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UP IN THE AIRWAVES: TECHNOLOGICAL DETERMINISM, THE PUBLIC PERFORMANCE RIGHT, AND AEREO'S UNCERTAIN FUTURE

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ABSTRACT

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This paper explores the public performance right, how it has evolved over time, and how it had been applied in Aereo, Inc.'s lower court descisions. It examines two competing philosophical approaches to the role technology plays in society, and provides examples of judicial subscription to one theory or the other. Written in anticipation of the 2014 Aereo Inc. descision, this paper posits that, when doubts arise in application of the copyright law, courts should resolve those doubts in favor of protecting new technologies like Aereo, consistent with Justice Breyer's analysis in his concurrence in Grokster*, rather than in the manner consistent with the eventual outcome of the case.*

I. INTRODUCTION

> In the long run, the American public will not tolerate monopoly abuse of such a medium of abundance. If cable becomes an increasingly important means of delivery and nonetheless acts with hubris, then resentment and protest against a power wielder that overcharges, keeps unfriendly interests from talking, and behaves with arrogance will generate demand for reform.
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> Ithiel de Sola Pool, Technologies of Freedom, 1983

As a professor of mine once said, "discussions of policy and economics can continue ad nauseam, however, in law school we cut to the chase by asking what the Constitution says on the issue."[1] Congress's ability to legislate in the area of copyright is based in the Article I Section 8 Clause 8, also known as the "Progress Clause."[2] It states "To 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[.]"[3] Given the explicit desire of the Continental Congress to "promote the Progress of Science," it would appear elementary that society should embrace new technology that allows for the more efficient spread of ideas. However, judges are not art critics and are presumed to subscribe to the doctrine of aesthetic neutrality. The doctrine directs judges to avoid passing legal judgment based on their own artistic determination of whether a given work is worthy of legal protection or not.[4] Therefore, in the eyes of the law Pablo Picasso's *Guernica* and ABC's *Trophy Wife* should hold the same artistic value. Even though judges cannot rule on the aesthetic value of a work, they are entitled to determine the value new technology has, or will have, in society because there is no corresponding doctrine of jurisprudence that

[1] Michael Metheson, Professorial Lecturer in Law at The George Washington University School of Law, Class One Lecture for Spring 2013 U.S. Foreign Relations Law (January, 2013).

[2] Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1, 3 (2013).

[3] U.S. CONST. art. I, § 8, cl. 8.

[4] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

requires judges to evaluate technological advancements in a neutral light.

Whether consciously or subconsciously, judges allow their philosophical understandings of the role technology plays, or should play, in society to slip into their opinions when tasked to rule on the legality of a new technology. Justice Breyer's concurrence in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* is demonstrative.[5] He argued that "[certain legal] standard[s] seek[] to protect . . . the development of technology more generally."[6] Justice Breyer is not unique in this regard. In the context of the Second Circuit's decision in *WNET, Thirteen v. Aereo Inc.* ("*Aereo II*"), both Judge Droney's majority opinion and Judge Chin's fierce dissent are peppered with differing models of technological philosophy.[7]

A. Technological Determinism vs. Social Determinism

The two competing philosophies of technology are "technological determinism" and "social determinism."[8] Technological determinism can be defined in terms of either "soft" or "hard" views.[9] "[A] 'soft view' . . . holds that technological change drives social change but at the same time responds discriminatingly to social pressures. A 'hard view' . . . perceives technological development as an autonomous force, completely independent of social constraints."[10] It is "the belief that social progress is driven by technological innovation[.]"[11] By contrast, social determinism teaches just the opposite, that technological innovations in society are driven by social progress.[12]

As you explore the contrasting opinions in *Aereo II*[13] as well as the other opinions mentioned in this paper, I challenge you to consider the philosophical forces that might be at play. Was Judge Droney simply

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[5] 545 U.S. 913, 955 (2005) (Breyer, J., concurring); s*ee infra* Part I.B (discussing Justice Breyer's concurring opinion in *Grokster*).

[6] Grokster, Ltd., 545 U.S. at 955.

[7] 712 F.3d 676 (2d Cir. 2013); *see infra* Parts III-IV (discussing in detail Judge Droney's majority opinion and Judge Chin's dissent).

[8] Mentor Cana, *Social Constructionism vs. Technological Determinism*, INFOSOPHY: SOCIO-TECHNOLOGICAL RENDERING OF INFORMATION (Apr. 29, 2013), http://www.kmentor.com/socio-tech-info/2003/04/social-constructionism-vs-tech.html.

[9] THE MIT PRESS, DOES TECHNOLOGY DRIVE HISTORY? THE DILEMMA OF TECHNOLOGICAL DETERMINISM 2 (Merritt Roe Smith & Leo Marx eds., 1994).

[10] *Id.*

[11] *Id.* at 38.

[12] *Id.*

[13] 712 F.3d 676 (2d Cir. 2013).

applying the letter of the law as it exists in the Second Circuit?[14] Were the broadcasters arguments simply insufficient to distinguish Aereo's system from the precedent set by *Cartoon Network*?[15] Was there something else at work? How can two equally qualified judges who sit on the same bench apply the same law to the same set of facts, yet reach polarized outcomes? For those who have studied the law, the answer is easy. Judges subscribe to different methods of interpretation and may give more or less weight to the arguments that parties bring before them. The clearest example of this phenomenon is the dichotomy between a strict textualism versus an interpretation that argues the law is more malleable inside the contours of the spirit of a given law. While these judicial modes of interpretation can help a judge reach a desired[16] conclusion, they do not explain why a judge subjectively desires a certain outcome. In the context of *Aereo II*,[17] I believe the difference between Judge Droney's opinion and Judge Chin's dissent is not a product of differing jurisprudential theories, but rather this fundamental disagreement entrenched between the two men's philosophical approaches to technology and the role it should play in society.

Members of society are not so different from judges.

> Faced with any proposal for a new technological system, citizens or their representatives would examine the social contract implied by building that system in a particular form. They would ask, How well do the proposed conditions match our best sense of who we are and what we want this society to be? Who gains and who loses power in the proposed change? Are the conditions produced by the change compatible with equality, social justice, and the common good?[18]

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[14] *See id*. at 695 (discussing stare decisis which requires the panel to comply with the decisions of a previous panel of the same court and determining that *Cartoon Network* is the law in the Second Circuit until an en banc panel or the Supreme Court overrule it).

[15] See *id.* at 690–95 (citing Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008)) for a discussion of the Plaintiffs' failure to distinguish *Aereo II* from *Cartoon Network*.

[16] I don't suggest that judges apply the law haphazardly and engage in judicial activism (although some do). Instead, I make reference to inherent ideological, social, and biological biases that shape human activity, whether it be age, wealth, religion, or the like that shape the human decision-making process.

[17] *Aereo, Inc.,* 712 F.3d at 676.

[18] LANGDON WINNER, THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY 55–56 (1986).

B. Justice Breyer's Concurrence in *Grokster*

Society benefits from new technological innovations because such developments often bring inherent efficiency-enhancing justifications that both individuals and businesses can utilize. When copyright law stands in the path of these developments, it's important to analyze whether this is the best possible outcome when weighing the benefits to society against protecting the content of rights holders. In close cases, copyright law should not be used to stifle the natural emergence of new technologies due to the inherent benefits that follow. Justice Breyer agreed with this position.[19] In his concurrence in *Grokster*, he states that the Court's decision in *Sony Corp. of Am. v. Universal City Studios, Inc.* "recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently."[20]

In *Grokster*, Justice Breyer writes separately to flesh out whether Grokster, accused of contributory infringement, was entitled to summary judgment under the *Sony* standard that provides an exception for devices that are capable of substantial or commercially significant non-infringing uses.[21] Answering the question in the affirmative, Justice Breyer honed in on the *Sony* Court's finding that survey evidence showed that at least nine percent of the programming Betamax owners recorded consisted of content that was either in the public domain, covered under the doctrine of fair use, or owned by producers and distributors who testified they did not object to their content being recorded.[22] The *Sony* Court ultimately held that Sony was not liable for contributory infringement.[23] Similarly, Grokster presented evidence of a comparable percentage (ten percent) of lawful uses for its peer-to-peer filing sharing software.[24] Breyer points out

[19] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 957 (2005).

[20] *Id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).

[21] *Id.* at 949.

[22] *See id.* at 950–51.

[23] *Id.* at 951 ("On the basis of . . . testimony and other similar evidence, the Court determined that producers of this kind had authorized duplication of their copyrighted programs 'in significant enough numbers to create a substantial market for a noninfringing use of the' VCR.") (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447 n.28 (1984)).

[24] *Id.* at 952.

that the *Sony* standard is forward-looking.[25] He continues by listing some of the non-infringing uses that Grokster's system is capable of.[26] Advocating for this approach, Breyer argues, "Sony's standard seeks to protect . . . the development of technology more generally."[27]

Aereo's system, as will be explained hereafter, does just that. It provides more convenient access to broadcast television by allowing subscribers to tune in to a "live" broadcast or watch a time-shifted recording on any mobile device or PC.[28] By using a remote-location antenna, Aereo provides an efficient alternative to purchasing "rabbit ears" or installing a rooftop antenna to access the free broadcast signals floating all around us.[29] With Aereo, subscribers are no longer confined to their homes when they choose to access broadcast television content.[30] Because technological determinism tends to embrace new technology, I argue that courts, when tasked to rule on close questions of copyright law, should resolve those questions with this philosophy in mind so as to foster greater protection for new technologies, especially those "that help disseminate information and ideas more broadly and more efficiently."[31]

C. A Brief History of Television

Broadcast television has proved to be an important medium of distributing information to the masses. Yet, the Internet has changed many of the ways people historically accessed information. We have

[25] *Id.* at 958. "And [*Sony's*] language also indicates the appropriateness of looking to potential future uses of the product to determine its 'capability.'" *Id.* at 953-54.

[26] *Id.* at 954 ("[R]esearch information (the initial purpose of many peer-to-peer networks); public domain films (e.g., those owned by the Prelinger Archive); historical recordings and digital educational materials (e.g., those stored on the Internet Archive); digital photos (OurPictures, for example, is starting a P2P photo-swapping service); 'shareware' and 'freeware' (e.g., Linux and certain Windows software); secure licensed music and movie files (Intent MediaWorks, for example, protects licensed content sent across P2P networks); news broadcasts past and present (the BBC Creative Archive lets users 'rip, mix and share the BBC'); user-created audio and video files (including 'podcasts' that may be distributed through P2P software); and all manner of free 'open content' works collected by Creative Commons (one can search for Creative Commons material on StreamCast).").

[27] *Id.* at 955.

[28] WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 702 (2d Cir. 2013).

[29] *See id.* at 682.

[30] *See id.* at 681–82 (explaining that subscribers can watch Aereo programming on a variety of devices, such as tablets or smart phones, which permits subscribers to access broadcast television content outside of their homes).

[31] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 957 (2005).

seen this play out through the rise of digital music and video streaming services, and exclusively online news programing and other content. Each time a new system arrived, it would break down the barriers imposed by the old, and shift the power structure of the industry all to the benefit consumers.[32] Why should broadcast television be any different?

Great minds around the world began experimenting with moving pictures around the turn of the 20th century, which was one of the most coincidental developments of the same technology in different places around the globe all at the same time.[33] For example, American Charles Francis Jenkins and Scotsman John Logie Baird invented the concept of mechanical television within six months of one another while neither was aware of his counterpart's work.[34] Broadcast television hit the scene in the early 1940s and has been delivering content over the air through radio frequencies ever since.[35] The phenomenon experienced by Baird and Jenkins is not unique to television, but rather rooted in a technological theory known as "simultaneity of invention." It postulates "that the process of discovery takes place along a well-defined frontier of knowledge rather than in a grab-bag fashion."[36]

Cable television soon followed. It offered consumers, quite literally, a direct line to more content through the use of coaxial cables

[32] *See generally* Gregory Carpenter, *Power Shift: The Rise of the Consumer-Focused Enterprise in the Digital Age*, KELLOGG SCH. OF MGMT. (last visited Oct. 8, 2014), https://www.kellogg.northwestern.edu/faculty/academics/~/media/Files/general/2013/Rise-of-the-Consumer-Focused-Enterprise.ashx (discussing the positive impact of new technologies on consumers).

[33] *See* Mary Bellis, *Timeline: The Invention of Television*, ABOUT.COM (last visited Oct. 8, 2014), http://inventors.about.com/od/tstartinventions/a/Television_Time.htm; *see also* Derek Thompson, *Forget Edison: This Is How History's Greatest Inventions Really Happened*, THE ATLANTIC (last visited Oct. 8, 2014), http://www.theatlantic.com/business/archive/2012/06/forget-edison-this-is-how-historys-greatest-inventions-really-happened/258525/ (discussing how many great inventions, including television, were the product of numerous inventors around the world and cannot be easily attributed to one individual).

[34] *See* George Shiers, *Television 50 Years Ago*, 19 J. BROADCASTING 387, 390 (1975).

[35] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 627 (1994); *see also* Robert L. Lombardi, *The 1992 Cable Act: Access Provisions and the First Amendment*, 4 SETON HALL CONST. L.J. 163, 167 (1993).

[36] Robert L. Heilbroner, *Do Machines Make History?*, *in* THE MIT PRESS, DOES TECHNOLOGY DRIVE HISTORY? THE DILEMMA OF TECHNOLOGICAL DETERMINISM 53, 56 (Merritt Roe Smith & Leo Marx eds., 1994).

piped directly into paying customers' homes.[37] Despite the seemingly blessed path cable television followed to reach its present point, therein lies an inherent problem that continues to passively plague the industry.

> The [cable] industry is short-sighted. It is tempted by quick profits rather than a permanently viable system. In the short run, large profits can be made from movies, sports, and entertainment offered by a monopoly that is created by control of the physical cable. In the long run, public action against such a monopoly is inevitable.[38]

D. Aereo, Inc. and the Promise of a New Future

Aereo is the public response to the cable industry's shortsighted profit maximizing model. Once a relatively unknown company (now backed by prominent media executive Barry Diller, former chairman of Paramount Pictures and Fox Broadcasting), Aereo has recently been thrust into the limelight. Although small in size, this startup is causing major headaches for broadcast television goliaths who cling to what they thought was an ironclad money making machine.

It's not surprising that Aereo has been so successful. We as a society continue to witness the growing role that streaming digital content plays in our lives. Streaming video providers like Netflix and Vudu are eating away at the profit margins of Blu-ray and other physical counterparts.[39] The music industry, a different beast in its own regard, continues to struggle with a Jekyll and Hyde-like response to streaming services such as Pandora, Spotify, and Google Music (just to name a few). On one hand, record labels license the use of their content to streaming services, all the while dragging their feet and not fully embracing the changing ways consumers buy and listen to music.[40]

Today, Aereo finds itself at the forefront of modern day copyright law and policy. Aereo is novel in the sense that it allows its

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[37] *See Evolution of Cable Television*, FCC, http://www.fcc.gov/encyclopedia/evolution-cable-television (last updated Mar. 14, 2012).

[38] ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 171 (1983).

[39] Mike Snider, *Blu-Ray Caught in Shift to Streaming*, USATODAY, Aug. 24, 2012, at 01b, *available at* Newspaper Source Plus, ISSN No. 0734-7456.

[40] Jay Frank, *Why Music Streaming Is More Lucrative for Lables,* HYPEBOT.COM (Jan. 6, 2014), www.hypebot.com/hypebot/2014/01/why-music-streaming-is-more-lucrative-for-lables.html.

subscribers, for a modest fee, the ability to access (almost) live broadcast television on their phone, tablet, or computer device, and Digital Video Recording (DVR) functionality for later playback.[41] This isn't your father's old rooftop antenna. The system is made possible by offsite warehouses that host hundreds of thousands dime-sized antennas affixed to circuit boards which captures the free public radio waves that broadcast networks emit into the air.[42] Each individual subscriber is assigned his or her own antenna and data storage for viewing recorded content at a later time, all of which is housed and maintained by Aereo.[43]

The broadcast networks (ABC, CBS, NBC, FOX, among others) argue that Aereo and its technology are based upon a legal fiction and is nothing more than a sham.[44]

> Aereo's "technological platform" is, however, a sham. The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.[45]

At the heart of the broadcasters' legal challenge is Aereo's alleged infringement of their public performance rights.[46] First, they argue that Aereo's system retransmits their copyrighted content and therefore are required to obtain a license to do so.[47] Second, the broadcasters argued that the Court should view Aereo's transmissions in the aggregate when evaluating whether the transmissions are made "to the public."[48] Because Aereo must begin to make a copy of a work

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[41] *Aereo Terms of Use*, AEREO (Jan. 8, 2014), www.aereo.com/terms/.

[42] Matthew Moskovciak, *Aereo Brings Over-The-Air TV to the Cloud*, CNET (Feb. 14, 2012), http://www.cnet.com/news/aereo-brings-over-the-air-tv-to-the-cloud/.

[43] *Id.*

[44] *See* Complaint at 2–3, Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 379–80 (S.D.N.Y. 2012) (No. 12-CV-0-1540).

[45] WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J. dissenting), *rev'd and remanded sub nom.* Am. Broad. Cos. v. Aereo, Inc., 134 S.Ct. 2498 (2014).

[46] *Id.* at 686.

[47] *Id*. at 690.

[48] *Id.*

each time a subscriber tunes in, the broadcasters also believed that "Aereo's copies are merely a device by which Aereo enables its users to watch nearly live TV . . . [and] lack legal significance . . . and are no different from the temporary buffer copies created by Internet streaming, a process [the] Court has assumed produces public performances."[49] Lastly, the broadcasters argued that Aereo's system is "functionally equivalent to a cable television provider[,]" and therefore must pay retransmission fees.[50]

Statutorily, public performance rights are granted by 17 U.S.C. § 106(4) while 17 U.S.C. § 101 defines what it means to perform a work "publicly."[51] Whether a work is performed "publicly" turns on the question of whether a copyrighted work is being "transmitted" to the public.[52] The Transmit Clause states:

> [T]o 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 separate places and at the same time or at different times.[53]

The broadcasters' arguments fail in both law and policy. Notably, the Transmit Clause only applies to transmissions made "to the public."[54] A transmission to a single subscriber is not "public" according to the Second Circuit as interpreted in *Cartoon Network*.[55] Because, Aereo's transmissions are only capable of being received by a single subscriber, it does not amount to a "public" performance. Additionally, the Copyright Act tells us that when a recording is performed, it is a performance separate and distinct from the original performance of which the recording was made.[56] Because the transmission of content to Aereo's subscribers are embodied in individualized recordings that were created by the volitional act of each subscriber, and that recording can only be accessed by the same subscriber, the performance of the recording when it is being transmitted to the subscriber is private, not public.

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[49] *Id.* at 692.
[50] *Id.* at 693.
[51] *See* 17 U.S.C. §§ 101, 106(4) (2012).
[52] *Id.* at § 101.
[53] *Id*.
[54] *See, e.g.*, Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 134 (2d Cir. 2008).
[55] *Id.* at 139.
[56] 17 U.S.C. § 101 (2012).

In addition to the shortcomings of the broadcasters' arguments, Aereo should prevail when the Supreme Court decides the case this term because its system is a new technology worthy of the Court's protection as discussed in Justice Breyer's concurrence in *Grokster*.[57] A ruling against Aereo would suppress the natural advancement of technology and would curtail citizens' access to information. Aereo's technology is revolutionary because it enables those who choose to access free broadcast television the ability to do so from anywhere in a given broadcasting area instead of being confined to a stationary antenna that can only be utilized within the home.[58] Further, should the Court decide that the interests of society are more strongly weighted toward the broadcast networks' bottom line, companies like Aereo would be disincentivized to pursue new technological innovations in the future.

II. HISTORY OF THE PUBLIC PERFORMANCE RIGHT AND RETRANSMISSIONS

A. Under the Copyright Act of 1909

It seems natural to examine a bit of the history of how courts have examined retransmissions and the public performance right under the Copyright Act of 1909 and the Copyright Act of 1976.[59] Beginning with the former, the cases of *Fortnightly*[60] and *Teleprompter*[61] are the most oft cited cases for the origins of the Transmit Clause.

Fortnightly proceeded as follows. Back in the late 1950's and early 1960's—at a time when television was starting to become a firmly settled household staple rather than a wondrous magic box that caused flocks of gawking consumers to congregate at department store windows—the television antenna was the main device people used to capture content that could be played on their television sets.[62] This presented a problem for those Americans who lived in the hinterlands

[57] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 545 U.S. 913, 955 (2005).

[58] *See id.* at 2.

[59] Copyright Act of 1909, 35 Stat. 1035, Pub. L. No. 60-349 (repealed 1976); Copyright Act of 1976, Pub. L. No. 94-553, title I, §101, 90 Stat. 2541 (1976) (codified as 17 U.S.C. § 101 (2012)).

[60] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

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

[62] *See* Robert R. Thomas, *Television Reception in the 1950s: A Coming of Age*, ANTIQUE WIRELESS ASS'N, http://www.antiquewireless.org/uploads/1/6/1/2/16129770/04-television_reception_in_the_1950s.pdf (last visited Oct. 6, 2014) (discussing the role of the outdoor antenna and the majority of television owners' reliance on it).

where broadcast signals were either weak, or blocked by the surrounding terrain.[63]

This reality created a market for community antenna companies ("CATV").[64] In topographically hilly or remote areas, CATV constructed taller and more powerful antennas and strategically placed them on surrounding hilltops to capture a strong broadcast signal.[65] The captured signal was then piped down from the hilltop to the homes of subscribers who resided in the valley below.[66] Litigation ensued when a motion picture company brought suit against a CATV, arguing its right to "perform in public for profit" was infringed.[67] The plaintiff alleged the defendant "performed" its work (a film that it had licensed to a television network and was subsequently broadcast).[68]

The Court drew a crucial line between those that perform and those that view copyrighted content.[69] It focused on the fact that even though the structure of the system was different than the typical roof antenna, it served the same purpose and, therefore, should not be treated differently.[70] It held that the CATV merely provided access to the content that the *broadcasters* were performing.[71] The Court mentioned that the decision partially rested on its desire that the copyright statutes (which had been written at a time before television was invented) not be used to stifle technological developments.[72] *Fortnightly* is an early example of judicial recognition that

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[63] *See, e.g.*, *Fortnightly*, 392 U.S. at 391-92.

[64] *Id.*

[65] *Id.* at 392.

[66] *Id.*

[67] *Id.* at 395; *see* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, *repealed by* Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976).

[68] *Fortnightly*, 392 U.S. at 395.

[69] *Id*. at 397–99.

[70] *Id*. at 399 ("It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer.").

[71] *Id*. at 400–401 ("The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.").

[72] *Id.* at 402 ("With due regard to changing technology, we hold that the petitioner did not under that law 'perform' the respondent's copyrighted work.").

technological advancements are part of society's natural progression and should not be stifled by outdated laws.

Six years later in *Teleprompter Corp.,* the Court decided once again to take up the issue of whether a CATV violated a copyright holder's right to perform a work in public for profit.[73] The facts in *Teleprompter* differed in three respects from those discussed in *Fortnightly*. First, the CATV transmitted its own content as well as that of the network broadcasters.[74] Second, the CATV sold advertisements that were targeted at its subscribers.[75] And third, CATV's around the country were now interconnected, which fostered the sale of redistribution rights of original programming among multiple CATV systems.[76] This interconnectedness also allowed these companies to import signals from one market into another, where the receiving market was at a great geographical distance and could not otherwise receive the broadcast (no matter how powerful its antenna).[77]

The copyright owner argued that each one of these differences distinguished this CATV from the one in *Fortnightly*, alone and in the aggregate. And further, that these differences pushed the CATV companies' conduct into the realm of broadcasting, and therefore could be held liable for copyright infringement. Despite these novel arguments, the Court was unpersuaded. On the issue of importing local signals of one market into a distant market, the Court didn't believe this affected the role that CATV provided to its subscribers.[78] Additionally, the Court stated that importing the signal of a distant broadcast into a local market does "not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor."[79] Like *Fortnightly*, the Court recognized the backwardness of allowing archaic copyright laws to stunt the growth of a budding technology based industry.[80]

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

[74] *Id.* at 403–04.

[75] *Id.* at 404.

[76] *Id.*

[77] *Id.* at 401.

[78] *Id.* at 408 ("When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so.").

[79] *Id.* at 412.

[80] *Id.* at 414 ("[S]hifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright

continued . . .

The holdings in *Fortnightly* and *Teleprompter* exemplify the Court's unwillingness to use the copyright laws as a conduit to strangle innovative new technology and legitimate business activities. At the end of each opinion, the Court instructs that regulation and resolution of the issues presented in these cases is better suited for Congress.[81] The Court was no doubt aware that the folks on Capitol Hill had already begun to draft new copyright legislation, which would ultimately become the Copyright Act of 1976.[82] When the new Act was codified in 1978, it brought with it the modern day "Transmit Clause."[83] In fact, "[t]he legislative history shows that the Transmit Clause was intended in part to abrogate *Fortnightly* and *Teleprompter* and bring a cable television system's retransmission of broadcast television programming within the scope of the public performance right."[84] What followed the codification of the 1976 Act was a mixed bag of judicial interpretation on the newly formulated Transmit Clause.

B. Under the Copyright Act of 1976

In an attempt to undo the result of *Teleprompter* and *Fortnightly*, Congress paid particular attention to the Transmit Clause during the drafting stage of the new copyright legislation.[85] Some courts have honed in on whether an intermediate transmitting body can be held liable for infringing on a copyright owner's public performance right.[86] In *National Football League v. PrimeTime 24 Joint Venture*, a Canadian satellite company—operating under a valid statutory license to retransmit copyrighted football game broadcasts to its U.S. subscribers—incidentally retransmitted those games to its Canadian subscribers too.[87] The court did not agree with the defendant's

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legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived.").

[81] *Id*; *Fortnightly*, 392 U.S. at 401.

[82] *See* 17 U.S.C. § 101 (2006); *Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary*, 90th Cong. 1 (1967).

[83] 17 U.S.C. § 101 (2006).

[84] WNET v. Aereo, Inc., 712 F.3d 676, 685 (2d. Cir. 2013).

[85] WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622, 627 (7th Cir. 1982) ("The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress's satisfaction.").

[86] *See id.*; *see also* NFL v. Primetime 24 Joint Venture, 211 F.3d 10, 11 (2d Cir. 2000).

[87] 211 F.3d 10, 11 (2d Cir. 2000).

reasoning;[88] rather, it believed that the conduct involved amounted to a transmission.[89] It further extrapolated, stating that "the most logical interpretation of the Copyright Act is to hold that a public performance or display includes each step in the process by which a protected work wends its way to its audience."[90]

More recently, the Second Circuit in *WPIX, Inc.* noted that Internet retransmissions are not entitled to compulsory licenses because they do not qualify as "cable systems" under 17 U.S.C. § 111(c)(1).[91] In reaching this conclusion, the court looked to the legislative intent.[92] "More broadly, the Copyright Office has maintained that § 111's compulsory license for cable systems is intended for localized retransmission services; under this interpretation, Internet retransmission services are not entitled to a § 111 license."[93]

This opinion is also relevant for it shows how judges, when tasked to rule in a matter concerning a new technology or new use for technology, root their opinions in underlying technological theory. In *WPIX, Inc.*, it is clear that Judge Chin's controlling opinion is backwards looking rather than forward looking.[94] He argues that since "Internet retransmission services are not seeking to address issues of reception and remote access to over-the-air television signals[,]" it would be improper to grant a compulsory license under § 111.[95] Because Congress did not create a provision in § 111 for Internet retransmission, as it did for microwave retransmission, this is proof Internet retransmission was considered for compulsory license status but was ultimately rejected.[96] By focusing on the Congressional interpretation of what the Internet was capable of in 1994 rather than what it has come to be capable of in 2012 (the year in which *WPIX,*

[88] *Id.* at 12 ("PrimeTime argues that capturing or uplinking copyrighted material and transmitting it to a satellite does not constitute a public display or performance of that material. PrimeTime argues that any public performance or display occurs during the downlink from the satellite to the home subscriber in Canada, which is in a foreign country where the Copyright Act does not apply.").

[89] *Id.* (internal quotes omitted) ("…the definition of transmit is broad enough to include *all conceivable forms and combinations* of wired or wireless communications media.").

[90] *Id.* at 13 (internal quotes omitted).

[91] WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 284 (2d Cir. 2012).

[92] *Id.* at 282 ("Through § 111's compulsory license scheme, Congress intended to support localized—rather than nationwide—systems that use cable or optical fibers to transmit signals through a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers.").

[93] *Id.* at 284.

[94] *Id.* at 282.

[95] *Id.*

[96] *Id.*

Inc. was decided) Judge Chin effectively condemned an efficient use of technology until a time when Congress has granted its express approval.[97] Such is a classic example of social determinism.

One of the more famous cases discussing copyright infringement under the contours of the public performance right is *Cartoon Network LP, LLLP v. CSC Holdings, Inc*.[98] There, plaintiff Cartoon Network, a television content owner, alleged inter alia that the defendant Cablevision's Remote Storage Digital Video Recorder system ("RS-DVR") infringed on its copyrighted works when it engaged in unauthorized public performances each time a Cablevision customer played back previously recorded content stored on an individually assigned remote hard drive.[99] To support its cause of action, Cartoon Network needed to prove that (1) when a RS-DVR playback occurs, Cablevision is making a "transmission;" and (2) the transmission was made "to the public."[100]

The court did not reach the question of whether it was Cablevision or its customers who "performs" the copyrighted work during RS-DVR playback (despite finding[101] that the customer, not Cablevision, "does" the copying when content is recorded) because "even . . . assum[ing] that Cablevision makes the transmission when an RS–DVR playback occurs, . . . the RS–DVR playback[ ] . . . does not involve the transmission of a performance 'to the public.'"[102] The court reached this conclusion largely by way of statutory construction.[103] It reasoned:

> [I]n determining whether a transmission is "to the public," it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times. The implication from this same language, however, is that it is relevant, in determining whether a transmission is made to the public, to discern who is "capable of

[97] *Id.* at 280.

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

[99] *Id.* at 123.

[100] *Id.* at 125.

[101] *Id.* at 131–32.

[102] *Cartoon Network LP,* 536 F.3d at 134.

[103] For the benefit of the reader, here is a refresher on the meaning of "publicly" under 17 U.S.C. § 101: "To perform or display a work 'publicly' means … 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 separate places and at the same time or at different times." 17 U.S.C. § 101 (2012) (emphasis added).

> receiving" the performance being transmitted. The fact that the statute says "capable of receiving the *performance*," instead of "capable of receiving the *transmission*," underscores the fact that a transmission of a performance is itself a performance.[104]

Therefore, on the question of whether a transmission was made "to the public," it is necessary to determine who is capable of receiving "a particular transmission of a performance."[105] Cartoon Network opposed this interpretation, arguing instead that the audience "capable of receiving the performance" included all Cablevision subscribers to a given channel and those who requested a recording of a program.[106] The lower court agreed with Cartoon Network. It stated that to determine whether a transmission was made "to the public," it is necessary to consider the audience of the underlying work being transmitted."[107] However, on appeal this interpretation proved overly broad.[108]

Overturning the lower court, the Second Circuit reasoned that the audience of the underlying work was not the proper inquiry because the potential audience of any work is the general public, which would mean any transmission of a protected work would be classified as a public performance.[109] Consequently, it would be impossible for a private performance to ever occur. To think Congress intended such a bizarre result would be unfounded given the statutory text specifically defining when a performance is "public."[110] In addition, Cartoon Network's interpretation fails because it would lead to absurd results. It would mean that "a hapless [cable subscriber] who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public."[111] The court cited *NFL v. PrimeTime 24* to further support its finding that the potential audience inquiry for a given performance should be the same as the transmission that embodies that performance because that case "directs us to look downstream, rather than upstream or laterally, to determine whether any link in a chain of transmissions made by a party constitutes a

[104] *Cartoon Network, LP*, 536 F.3d at 134 (emphasis added).
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 135–36.
[110] 17 U.S.C. § 101 (2012).
[111] *Cartoon Network LP,* 536 F.3d at 136.

public performance."[112] Therefore, to determine whether a performance is "to the public," the inquiry lies in who are the potential recipients of the transmission made by the alleged infringer.[113] Since only a single subscriber received a transmission of a recorded work in their RS-DVR, such a transmission was not "to the public."[114]

An additional aspect to consider in the public performance inquiry is how and from what source the copy of the transmitted work came into existence. The court posited that "the transmit clause suggests that, in general, any factor that limits the *potential* audience of a transmission is relevant [to the inquiry]."[115] Illustratively, the court explained that,

> it seems quite consistent with the [Copyright] Act to treat a transmission made using Copy A as distinct from one made using Copy B, just as we would treat a transmission made by Cablevision as distinct from an otherwise identical transmission made by Comcast. Both factors—the identity of the transmitter and the source material of the transmission—limit the potential audience of a transmission . . . and are therefore germane in determining whether that transmission is made "to the public."[116]

In sum, *Cartoon Network* holds:

> (1) courts must examine who is capable of receiving a *particular* transmission, (2) . . . the focus must be the *transmission, not the underlying copyrighted work or original performance*, (3) . . . courts must look at the [d]efendant's "downstream" transmission, not the entire transmission process, (4) digital retransmission may still implicate the Reproduction Right, and (5) transmitting distinct, individualized copies of a work is relevant to the Transmit Clause analysis because it limits the potential audience of a particular transmission.[117]

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[112] *Id.* at 137.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 138.
[117] Rom Bar-Nissim, *Copyright's "Rube Goldberg" Problem: Retransmission in the Digital Age*, SOCIAL SCIENCE RESEARCH NETWORK (Oct. 15, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340300 (follow "Download this Paper hyperlink").

It is under this framework that we begin in analyze the Second Circuit's decision in *Aereo II*.

III. SECOND CIRCUIT'S DECISION IN *AEREO II*

Fresh off of the district court's denial of the broadcasters' motion for preliminary injunction against Aereo's system, the Second Circuit reviewed the decision, which largely rehashed *Cartoon Network*, and applied the interpretation of the Transmit Clause embodied therein.[118] It adopted the view that the relevant audience for purposes of the Transmit Clause are those who are "capable of receiving a particular transmission of a performance."[119] Further, it stated that courts should examine the "potential audience of the performance created by the act of transmission," and not the potential audience for the original transmission.[120] Under this scheme, the court held that Aereo's system did not infringe on the broadcasters' public performance rights largely because Aereo subscribers created a unique copy each time they tuned in to "live" television or watched pre-recorded content.[121] Further, since the individual subscriber has sole access to his or her unique copy, the same lone subscriber was found to constitute the "potential audience of the performance created by the act of transmission," and thus, a private performance.[122]

The broadcast network plaintiffs attempted to distinguish *Cartoon Network* from Aereo's system based on (1) the presence of an underlying license, (2) aggregation of transmissions, (3) a "broken chain" of transmissions, and (4) a substance over form argument.[123]

The Second Circuit was not persuaded.[124] To decide the case based on the presence or absence of a license, the court stated, is to put the cart before the horse because, only if Aereo's transmissions are found to be public performances, does it need a license to transmit the broadcasters' content.[125] In further support of this point the court reasoned that "having a license to publicly perform a work in a particular instance, such as to broadcast a television program live, does

[118] *See* WNET v. Aereo, Inc., 712 F.3d 676, 689 (2d. Cir. 2013).
[119] *Id.* at 687.
[120] *Id.* at 688.
[121] *Id.* at 690.
[122] *Id.* at 688, 690.
[123] *Id.* at 690–93.
[124] *Id.*
[125] *See id.* at 690.

not give the licensee the right to perform the work again."[126] If such was the case, then there would be no need for cable companies to secure licenses for the on-demand content they offer to subscribers when they already possessed a license to transmit the same works when they originally aired.

Next on the chopping block was the broadcasters' argument that each one of Aereo's transmissions should "be aggregated and viewed collectively as constituting a public performance" since Aereo's transmissions are "the same performance" that was transmitted when the content was originally broadcast live.[127] This avenue, however, was closed by *Cartoon Network.*[128] The court reminded the broadcasters that "the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted."[129]

The court also rejected one of the broadcasters' more respectable arguments for distinguishing Aereo's system from *Cartoon Network*.[130] The broadcasters equated the copies made by Aereo's system as a buffer copy required for Internet streaming and therefore are public performances under *WPIX, Inc*.[131] Unpersuaded, the Second Circuit cited the "volitional control" possessed by Aereo subscribers, a difference the court says takes Aereo's system out of the realm of Internet streaming condemned in *WPIX, Inc*. because in *WPIX, Inc.*, the user "only exercises control *before* the copy is created in choosing to watch the program in the first place."[132] This is in contrast to Aereo's system where a user retains control over "when and how that copy is played."[133] Another distinction could be had based on Aereo's individualized antenna system.[134] Since a user's antenna generates a single copy (the copy created by the antenna's assigned subscriber) which can only be viewed by that same subscriber, the user that created that copy is the sole audience "capable of receiving" the performance.[135]

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[126] *Id.*
[127] *Id.* at 690–91.
[128] *Id.* at 691.
[129] *Id.*
[130] *Id.* at 692–93.
[131] *Id.* at 692.
[132] *Id.*
[133] *Id.*
[134] *See id.* at 693.
[135] *Id.* at 693.

Lastly, the broadcasters groaned an audible "oh, come on!" argument.[136] The broadcasters believed that Aereo's technological system was molded around the holding in *Cartoon Network* with the specific intent to avoid copyright liability.[137] The Second Circuit, however, equated this argument with one that argues the holding in *Cartoon Network* should be overturned and therefore did nothing to support the broadcasters' attempt to distinguish *Cartoon Network* from Aereo's system.[138]

Judge Droney lets slip his allegiance to technological determinism near the end of his opinion in *Aereo II*. He states:

> As much as Aereo's service may resemble a cable system, it also generates transmissions that closely resemble the private transmissions from these devices. Thus *unanticipated technological developments* have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private.[139]

One cannot overlook this loaded statement. Judge Droney is telling the reader that, even though Congress crafted the Copyright Act of 1976 in a particular way during the years leading up to its codification, new and unforeseeable technological advancements have taken hold since that time. Further, we as a society value these advancements highly enough that we should require the law to change and, in the meantime, allow society to reap the benefits of the technological advancements until Congress decides to change the law to cover the new technological reality.[140]

IV. JUDGE CHIN'S DISSENT IN *AEREO II*

Judge Chin furiously dissents in *Aereo II*, arguing that the issue before the court could not be more elementary.[141] He argues that Aereo's system of thousands of tiny antennas is a "device or process," and such a "device or process" is being used to transmit copyrighted works "beyond the place from which they are sent."[142] He goes on to

[136] *Id.* at 693–94.
[137] *Id.* at 694.
[138] *Id.*
[139] *Id.* at 695 (emphasis added).
[140] *Id.*
[141] *Id.* at 696–97 (Chin, J., dissenting).
[142] *Id.* at 698 (Chin, J., dissenting) (quoting 17 U.S.C. § 101 (2006)).

say that Aereo's transmissions are "to the public" because the ordinary meaning of "the public" is "anyone other than oneself or an intimate relation . . . because it is not in any sense private."[143] In order to distinguish Aereo's system from the system involved in *Cartoon Network*, Judge Chin looks to the reason individual copies are created under each system as well as the presence of an underlying license.[144] "Aereo's use of copies is essential to its ability to retransmit broadcast television signals, while Cablevision's copies were merely an optional alternative to a set-top DVR."[145] Therefore, he argues, *Cablevision* does not control the facts in *Aereo II*. Rather, the proper analysis is one that uses the precedent set by *WPIX v. ivi*, where global Internet streaming of broadcast content amounted to a finding of infringement of the public performance right.[146]

Like Judge Droney, Judge Chin shows his allegiance to a technological philosophy that shapes his interpretation of the case. However, in contrast to Droney's technological determinism, it is social determinism that laces Judge Chin's dissent. Judge Chin disparages Aereo's technology platform as a "sham" right at the outset.[147] In his view, society has spoken (through Congress) on what it holds as its values, and those technologies that do not conform to these values must yield.[148] He explains that Aereo's system is nothing more than a Rube Goldberg machine, "over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law."[149] This approach to new technology in society is congruent with a social determinist perspective that "the people who create and employ technologies are driven by goals and judgments about public and private goods. Their actions follow certain culturally accepted norms and are sanctioned by politically legitimated forms of power."[150] What I believe Judge Chin is trying to say is that all too often it is money, not society, which drives the engine of technological advancement; the applicability of society's carefully crafted laws should not be contingent on which technology sector projects venture capitalists choose to invest in.

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[143] *Id.*

[144] *Id.* at 702.

[145] *Id.*

[146] *Id.* at 70–-05.

[147] *Id.* at 697.

[148] *See id.* at 705 ("Based on the plain meaning of the statutes, its legislative history, and our precedent, I conclude that Aereo's transmission of live public broadcasts over the Internet to paying subscribers are unlicensed transmissions 'to the public.' Hence, these unlicensed transmissions should be enjoined.").

[149] *Id.* at 697.

[150] Smith & Marx, *supra* note 9, at 82.

V. CONCLUSION

Without a shade of doubt, technology will become even more engrained in our society and culture. The recent rise of "wearables" (electronics and technological devices worn by the user) shows how technology is on a path to become not just part of our lives, but part of our being. In a legal field like copyright, which so heavily relies on technology for the creation and disbursement of works, authors and innovators alike should not be held hostage to a statute that remains stagnant while the technological reality around them is changing so rapidly. Thus, technological determinism must be used by judges who are forced to reconcile seemingly irreconcilable differences between new technological advancements that do not fit neatly into the woodwork of an outdated copyright statute.

VI. ADDENDUM

On June 25, 2014, the Supreme Court ruled on *Aereo, Inc.*,[151] holding that, by providing viewers with the means of streaming television programs over the Internet in real time, Aereo was violating the Copyright Act of 1976's[152] guarantee that an owner of a copyrighted work has exclusive rights of performance, including transmission of the work.[153]

The proliferation of technology devices in tandem with the ways we connect online to the people and things we love is inherently changing how we consume media. If you're like me, you can't remember the last time you inserted a CD for audio or visual playback. This largely exemplifies a trend whereby new innovation emerges to exploit inefficiencies in the marketplace.

Effectively, the Court nixed this trend in the broadcast television realm with an overly broad interpretation,[154] arguing that nearly any non-sourced signal will fall under the Transmit Clause.[155] It's for this reason that I can confidently declare that broadcast television is an aging dinosaur waiting on the next meteor strike.

Justice Breyer's defense of the *Aereo* opinion's effect on discouraging the emergence of new technologies is backwards-looking. He argues that, although Aereo 'performs,' "the history of cable broadcast transmissions that led to the enactment of the Transmit Clause . . . does not determine whether different kinds of providers in different contexts also 'perform.'"[156] That the Majority agreed with Aereo's briefing is dispositive of the Court's backwards-looking perception.[157] But what happens when modern technology is

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[151] Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

[152] 17 U.S.C. §§ 101-810.

[153] 17 U.S.C. § 106(4); *Aereo*, 134 S. Ct. at 2503

[154] "[T]he Court reaches out to decide the case based on a few isolated snippets of legislative history . . . (citing H.R. REP. NO. 94-1476 (1976)). The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress." Aereo, 134 S. Ct. at 2515 (J. Scalia, dissenting).

[155] "[T]he concept of public performance … cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public." Aereo, 134 S. Ct. at 2506, (quoting H.R. REP. NO. 94-1476, 63, 1976).

[156] Aereo, 134 S. Ct. at 2510.

[157] *See id.* (quoting Brief for Respondent as stating that "[i]f a distributor sells multiple copies of a [DVD] by mail to consumers, … its distribution … merely makes it possible for the recipients to perform the work themselves - its not a 'device or process' by which the *distributor* publically performs the work.").

incapable of even fitting within statutory commands because the language was crafted at a time when modern methods of content delivery weren't even fathomable? Has the Court concluded that consumers shouldn't fear that the emergence of new technologies won't be stifled because "alternative" (read "outdated") methods of content delivery, which do not offend the public performance right, already exist? My answer is clearly "yes."

Not all hope is lost. Consumers can take solace that change is afoot. Notably, at least one city has decided to completely expel a cable giant from its jurisdiction.[158] Further, as of this writing two content providers, CBS and HBO, broke the mold when they announced plans to offer their content outside of the traditional cable package.[159] For a flat monthly fee, both providers will offer unlimited on-demand streaming of its content in a Netflix/Hulu style[160] media delivery service[161] that many of us have grown to love and expect.[162] While this concept was widely rumored to be forthcoming by one provider (HBO), the fact that a *broadcast*[163] network (CBS) jumped on the same bandwagon caught many industry insiders off guard.[164] As data becomes cheaper[165] and more people gain wider access to capable

[158] Jon Brodkin, "*It's a Terrible Company:" Comcast Not Welcome in City, Council Says*, ARSTECHNICA (Oct. 15, 2014, 10:10AM), http://arstechnica.com/business/2014/10/its-a-terrible-company-comcast-not-welcome-in-city-council-says (stating that the City Council for Worcester, Massachusetts voted to block Comcast from receiving a license transfer as part of a "customer swap" that comes as the result of its purchase of Time Warner Cable).

[159] *See* Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, NYTIMES, Oct. 17, 2014, at A1, *available at* http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html?_r=0; Emily Steel, *Eye on Rivals, HBO Unveils New Service for Streaming,* NYTIMES, Oct. 16, 2014, at B1, *available at* http://www.nytimes.com/2014/10/16/business/media/time-warner-chief-to-brief-investors-on-plans-for-growth.html?contentCollection=business&action=click&module=NextInCollection&region=Footer&pgtype=article,

[160] *See Home Page*, NETFLIX, https://www.netflix.com/home?locale=en-US, (last accessed Oct. 20, 2014) (stating that, starting at $7.99 a month, subscribers have the ability to "[w]atch TV shows and movies anytime, anywhere;" *About*, HULU, http://www.hulu.com/about (last accessed Oct. 20, 2014) (stating that, as a "premium streaming TV destination," Hulu allows its viewers, for "just $7.99 a month" to access and watch any "current season episode of primetime TV shows," as well as episodes of "classic series").

[161] *See* Steel, *Cord-Cutters Rejoice*, *supra* note 159; Steel, *HBO Unveils*, *supra* note 159.

[162] *See id.*

[163] Steel, *Cord-Cutters Rejoice*, *supra* note 159.

[164] *See id*. (calling CBS an "unlikely disrupter").

[165] *See* Stacey Higginbotham, *The Internet of Things Isn't About Things. It's*

continued . . .

devices,[166] its likely many other content providers will follow the path of HBO and CBS by cutting their copper wire umbilical cord and rely solely upon Internet streaming for content delivery.

Even though the Court remains content in its reliance on ideals of social determinism[167] to render an opinion upon whether new technologies offend the laws of the nation, the underlying premise of social determinism has not won the day. The spirit of tech startups is alive and well in the U.S., and not solely in Silicon Valley.[168] Smaller communities such as Detroit, Pittsburgh, and Cincinnati are rising from the ashes of the Great Recession, in large part because of a new generation of innovators.[169] I believe that these clusters of startups will continue to attract talented folks who will develop the technology[170] that influences our society for the generations ahead.

about Cheap Data, GIGAOM.COM (Jun. 9, 2014, 12:00 AM), https://gigaom.com/2014/06/09/the-internet-of-things-isnt-about-things-its-about-cheap-data (discussing the practical implications of cheap data).

[166] *See Mobile Technology Fact Sheet*, PRE RESEARCH INTERNET PROJECT, http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet (last accessed Oct. 20, 2014) (stating that, as of January 2014: "90% of American Adults have a cell phone; 58% of American adults have a smartphone; 32% of American adults own an e-reader; [and] 42% of American adults own a tablet computer").

[167] *See Aereo*, 134 S. Ct. at 2511 (arguing that "[w]e cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us."); ("[T]o the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress.").

[168] Steve Case, *Case: Start-ups pave roads beyond Silicon Valley*, USA TODAY (July 23, 2014, 4:43 PM), http://www.usatoday.com/story/opinion/2014/07/22/steve-case-startups/13000859.

[169] *Id.*

[170] *See* Alex Kinrad, *With $40 Million in New Case, Parent-Teacher App Remind Targets A Billion Users Worldwide* (Sept. 30, 2014, 10:08 AM), http://www.forbes.com/sites/alexkonrad/2014/09/30/with-40-million-in-new-cash-teacher-student-app-remind-targets-a-billion-users-worldwide.