra* note 119, at 489.

[206] Bode, *supra* at note 200.

[207] *See* Walker, *supra* note 119, at 490.

[208] Brad Tuttle, *TV A La Carte: One Man's Dream*, TIME, Mar. 4, 2010, *available at* http://business.time.com/2010/03/04/tv-a-la-carte-one-mans-dream/ (noting that "If [cable company] subscribers on average receive 200 channels, but only watch fifteen of them, then a switch to a la carte would reduce their revenue.").

likely have to raise fees to maintain their [current] revenue."[209] It would also set up an interesting battle between channels—while the successful channels would likely have the ability to gain more revenue from an a la carte system, less popular channels would have to cut costs, and some may even be forced out of business.[210] Many companies like Disney own upwards of twenty channels, so even while some of their more successful channels might survive in an a la carte system, they would likely oppose such an option because their remaining channels would likely suffer.[211] A potential solution to this problem would be to allow Disney and similar companies to bundle their collective networks. This option, however, likely would lead to the same problems as in the previously mentioned tiered channel packages.[212] As recently as two years ago, resistance from networks and cable companies made this "direct from channel" model seem unlikely, but with the help of third parties such as Aereo "chipping away" at the status quo, it has become a legitimate possibility.[213]

A final model is essentially the one that Aereo is attempting to implement—one that charges consumers a subscription fee for content through an already existing service.[214] This option deserves a second look because other companies are attempting to institute this model as well, with varying levels of success. Apple has been one of the earliest proponents of such a model, often referred to as an "over-the-top" service.[215] It has already proposed a program where it would charge consumers thirty dollars per month to watch television through iTunes.[216] This service would not be linked to any specific Apple device, but would instead be an extension of the company's iTunes store.[217] Network executives have been reluctant to buy into this model, primarily because they do not want to threaten existing relationships with and subscription fees from cable providers.[218] Perhaps sensing this hang-up, Apple has also implemented streaming technology through its Apple TV, which allows people who own the device to stream existing platforms such as Netflix or HBO Go, which they can already access.[219] Meanwhile, companies like

[209] Catherine DiBenedetto, *Burning Question: Where's My A La Carte TV?*, WIRED, Jan. 25, 2010, *available at* http://www.wired.com/magazine/2010/01/ts_burningquestion/.

[210] Tuttle, *supra* note 208.

[211] *Id.*

[212] *Id.*

[213] DiBenedetto, *supra* note 209.

[214] Walker, *supra* note 119, at 485-87.

[215] Peter Kafka, *Apple's iTunes Pitch: TV for $30 a Month*, ALL THINGS D (Nov. 2, 2009), http://allthingsd.com/20091102/apples-itunes-pitch-tv-for-30-a-month/.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *What's on Apple TV?*, APPLE, http://www.apple.com/appletv/whats-on/ (last visited

Roku, which give users the option of purchasing a variety of streaming entertainment devices, have followed suit.[220] It will be interesting to see how Aereo's introduction into the market place affects these companies in the future.

VII. CONCLUSION

During the first week of 2013, Diller's InterActiveCorp ("IAC") along with other investors, such as Highland Capital Partners, agreed to expand their initial investment in Aereo from $20.5 million to $38 million.[221] This increase in funding will certainly bolster Aereo's legal resources as it continues to tackle the broadcasters in court. The platform also began the new year by announcing that it would expand its services to twenty-two new cities.[222] Within the next several months, people eager to cut the cord on traditional cable services will have the ability to do so in cities such as Birmingham, Madison, Cleveland, Providence, and many more.[223]

Yet this expansion comes at a time when Aereo is also fighting for its right to exist. Both the new media platform and the broadcast networks appeared before the Second Circuit in late November of 2012 in order to, once again, discuss the prospects of a preliminary injunction.[224] Just as before, the holding in *Cablevision* was at the center of the debate.[225] Attorneys for the broadcasters first argued that Cablevision "had licensed its primary transmission, whereas Aereo had not," and second that Cablevision's DVR technology represented "a storage service, not a retransmission service" like Aereo.[226] In response, Aereo's attorneys countered that the district court knew exactly what it was doing when it correctly held that the platform was a private service based on thousands of antennas each capturing individual copies for playback.[227] The court worried that the networks' arguments might implicate other devices such as Slingbox, which were not on trial, but its biggest point of emphasis was that both sides should "think big" when making arguments.[228] Apparently Aereo's lawyers thought bigger, as the Second Circuit dismissed the broadcaster's

Nov. 17, 2013).

[220] *About Roku*, ROKU, http://www.roku.com/about/company (last visited Nov. 17, 2013).

[221] Gardner, *Aereo Expands*, *supra* note 167.

[222] *Id*.

[223] *Id*.

[224] Eriq Gardner, *TV Broadcasters Tell Appeals Court to Shut Down Aereo*, HOLLYWOOD REP, (Nov. 30, 2012), http://www.hollywoodreporter.com/thr-esq/tv-broadcasters-tell-appeals-court-395858; *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2013).

[225] WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 689-94 (2013).

[226] *Id*. at 690-91; Gardner, *TV Broadcasters*, *supra* note 224.

[227] Gardner, *TV Broadcasters*, *supra* note 224.

[228] *WNET, Thirteen*, 712 F.3d at 695.

arguments as to why Aereo is distinguishable from Cablevision.[229] Writing for the Second Circuit panel, Judge Droney concluded that Aereo "creates unique copies for each customer and that the transmission of the copy is generated from the unique copy that no one else can view."[230] The broadcast networks will not take the ruling lightly, however, and at this time, an appeal to the Supreme Court seems likely.[231]

Indeed, if one phrase characterizes Aereo's service, and the Internet in general, it is "think big." While Aereo represents some exciting possibilities for a la carte television, it is also much more—it is about moving television online, allowing sports fans to watch the Olympics or the Super Bowl without a cable package, and giving consumers real choice.[232] New media platforms have always evolved ahead of existing law, and there is no doubt that Aereo and similar services will continue to stretch the boundaries of current copyright law.[233] In fact, courts have noted that new technology, such as the RS-DVR at issue in *Cablevision* as well as Slingbox, have blurred the line between cable systems, which retransmit public performances, and those transmissions which are classified as private.[234] Yet courts have explicitly noted that they will be careful not to disregard the language of the transmit clause without direct instruction from Congress.[235] Aereo's services therefore seem to be safe, absent future congressional intervention. If federal courts continue to interpret copyright law, notably the transmit clause, in a technologically friendly way, companies like Aereo, Netflix, Slingbox, and many others will continue to innovate and ultimately provide consumers with more choice at lower prices.

[229] *Id*. at 696; Eriq Gardner, *Aereo Beats Broadcasters in Big Appellate Ruling*, HOLLYWOOD REP, (Apr. 1, 2013), http://www.hollywoodreporter.com/thr-esq/aereo-beats-broadcasters-big-appellate-431988.

[230] Gardner, *Aereo Beats*, *supra* note 229.

[231] *Id*.

[232] Thompson, *supra* note 177.

[233] McCallion, *supra* note 2, at 70.

[234] Gardner, *Aereo Beats*, *supra* note 229.

[235] *Id*.