

***FOX TELEVISION STATIONS, INC. V.
AEREOKILLER, LLC: HOW THE NARROW
FRAMEWORK OF THE 1976 COPYRIGHT ACT CUT
THE CORD ON INTERNET TELEVISION
RETRANSMISSIONS***

Dina Ljekperic[†]

I. INTRODUCTION

The shift from broadcast and cable to the digital television model has transformed the communications industry. Consumers want on-demand programming accessible on their computers and mobile devices. While cable and broadcast companies have steadily adapted to consumer demand by making some programming available online by subscription, new market entrants also continue to push the envelope on the distribution of video programming.

This industry innovation has forced regulators to revisit the careful balance of interests steadied by communications regulation. Implicating the policy interests of copyright holders and consumers alike, the intersection of telecommunications and copyright law has been carved by courts, Congress, and federal agencies. It is no surprise, then, that this complex regulatory framework has resulted in inconsistent court rulings over emerging technology in the television industry. A recent and important chapter in this ongoing saga is *Fox v. Aereokiller*.¹ After the Central District of California gave Internet retransmitters their first legal victory against copyright owners, the Ninth Circuit reversed on appeal.² The Ninth Circuit's *Aereokiller* opinion cuts short independent judicial analysis to instead rely on the Copyright Office's position that Internet retransmitters are not eligible for the Copyright Act's section 111 compulsory license, under which cable systems may make secondary retransmissions of copyrighted content.³

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[†] J.D. Candidate, 2019, University of California, Berkeley, School of Law.

1. *Fox Television Stations, Inc. v. Aereokiller LLC*, 851 F.3d 1002 (9th Cir. 2017).

2. *Id.*; see *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152 (C.D. Cal. 2015).

3. *Aereokiller*, 851 F.3d at 1008–15.

Aereokiller and its companion cases regarding over-the-Internet retransmissions are the latest in a long line of jurisprudence at the intersection of copyright and telecommunications that implicate the complex regulatory relationship between courts, Congress, the Copyright Office, and the Federal Communications Commission in setting the balance of copyright protection and emerging technologies.

This Note will examine how the Copyright Act's broad definition of the exclusive right of public performance and narrow reading of the section 111 compulsory license has resulted in court decisions that leave Internet retransmissions services hanging in legal limbo. These services bear the burden of cable system designation, but do not reap the benefits of any statutory license. Part II will introduce over-the-Internet broadcast retransmission technology. Part III will discuss the development of copyright law in television programming distribution and regulation, ending with the U.S. Supreme Court's 2014 decision in *American Broadcasting Cos. v. Aereo, Inc.* Part IV will discuss the Ninth Circuit's recent decision in *Aereokiller*. Part V will identify the legal incongruence formed by *Aereo* and *Aereokiller*, the parallel public interests in cable retransmissions and over-the-Internet retransmissions; and the significance of *Aereokiller* in a policy playground currently being shaped by other actors, namely the Copyright Office and the Federal Communications Commission. Part VI concludes.

II. TECHNOLOGY BACKGROUND

Traditional broadcast systems transmit programming by radio waves; cable systems use central antennas to receive programming signals, amplify them, and transmit them through a network of cables.⁴ Internet retransmitters also use central antennas to capture television signals, but then translate those signals into data that can be sent over the Internet.⁵ The service creates subscriber-specific copies of content, which users can access by logging onto the service's website.⁶ Users can watch programming only a few seconds behind the over-the-air broadcasting, or at any other time they choose, as well as access local programming online.⁷

Aereo was among the first companies to capitalize on this Internet retransmission technology, with Film On X (Film On) following shortly thereafter. At the height of its success, Aereo was well-reviewed by users, and

4. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014).

5. *Id.* at 2503.

6. *Id.*

7. *Id.*

saw its popularity grow outside its origin in the Northeast. At the end of 2013, six months before the service shut down, Aereo had about 78,000 subscribers including 27,000 located in the New York City area, 12,000 in the Boston area, and 10,000 in the Atlanta area.⁸ As of May 2013, the service offered 28 channels, including all major broadcast channels.⁹ Monthly plans started at eight dollars for 20 hours of DVR storage, which allowed users to access recorded programming.¹⁰ Users called the service “brilliantly simple” and claimed it “work[ed] exceptionally well.”¹¹ They deemed Aereo “a hassle-free way [for users] to add live local programming” to their online streaming.¹²

While Aereo technology grew popular among users, the service created a challenge for the television industry and copyright policy that regulates the distribution of copyrighted programming. It is no wonder the same consumers correctly predicted that the service would be “so sued.”¹³ This was not the first time, however, that new technology that provided access to broadcast programming challenged the Copyright Act’s *status quo*.

III. LEGAL BACKGROUND

Long before over-the-Internet retransmitters like Aereo and Film On, it was the now-powerful cable systems that disrupted the traditional broadcasting model by retransmitting broadcast programming to viewers. They, too, were once “so sued.”

A. COPYRIGHT LAW AND THE PERFORMANCE RIGHT

The Copyright Clause of U.S. Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴

8. Peter Kafka, *Here’s How Many Subscribers Aereo Had Last Year*, RECODE (July 21, 2014), <https://www.recode.net/2014/7/21/11629036/heres-how-many-subscribers-aereo-had-last-year> [<https://perma.cc/RA9T-V4TF>].

9. Jordan Cook, *Aereo Switches Up Pricing: \$8/Month for 20 Hours of DVR, \$12/Month For 60 Hours Starting May 15*, TECHCRUNCH (May 13, 2013), <https://techcrunch.com/2013/05/13/aereo-switches-up-pricing-8month-for-20-hours-of-dvr-12month-for-60-hours-starting-may-15/> [<https://perma.cc/QN2L-478G>].

10. *Id.*

11. Christina Warren, *Aereo Gives New Yorkers Online Access to Live TV [HANDS ON]*, MASHABLE (Feb. 28, 2012), <http://mashable.com/2012/02/28/aereo-hands-on/#kOKjZ4LjVlqu> [<https://perma.cc/T6W3-N4VE>].

12. *Id.*

13. *Id.*

14. U.S. CONST. art. I, § 8, cl. 8.

The Copyright Act of 1790 was the first U.S. federal copyright law. The Act has been updated since, most comprehensively by sweeping changes in 1976, which still govern copyright law in the United States today. According to its Constitutional purpose, copyright regulation seeks to balance the interests of copyright holders with the interests of the public in having access to creative works.¹⁵

Copyright protects six basic rights of copyright holders, including the right to “publicly perform” a copyrighted work.¹⁶ The public performance right covers literary, musical, dramatic, and choreographic works, as well as pantomimes, motion pictures, and other audiovisual works—which include television programming.¹⁷

In the 1960s and early 1970s when cable was first deployed, the legal status of the cable retransmissions of broadcast television was unclear. But after two landmark Supreme Court cases and several years of legislative drafting, the Congress amended the “public performance” right specifically to bring the activity of cable systems within the scope of the Copyright Act.

B. THE RISE OF CABLE TELEVISION

Traditional cable television systems use central antennas to receive television broadcasting signals, amplify them, and then transmit those signals by cable or microwave to their paying customers.¹⁸ At its inception, the vast majority of cable television programming was not original content created by cable companies, but, rather, consisted of the “secondary transmission” of signals broadcast by others.¹⁹ Cable companies argued that they did not need

15. *See id.*; *see also* *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948), and U.S. CONST. art. I, § 8, cl. 8) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993–1000 (1997) (discussing the balance of access and incentives in copyright law); Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473 (2004) (suggesting that more regulation is needed when too many intellectual property protections disrupt the balance between the interest of right holders and the public’s access to creative works).

16. The five other basic rights are the right to reproduce works, the right to prepare derivative works, the right to distribute copies of works, the right to publicly display the work, and the right to digitally transmit sound recordings. 17 U.S.C. § 106 (2012).

17. *Id.*

18. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18[A] (2017).

19. *Id.*

to obtain licenses from the copyright owners of the material because they did not “perform” the material within the meaning of the Copyright Act.²⁰

The U.S. Supreme Court addressed cable technology in two landmark cases: *Fortnightly Corp. v. United Artists Television, Inc.*²¹ and *Teleprompter Corp. v. Columbia Broadcasting*.²²

In *Fortnightly*, the Court was asked whether cable systems “performed” the broadcasted program, under the Copyright Act’s meaning of “perform.”²³ It ruled that cable television systems did no more than enhance their viewers’ capacity to receive the broadcast signals, and, thus, did not “perform” the programs that their systems received and carried.²⁴ Importantly, the Court explicitly refused to serve as the gatekeeper of new technology:

We have been invited . . . to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. We take the Copyright Act of 1909 as we find it.²⁵

When Congress did not act on the Court’s prompt in *Fortnightly*, the Court amplified their call for congressional action in the next big cable systems case that reached their docket. Eight years later, in *Teleprompter*, the Court was asked whether the development of cable retransmissions of “distant signals” now created copyright liability for cable systems.²⁶

Again, the Court chose not to create liability and extended their *Fortnightly* decision.²⁷ It held that the development and implementation of new functions of cable systems did not convert the entire systems, regardless of distance from the broadcasting station, into a “broadcast function.”²⁸ Thus, despite developments in program origination, sale of commercials, and interconnection with other cable systems, cable television operators were still not liable for copyright infringement.²⁹ The Supreme Court also found that the importation of “distant” signals from one community into another did not

20. *Id.*

21. 392 U.S. 390 (1968).

22. 415 U.S. 394 (1974).

23. *Fortnightly*, 392 U.S. at 390.

24. *Id.*

25. *Id.* at 401–02.

26. *Teleprompter*, 415 U.S. 394.

27. *Id.* at 414–15.

28. *Id.* at 404–05; *see also* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:80 (2017).

29. *Teleprompter*, 415 U.S. at 405.

constitute a “performance” under the Copyright Act,³⁰ explaining that reception of signals was still a “viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.”³¹

Once again, the Court highlighted its inadequacy as a forum for weighing the costs and benefits of emerging technologies. The Court wrote that it was severely handicapped by the limits of the outdated Copyright Act to which it was bound. The industry had outgrown the “copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived.”³² The Court repeated that regulation of this field should be left to Congress.³³

Where the *Fortnightly* court gave Congress a wink, the *Teleprompter* court was not afraid to shout. The decision spurred congressional action³⁴ and soon after Congress amended the Copyright Act to explicitly cover the act of cable retransmissions.

C. THE 1976 COPYRIGHT ACT, THE PUBLIC PERFORMANCE RIGHT AND SECTION 111 COMPULSORY LICENSING

In 1961, Congress set out to comprehensively update the Copyright Act to adapt to new technologies and international standards.³⁵ The revision process was slowed until 1972, in part, by the substantial complications arising from emerging cable technology.³⁶

Congress finally acted after the *Teleprompter* decision in 1976. Congress found that the basic operations of cable providers are based on the distribution of copyrighted material, and, thus, copyright royalties should be paid by cable operators to copyright holders.³⁷

To codify this conclusion, Congress first asserted a broad definition of the Act’s meaning of performance. Under the Act, to “perform” means “to recite, render, play, dance, or act [a work], either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it

30. *Id.* at 394.

31. *Id.* at 408.

32. *Id.* at 414. CATV stands for community antenna television systems, the first moniker for cable.

33. *Teleprompter*, 415 U.S. at 414.

34. 1 PATRY, *supra* note 28, § 1:80.

35. *Id.* § 1:46.

36. PETER MENELL, MARK A. LEMLEY, ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE: 2017, VOLUME II: COPYRIGHTS, TRADEMARK AND STATE IP PROTECTIONS 706 (2017).

37. H.R. REP. No. 94-1475, at 89 (1976).

audible.”³⁸ Congress added that a performance may be achieved “‘either directly or by means of any device or process,’ including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.”³⁹

Then, Congress amended the Act to include the Transmit Clause to broaden the definition of what it meant to “publicly” perform a work.⁴⁰ According to the Transmit Clause, a work is performed “publicly” when the performance is transmitted 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.”⁴¹ Congress did not mask their intent behind these changes. The House Report explicitly declared: “a cable television system is performing when it retransmits the broadcast to its subscribers” and such retransmissions are “public” even when the potential recipients are limited to “the subscribers of a cable television service.”⁴²

Yet, Congress valued the public benefit of wider dissemination of television programming provided by cable.⁴³ So, once Congress concluded that cable systems were liable for copyright infringement, it sought a solution to keep the technology alive. Congress noted that it would be “impractical and unduly burdensome” to require all cable systems to negotiate with every copyright owner whose work was retransmitted by a cable system.⁴⁴ As a result, Congress developed a compromise in the form of compulsory licensing of broadcasting signals for cable systems—section 111 of the Copyright Act.⁴⁵

Section 111’s compulsory license enabled cable systems to bypass the transaction costs and impracticalities of negotiating individual licenses with dozens of copyright owners, while simultaneously ensuring that copyright owners were compensated.⁴⁶

38. 17 U.S.C. § 101 (2012).

39. H.R. REP. No. 94-1475, at 63 (1976).

40. 17 U.S.C. § 101 (2012).

41. *Id.*

42. H.R. REP. No. 94-1476, at 63, 65 (1976).

43. *Id.* at 89.

44. *Id.*

45. *Id.* at 88–101; *see also* 1 PATRY, *supra* note 28, § 1:78; Peter Menell & David Nimmer, *Aereo, Disruptive Technology, and Statutory Interpretation*, SCOTUSBLOG (June 26, 2014), <http://www.scotusblog.com/2014/06/symposium-aereo-disruptive-technology-and-statutory-interpretation/> [<https://perma.cc/6HM5-J2FH>].

46. *See* WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 281 (2d Cir. 2012).

Section 111 applies to a “cable system” as defined as “a facility” in the United States that “receives signals transmitted or programs” by television broadcast stations 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.”⁴⁷

D. *AMERICAN BROADCASTING COMPANIES V. AEREO INC.*

Fast forward almost forty years later: the interests of broadcasters and television innovators were unbalanced yet again by the invention of over-the-Internet retransmission systems. Indeed, this constant battle between industry stakeholders and new market entrants is a defining theme of copyright jurisprudence:

We can predict that conflicts between incumbent and challenger disseminators will arise so long as two things are true: first, that more efficient technologies of dissemination will be invented and second, that there exists the possibility, but not the certainty, of convincing government to provide laws that can be used against a competitor.⁴⁸

The new challenger here was Aereo.⁴⁹ American Broadcasting Companies (ABC) claimed Aereo violated their rights under the Copyright Act by selling a service that allowed subscribers to watch television programs over the Internet almost simultaneously while they were broadcast over the air.⁵⁰ ABC argued that Aereo was infringing their right to “perform” their works “publicly,” as defined by the Transmit Clause of the Copyright Act.⁵¹

Aereo argued that because users themselves selected which programs they wanted to watch and receive, only Aereo’s users “performed” the works and Aereo itself served only as an equipment supplier.⁵² The Supreme Court rejected this argument, finding that by adding the Transmit Clause, Congress clearly intended to bring exactly this type of activity within the scope of the Copyright Act. Aereo’s services, the Court wrote, were “substantially similar” to the very cable operations Congress amended the Act to cover.⁵³

The Court found the text of the Transmit Clause made clear that a system that “acts like a [cable] system itself *performs*, even if when doing so, it simply

47. 17 U.S.C. § 111 (f)(3) (2012).

48. Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 292 (2004); *see also* MENELLE ET AL., *supra* note 36, at 725.

49. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2498 (2014).

50. *Id.* at 2499.

51. *Id.* at 2503–04.

52. *Id.*

53. *Id.* at 2506.

enhances viewers' ability to receive broadcast television signals."⁵⁴ Based on the substantial similarity of the activities, rather than the specifics of each technology, the Court concluded that "*Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.*"⁵⁵

Having settled the performance issue, the Court then rejected Aereo's claim that the works were not performed "publicly" because they were each received by only one subscriber.⁵⁶ The Transmit Clause broadly defines the right to transmit a performance of protected content "to the public, by means of any device or process" whether members of the public "receive it in the same place or in separate places and at the same time or at different times."⁵⁷ The Court found that Aereo's subscribers collectively constituted "the public" because they were a "large number of people who are unrelated and unknown to each other," even if programs were received by different people at different times and locations.⁵⁸ The Court stated that these "behind-the-scenes technological differences" did not distinguish Aereo from cable television, given Congress's regulatory objectives.⁵⁹

In his dissent, Justice Scalia maintained that Aereo did not "perform" the works at all because it was the viewers who "performed" the work when they selected the content.⁶⁰ Focusing on the technology distinctions between Aereo and cable, Justice Scalia argued that, unlike the cable systems Congress targeted with the 1976 Amendments, Aereo did not capture and transmit a range of broadcast signals for subscribers at all times, but rather only transmitted the specific programs at specific times, both selected by the user.⁶¹ Justice Scalia wrote that the majority "disregard[ed] widely accepted rules for service-provider liability and adopt[ed] in their place an improvised standard ('looks-like-cable-TV') that will sow confusion for years to come."⁶²

Justice Scalia was right in predicting the confusion the "results-driven" opinion would cause, which was squarely manifested in the paradoxical holding in *Aereokiller*.

54. *Id.* (emphasis added).

55. *Id.* at 2501 (emphasis added).

56. *Id.* at 2508–10.

57. 17 U.S.C. § 101 (2012).

58. *Aereo*, 134 S. Ct. at 2509.

59. *Id.* at 2501, 2508.

60. *Id.* at 2515.

61. *Id.*

62. *Id.* at 2512.

E. AFTER *Aereo*: “TURN[ING] LEMONS INTO LEMONADE”⁶³

Aereo ceased operations soon after losing in the Supreme Court, but other Internet retransmitters continued providing their services, armed with a new argument for the courts. Faced with copyright infringement suits yet again, Internet retransmitters, including Film On, argued that since *Aereo* concluded that online retransmitters publicly performed the works “like cable systems,” their activities should be eligible for section 111’s compulsory license, and attempted to comply with the license’s requirements. Most courts, however, did not buy the argument,⁶⁴ deferring instead Copyright Office’s opinion that Internet retransmissions should not be eligible for compulsory licensing.⁶⁵

Under doctrines of judicial deference, courts defer to an agency interpretation that is reasonable—the *Chevron* test—or persuasive—the *Skidmore* test—depending on which test applies.⁶⁶

The Copyright Office has historically opposed all statutory licensing for copyrighted works, preferring that licensing be determined in the market by copyright owners through the exercise of their exclusive rights.⁶⁷ The Office opposes section 111 on policy grounds, but recognizes that the permanence

63. *Am. Broad. Cos. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *1 (S.D.N.Y. Oct. 23, 2014).

64. Seven federal courts weighed in on whether Internet-based retransmission services count as “cable systems” under section 111. All but one said no. *See* *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 276 (2d Cir. 2012), *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 600 (S.D.N.Y. 2011), *Fox Television Stations, Inc. v. Film On X LLC*, 150 F. Supp. 3d 1, 7 (D.D.C. 2015); *Film On X, LLC v. Window to the World Commc’ns, Inc.*, No. 13 C 8451, 2016 WL 1161276, at *7 (N.D. Ill. Mar. 23, 2016), *CBS Broad. Inc. v. Film On.com, Inc.*, No. 10 CIV. 7532 NRB, 2014 WL 3702568, at *4 (S.D.N.Y. July 24, 2014), *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *3 (S.D.N.Y. Oct. 23, 2014).

65. *See* *WPIX*, 691 F.3d, at 275, 276; U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 97–98 (Aug 1, 1997); *see also* *Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 106th Cong. 26 (2000) (statement of Marybeth Peters, The Register of Copyrights) [hereinafter 2000 Register of Copyrights Statement to Congress].

66. *See* *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). For further discussion, see Eskridge, William N. Jr. & Baer, Lauren E., *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (tracking the application of the doctrine of judicial deference since *Chevron*).

67. 2000 Register of Copyrights Statement to Congress, *supra* note 65; *Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary* 108th Cong. (Feb. 24, 2004).

of cable (and later satellite) licenses has created expectations for both copyright holders and consumers, making elimination of the license difficult.⁶⁸

The Copyright Office first published their opposition to granting compulsory licenses to Internet retransmitters in a 1997 report.⁶⁹ Early Internet retransmission innovators argued that they faced the same economic and logistical difficulties that early cable companies faced in negotiating individual licenses.⁷⁰ But convinced by testimony from copyright owners, broadcasters, and cable interests, the Office concluded that it would be inappropriate to extend the existing scheme or create a new compulsory license scheme for Internet retransmitters, an industry “so vastly different” from other retransmission services.⁷¹ The Office reasoned that unlike satellite and cable, Internet retransmitters were not subject to FCC regulation, had no geographic limitations, and were more likely to be subject to unauthorized copying and dissemination.⁷² Moreover, the Office adopted the FCC’s “wait and see” approach for the burgeoning industry: not interfering with the development of the Internet was best practice. At this time, the FCC recognized that the Internet’s growth would shift the communications industry from “regulated monopolies to a world of overlapping competitive firms.”⁷³ The government’s only responsibility was to open doors. As such, the Office thought that a compulsory license scheme would go against this spirit, creating a competitive disadvantage for content providers to directly make their content available on the Internet.⁷⁴

Early online video providers argued that streaming audiovisual media was extremely expensive and logistically challenging: new services faced a disadvantage trying to negotiate with large content providers who could withhold rights to prevent new competition in the market.⁷⁵ To those innovators, setting geographic limitations were plausible technological adaptations, but ones that would undermine the potential of the technology

68. See U.S. COPYRIGHT OFFICE, THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS 81 (1992); U.S. COPYRIGHT OFFICE, A REVIEW OF COMPULSORY LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS, at 32–33 (1997) [hereinafter 1997 COMPULSORY LICENSING REPORT]; see also 2000 Register of Copyrights Statement to Congress, *supra* note 65.

69. 1997 COMPULSORY LICENSING REPORT, *supra* note 68.

70. *Id.* at 93.

71. *Id.* at 97.

72. *Id.* at 97–99.

73. *Id.* at 98; see INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION 109 INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 53 (Sept. 1995).

74. 1997 COMPULSORY LICENSING REPORT, *supra* note 68, at 99.

75. *Id.* at 93.

entirely: the Internet was exciting *because* it was an unparalleled global communications medium.⁷⁶ While the Office reasoned that a deregulatory approach would ensure market competitiveness, innovators argued just the opposite: an administrative scheme was necessary to buoy the experimental nature of Internet retransmitters.

In 2000, the Office restated its earlier conclusion that a compulsory licensing scheme for Internet retransmissions would be inappropriate.⁷⁷ The Office reiterated that the Internet's unregulated nature—making content “instantaneously worldwide” and vulnerable to improper copying—made it a “poor candidate” for a compulsory license.⁷⁸ The Office expanded on two points: (1) a licensing scheme would create a competitive disadvantage to content providers and (2) raise international concerns.⁷⁹

On the first point, the Office highlighted that Internet retransmitters do not build delivery platforms like cable and satellite systems but use an existing platform broadcasters can exploit on their own.⁸⁰ As such, copyright owners should decide for themselves if they want to distribute content online, and not be dictated by a government system. Internet streaming, the Office continued, is inherently vulnerable to illegal downloading and dissemination.⁸¹ And the decision to assume that risk should be left to copyright holders.⁸²

Secondly, the Office worried that a scheme would violate international copyright obligations.⁸³ Under the Berne Convention, the retransmission of work by any means must be subject to the author's exclusive rights.⁸⁴ While exceptions exist for compulsory licensing schemes, those exceptions are limited by territorial restrictions.⁸⁵ To coexist with Berne obligations, the Office concluded that a compulsory license for Internet retransmissions could only permit retransmissions in the United States.⁸⁶ At that time, the Office found no technology one hundred percent capable of preventing reception outside the United States.⁸⁷

76. *Id.* at 93–94.

77. *See* 2000 Register of Copyrights Statement to Congress, *supra* note 65.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Nearly a decade later, in 2009, the Office maintained this position, reiterating concerns about geographical limitations and piracy, but added a new argument: The Internet has flourished as a platform for video programming without help from any statutory scheme.⁸⁸

IV. CASE SUMMARY

Nearly all courts relied on this Copyright Office position rejecting Internet retransmitters' request to be included under section 111—all but one. The first, and only, court to rule in favor of Internet retransmitters was the Central District of California in *Fox v. AereoKiller* in 2015.⁸⁹

A. FACTS

A group of broadcasting and cable industry giants,⁹⁰ collectively “Fox,” brought suit in the U.S. District Court for the Central District of California against Internet retransmitter Film On for copyright infringement.⁹¹ The plaintiffs moved for summary judgment to find that Film On was not entitled to the section 111 compulsory license.⁹²

Like Aereo, Film On captured over-the-air broadcast programming and retransmitted select programming to its paying customers through the Film On website.⁹³ The service allowed subscribers to access nearly simultaneous live streams of broadcast television over the Internet on their personal electronic devices.⁹⁴

88. *Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary* 111th Cong. (Feb. 25, 2009) [hereinafter 2009 Register of Copyright Statement to Congress]; U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 23–33, 85, 87 (June 30, 2008) [hereinafter SHVERA REPORT].

89. *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1167 (C.D. Cal. 2015).

90. The plaintiffs were: Fox Television Stations, Inc., Twentieth Century Fox Film Corp., Fox Broadcasting Co., Inc., NBCUniversal Media LLC, Universal Network Television LLC, Open 4 Business Productions LLC, NBC Subsidiary (KNBC-TV) LLC, Telemundo Network Group LLC, WNJU-TV Broadcasting LLC, American Broadcasting Companies, Inc., ABC Holding Company Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., and Big Ticket Television, Inc. *Id.* at 1154.

91. *Fox Television Stations, Inc. v. Film On X, LLC* consolidated with *NBCUniversal Media, LLC v. Film On X, LLC* for rulings on cross-motions for summary judgment as to compulsory license eligibility under 17 U.S.C. § 111 (2012). *Id.*

92. *Id.*

93. *Id.* at 1156.

94. *Id.*

Film On operated facilities in certain regional markets, housing antennas and other electronic equipment to capture programming transmissions.⁹⁵ That captured programming was then transmitted to specific paying customers over the Internet.⁹⁶ When users accessed the Film On website, the Film On server provided a list of available programming.⁹⁷ Users then picked a broadcast channel, and the request was directed to a local Film On facility.⁹⁸ Users could watch programs almost simultaneously or at any other time.⁹⁹ Film On omitted all closed captioning, played an advertisement before users could view the selected programming, and added the Film On logo.¹⁰⁰ Otherwise, Film On did not alter the programming.¹⁰¹

In October 2014, after *Aereo*, Film On mailed approximately 130 letters to broadcasters informing them of their intent to restart operations as a multichannel video programming distributor (MVPD) in certain markets, and attempted to comply with other cable regulations.¹⁰² Attempting to comply with section 111, Film On also submitted Statements of Account to the Copyright Office for each six-month period between August 2012 and July 2014, and paid the corresponding fees.¹⁰³

With hopes of restarting their business after *Aereo*, Film On modified their service by adding further protections for content.¹⁰⁴ The service claimed to restrict user access to programming based on the user location, and used an encryption key to ensure that only the user with the authorized IP address was able to view the stream, and only for a limited time.¹⁰⁵ Ostensibly, Film On's updated geolocation system sought to deny access to any broadcast channel unless the user's credit card address was within the relevant designated market

95. Appellees' Consolidated Opposition Brief at 11–12, *Fox Television Stations, Inc. v. AereoKiller, LLC*, No. 15-56420 (9th Cir. Mar. 28, 2016).

96. *Id.*

97. *AereoKiller*, 115 F. Supp. 3d at 1156.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1159. Film On requested local broadcasters to inform them if they elected “must-carry status. “Must-carry” regulation states that locally licensed television stations may require a cable operator that serves the same market to carry its signal. *See Cable Carriage of Broadcast Stations*, FED. COMM. COMMISSION (Dec. 9, 2015), <https://www.fcc.gov/media/cable-carriage-broadcast-stations> [<https://perma.cc/B2EK-H7A7>].

103. Unsurprisingly, however, Film On did not pay the required royalties for the networks with whom they were then in litigation. *See AereoKiller*, 115 F. Supp. 3d at 1158.

104. *See id.* at 1156–59.

105. *Id.* at 1157–58.

area.¹⁰⁶ Additionally, the new system required mobile viewing devices to be located within the market area at the time of transmission.¹⁰⁷ Film On also hired a third-party service to prevent users from other markets from using proxy servers to access market-specific content.¹⁰⁸ Evidence presented at trial, however, suggested that Film On's new software was not fully developed and vulnerable to manipulation.¹⁰⁹

Plaintiff Fox argued that (1) Film On did not meet section 111's definition of a "cable system;" (2) *Aereo* did not support the conclusion that Film On is a "cable system;" and, (3) section 111 should be construed narrowly.¹¹⁰ In addition, Fox pointed to the unanimity of court decisions across the country in its favor. But Fox also urged that if the statutory language was found unclear, the court should defer to the Copyright Office's position that Internet retransmitters are not "cable systems" that qualify for the Act's compulsory license.¹¹¹ Drawing attention to the Copyright Office's view was a strategic move by the appellants. Fox repeatedly highlighted the Copyright Office's responsibility of administering the Act, subtly giving weight to its favorable opinion.¹¹² They called it a "textbook" case for administrative deference.¹¹³

Film On, on the other hand, defended the singular opinion of the lower court, maintaining that (1) section 111 was "technology agnostic," consistent with both the 1976 Act and *Aereo*; (2) Film On was a cable system eligible for the section 111 license; and, (3) the district court correctly declined to defer to the view of the Copyright Office.¹¹⁴

Moreover, the two sides held different interpretations of Congress's intent regarding the Act's 1976 amendments. Film On argued that Congress crafted the language of the Act to expand public access to over-the-air programming, and to stand the test of time.¹¹⁵ Film On argued that Congress drafted the amendments to anticipate the future technological advances in television retransmission, "not to technologically handcuff an industry for almost half a

106. *Id.* at 1157.

107. *Id.* at 1157–58.

108. *Id.*

109. *Id.* at 1158.

110. Brief of Petitioner-Appellant at 25–60, *Fox Television Stations, Inc. v. AereoKiller*, No. 15-56420 (9th Cir. Jan. 27, 2016) [hereinafter Brief of Petitioner-Appellant].

111. *Id.* at 3.

112. *Id.* at 3, 10, 46.

113. *Id.* at 3.

114. Appellees' Consolidated Opposition Brief at 25–62, *Fox Television Stations, Inc. v. AereoKiller, LLC*, No. 15-56420 (9th Cir. March 28, 2016).

115. *Id.* at 2.

century.”¹¹⁶ Deference to the Copyright Office was not warranted, Film On concluded, because the statute “unambiguously encompass[ed]” their service.¹¹⁷ Fox, on the other hand, argued that Film On’s argument “ignore[s] the canon of construction that compulsory licenses . . . are to be narrowly construed.”¹¹⁸

B. PROCEDURAL HISTORY

1. *The California District Court’s Break from National Pattern*

Among all the infringement cases brought against Internet retransmitters across the country in the wake of *Aereo*, the California District Court was the only court that agreed with retransmitters.¹¹⁹

The district court noted that plaintiffs, much like the defendants, had dramatically flipped from their position in *Aereo* deemphasizing technological differences. Now, plaintiffs highlighted the technological differences between a cable company and Film On as “exceedingly meaningful.”¹²⁰ While the *Aereo* court did not consider the same section 111 question, Judge Wu of the Central District of California wrote that *Aereo* was “about as close a statement directly in Defendants’ favor as could be made[.]”¹²¹

Furthermore, the court wrote that its holding followed the judicial trajectory that began in *Fortnighly*, where the Supreme Court refused to pull cable television technology within the Copyright Act’s meaning of performance despite its vast innovation: “[C]ourts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation” and that such rebalancing must be left to Congress.¹²²

Judge Wu wrote that the Copyright Office’s opinions, while influential, certainly did not control, as they did not control in *Fortnighly* and *Teleprompter*.

Given that the Office disagrees with Congress [against the very existence of section 111], *it is no surprise that it seeks to cabin the statute whenever possible*. However, this administrative opposition to Congressional text requires a particularly close look at any assertion that courts should defer to the agency’s interpretation.¹²³

116. *Id.*

117. *Id.*

118. Brief of Petitioner-Appellant, *supra* note 110, at 22.

119. *See supra* note 64 and accompanying text.

120. *AereoKiller*, 115 F. Supp. 3d 1152, 1163 (C.D. Cal. 2015).

121. *Id.* at 1163.

122. *Id.*

123. *Id.* at 1164 (emphasis added).

The court, further challenging deference to the Office, emphasized that copyright law does not exist in a vacuum, but is instead “intertwined with equally complex provisions of communications law and policy—the implications of which are outside the expertise of the Copyright Office and require further consideration by Congress.”¹²⁴

Ultimately, the court found the statute clear and unambiguous, and, thus, did not warrant a discussion of legislative history or administrative interpretation.¹²⁵ Relying on the plain meaning of the statute, the court held that Film On should be eligible for the section 111 license.¹²⁶

The district court’s opinion kept with the *Fortnightly* model of strict statutory interpretation of the Copyright Act’s plain meaning (and rejected the *Aereo* “would have intended” model), irrespective of the policy arguments against the result.¹²⁷ In light of the far-reaching implications, however, the court recommended immediate appeal.¹²⁸

2. Ninth Circuit Reversal

Unlike the district court below it, a Ninth Circuit panel found the plain meaning of section 111 to be inconclusive, and subsequently deferred to the Copyright Office’s sufficiently persuasive opinion that Internet retransmitters are not “cable systems” under section 111.¹²⁹

The court found the language of section 111 to be ambiguous as to whether, to qualify as a “cable system,” a retransmission service must have control over the means it uses to transmit material (plaintiffs urged it did),¹³⁰ or whether the Internet fell within the Act’s meaning of “other communications channels” that can be used by cable systems to make secondary transmissions (as defendants urged).¹³¹

Turning to legislative intent, the court called Film On’s interpretation of the statute as technology agnostic “a poor fit” with section 111’s text.¹³² The

124. *Id.*

125. *Id.* at 1168.

126. *Id.* at 1171.

127. *Id.* at 1168.

128. *Id.* at 1171.

129. *Fox Television Stations, Inc. v. Aereokiller LLC*, 851 F.3d 1002 (9th Cir. 2017).

130. *Id.* at 1008. Plaintiffs argued that section 111’s definition of a “cable system” as a “facility” mandated that Film On be excluded from the definition because it did not own or control the retransmissions service it used (the Internet) as a traditional cable system facility would. *Id.*; 17 U.S.C. § 111(f)(3) (2012).

131. *Aereokiller*, 851 F.3d at 1008–11; *see also* 17 U.S.C. § 111(f)(3) (2012). “Communications channels” had been elsewhere narrowly defined as “bandwidth noise and throughput.” *See Aereokiller*, 851 F.3d at 1009–10.

132. *Id.* at 1009.

court admitted that the definition of cable system was “ambiguous,” but not completely without detail.¹³³ It found that Congress’s decision to apply section 111 only to “cable systems” revealed that it sought to exclude all other types of retransmitters.¹³⁴ It was also convinced by Congress’s later additions of sections 119 and 122, establishing compulsory licensing schemes for satellite providers that granted them similar rights to cable providers.¹³⁵ To the court, this revealed that Congress made a specific choice to create a new scheme rather than expand section 111 to encompass new technology.

Moreover, the imbalance of interests solved by the creation of section 111, according to the court, did not exist here.¹³⁶ In creating section 111, Congress sought to “restore a measure of protection to copyright owners,” while simultaneously supporting the important public good served by cable systems.¹³⁷ That public good was transmitting broadcasting to geographically distant and isolated American communities that did not receive over-the-air signals.¹³⁸ The statutory scheme helped an early cable industry with little market power overcome the transaction costs of negotiating individual licenses with all copyright holders.¹³⁹ The solution also prevented cable companies from losing all the infrastructure investments they had already made and would even benefit copyright holders by exposing new audiences to their content.¹⁴⁰

Comparing these climates, the court found that the benefits of Internet retransmissions did not equate. Internet retransmissions did not hold the same public interest value because they were not reaching otherwise unserved communities, there was no evidence that such services lacked the market power needed to negotiate licenses individually, and the content providers could just use the platforms themselves.¹⁴¹ Furthermore, the court stressed that because Internet retransmissions had no geographic boundaries and were much more vulnerable to piracy than cable retransmissions, they posed “a more serious threat to the value and integrity of copyrighted works.”¹⁴²

The court thus believed the appellants’ argument to be significantly stronger based on the statutory text and legislative history, but still reasoned that a plain reading of the Act did not explicitly exclude Film On from the

133. *Id.*

134. *Id.*

135. *Id.* at 1009.

136. *Id.*

137. *Id.* at 1010.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1011.

142. *Id.*

license. As such, the court turned to the Copyright Office.¹⁴³ The court highlighted four instances, in official reports and testimony before Congress, in which the Office “specifically and unequivocally” said that Internet-based retransmission services are not cable systems under section 111.¹⁴⁴

The court chose to apply the *Skidmore* standard, a somewhat less deferential standard, to the Office’s opinion.¹⁴⁵ Under *Skidmore*, the court concluded that the Office’s position was “persuasive and reasonable,” and, thus, owed deference.¹⁴⁶ The court reached this conclusion based on support from the statutory text, the Office’s consistent position on the matter since it first expressed its views, and congressional inaction on the issue, despite knowledge of the Office’s position.¹⁴⁷ The court concluded that the decision did not conflict with *Aereo*, which dealt with a completely different provision, the Transmit Clause, with far broader terms.¹⁴⁸

In sum, the Ninth Circuit ruled that section 111, as drafted in 1976, did not make clear whether Internet retransmitters would be eligible for the compulsory license for cable systems, and, as such, relied on the Copyright Office’s sufficiently persuasive and reasonable opinion that they were not eligible for the license.¹⁴⁹

V. ANALYSIS

The holdings in *Aereo* and *Aereokiller* combine to cut the cord on Internet television retransmission services like Aereo and Film On. Despite parallels with cable systems, their fates did not play out the same: doors were opened for cable innovators; they’ve been shut for Internet innovators.

Though legally plausible, the result of *Aereo-Aereokiller* reflects an awkward union of a narrow reading of section 111 with a broad reading of the Transmit Clause. The Ninth Circuit gives unjustifiable weight to the Copyright Office’s opinion that is actually in tension with both historical policy concerns over market access for new technology, and with modern FCC policy goals to make technology neutral video programming regulation more inclusive of over-the-Internet retransmissions.

143. *Id.* at 1011–12.

144. *Id.* at 1012.

145. *See* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also* 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMIN. L. & PRAC. § 11:32 (3d ed. 2018).

146. *Aereokiller*, 851 F.3d at 1012–13.

147. *Id.*

148. *Id.* at 1009.

149. *Id.* at 1015.

A. THE *AEREO-AEREOKILLER* OUTCOME RESULTED FROM DIFFERENT MODELS OF STATUTORY INTERPRETATION OF THE PUBLIC PERFORMANCE RIGHT AND THE COMPULSORY LICENSE

Though the Supreme Court avoided creating liability in *Teleprompter* and *Fortnightly*, it did just that in *Aereo*. In ruling that Aereo “publicly performed” under the meaning of the Copyright Act, the Supreme Court found that Congress *would have intended* to include the activities of Aereo in its definition and held Aereo liable for copyright infringement.¹⁵⁰

This contrasts with Judge Wu’s opinion in the U.S. District Court for the Central District of California. Judge Wu explicitly sought to follow in the tradition of *Teleprompter* and *Fortnightly* by refraining from creating new communications regulation and instead read the Act as written.¹⁵¹

The Ninth Circuit diverged from both *Teleprompter* and *Fortnightly* and disagreed with Judge Wu. According to the Ninth Circuit, the statute did not contain enough explicit language to tell them “what the law is.” Unlike the Supreme Court in *Aereo*, it did not decide the case by interpreting what Congress “would have intended:” the Ninth Circuit called the well-documented legislative history of section 111 “a wash” (and concluded that the Copyright Office would have a better picture of that history anyway).¹⁵²

The result is an *Aereo* decision that gives Internet transmissions the burden of cable system liability, but an *Aereokiller* decision that denies them the benefit of cable system compulsory licensing, excluding Internet retransmitters from a pathway into the industry.

The two opinions can plausibly coexist. The *Aereo* and *Aereokiller* courts interpreted two separate provisions of the Act: the public performance right found in section 101, and the compulsory license found in section 111. The Ninth Circuit reasoned that the addition of the Transmit Clause to the public performance right sought to include general retransmissions within the scope of the Copyright Act, while section 111 is a narrow statutory license meant to bolster cable systems technology.¹⁵³

The Ninth Circuit distinguished the language and legislative intent behind the two provisions. In confirming that cable systems “performed” the

150. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2501 (2014).

151. *Fox Television Stations, Inc. v. AereoKiller, LLC*, 115 F. Supp. 3d 1152, 1171 (C.D. Cal. 2015) (“Plaintiffs’ policy may be the better one, but this Court does not presume to make policy. With apologies to John Marshall, who said it in a much stronger sense, the Court’s role here is merely ‘to say what the law is.’”).

152. *Fox Television Stations, Inc v. Aereokiller, LLC*, 851 F.3d 1002, 1011 (9th Cir. 2017).

153. *Id.* at 1009.

retransmitted programming under the Act, Congress sought to broadly include “all kinds of equipment . . . any sort of transmitting apparatus . . . and *any other techniques and systems not yet in use or even invented.*”¹⁵⁴ Congress’s focus was not on the technology, but the activity itself—balancing the interests of the stakeholders in the distribution of copyrighted works. The House Report states that the definition of “transmit”—“to communicate a performance or display by any device or process whereby images or sound are received beyond the place from which they are sent”—is purposefully “broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them.”¹⁵⁵ *Aereo* relied on this legislative history when it declared the public performance right technologically agnostic, minimizing the technology distinctions and maximizing the essential purpose of the activity.¹⁵⁶

This same technology-agnostic intent does not exist for the section 111 compulsory license. Section 111 specifically defines a “cable system” as “a facility . . . that receives signals transmitted or programs” broadcasted by broadcast television stations “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.”¹⁵⁷ A plain reading of this text could conclude that the Internet does not qualify as a facility under the control of Film On, nor did “other communications channels” conceive of Internet technology. Moreover, one could reasonably argue that legislative history reveals that Congress did not seek to expand the license beyond cable systems.

Distinguishing the legislative intent behind the two provisions so drastically, however, ignores their concurrent histories. The updated public performance right and the compulsory license are not provisions separated by different time periods or political atmospheres. They were created in the same set of amendments in 1976, by the same individuals who worked almost two decades to pair the provisions to create a compromise between broadcasting and copyright stakeholders and cable television upstarts. The two provisions served as essential weights on the teetering scales Congress attempted to settle with the 1976 Copyright Act. Interpreting one provision as narrow and the other as broad is defensible, but deeming the legislative intent behind one as conclusive, as the *Aereo* court did, and the other as “a wash,” as the *Aereokiller*

154. 17 U.S.C. § 106 (2012); 2 NIMMER & NIMMER, *supra* note 18, § 8.14[B][1] (citing H.R. REP. 94-1476, at 63 (1976)) (emphasis added).

155. H.R. REP. 94-1476, at 64 (1976).

156. *See* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2509 (2014).

157. 17 U.S.C. § 111(f)(3) (2012).

court did, is to come to markedly different conclusions about the same legislative history.

B. LIKE CABLE, THERE IS A PUBLIC INTEREST IN INTERNET
RETRANSMISSIONS

Because of the public benefits of cable retransmission, Congress created a statutory licensing scheme to ensure their survival. With Internet retransmissions, neither courts nor the Copyright Office have identified the public benefits of enabling Internet retransmissions, but innovators and other policymakers disagree. If Internet retransmitters warrant a compulsory license scheme, it is critical to ask why, beyond an examination of outdated statutory language.

In order to answer whether the social benefits of Internet retransmission warrant a compulsory licensing scheme, it is essential to identify the social benefits of cable that drove Congress to set up a compulsory scheme in cable's favor. If those same benefits of cable persist for modern over-the-Internet retransmissions, then there is a robust policy argument to include Internet retransmitters within a compulsory license. The public's interest in cable is the very purpose of the creation of section 111. On the Copyright Act, Congress said "the bill reflects our belief that authors' rights should be stated in the statute in broad terms and that the specific limitations on them should not go any further than is shown to be necessary in the public interest."¹⁵⁸

"Necessary in the public interest" is a broad phrase, but certainly not one without direction. When section 111 was created, there were particularly high hopes for the benefits of cable. Cable was described as "having near-utopian promise for social liberation" that would bring unlimited and diverse channels of information into American homes.¹⁵⁹

Internet retransmitters, opponents argue, do not elicit this same utopian good. To opponents, they do not provide, nor do they seek to provide, newfound access to content in areas of geographic isolation; they provide a geographically limitless, rather than local, service.¹⁶⁰ Moreover, the Copyright Office maintains that Internet distribution makes copyrighted works vulnerable to digital theft and dissemination in a way cable did not.¹⁶¹ In

158. *Copyright Law Revision: Hearings on H.R. 4347 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 31–33 (1965) (prepared testimony of George Cary, Deputy Register of Copyrights).

159. TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 176 (2010).

160. *See* *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 282 (2d Cir. 2012).

161. 2000 Register of Copyrights Statement to Congress, *supra* note 65.

addition, both the Office and the *Aereokiller* court found no evidence that Internet retransmitters lacked the market power needed to negotiate licenses individually. For cable upstarts, Congress implicitly assumed the obvious transactions costs of rag-tag inventors negotiating with broadcasting powerhouses.¹⁶² Now, the Copyright Office points to the success of online video platforms as proof that a statutory licensing scheme is not needed to keep them competitive.¹⁶³

This is not the first time, however, that Congress has been asked to consider expanding this license to cover a new technology. Satellite technology challenged the balance of the Act as well. In 1991, the Eleventh Circuit held that a satellite carrier was a cable system covered by section 111's compulsory licensing scheme.¹⁶⁴ Seven years later, in 1998, Congress responded by codifying a separate statutory license for satellite carriers under section 119 of the Copyright Act.¹⁶⁵ Once again, Congress determined that it was in the public interest to maintain the increased access to broadcasting content created by a new transmissions technology.¹⁶⁶

Congress intended section 119 to be only a temporary license set to expire after five years. The statute, however, has been repeatedly reauthorized since.¹⁶⁷ The creation of this additional provision, on an interim basis, has been interpreted as a warning to courts that section 111 should not be read to include any new technologically-distinct retransmissions systems.¹⁶⁸ It could also show, however, that the continued renewal of this initially temporary solution proves just the opposite—it works. The continued existence of statutory licenses despite opposition from the Copyright Office may be evidence itself that such schemes are the optimal market solution, and, excluding new retransmissions systems from this model puts them at a disadvantage.

In its amicus brief for *Film On*, the Electronic Frontier Foundation (EFF) urged that a technological-neutral interpretation of section 111 better serves copyright's constitutional purpose by reserving some value of copyrighted works to the public. The transaction costs of negotiating licenses, they urged,

162. WU, *supra* note 159, at 178–79 (“In the late 1960s, cable had a distinctive identity. It was scrappy industry of small-town entrepreneurs in perpetual trouble with the law.”); *Id.* at 178.

163. 2000 Register of Copyrights Statement to Congress, *supra* note 65.

164. *Nat'l Broad. Co., Inc., v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991).

165. Satellite Home Viewer Act of 1988, 17 U.S.C. § 119 (2012).

166. *See* 2 NIMMER & NIMMER, *supra* note 18, § 8.18.

167. *See* 2009 Register of Copyright Statement to Congress, *supra* note 88.

168. *See* *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 282 (2d Cir. 2012).

remained “insurmountably high” for new competitors.¹⁶⁹ Television retransmission technology need not invoke “near utopian promise” to prove its public good. Statutory licenses, the EFF argued, are meant to give new competitors like Film On the constitutionally-prescribed “breathing room” needed, give viewers more choices, incentivize market innovation, and increase access to creative works in the long term.¹⁷⁰

C. IN ITS DEFERENCE TO THE COPYRIGHT OFFICE, THE NINTH CIRCUIT’S *AEREOKILLER* OPINION PAINTS AN INCOMPLETE PICTURE OF BROADCASTING REGULATION

Courts defer to the Copyright Office when application or interpretation of Office regulations or longstanding practice is implicated.¹⁷¹ The U.S. Copyright Office, part of the Library of Congress (thus, an arm of the legislative branch of the federal government) supervises copyright registration and deposit, recordation of transfers, payment of fees, and other related functions.¹⁷² Congress relies on the Office to provide its technical expertise in the legislative process, often in the form of studies.¹⁷³ The Ninth Circuit has previously awarded deference to the Copyright Office in interpreting copyright law, relying on *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*,¹⁷⁴ in fact, deferred to the Office specifically on a section 111 issue.¹⁷⁵

In *Aereokiller*, the court begins its analysis: “It is crucial to point out that we do not confront [section] 111’s compulsory licensing scheme on a blank slate, because there is an agency interpretation in the background.”¹⁷⁶ This statement is a startling admission by the court on the influence of the Copyright Office’s opinion in its decision even before it independently worked

169. Brief for the Electronic Frontier Foundation and Public Knowledge as Amici Curiae Supporting Respondents, at 2, *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1167 (C.D. Cal. 2015) (No. 15-56420), 2016 WL 1451913, at *2.

170. *Id.*

171. 2 NIMMER & NIMMER, *supra* note 18, § 7.26. *But see id.* (“Though courts frequently invoke their willingness to defer to Copyright Office practices, one gathers the impression that their deference ends as soon as their disagreement with the Office’s position begins.”).

172. *Id.*

173. *Id.*

174. 836 F.2d 599, 609–10 & n.16 (D.C. Cir. 1988); *see also* *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991) (holding Copyright Office’s statutory interpretations are entitled to deference “if reasonable” while the Office’s opinion letters are only entitled to deference if “persuasive”).

175. *Id.* at 608 (holding that the Copyright Office is due judicial deference because otherwise every dispute over the meaning of the statute could rise to an infringement action, a policy result that would be “antithetical to Congress’s concern of providing a low cost transfer of copyrighted materials”).

176. *Fox Television Stations, Inc v. Aereokiller, LLC*, 851 F.3d 1002, 1007 (9th Cir. 2017).

to declare the provision ambiguous. Procedure requires that a court find a statute to be ambiguous before deferring to agency opinion. A court must, in fact, confront a statute as “a blank slate” to identify its plain meaning. Only if the meaning is ambiguous should a court look outside of its independent analysis for the opinion of an outside agency. A *Skidmore* level of judicial deference requires a court to evaluate the Office’s opinion for persuasiveness and reasonability. However, before even doing so, the court aligned its own analysis of section 111 with the Copyright Office’s opinion in mind, and prepared to come to the same conclusion.¹⁷⁷

Furthermore, unlike Judge Wu in the district court, the Ninth Circuit chose to ignore the complex interplay between copyright and communications law, and to ignore the other actors involved—including those that may be better-equipped to regulate the communications industry than the Copyright Office altogether, like the FCC.

The Copyright Office itself has stated their opinion is, in part, dependent on FCC regulation.¹⁷⁸ Internet retransmissions services do not qualify for section 111, the Office has said, partly because they are not regulated as cable systems by the FCC.¹⁷⁹ If, then, the FCC were to regulate Internet retransmitters as cable systems, the Office may rethink its opinion. And the FCC may currently be doing just that.¹⁸⁰

In 2014, after *Aereo*, the FCC released a Notice of Proposed Rulemaking (NPRM), updating FCC rules to modernize its interpretation of the term “multichannel video programming distributor” (MVPD) to include services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming.¹⁸¹ In sharp contrast with the narrow construction of section 111’s definition of a cable system, the FCC proposes that MVPD be defined “in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet

177. *Id.* at 1007.

178. Letter from Jacqueline C. Charlesworth, Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Dir. of Fin. Planning & Analysis & Revenue, Aereo, Inc. (July 16, 2014).

179. *See also* 57 Fed. Reg. 3284, 3292 (Jan. 29, 1992).

180. FED. COMM’NS COMM’N, FCC 14-210, NOTICE OF PROPOSED RULEMAKING IN THE MATTER OF PROMOTING INNOVATION AND COMPETITION IN THE PROVISION OF MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION SERVICES (Dec. 19, 2014) [hereinafter FCC NPRM].

181. FCC NPRM, *supra* note 180, at 11.

delivery.”¹⁸² Creating industry access for Internet retransmitters, the FCC wrote, aligns with the Commission’s pro-consumer values in MVPD regulation.¹⁸³

Promoting the broad distribution of communications services is an essential purpose of the FCC. The Communications Act of 1934 authorized the FCC “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”¹⁸⁴ Following *Aereo*, former FCC Chairman Tom Wheeler declared that technology-neutral rules spur competition. “[T]he definition of MVPD,” he urged, “should turn on the services that a provider offers, not on how those services reach viewers.”¹⁸⁵ Wheeler said that making rules technology-neutral allows both new and incumbent television transmitters to take advantage of online transmission. Regulations should allow for new business models to bring new choices to customers.¹⁸⁶

This, however, stands in contrast to the positions of the courts and Copyright Office regarding Internet retransmissions. As such, the FCC sought commentary on the interplay between communications and copyright law.¹⁸⁷ The FCC intended to explore how this technology-neutral interpretation would affect license negotiation between broadcasters and Internet-based retransmitters, especially if the Copyright Office does not grant statutory licenses to Internet retransmitters. The FCC also asked if this updated definition of Internet-based television programming distributors as MVPD’s and the Copyright’s Office position that Internet-based distributors do not

182. *Id.* at 11–12.

183. *Id.* at 12.

184. 47 U.S.C. § 151 (2012).

185. Tom Wheeler, *Tech Transitions, Video, and the Future*, FED. COMM. COMMISSION (Oct. 28, 2014), <https://www.fcc.gov/news-events/blog/2014/10/28/tech-transitions-video-and-future> [<https://perma.cc/V7TV-7W2J>] (“Such benefits follow from innovation. Taking advantage of this rule, new [over-the-Internet television providers] may offer smaller or specialized packages of video programming, so consumers will be able to mix-and-match to suit their tastes And perhaps consumers will not be forced to pay for channels they never watch.”).

186. *Id.*

187. *See also* FED. COMM’NS COMM’N, DA 18-53, COMMENT DEADLINES SET FOR NOTICE OF PROPOSED RULEMAKING TO UPDATE MVPD SUBSCRIBER NOTIFICATION RULES AND BROADCASTER CARRIAGE ELECTION PROCEDURES (Jan. 18, 2018) (setting comment deadlines for March 2, 2018).

qualify for the compulsory license would even create a workable regulatory scheme.¹⁸⁸

Once again, the copyright's communications policy may play out in several regulatory arenas. The answer may lie within the Copyright Office's response to the proposal. Others say courts could play a role, as well. In support, the EFF has said that although the Copyright Act and the Communications Act are separate bodies of law, the broadcasting compulsory licenses in the Copyright Act were written with MVPDs in mind.¹⁸⁹ The EFF contends that awarding Internet-based retransmitters MVPD status, giving them regulatory parity with incumbent services for purposes of the Communications Act, may encourage courts to treat such services as cable systems for Copyright Act purposes, establishing regulatory parity and technological neutrality across statutes.¹⁹⁰

FCC regulation could also be an answer to some of the policy concerns driving the Copyright Office's position: Internet retransmitters' lack of geographical limitations, and lack of technological prevention against copying and dissemination.

First, the Copyright Office has stated that: "A compulsory licensing regime that required retransmissions to be encrypted, and prohibited foreign distribution of the decoding technology, could satisfy the territorial limitations of Berne" so long as the technology could effectively prevent reception of the retransmitted signals outside the United States.¹⁹¹ Essentially, a service that developed solid geographic limitations could change its position on the appropriateness of a compulsory license scheme.

Moreover, the Copyright Office has focused on ineffective technology protections from copying and dissemination as a reason to refuse to grant compulsory licenses to Internet retransmitters. This suggests then that effective technological protection measures (TPMs) could be a possible solution for Internet retransmissions services. Effective TPMs could prevent the infringing uses imagined by broadcasters and copyright holders, while allowing Internet retransmitters the benefits of compulsory licensing. While the enforcement of TPMs is mostly left up to the market, (through contract law, for example) copyright scholars suggest that the FCC could play a larger

188. FCC NPRM, *supra* note 180, at 55.

189. *Comments of the Electronic Frontier Foundation before the Federal Communications Commission, In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, at 4.

190. *Id.*

191. 2000 Register of Copyrights Statement to Congress, *supra* note 65.

role.¹⁹² With its deep knowledge of the industry, the FCC may be best equipped to establish a standard of TPMs that is “less restrictive, more consistent with the intentionally limited protections granted by copyright law, and also closer to consumer preferences than the market-regulated alternatives would have been.”¹⁹³ Compared to the Copyright Office, the FCC is more accustomed to assessing and reassessing data about industry conditions and practices and competitive conditions; has better experience in the specialized treatment of television industry; and has held a role in promoting Copyright’s goals of promoting creativity, production, and access to communications services.¹⁹⁴ Certainly, with any discussion of increased government regulation come concerns about bureaucratic inefficiency, but uniformity may be better than the unregulated alternative. The FCC may be the only agency that has demonstrated an understanding of the intersection of copyright and communications policy.¹⁹⁵

VI. CONCLUSION

Aereo-Aereo-killer reflects the legal roadblock created by Congress when it drafted a Copyright Act that includes broad copyrights and limited exceptions. By creating a narrow compulsory license for cable systems, Congress sought to protect the rights of copyright holders while expanding access to programming, but it simultaneously created an Act that would be rapidly outpaced by technology. Indeed, section 111 is not the result of regulatory foresight, but an exhausted compromise after two decades of negotiation.¹⁹⁶

Copyright scholar Jessica Litman identified this problem early on: “[t]he definition of performance was designed to encompass future technological developments; the privileges and limitations were not.”¹⁹⁷ Internet retransmission has become the poster child for this dichotomy. The Supreme Court was able to interpret the Transmit Clause to encompass the activities brought about by technological advances, but the Ninth Circuit could not simultaneously interpret the license to keep up with those same advances. Litman wrote: “[d]efining very broad rights subject to very specific exceptions

192. Molly Van Houweling, *Communications Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97 (2005).

193. *Id.* at 112–13, 114–18.

194. *Id.* at 114–18.

195. *Id.* at 117–18.

196. Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 361 (1989).

197. *Id.* at 345.

creates a systemic bias: the exceptions will quickly grow obsolete, while the increasingly less qualified rights will endure.”¹⁹⁸

With over-the-Internet retransmissions technology, this has unfolded as predicted. The solution, then, may be for the Copyright Office to update its interpretation of the Act, in line with the FCC’s attempts to be technology-neutral, and match the flexible rights of copyright holders with equally flexible limitations.¹⁹⁹

Despite the Copyright Office and the Ninth Circuit’s conclusions that Internet retransmissions do not have the same public benefits of cable, there is consumer interest in promoting broadcast retransmissions. This matches the policy goals otherwise held by the Copyright Office and FCC, as well as Congress’s intent in creating section 111. This was also the interest the Supreme Court had in mind in both *Fortnightly* and *Teleprompter* when it decided against creating copyright infringement liability in order to maintain the increased access to broadcast content through cable retransmissions. The Court broke from this tradition in *Aereo*, but it certainly did not reject copyright’s Constitutional purpose to promote innovation in science and the arts.

Compulsory licensing is, of course, not the only way to remain competitive. The Copyright Office has actually highlighted Netflix and other thriving online content providers as examples of industry newcomers that have broken into the market without the help of compulsory licensing. Other scholars share the Office’s opinion and argue against the use of compulsory licensing in general.²⁰⁰

Despite some success among Internet retransmitters, *Aereo-Aereokiller* discourages a much broader, essential pathway for technological innovation—the savvy exploitation of legal loopholes. Communications law and policy scholar Tim Wu wrote that the very evolution of information technology “is powered by disruptive innovations that upend once thriving industries,

198. *Id.* at 346.

199. *See id.* at 361.

200. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1294 (1996) (arguing that, in place of “one-size-fits-all” compulsory licensing, intellectual property rights will “force industry participants to invest in institutions to conduct transactions”); Jiarui Liu, *Copyright Reform and Copyright Market, A Cross-Pacific Perspective*, 31 BERKELEY TECH. L.J. 1461 (2016) (listing several drawbacks of compulsory licensing, including “divesting authors of exclusive rights in copyrighted works, resulting in wasteful rent seeking, and setting arbitrary prices for copyright royalties”).

bankrupt the dominant powers, and change the world.”²⁰¹ Disruptive innovations, in turn, are powered by the creative legal and technological exploitation of loopholes. Indeed, Netflix itself started out by legal maneuvering to exploit the first-sale doctrine to rent out DVDs through the mail. It identified an underserved consumer interest, disrupted the market’s status quo, and forced the existing industry stakeholders to create more online access to on-demand content in order to remain competitive. Justice Scalia identified this issue in his passionate *Aereo* dissent:

[W]hat we have before us must be considered a “loophole” in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes.²⁰²

Courts should hesitate to drop roadblocks on this essential pathway to market growth. By doing so here, they have placed Internet retransmitters at a distinct disadvantage.²⁰³ Even worse, they may have discouraged other technology innovators from looking for new legal loopholes to do the same.

While the *Aereo-Aereo* web has trapped Internet retransmitters for now, its hold may be short-lived. Considering the general success of online video programming distribution and the trajectory of the FCC’s regulatory path, it is likely the market will only become friendlier to online retransmissions.

201. WU, *supra* note 159, at 20; *see also* Nilay Patel, *Can the Supreme Court Ever Get Technology Decisions Right*, VOX (June 26, 2014), <https://www.vox.com/2014/6/26/5842876/can-the-supreme-court-ever-get-technology-decisions-right> [<https://perma.cc/36SG-GARS>] (arguing that the Supreme Court missed the ingenuity of Aereo technology by declaring the issue technology agnostic).

202. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2517 (2014).

203. *See* Letter from Seth Greenstein, Counsel to Aereo, to Marlene H. Dortch, Sec’y, Fed. Comm’n Comm’n, MB Docket No. 12-83, at 2 (filed Oct. 10, 2014) (“Particularly in the wake of adverse judicial and agency decisions over the last several years, linear online streaming services likely cannot attract the level of investment necessary to create meaningful competition to incumbent business models without a clear path of regulatory certainty.”).