"GENTLY DOWN THE STREAM": WHEN IS AN ONLINE PERFORMANCE PUBLIC UNDER COPYRIGHT?

Daniel Brenner[†]

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† Judge, Superior Court, Los Angeles County; Adjunct Professor, University of Southern California Gould School of Law. Formerly Partner, Hogan Lovells LLP. The Author wishes to thank Professor Paul Goldstein, Stanford Law School, and Rose Perez, Esq. for helpful suggestions to this Article.

I. INTRODUCTION

The "public performance" right in copyright law may lack the eponymous primacy of the right to copy, but it is a close second. Creators of literary works, sound recordings, and audio-visual productions rely on the right to copy as a significant inducement to create. But the latter two groups, along with playwrights and specifically composers, look to public performances of their works as a major source of their economic reward. Online audio-visual works present a challenge for courts tasked with defining the scope of the public performance right. The economic implications are significant for ASCAP, BMI, and SESAC[1]—the nation's three performance rights organizations ("PROs"), which collect royalties on behalf of member composers (and their estates)—as well as owners of audio-visual works, when the distributor is not under license.[2]

This Article concludes that the language of the Copyright Act supports a limited online public performance right. It argues that it is wrong to conclude every online performance is public, however.[3] Instead, to claim this right, the copyright owner (or her PRO) must establish that the work is performed for a substantial number of online viewers and the viewing is not a substitute for an already compensated performance. This Article also explores why PROs today collect millions of dollars for public performances of audio-visual works and concludes that this role is hardly inevitable as is the case with other performances; however, eliminating PRO audio-visual performance collections would be very difficult.

Establishing the public performance right for new media has been both essential and difficult. Motion pictures would have remained an experimental art form without creation of the right to collect when a film is performed for the public.[4] Broadcasters twice sought to declare cable television

1. American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and Society of European Stage Authors and Composers (although BMI and SESAC's company names were once acronyms, today they are not abbreviations of anything). *About ASCAP*, ASCAP, http://www.ascap.com/about/ (last visited Sept. 30, 2013); *About*, BMI, http://www.bmi.com/about (last visited Sept. 30, 2013); *About SESAC*, SESAC, http://www.sesac.com/About.aspx (last visited Sept. 30, 2013).

2. Owners of audio-visual works suffer when copies are downloaded from unauthorized websites as well as when the works are viewed on a streaming basis from websites where the content has been posted without authorization. The downloading itself does not constitute a performance, however.

3. *See* Part V, *infra*.

4. On August 24, 1912, motion pictures, previously registered as photographs, were added to the class of protected works in the 1909 Copyright Act. Frank Elvina, *Copyright Lore*, *in* COPYRIGHT NOTICES (Oct. 2004), *available at* http://copyright.gov/history/lore/2004/oct04-lore.pdf.

transmissions of their shows public performances and were twice rebuffed by the U.S. Supreme Court.[5] The Copyright Act of 1976 created a compulsory licensing scheme for cable to perform secondary transmissions, allowing both cable operators and TV program owners to prosper.[6] Sound recording owners, denied a royalty for performance of their phonorecords by analog AM and FM radio stations, changed the calculus by obtaining a performance right when digital, largely Internet, radio was introduced.[7]

When a composer's song is performed on a broadcast or cable program, its owner, typically its publisher, collects twice: first when the derivative audio-visual work is created by synchronizing the picture to the music, second when the audio-visual work is publicly performed as a broadcast or cablecast transmission. The first use is directly licensed from the publisher of the composition or through a rights agent.[8] The latter use is typically paid to PROs under a blanket license issued to networks, stations, or local cable operators, with the money pooled and distributed to composers. The PROs collect and pay based on surveys, cue sheets, and internally-developed algorithms.[9]

It is settled that these "linear" transmissions—that is, programs viewed as they are transmitted to all potential viewers at the same time—of TV programs are public performances.[10] And it is equally clear, if not explicitly

5. *See* Teleprompter Corp. v. CBS Inc., 415 U.S. 394, 413–14 n.14 (1974) (finding active importation of a distant signal not a performance); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399–400 (1968) (deeming passive carriage of a retransmitted broadcast signal not a performance).

6. Pub. L. 94-553, tit. I, § 101, 90 Stat. 2541 (codified at 17 U.S.C. § 111(c) (2012)).

7. The Digital Performance Right in Sound Recordings Act of 1995 grants owners of a copyright in sound recordings an exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. §§ 106, 114–115 (2012). Setting the right rate for online radio services like Pandora has been highly controversial. *See* Katy Bachman, *Lawmakers Ponder Disparity in Internet Radio Fairness Act; Music Performance Rates a Pandora's Box*, http://www.adweek.com/news/technology/lawmakers-ponder-disparity-internet-radio-fairness-act-145488.

8. MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW, § 7:47 (2013).

9. *See, e.g.*, *ASCAP Payment System: Introduction*, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, http://www.ascap.com/members/payment/ (last visited Feb. 2, 2013) (discussing ASCAP's payment system).

10. Early on television broadcasters accepted that an ASCAP license was needed. The Television Music License Committee, LLC, which handles PRO negotiations for TV stations, summarized this history:

> The first ASCAP television licenses were negotiated in the 1940s. ASCAP initially offered free licenses to television broadcasters. In 1948, ASCAP notified the broadcasters that it was terminating the free licenses and the National Association of Broadcasters (NAB) formed a separate committee to negotiate music licenses for television stations. In 1949, the

decided in case law, that playing back a VCR, DVD, or DVR home recording of that same program to a small group of friends or family is not a "public" performance. Routinely, however, viewers watch linear video programs on-demand via a cable operator set-top box or online over the Internet at a site like Hulu or YouTube. The copyright statute does not provide an unequivocal right for composers to collect under the public performance right in these instances. But the definition of "To perform or display a work 'publicly' " in section 101 of the Copyright Act[11] provides a statutory basis to claim a right to collect. Congress can, of course, redefine the public performance right, as it did for broadcasters (in reference to cable retransmissions) in the 1976 statutory rewrite and for record companies in the 1995 Digital Performance Right in Sound Recordings Act.[12] But it probably should not. Given the political challenges to changing such fundamental terms like "publicly perform," it is unlikely that a statutory change would cleanly resolve the issue. In sum, PROs, other rights holders, and licensees should recognize that online public performances exist, but their scope may be more or less broad than either side to this debate may believe.

II. ONLINE DISTRIBUTION AND PERFORMANCE OF AUDIO-VISUAL WORKS

Evolution of Internet availability of audio and audio-visual works has been rapid. Early downloads from unauthorized central file servers like Napster helped propel music use on the Internet. File sharing facilitators like Grokster, which connected two users but did not store content itself, coincided with the rollout of broadband and its wider capacity in the early 2000s.[13] Broadband capacity facilitates video file sharing and thus ensnared

> parties reached agreement on an ASCAP blanket fee of "radio plus 10." This license fee mirrored the radio percentage of revenue license at 2.25% and also included a 10% surcharge. This was the beginning of a long, contentious and litigious relationship between television stations and the music licensing organizations.

History, TELEVISION MUSIC LICENSING COMMITTEE, http://www.televisionmusic.com/Joomla_1.5.15/index.php?option=com_content&view=article&id=4 (last visited Mar. 16, 2013).

11. 17 U.S.C. § 101 (2012).

12. *See* Copyright Act of 1976 § 101, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 (2012)); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2 (1995) (codified as amended at 17 U.S.C. § 106(6) (2012)).

13. Cable broadband and DSL offered much faster speeds than dial-up Internet service. Downloading and file sharing, legal and illegal, require sufficiently fast upload and download speeds to be practical. *See* DANIEL L. BRENNER, MONROE E. PRICE & MICHAEL I. MEYERSON, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 18:5 (2013).

the motion picture and television industry into the piracy problems faced first by the recording industry.

Courts found both Napster and Grokster—which helped to launch debilitating worldwide online piracy—to be infringing services under the Copyright Act,[14] and legitimate downloading sources like iTunes emerged.[15] But the desire to use broadband for free video downloads continued, initially with the near-overnight success of YouTube. While YouTube reformed its early "post-nearly-anything" policy, it still hosts hundreds of millions of videos that contain unlicensed copyrighted material (including musical compositions that are likewise unlicensed for either reproduction or public performance purposes) along with material that is authorized by its owners, at least for purposes of reproduction.[16] It obtained a court-determined public performance license rate from ASCAP in 2009,[17] following licenses sought and obtained by Yahoo! and others.[18]

In the YouTube, Yahoo!, and related cases, the applicant websites sought whatever public performance license was required. The parties and the ASCAP rate court, which sets the rates in the absence of an agreed-to rate, assumed without analysis that on-demand streams of music videos—the primary audio-visual works in the cases—were being "publicly" performed. In particular, the court assumed that licenses were required by relying on the

14. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

15. The iTunes Store, originally the iTunes Music Store, opened on April 28, 2003. Press Release, Apple Inc., Apple Launches the iTunes Music Store (Apr. 28, 2003), *available at* http://www.apple.com/pr/library/2003/04/28Apple-Launches-the-iTunes-Music-Store.html.

16. YouTube originally allowed longer videos to be posted but in 2006 reduced the length to ten minutes to prevent TV episodes and other longer-form video from being illegally posted. Ken Fisher, *YouTube Caps Video Lengths to Reduce Infringement*, ARS TECHNICA (Mar. 29, 2006), http://arstechnica.com/uncategorized/2006/03/6481-2. Current policy allows up to fifteen minutes of uploaded material unless a subscriber is qualified for longer uploads. *Frequently Asked Questions*, YOUTUBE, http://www.youtube.com/t/faq (last visited Mar. 17, 2013) ("why can't I upload videos longer than 15 minutes?"). One licensor explained its view of the situation this way: "[T]he majority of our music appearing in YouTube videos is actually unlicensed. Like many content owners, instead of attempting to block these unauthorized videos or otherwise pursue these users through legal channels, we simply opt to monetize the videos by having ads placed around them." Ron Mendelsohn, *A Look Inside YouTube: Skateboarding Cats, Talking Dogs and Content ID*, MEGATRAX (Oct. 7, 2012), http://www.megatraxblog.com/2012/10/08/a-look-inside-youtube-skateboarding-cats-talking-dogs-and-content-id/.

17. United States v. ASCAP (*In re* YouTube), 616 F. Supp. 2d 447 (S.D.N.Y. 2009).

18. United States v. ASCAP (*In re* Am. Online, Inc., RealNetworks, Inc., and Yahoo! Inc.) (*RealNetworks and Yahoo! II*), 559 F. Supp. 2d 332 (S.D.N.Y. 2008), *rev'd in part sub nom.* United States v. ASCAP (*In re* RealNetworks, Inc., Yahoo! Inc.), 627 F.3d 64 (2d Cir. 2010), *cert denied*, 132 S. Ct. 366 (2011).

websites' voluntary requests for public performance licenses from the PROs.[19] But in other instances, parties raised the basic question of whether a license was even necessary. For instance, the rate court found that a Yahoo! and Real Networks user who merely downloads songs to an MP3 player did not publicly perform the music.[20]

Cable and broadcast television providers have added to the online mix. Local stations may offer a real-time or delayed online feed of their free-to-air programming, such as locally produced news shows.[21] They may also produce web-only versions of their news, sports, or weather coverage. Starting in 2007, owners of other programming, including popular broadcast and cable network shows, made their content available on the web on a host of sites. Fox and NBC launched Hulu, a service to capture online viewers of their programs (some of which were being posted to YouTube, at a time the networks could not monetize YouTube performances), in 2008.[22] Disney joined the venture in 2009 after making some of its network programs available on its own website earlier.[23] Some cable networks offer their programming through Hulu or through sites created by their cable distributors, such as Comcast[24] and Cox.[25]

There are two primary motivations for these video sites. First, it is generally acknowledged (although not proven) that the recording industry

19. *In re YouTube*, 616 F. Supp. 2d at 448 ("On September 25, 2006, YouTube applied to ASCAP for a blanket through-to-the-listener license for a two-year period commencing in May 2004"); *RealNetworks and Yahoo! II*, 559 F. Supp. 2d at 343.

20. United States v. ASCAP (*In re* Am. Online, Inc., RealNetworks, Inc., and Yahoo! Inc.) (*RealNetworks and Yahoo! I*), 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007), *aff'd sub nom.* United States v. ASCAP (*In re* RealNetworks, Inc., Yahoo! Inc.), 627 F.3d 64 (2d Cir. 2010).

21. Segments are often available on a TV station's "video" tab. *See, e.g.*, *Video*, CBS LOS ANGELES, http://losangeles.cbslocal.com/video/ (last visited Mar. 17, 2013) (providing the local weather reporter's forecast for Los Angeles and other video clips from KCBS's news department).

22. *Company Timeline*, HULU, http://www.hulu.com/about/company_timeline (last visited Apr. 24, 2013).

23. *Id.*; *Disney Joins Hulu Video Site*, BILLBOARD.BIZ, http://www.billboard.com/biz/articles/news/global/1271122/disney-joins-hulu-video-site (last visited Apr. 24, 2013) ("Disney has previously sought to expand viewership of ABC shows offered on its Web site and its local affiliates' sites, on AOL.com and on Comcast Corp's Fancast site.").

24. Comcast offered video content through its Fancast website which was incorporated into its Xfinity brand. *See* Ryan Kim, *Comcast Launches Fancast XFINITY for TV Everywhere*, *The Tech Chronicles*, SAN FRANCISCO CHRONICLE, Dec. 15, 2009, http://blog.sfgate.com/techchron/2009/12/15/comcast-launches-fancast-xfinity-for-tv-everywhere/.

25. The service is marketed as Cox TV Online. *Internet Support*, COX, http://ww2.cox.com/residential/centralflorida/support/internet/article.cox?articleId=ad1297d0-088e-11e0-7ab7-000000000000#typeContent (last visited Apr. 22, 2013).

realized the impact of the Internet too late.[26] Some claim record companies should have developed a legitimate capability for single-song downloads once they perceived the customer demand that Napster and its progeny had identified instead of emphasizing their right to pursue and punish copyright violators.[27] By the early 2000s a customer-friendly "Internet strategy" for video content was imperative to avoid sending viewers into the arms of pirates.[28]

There is a second reason for some free online video: broadcasters often give away their content for free over the air in exchange for advertising (the recording industry does, too, but a listener cannot typically record songs or albums from a radio broadcast unless the playlist is disclosed in advance). Free-to-air viewers constitute only a small portion of a broadcaster's audience; nearly ninety percent of households get broadcast channels from cable or satellite operators who must obtain retransmission consent in order to carry the signals of the most valuable TV stations.[29] Since the underlying off-air audio-visual works generally have been made available free to the public, facilitating their viewing adds to the value of a free-to-air program, so long as the online viewing can be measured for advertisers.

While retransmission payments are growing for some broadcasters, advertising still constitutes the lion's share of revenues associated with broadcasting.[30] From that perspective, whether a viewer sees a show in its first run, as a repeat, on an affiliated cable channel owned by the broadcast network,[31] or online, a broadcaster revenue model seeks to maximize the

26. *See* Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES, Feb. 26, 2013, http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html?_r=0 (showing that the music industry is posting stronger profits after the rise of digital music services).

27. *See id.*

28. *See id.*

29. *Nielsen: Broadcast-only TV Households to Slip Below 10 Percent*, BROADCAST ENGINEERING (May 4, 2010), http://broadcastengineering.com/hdtv/nielsen-broadcast-only-tv-households-slip-below-10-percent (stating that by 2010 fewer than ten percent of viewers watched TV over the air).

30. For example, LIN TV Corp., a multimedia company serving twenty-three U.S. markets, projected cash payments for retransmission consent for 2012 Q3 at $5.5–6 million versus net advertising revenues between $110.5–116 million. *LIN TV Corp. Announces Second Quarter 2012 Results*, WISHTV.COM (Jul. 31, 2012, 4:55 PM), http://www.wishtv.com/dpp/about_us/lin-media-announces-2nd-quarter-results.

31. ABC, NBC, and Fox have extensive cable network holdings. NBC can offer a show on its broadcast network, run a second play on USA Network or CNBC, and garner advertising support on each showing. NBC used commonly owned NBC Sports Network, Bravo, CNBC, MSNBC, and Telemundo (vertically owned by cable operator Comcast) to present different or replayed 2012 Olympics coverage. Rene Lynch, *Olympics 2012: Opening*

number of viewers seeing the embedded advertising. So online viewing of broadcast TV shows avoids the negatives associated with online music—copying—so long as viewership can be counted.

Cable networks, too, want to maximize their advertisers' audience but the calculation is more complicated. This is because many cable program networks get roughly half of their revenues from program license fees from cable and Direct Broadcast Satellite ("DBS") distributors.[32] Free online distribution can harm those distributors by making the viewer-pay model a less compelling proposition. Posting marquee programming for free on the Internet reduces the value of programming to a cable operator who has paid for such programming based on a subscription-only assumption. If subscribers can get their favorite shows on the Internet for free, some "cord-cutters" will drop, and have dropped, their cable subscriptions.[33] Going forward, cable or DBS distributors do not want to necessarily dictate what model programmers choose, but they do expect to pay lower fees for programming if it is also made available for free online.

These distributors want to have an Internet strategy, too. Cable operators and programmers are convinced that allowing customers to view programming "whenever, wherever"—in real time, on video-on-demand, via DVRs, on the Internet in the home, or by mobile device—is their only sustainable distribution strategy. The goal is the ability to authenticate, measure, and eventually tailor advertising to viewers for online and mobile viewing. Denying Internet availability is not considered a viable long-term strategy.[34] If unauthorized uploaders can post content to YouTube or other

Ceremony—When It Starts, What to Expect, LA TIMES, July 27, 2012, http://articles.latimes.com/2012/jul/27/nation/la-na-nn-olympics-2012-opening-ceremony-20120727. NBC also repurposed *Monk*, a USA Network show, for NBC in 2007. Edward Wyatt, *NBC To Repurpose USA's 'Monk' and 'Psych'*, N.Y. TIMES MEDIA DECODER BLOG (Dec. 18, 2007, 3:11 PM), http://mediadecoder.blogs.nytimes.com/2007/12/18/nbc-to-repurpose-usas-monk-and-psych/.

32. *The State of the News Media 2013: Cable-Glossary*, THE PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, http://stateofthemedia.org/2013/cable-a-growing-medium-reaching-its-ceiling/cable-glossary/ (last visited May 20, 2013).

33. "Cord-cutting," which refers to cable or DBS customers who cancel their pay-TV subscriptions, is much discussed, yet accurate statistics on the extent of the practice do not exist because cable and DBS subscribers disconnect for many reasons besides online substitutes.

34. For example, Time Warner, which operates HBO, has promoted TV Everywhere:

> Time Warner is a leader in the next phase of the digital evolution of media: delivering content that consumers love to watch on any device and at any time. As a guiding principle, the company is aggressively pursuing initiatives that give audiences more choice and quality at no additional

sites anyway, it is better to make the content available on a site whose quality and advertising potential can be controlled by the cable operator, who has paid for a license to present the show.[35] Under this view, online distribution complements the pay-TV model rather than competes with it.

Moreover, the ways in which video is performed on the Internet are evolving. How a court characterizes performing methods has decisional significance, and cases often turn on how the court views the distribution technology.[36] PROs would prefer to characterize online viewing as equivalent to broadcast transmissions, long established as public performance regardless of actual proof of viewing or listening. Online providers who wish to avoid paying for music performances under a PRO license would benefit from likening their performances to home-based VCR or DVD plays, unequivocally not "public" and therefore requiring no license.

Realizing the contentiousness of such descriptions, it is useful, though not dispositive, to differentiate the ways that audio-visual works are "performed" on the Internet: downloads, multicast streaming, and unicast streaming (of which there are two varieties). First, an audio-visual work may be downloaded as a digital file from a server to a computer which hosts the file, and then to the client's devices, which receives a copy of the file during the download. Podcasts, ringtones, and iTunes are familiar examples of downloads. Second, real-time multicast streaming provides a performance of the work and does not result in creation of a permanent file on the

> cost to them—while also maintaining or enhancing the economic models of our businesses.

Content Everywhere, TIMEWARNER, http://www.timewarner.com/our-innovations/content-everywhere/ (last visited Mar. 16, 2013).

35. Cable operators are teaming up with networks to control who views content online. For its online viewing site HBO Go, subscription cable channel HBO requires a user to log in to the online account she holds with her cable provider before acquiring access to HBO's programming online, thereby ensuring only those viewers who actually pay for and receive HBO on their televisions can access the programming online. *See What Is HBO GO*, http://www.hbogo.com/ (last visited Mar. 16, 2013) (requiring login). This trend is spreading beyond cable subscription channels. Fox Broadcasting implemented an authentication system which requires a user's cable subscription information in order to watch shows the day after they air; otherwise, viewers without a cable subscriber have to wait eight days to watch programming online. Chloe Albanesius, *Fox Puts Online Content Behind Pay Wall*, PC MAGAZINE (July 27, 2011), http://www.pcmag.com/article2/0,2817,2389211,00.asp.

36. *Compare* Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision II*), 536 F.3d 121, 124–25 (2d Cir. 2008), *with* Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478 F. Supp. 2d 607, 610–16 (S.D.N.Y. 2007) (providing different descriptions of remote DVR technology).

customer's computer. It is most like broadcasting but is not commonly used.[37]

In contrast to multicast streaming, unicast streaming, the third form of online performance, establishes session-based one-to-one connections between a customer and the server.[38] For example, when the customer connects to, for example, the Hulu server, it creates a direct relationship that consumes bandwidth on (i) the server, (ii) the network-of-networks that constitute the Internet backbone (or content delivery network ("CDN") if the content is cached closer to the user), and (iii) the customer's internet service provider ("ISP") network. The server must dedicate specific bandwidth to that unicast. Unlike multicast, where the server sends out one stream to all users, if ten users seek a unicast at the same time, separate bandwidth will be needed for each unicast.[39]

This distinction between multicast and unicast would on its surface seem to differentiate Internet video. Watching the simulcast of a video channel (for example, CSPAN-2 on cspan.org) seems like multicast; viewing a YouTube video of the Kennedy-Nixon debate seems like unicast. In practice, however, the public Internet does not support multicasts. Multicasts are possible on a private network: sending a video out to all terminals on a local area network, for example. Instead, a website sets up a number (up to hundreds of thousands) of unicasts, costing a tenth of a cent or less, to serve

37. As Microsoft explains it:

> The multicast source relies on multicast-enabled routers to forward the packets to all client subnets that have clients listening. There is no direct relationship between the clients and Windows Media server. The Windows Media server generates an .nsc (NetShow channel) file when the multicast station is first created. Typically, the .nsc file is delivered to the client from a Web server. This file contains information that the Windows Media Player needs to listen for the multicast. This is similar to tuning into a station on a radio. Each client that listens to the multicast adds no additional overhead on the server. In fact, the server sends out only one stream per multicast station. The same load is experienced on the server whether only one client or 1,000 clients are listening.

Differences Between Multicast and Unicast, MICROSOFT, http://support.microsoft.com/kb/291786 (last updated Nov. 03, 2003) ("The multicast source relies on multicast-enabled routers to forward the packets to all client subnets that have clients listening. There is no direct relationship between the clients and Windows Media server.").

38. *Unicast and Multicast Streaming*, EYEPARTNER (Dec. 26, 2009), http://www.eyepartner.com/tutorials/unicast-and-multicast-streaming/.

39. Shahar Ze'evi, *Multicast Video Transmission vs. Unicast Video Transmission Methods*, AMERICAN DYNAMICS SECURITY BLOG (May 14, 2012, 10:10 AM), http://security.americandynamics.net/blog/bid/56070/Multicast-video-transmission-vs-Unicast-video-transmission-methods.

each customer separately.[40] Or it uses gridcasting technologies, similar to peer-to-peer, to utilize a user's bandwidth to relay the video, reducing the burden on the source server.[41]

The result is that all online video not previously downloaded to the user's device is viewed primarily in a unicast mode. As discussed below, the fact that each transmission is unicast—and therefore not multicast—is no basis to declare all online viewing as non-public.[42] An online video that simulcasts a broadcast or cablecast program is as "public" a performance as the version carried on a traditional video network. The second type of unicast, programming watched on-demand, presents the more difficult problem of when its performance by a website should be deemed "public."

As noted, the methods of distributing video over the Internet are evolving, and all of them have emerged since the 1976 Copyright Act defined public performance. We now turn to the text of the statute to see how its language draws distinctions among these different forms of performance.

III. TO PERFORM A WORK "PUBLICLY": THE COPYRIGHT ACT'S "PUBLIC PLACE" AND "TRANSMIT" CLAUSES

The Copyright Act grants a copyright owner the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly."[43] As the law surely was not meant to require every whistled tune to be licensed, the focus of the statute is determining when a work is "publicly" performed.

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40. Telephone Interview with Steven Harkness, Internet Dir., C-Span (Aug. 10, 2009).

41. Gridcasting is a streaming system that uses idle bandwidth on a user's computer to deliver large-scale live or on-demand broadcasts. *See* Stephen Alstrup & Theis Rauhe, *Introducing Octoshape—A New Technology for Large-Scale Streaming over the Internet*, EUR. BROADCASTING UNION TECHNICAL REV. (July 2005), *available at* http://www.octoshape.com/press/pdf/papers/0507ebu.pdf. Gridcasting improves performance, scalability, and cost efficiency of delivering files and streams to end users through the use of a media plug-in. *See* National Association of Broadcasters, *Gridcasting*, RADIO TECHCHECK (Dec. 4, 2006), *available at* http://www.nab.org/xert/scitech/pdfs/rd120406.pdf. It is similar to BitTorrent. *See id.* Octoshape is one gridcasting system and has been used for large-scale broadcasts such as the 2009 Presidential Inauguration, which had over 1.3 million simultaneous viewers. *See* Janko Roettgers, *CNN: Inauguration P2P Stream a Success, Despite Backlash*, GIGAOM (Feb. 7, 2009, 12:01 AM) http://gigaom.com/2009/02/07/cnn-inauguration-p2p-stream-a-success-despite-backlash/.

42. *See* Section IV.C, *infra*. As discussed below, the *Cablevision* and *Aereo* decisions consider it significant that the copy that is being performed is created by that user and performed only for that user. In unicast technology, each transmission is separate but the copy on which the transmission is based is reused. *Id.*

43. 17 U.S.C. § 106(4) (2012).

> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[44]

The definition of "publicly" is in two parts.[45] The most pertinent section of the definition focuses on transmitting a performance of the work to the public.[46] This is known in the case law as the "Transmit Clause." It constitutes the second, and less intuitive, delineation of a public performance. The first definition, in the "Public Place Clause," refers to a physical event. It defines "public" performance of a work to be "at a place open to the public or any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[47]

The paradigmatic performance covered by the Transmit Clause is a program carried on traditional over-the-air radio and television broadcasting. The Transmit Clause, added in the 1976 Copyright Act revision[48]—in part in response to *Fortnightly* and *Teleprompter*,[49] which held that cable broadcasting

44. 17 U.S.C. § 101 (2012).

45. *Id.*

46. *Id.*

47. *Id.* The 1976 Act reversed cases that held that a performance was not public if the audience was limited to a particular group rather than the public in general. *See* Metro-Goldwyn-Mayer Distrib. Corp. v. Wyatt, 21 Copyright Off. Bull. 203 (D. Md. 1932).

48. WNET, Thirteen v. AEREO, Inc. (*Aereo II*), 712 F.3d 676, 685, 694–95 (2d Cir. 2013) ("The 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."). The public performance clauses were included in a 1967 predecessor bill, H.R. 2512, 90th Cong. (1967), which was an outgrowth of the 1965 general proposed revision to the 1909 Act. *See* STAFF OF H.R. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL at 23 Comm. Print (1965), *available at* http://ipmall.info/hosted_resources/lipa/copyrights/Supplementary%20Register's%20Report%20on%20the%20General%20Revision%20of.pdf. The 1967 House Report would have included transmissions to "the subscribers of a community antenna television service." H.R. REP. NO. 90-83, at 29 (1967).

49. *See supra* note 5 and accompanying text.

was not a public performance—incorporated judicial recognition as early as the 1920s that broadcasting to car radios or home sets was a public performance under the 1909 Copyright Act.[50] A broadcast performance is public even if no person is in fact operating receiving equipment at the time of the transmission.[51] This includes linear cable networks, whose audiences may be small or nonexistent on a particular system.[52] The 1976 Act also defined "public performance" liability as unrelated to whether the performance is for commercial or non-commercial purposes.[53]

Thus, while the Public Place Clause assumes a public gathering, the Transmit Clause does not. Members of the public who receive the transmission need not receive it in the same place. Unlike a traditional performance in public, a broadcast or cablecast performance will be in the home to groups of family or friends who would not otherwise constitute a "substantial" number of persons.[54] But added together, these television households often constitute a very substantial audience; indeed, mass media advertising is premised on reaching an accumulated audience.

Not only does a public performance under the Transmit Clause encompass performances at different locations; the definition allows the public capable of receiving the performance to "receive it at the same time or at different times."[55] The accompanying legislative history does not explain the legislature's intent in not requiring simultaneity.[56] One explanation could be that Congress thought to cover performances by devices like jukeboxes,

50. *See* Jerome H. Remick & Co. v. Am. Auto Accessories Co., 5 F.2d 411 (6th Cir. 1925) (finding that radio station WLW publicly performed music). The case pre-dates the formal licensing of radio stations. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 et seq. (2012)).

51. H.R. REP. NO. 94-1476, at 64–65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

52. *Id.* at 65 ("[A] performance made available by transmission to the public at large is 'public' . . . whenever the potential recipients of the transmission represent a limited segment of the public, such as . . . subscribers of a cable television service."). Indeed, the concept of switch digital video assumes some narrow-taste channels will be tuned in only occasionally and so their transmission occurs only when a subscriber chooses to watch it.

53. The 1909 Act based the definition of a public performance in part on whether the performance was "for profit." *Id.* at 62–63. Congress rejected this approach and rested the applicability of the Act solely on the question of whether a performance is private or public, with no consideration of whether it is commercial or non-commercial. *Id.*

54. Broadcasting to public places, such as restaurants, would qualify under either clause, but 17 U.S.C. § 110(5)(B) (2012) exempts musical broadcasts in public places of limited size or containing a limited number of speakers.

55. 17 U.S.C. § 101 (2012).

56. MELVILLE F. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.14[C][3] (2013) ("The Senate and House Reports offer no explanation of this . . . phrase, and it is difficult to believe that it was intended literally.").

where the same recording is performed for one or a few people at one time but the numerous performances should amount to public performance.[57]

This approach, focusing on the performance of the same copy of a work in a public place, accords with earlier case development. For instance, in *Columbia Pictures Industries v. Redd Horne Inc.*, a videocassette shop rented tapes to customers and provided private screening rooms.[58] No more than four persons, who had to be relatives or close acquaintances, could occupy the screening room at one time.[59] The court declared the private screening rooms the equivalent of a movie theater and the film performances public.[60] A similar situation, where the video store rented cassettes and rooms with video players in separate transactions (here accommodating up to twenty-five people in a room) was also deemed to be a public performance when video cassettes were played.[61] But in *Columbia Pictures Industries v. Professional Real Estate Investors, Inc.*, where a hotel rented videodiscs and hotel rooms furnished with do-it-yourself videodisc players, the court found no public performance.[62] Yet in the same circuit, a district court in *On Command Video Corp. v. Columbia Pictures Industries*[63] found a public performance where a hotel used a bank of video cassette players, with each VCR containing a copy of a particular movie. The single copy of the movie was transmitted electronically to a hotel guest's room upon demand via remote control from a list on the guest's TV.[64] Note that the *Professional Real Estate Investors, Inc.* case involved the Public Place Clause, whereas *On Command* interpreted the Transmit Clause.[65]

Attempting to apply these cases (which addressed essentially outdated types of video performances), the Second Circuit in *The Cartoon Network LP,*

57. *See id.* at 8-192.8(1) (citing H.R. REP. NO. 94-1476, at 114).
58. 749 F.2d 154 (3d Cir. 1984).
59. *Id.* at 157.
60. *Id.* at 159. In evaluating the liability of the defendant Maxwell's, the court stated:

> We find it unnecessary to examine the second part of the statutory definition because we agree with the district court's conclusion that Maxwell's was open to the public . . . . Any member of the public can view a motion picture by paying the appropriate fee. The services provided by Maxwell's are essentially the same as a movie theater, with the additional feature of privacy.

Id.

61. Columbia Pictures Indus. v. Aveco, Inc., 612 F. Supp. 315 (M.D. Pa. 1985), *aff'd*, 800 F.2d 59 (3d Cir. 1986); *accord*, Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010 (7th Cir. 1991).
62. 866 F.2d 278 (9th Cir. 1989).
63. 777 F. Supp. 787 (N.D. Cal. 1991).
64. *Id.* at 788.
65. *See id.* at 789; *Columbia Pictures Inds.*, 866 F.2d at 280.

LLLP v. CSC Holdings, Inc. (*Cablevision II*)[66] emphasized that decisions that found a public performance involved the use of a single copy over and over. The use of a single copy for each performance in *Cablevision* rather than reusing one copy for performances from a single copy was critical to the decision and the precedent it created. In the case, the cable operator, Cablevision, offered its customers a network remote-storage digital video recorder ("RS-DVR") service. The service made a copy at its network headend[67] of a show on a linear network, at the request of the customer. This differed from DVRs in other cable systems, where the copying was done in the digital set-top box DVR in the customer's home.[68] Content owners sued, arguing that, unlike customer-situated recordings on an in-home DVR or VCR, here Cablevision was doing the recording and was thus liable for making an unauthorized copy and for publicly performing content through the playback of the networked DVR copy.[69]

In deciding that Cablevision did not engage in unauthorized public performances of the plaintiffs' work through the playback of the RS-DVR copies, the circuit court rejected the idea that the cable operator "performed" the copyrighted work.[70] Instead, it concluded that the playback did not involve the transmission of the performance to the public.[71] It reached this conclusion because only the particular customer who had ordered the recording received the transmission.[72] Both the appeals court and the district court offered detailed treatment of the technology of the copying process.[73]

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66. 536 F.3d 121 (2d Cir. 2008) (referring to appellants, CSC Holdings, Inc. and Cablevision Systems Corporation, as "Cablevision").

67. A headend is the facility where a cable operator assembles all content—such as broadcast, satellite, and on-demand video—going to and from a subscriber's premises. *See* BRENNER ET AL., *supra* note 13, § 1.5.

68. The court of appeals noted:

> As the district court observed, "the RS-DVR is not a single piece of equipment," but rather "a complex system requiring numerous computers, processes, networks of cables, and facilities staffed by personnel twenty four hours a day and seven days a week." To the customer, however, the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR.

Cablevision II, 536 F.3d at 125 (citations omitted).

69. *See id.*

70. *Id.* at 134.

71. *Id.*

72. *Id.* at 139 ("Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance.").

73. 20th Century Fox Film Corp. v. Cablevision Sys. Corp. (*Cablevision I*), 478 F. Supp. 2d 607 (S.D.N.Y. 2007), *rev'd sub nom.* The Cartoon Network LP, LLLP v. CSC Holdings,

The cable operator emphasized that copying occurred at the direction of the subscriber.[74] Although a "buffer" copy was made before (and whether or not) a customer chose to record it, that "copy" remained in the buffer for no more than 1.2 seconds, a time insufficient to meet the requirement that a copy be "fixed" to constitute "copying" under the Copyright Act.[75]

As to the public performance claim, the district court summed all of Cablevision's RS-DVR subscribers who requested a copy of the program and

Inc. (*Cablevision II*), 536 F.3d 121 (2d Cir. 2008). Judge Chin, who authored the district court opinion finding a public performance, was elevated to the Second Circuit Court of Appeals which reversed this opinion. He vigorously dissented to the Second Circuit's subsequent decision in *Aereo II*, 712 F.3d 676, 696 (2d Cir. 2013) (Chin, J., dissenting), where broadcasters unsuccessfully argued that a system that transmitted broadcast signals via the Internet using dedicated antennas for each customer amounted to unlicensed public performances. Judge Chin's dissent called Aereo's platform a "sham . . . 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." *Id.* at 697. Judge Chin distinguished the Second Circuit's *Cablevision II* case inter alia by noting that the cable system had paid license fees for the content performed through the RS-DVR system; had viewers watched the real-time transmission, no additional fee would have been owed. *Id.* at 699–700. Aereo paid the content owners no fees, having taken the signals off-air via dedicated antennas. *Id.* Judge Chin emphasized the distinction between the activity of Cablevision as a licensed customer of the plaintiffs whereas Aereo paid the plaintiff broadcasters nothing. *Id.* It should be noted, however, that the over-the-air signals of broadcasters are offered free, without license, to anyone with a receiving antenna. The content of The Cartoon Network and other *Cablevision* plaintiffs is solely available under license. The significant economic issue raised by Aereo is whether it will cause cable and DBS systems, which pay broadcasters retransmission consent fees under 47 U.S.C. § 325(b) (2012) for the right to include their signals as part of a basic cable tier, to try to avoid these payments by switching to an Aereo-like system. *See* Chris Davies, *Aereo in AT&T and DISH Deal Talks amid Broadcaster Fury*, SLASHGEAR (Apr. 1, 2013), http://www.slashgear.com/aereo-in-att-and-dish-deal-talks-amid-broadcaster-fury-01275957/ (discussing possible deal for AT&T U-verse or DishTV to buy Aereo).

74. While the court placed great emphasis on the customer, as opposed to Cablevision, initiating the copying, see *Cablevision II*, 536 F.3d at 139, other courts have not found that to be a significant factor. *See* On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991) ("The non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute 'the public' under the transmit clause.").

75. The court of appeals found the lifespan of the buffer copy to be de minimus and therefore no copy was created for purposes of liability:

> Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not "embodied" in the buffers for a period of more than transitory duration, and are therefore not "fixed" in the buffers. Accordingly, the acts of buffering in the operation of the RS-DVR do not create copies, as the Copyright Act defines that term.

Cablevision II, 536 F.3d at 130.

concluded the work was "publicly" performed.[76] The appeals court rejected this conclusion, stating it "makes Cablevision's liability depend, in part, on the actions of legal strangers."[77] The appeals court emphasized that it was the subscriber-initiated copy that was being "transmitted" or "performed."[78] Because the transmission was to one customer's home only, that transmission (and the copy on which it was based) was not capable of being seen by more than the one home. This one-to-one analysis meant that the potential audience for the particular transmission was limited; therefore, there was no public performance under the Transmit Clause.[79] This remained true even though the potential audience for the underlying work—if thousands recorded the program, thousands would see it, at different times and at different locations—was vast.[80]

The Second Circuit followed this thinking in *WNET, Thirteen v. AEREO, Inc.* (*Aereo*),[81] which reiterated in considerable detail the analysis in *Cablevision.* There, the defendant online distributor retrieved broadcast programs off-the-air from an antenna dedicated to the subscriber (even though there was some antenna reuse) and allowed the subscriber to decide whether to watch immediately, pause, or record the programming via their Internet connection.[82] In finding no public performance by this system, *Aereo*

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76. *Cablevision I*, 478 F. Supp. 2d at 622–23 ("Under the plain language of this clause, a transmission 'to the public' is a public performance, even if members of the public receive the transmission at separate places at different time.").

77. *Cablevision II*, 536 F.3d at 136.

78. *Id.* at 137 ("And because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission.").

79. *Cablevision II*, 536 F.3d at 139.

80. *See* Am. Broad. Cos. v. AEREO, Inc. (*Aereo I*), 874 F. Supp. 2d 373, 389 (S.D.N.Y. 2012), *aff'd sub nom.* WNET, Thirteen v. AEREO, Inc. (*Aereo II*), 712 F.3d 676, (2d Cir. 2013).

> Whether a user watches a program through Aereo's service as it is being broadcast or after the initial broadcast ends does not change that the transmission is made from a unique copy, previously created by that user, accessible and transmitted only to that user, the factors *Cablevision* identified as limiting the potential audience.

Id. at 389 (citing *Cablevision II*, 536 F.3d at 134–39).

81. WNET, Thirteen v. AEREO, Inc. (*Aereo II*), 712 F.3d 676, 689, *rehearing en banc denied,* 722 F.3d 500 (2d Cir. 2013), *petition for cert. filed* (Oct. 11, 2013) ("It is therefore irrelevant to the Transmit Clause analysis whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions."). Injunction was also denied against Aereo in *Hearst Stations v. Aereo*, Civ. A. No. 13-11649-NMG, 2013 WL 5604284 (D. Mass. Oct. 8, 2013).

82. *Aereo I*, 874 F. Supp. 2d at 376–81.

emphasized—perhaps created—a limitation to *Cablevision*'s non-aggregation of one-to-one transmissions: if private copies are generated from the *same* copy, then private transmissions should be aggregated; "and if these aggregated transmissions from a single copy enable the public to view that copy, the transmissions are public performances."[83]

Both *Cablevision* and *Aereo* concluded that the requirement of the Transmit Clause—"transmit . . . a performance . . . of the work"—was not met.[84] *Cablevision* did so by focusing on two different meanings of the word "performance." The Copyright Act defines "perform"[85] but not "performance." "Performance" can refer to the audio-visual presentation of the work, for example, actors playing and speaking the lines in a movie script (the "work"). Or "performance" can refer the act of *transmission*; for instance, a company can perform delivery of a film reel to a theater in the physical world, or send the work (as in *Cablevision*) via a cable system's network to a subscriber.[86] In the case of the RS-DVR, the system sends electronic impulses to the customer's TV. Thus, the "transmittal of a work" is not the same as transmittal of a "performance."[87] A content owner, like plaintiff Cartoon Network, transmitted a work that was captured by the customer's RS-DVR. The RS-DVR then transmitted the performance of the recorded work. As explained by the court of appeals in a subsequent decision, "the former [is] a transmittal of the underlying work and the latter [is] a transmittal that is itself a performance of the underlying work."[88] The Second Circuit in *Aereo* makes the same point: "*Cablevision* . . . decided that 'capable of receiving

83. *Id.* This statement comes close to the proposal in Part V of this Article. The critical question is not whether the transmissions are made from a single copy or distinct copies but whether the number of transmissions would be considered publicly performed.

84. 536 F.3d at 134; *Aereo II*, 712 F.3d at 696.

85. 17 U.S.C. § 101 (2012).

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

Id.

86. United States v. ASCAP (*In re* RealNetworks, Inc. Yahoo! Inc.) (*RealNetworks and Yahoo! III*), 627 F.3d 64, 73 (2d Cir. 2010) (" '[W]hen Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission,' not simply to transmitting a recording of a performance." (quoting *Cablevision II*, 536 F.3d 121, 136)).

87. The court concluded that "the transmit clause directs us to examine who precisely is 'capable of receiving' a particular transmission of a performance." *Cablevision II*, 536 F.3d at 135.

88. *ASCAP (In re RealNetworks, Inc., Yahoo! Inc.)*, 627 F.3d at 74.

the performance' refers not to the performance of the underlying work being transmitted but rather to the transmission itself."[89]

Thus, using the second meaning of the word "performance," *Cablevision* concluded that "a transmission of a performance is itself a performance."[90] But it is not necessarily a *public* one. To use the language of the Transmit Clause: although the public can receive the transmission, it is not the same as the statutory requirement that the public is "capable of receiving the performance"[91]—that is, the public is capable of receiving a particular *transmission*.[92] Another court characterized this formulation this way: courts "are to look to the transmission being made as the performance at issue, rather than simply to whether the public receives the underlying work."[93]

89. *Aereo II*, 712 F.3d 676, 687.

90. *Cablevision II*, 536 F.3d at 134.

91. *Cablevision II* in this regard turns what might be considered ways the statutory language qualifies performances as public—that they are received at different times or different places—to be less helpful to plaintiffs: "[I]t 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." *Id.* Rather the critical question is to "discern who is 'capable of receiving' the performance being transmitted." *Id.* (quoting 17 U.S.C. § 101 (2012)).

92. Congress has used the concept of transmissions to define copyright liability in the cable and satellite context. So-called secondary "transmissions" of primary transmissions of TV signals by a cable or direct broadcast system ("DBS") are subject to compensation to program owners under a compulsory license, first established in 1976 for cable. 17 U.S.C. §§ 111, 119(a). A cable or DBS system can carry a local or distant TV signal on its channel lineup subject to payments. *See* BRENNER, PRICE & MEYERSON, *supra* note 13, §§ 9:6, 9:30, 9:31, 15:27. What is not certain is which right under 17 U.S.C. § 106 (2012) the cable/DBS compulsory copyright is intended to address: the right to copy, to distribute, or to publicly perform the primary transmission. Most likely, the secondary transmission by the cable system or DBS operator falls under the copyright owner's right to distribute copies, 17 U.S.C. § 106(4).

93. *Aereo I*, 874 F. Supp. 2d 373, 384. Professor Goldstein believes this construction was error. He emphasizes certain words in the Transmit Clause—"to transmit . . . a performance or display of the work . . . 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 or different places or times. 17 U.S.C. § 101 (2012) (emphasis added). He concludes: "There can be little doubt that the italicized word *it* in the definition refers to 'performance or display,' not transmission, which in fact appears only as a verb, and not as a noun, in the definition." PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.7.2, at 7:168 (3d ed. Supp. 2012). However, while this reading makes sense, it does not address what the phrase "to the public" means. Surely, not every transmitted performance is "to the public"; there must be something more. Otherwise, every email sent to one person that may have an audio accompaniment is a public performance. So it is hard to conclude that the *Cablevision II* court was wrong to focus on the nature of the transmission, particularly where a broader reading would have imposed liability.

So the definition of a public performance must inevitably return to the word "public." Courts must give meaning to the size of the actual audience for a work in the on-demand world. Dual use of the term "performance" to cover both the underlying work and the act of transmission allows courts (and those negotiating rights) some flexibility to focus on economically significant numbers of transmissions, discussed below, rather than counting every transmission as a public performance.

How to decide what is the "public," that is, those "capable of receiving" a performance, also arises in differentiating a download from streaming in the ringtone context, although this line-drawing may not fully explain the Transmit Clause. In determining that the act of downloading a ringtone from a vendor is not a public performance, the Second Circuit Court of Appeals distinguished streaming transmissions that render a musical work audible as it is received by the client's computer's temporary memory ("public" performance) from a downloading a musical work that is "transmitted at one point in time and performed at another" (not a performance, public or otherwise).[94] Under this rationale, so long as the performance leads to a contemporaneous delivery to a broad public—even if the challenged performance itself is not seen by anyone[95]—the performance is public. On the other hand, millions of downloads of the same digital ringtone file do not amount to a public performance because the ringtone is not rendered audible during any transmission.[96]

IV. WHEN A TRANSMISSION IS "PUBLICLY" PERFORMED

The questions posed by the Copyright Act, related cases, and commentary beg for a useful, credible criterion to draw the line between public and non-public performance when a "transmission" of a performance occurs. Does simultaneity of watching or listening matter? Does the fact that

94. *RealNetworks and Yahoo! III*, 627 F.3d at 74.

95. *Id.* (citing *NFL v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000), as an example of meeting this contemporaneous public performance standard). In *NFL*, the NFL sought to enjoin transmissions sent to Canada by a satellite uplink. *NFL*, 211 F.3d at 11. The problem for the copyright owners was that the uplink provided by defendant Prime Time 24 itself could not be perceived by viewers; the performance was only viewable in Canada, which meant bringing the infringement action under Canadian copyright law. *Id.* at 12. The appeals court determined that the uplink transmission captured in the United States amounted to a public performance because it was an integral part of the process by which the NFL's work was inarguably delivered to the public. *Id.* at 13. Had the uplink transmission only led to downloads of the NFL's content, to be played back on a device at the viewer's choosing, the theory would break down.

96. *RealNetworks and Yahoo! III*, 627 F.3d at 74–75.

one copy is used for one performance matter? Can we use an economic test to separate which performances should be "public" and therefore compensable from those that should not? This Part considers the different criteria in turn.

A. RECEIVED AT "SEPARATE LOCATIONS": A DISTINCTION WITHOUT A DIFFERENCE?

As noted in Part III, *supra*, the Copyright Act statute and legislative history leave no room for doubt that a Transmit Clause performance need not be received at a single location to qualify as "public."[97] This approach differs from the requirement of reaching "substantial persons" under the Public Place Clause. No single location receiving the transmission must have a substantial number of persons under the Transmit Clause. By stating the condition in the negative (i.e., it need not be received at a single location), the Transmit Clause criterion is less helpful than a rule explaining when a performance *is* public. At most it is a clarifying point but does little to prove a positive statement about whether a performance is public under the Transmit Clause.[98]

An early case under the 1909 Act, decided well before the Transmit Clause was enacted, illustrates why its application is not bounded by a single location (as the Public Place clause is).[99] Radio station transmissions in 1925 were received by individuals in separate cars and homes.[100] Still the court in *Jerome Remick & Co.* did not hesitate to describe the performance as "public."[101] The statute is meant to cover such broadcasts, even if delivered to separate locations.[102]

On the other hand, *Cablevision* and *Aereo* indicate that courts cannot simply sum up different transmissions to different locations, however widespread and frequent the performances, and conclude that a performance is public. This principle is not limited to the facts in these cases: determining that a transmission occurs in geographically distinct locations does not decide

97. *See* 17 U.S.C. § 101 (2012) (including in the Transmit Clause "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places").

98. In terms of logic, it is why neither the converse nor the inverse of a true statement are necessarily true (i.e., if $A > B$, it is not the case that $-A > -B$, or that $B > A$).

99. Jerome H. Remick & Co. v. Am. Auto. Accessories Co., 5 F.2d 411, 412 (6th Cir. 1925); *see supra* note 48 and accompanying text.

100. *See Jerome H. Remick & Co.*, 5 F.2d at 412.

101. *See id.*; *see also* Note, *Copyright Law: Existence of a Second Legitimate Use Held Ineffective to Cure An Infringing Public Performance for Profit*, 1965 DUKE L.J. 404, 406 (1965).

102. *See* 17 U.S.C. § 101 (2012).

whether the performance is public. In traditional linear transmissions,[103] such dispersed performances will be public. However, in the RS-DVR, or even non-networked DVR case, the sum of several individual performances does not equate to a finding of a public performance.[104] If this were not the case, separate performances of, say, a DVD on DVD players would require a public performance license by either the customer or the equipment supplier, a result no less absurd than if the publishers of *Goodnight Moon* could claim the right to a public performance license of iterative plays of an audio download version (or bedside reading) of that book.[105]

B. RECEIVED AT "DIFFERENT TIMES": A SIMILARLY LIMITED CRITERION

Recall that the Transmit Clause indicates that a public performance can occur not only when it is disbursed as to location but also when disbursed as to time. The previously mentioned jukebox example illustrates when "chronologically disbursed"[106] performances amount to public ones.[107] But not all performances, disbursed over time, amount to a public performance. Again, it would be bizarre to conclude that multiple plays of a CD or a child's "Barney" DVD require either the manufacturer or the home purchaser to obtain a performance license. So this "different times" criterion, too, has limited utility in drawing a distinct line between public and nonpublic performances.[108]

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103. Linear transmission refers to broadcasts or cablecasts of programming at a scheduled time and delivered to all viewers eligible to receive it. It differs from on-demand programming, which is viewed when and how an eligible viewer chooses to watch it.

104. In *Cablevision II*, broadcasters argued that the court should look "upstream," that is, at the original cablecast of the programs that had been recorded, to decide whether they were publicly performed—not at the transmission to the single user through the subscriber's RS-DVR. The court rejected this approach. *Cablevision II*, 536 F.3d 121, 136 (2d Cir. 2008) ("Furthermore, we believe it would be inconsistent with our own transmit clause jurisprudence to consider the potential audience of an upstream transmission by a third party when determining whether a defendant's own subsequent transmission of a performance is 'to the public.' ").

105. The cassette and book are available at *Goodnight Moon (Book and Cassette)*, BARNESANDNOBLE.COM, http://www.barnesandnoble.com/w/goodnight-moon-margaret-wise-brown/1100337988 (last visited Mar. 27, 2013).

106. This is Nimmer & Nimmer's phrase. NIMMER & NIMMER, *supra* note 56.

107. *See* Section III, *supra*.

108. NIMMER & NIMMER, *supra* note 56. As Nimmer & Nimmer point out, the "at different times" language was not necessary to account for the different time zones associated with, say, a single network broadcast. The broadcast in each time zone already constitutes a "public" performance. *Id.*

C. ONE COPY VERSUS MULTIPLE COPIES

In determining that there was no public performance of an audio-visual work, the Second Circuit in *Cablevision*,[109] the *Aereo* district court,[110] and the Second Circuit in *Aereo*[111] all placed great emphasis on the presence of a dedicated copy, created by the viewer, that was performed. Had Cablevision used a single copy of a program or had Aereo streamed all broadcast programming[112] not at the direction of the subscriber, the performance might possibly have been deemed public and resulted in liability, although the Second Circuit did not affirmatively conclude this in *Cablevision*.[113]

In analyzing the video viewing booth[114] and hotel cases,[115] Nimmer & Nimmer suggest that the "different times" criteria can be explained by focusing on whether the *same copy* of a work is repeatedly played or received by different members of the public at different times.[116] Nimmer & Nimmer identified motion picture peep shows and video jukeboxes[117] as technologies through which performances should be considered public even if only displayed to one viewer at a time. The same copy is used over and over again. Summing these "non-substantial" crowds leads to the result that the peep show device or jukebox performance is "public." In contrast, the *Cablevision* court stressed that the performance involved a unique copy for each viewer in finding no performance "to the public."[118] It is, however, worth noting

109. *Cablevision II*, 536 F.3d at 138.

110. *Aereo I*, 874 F. Supp. 2d 373, 399 (S.D.N.Y. 2012), *aff'd*, *Aereo II*, 712 F.3d 676 (2d Cir. 2013).

111. *Aereo II*, 712 F.3d at 696 (2d Cir. 2013).

112. The online offering of broadcast services without the permission of the TV station was deemed to be a violation of broadcasters' copyright in *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012). In that case the online service claimed the right to the Copyright Act's compulsory copyright for secondary transmissions by a cable system, 17 U.S.C. § 111(c)(1) (2006). The court relied on the Copyright Office's analysis of the statute to conclude that the ivi system did not constitute a "cable system" under Section 111(f)(3) of the Act. Ivi had also not obtained retransmission consent of the stations it carried. *WPIX*, 691 F.3d at 285.

113. *Aereo II*, 712 F.3d at 689 (noting "there is an exception to this no-aggregation rule when private transmissions are generated form the same copy of the work." (citing *Cablevision II*, 536 F.3d at 135–37)). But as *Aereo II* itself notes, the aggregated transmissions from a single copy must enable "the public" to view that copy. *Id.*

114. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984).

115. On Command Video Corp. v. Columbia Pictures Indus., Inc., 777 F. Supp. 787, 790 (N.D. Cal. 1991).

116. NIMMER & NIMMER, *supra* note 56.

117. *Id.*

118. *See Aereo I*, 874 F. Supp. 2d 373, 384 (citing *Cablevision II*, 536 F.3d at 125, 135, 139).

that the plaintiffs in that case did not think that the number of copies of a work mattered.[119]

The Transmit Clause makes no mention of how many copies are involved in determining whether a performance is public.[120] In the case of live radio or television, there is no copy to even consider beyond the copy that is transmitted linearly. Apart from the Copyright Act's silence, this suggested criterion, i.e., relying on single-copy-to-many as a way to distinguish public from non-public performances, is also likely to produce a false positive, as Nimmer & Nimmer point out.[121] It would mean that renting a videocassette would give rise to a public performance in homes because the same copy gives rise to numerous performances "at different times."

Recognizing that the motion picture studios have not made this argument and may indeed have conceded that in-home use of cassettes or DVDs is non-infringing, Nimmer & Nimmer draw a distinction between private screening rooms where the viewing activity "is a substitute for a theater" and liability attaches; and a screening in a dwelling place, where there is no liability.[122] This distinction would also explain why the video store operator in *Redd Horne* was liable, but the hotel that furnished video discs to individual rooms was not.[123]

This "public space / private space" distinction is of decreasing utility because digital technology and the Internet make it easier to view content in private spaces than in the now nearly extinct world of private screening rooms.[124] More significantly, relying on one copy rather than many copies would recreate the videocassette rental paradigm in cyberspace. It elevates a formality over efficiency and freezes copyright law based on mid-1970s technology. Thus, the courts in *Cablevision* and *Aereo* found no liability under

119. *Cablevision II*, 536 F.3d 121, 137 (2d Cir. 2008) ("Plaintiffs contend that it is 'wholly irrelevant, in determining the existence of a public performance, whether "unique" copies of the same work are used to make the transmissions.' ").

120. The definitions are silent on this point and this issue forms the crux of the *Cablevision* and *Aereo* holdings—that where the performance is to a single customer, using a single copy, there is no public performance. Where a single copy is used to generate several private transmissions, and the aggregated transmissions "enable the public to view that copy, the transmissions are public performances." *Aereo II*, 712 F.3d 676, 689 (2d Cir. 2013) (citing *Cablevision II*, 536 F.3d at 137–38).

121. NIMMER & NIMMER, *supra* note 56.

122. *Id.*

123. *See supra* notes 58–62 and accompanying text.

124. Private screening rooms were often peep show parlors carrying adult films, famously on 42nd Street in New York but common in major cities. The last such theater in Toronto was chronicled in Dimitrios Otis, *The Last Peep Show*, VANCOUVER NEON (Aug. 31, 2005), http://www.vancouverneon.com/page_q/q_arcade.htm.

the public performance clause because each performance was tied to a dedicated copy. The price to avoid copyright liability is creation of a separate electronic copy for each user—"a Rube Goldberg-like contrivance"[125] in the words of the dissent in *Aereo*.

This artificial, and non-enumerated, distinction[126] runs counter to the Constitution's patent and copyright clause itself: "To promote the Progress of Science and Useful Arts."[127] The advent of digital technology—surely a significant scientific development—allows a single server copy to suffice for unlimited performances whereas a VCR copy can only be used on one machine at a time. It would be strange indeed, then, to base the "public performance" definition on a criterion that does not appear in the statute and which has a backwards look to it.

The court in *Aereo* recognizes a limit to the "same copy equals public performance" approach under the Transmit Clause. The "aggregated transmissions from a single copy" must "enable the public to view that copy."[128] While a useful limitation, it begs the question of what constitutes the "public," which this Article addresses in Part V.

In its defense, the one-copy, one-user approach does resemble the reasoning behind the first sale doctrine. While an owner of a copy of a work may not make copies without a license, she may generally sell that copy freely without paying the owner any gain from the sale.[129] The analogy breaks down, however, when one considers that the content at issue under the

125. *Aereo II*, 712 F.3d at 697 (Chin, J., dissenting).

126. James Grimmelman explains the problems with this distinction:

> Making separate copies for each user is a massive waste of storage. Systems engineers would say that *Cablevision* should make only as many copies as it needs to meet demand. Making more does nothing to improve the experience for users; it does nothing to change the impact on copyright owners. All it does is drive up costs. But courts have to play the hands they're dealt, and the *Cablevision* court was working with precedents that made the use of individual copies highly significant. If it is fair to say that Cablevision won on a technicality . . . [t]hese are precisely the kinds of technicalities that matter in modern copyright law.

James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane*, ARS TECHNICA (Aug. 30, 2012), http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane/.

127. U.S. CONST. art. I, § 8, cl. 8.

128. *Aereo II*, 712 F.3d at 689.

129. 17 U.S.C. § 109(a) (2012) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."). There are exceptions for rentals of recordings and computer programs. *Id.* § 109(b).

Transmit Clause is not a purchased copy but is licensed for viewing by the subscriber or online buyer.

D. "SUBSTITUTE FOR OTHERWISE PUBLIC THEATER VIEWING"

Nimmer & Nimmer's distinction as to when a single-copy performance is public boils down to this: the location of the transmitted performance is public if that location is really a substitute for a concededly public performance space.[130] Display of a single copy is considered a public performance if the space in which it is shown is a theater; but not if the space in which it is shown is a dwelling.[131]

However, this test too may exclude much that the statute intends to cover. The Transmit Clause was certainly meant to cover traditional broadcasting. This use typically involves a performance at the network studio of one phonorecord (in the case of radio) or one copy of an audiovisual work (in the case of filmed or video entertainment carried by a broadcaster or cable operator), and it is viewed overwhelmingly in private dwellings. In other words, the Transmit Clause should classify performances as public even if they are received in private spaces and even if they use but one copy.

Use of this substitution test would define too many intended public performances as nonpublic. While it may decide the issue of public-versus-private performance of a video rental, it does not serve as a defining criterion in a broader context. Yet the concept of "substitution" appears to be on the right track analytically in trying to apply the Transmit Clause. It invokes the economic consequences that should guide which performances are compensable as public.

V. ADAPTING THE "TRANSMIT" CLAUSE TO THE ONLINE CONTEXT

A. CRITERION ONE: "SUBSTITUTE FOR" VERSUS "ORIGINATE" A PUBLIC PERFORMANCE

Running through the public performance infringement cases, and the system of copyright generally, is the proposition that liability exists when economic benefits accrue to the user of content. Exceptions abound to this proposition,[132] but copyright considers explicitly economic trade-offs in

130. NIMMER & NIMMER, *supra* note 56, § 8.14[C][3].

131. *Id.*

132. A common example is the first sale doctrine, 17 U.S.C. § 109(a) (2012), which states that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright

determining the scope of the owner's exclusivity. For example, the fair use statute considers the economic impact of a use in deciding whether that use infringes.[133] And the exclusion of a performance right in non-digital sound recordings was based, in part, on the view that traditional radio airplay provided free publicity for the sound recording.[134]

How might copyright law's economic trade-offs be considered in determining when a transmission is "publicly" performed? The rewrite of the public performance clauses in 1976 rejected the proposal that any transmission for "commercial purposes" in and of itself is a public performance.[135] However, the concept of "substitution" introduced in Nimmer & Nimmer's formulation above is a useful tool. The inquiry would be two-fold: does the transmission "substitute" for an already likely compensated public performance, or does it originate a performance that has not yet occurred and been paid for? This test looks to whether a prior public performance that has been properly licensed would cover the subsequent performance in question. The subsequent performance then is—or should be—a performance covered by the initial license, though possibly received in different places and nearly always at different times. This attention to the economic consequences formed the basis of the dissent in *Aereo* as well.[136]

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owner, to sell or otherwise dispose of the possession of that copy or phonorecord." The purchaser of a first edition of a book that becomes a classic gets all the benefits for holding and reselling the book; the creator of the work will get nothing on resale. And fair use under section 107 of the Act allows some uses to be non-infringing. *Id.* § 107.

133. *Id.* § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . (4) the effect of the use upon the potential market for or value of the copyrighted work.").

134. Broadcasters have successfully fended off fees for performances of phonorecords on AM and FM radio, although bills to create a performance right have been frequently introduced. In June 2012, a major broadcaster agreed to pay a record company a royalty for use of its library. *Big Machine Label Group and Clear Channel Announce Groundbreaking Agreement to Enable Record Company and Its Artists to Participate in All Radio Revenue Streams and Accelerate Growth of Digital Radio*, CLEAR CHANNEL, http://www.clearchannel.com/Pages/Big-Machine-Label-Group-and-Clear-Channel-Announce-Groundbreaking-Agreement-to-Enable-Record-Company-and-Its-Artists-to-Par.aspx.

135. *Cablevision II*, 536 F.3d 121, 139 (2d Cir. 2008).

136. Judge Chin, in his dissent in *Aereo II*, attempted to distinguish that case from *Cablevision* (in which he was reversed while sitting as the trial judge). He observed that there were "critical differences between Cablevision and this case. Most significantly, Cablevision involved a cable company that paid statutory licensing and retransmission consent fees for the content it retransmitted, while Aereo pays no such fees." *Aereo II*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting). Another case has also recognized this distinction:

> If Defendants can transmit Plaintiffs' content without paying a fee, Plaintiffs' existing and prospective licensees will demand concessions to make up the loss of viewership to non-paying alternatives, and may push

If the subsequent use is a substitute for an otherwise compensated performance, however, the subsequent use is not considered a public performance. The paradigmatic example involves a VCR or home-DVR recording of a broadcast television program. The linear network originally licensed the transmitted public performance. The user playing the recorded version is not separately publicly performing the work but getting the value of the content for which the subscriber has already paid the licensee through subscription or downloading charge.[137] The initial public performance license paid by the distributor would cover these time-shifted performances. Thus, the "substitution/origination" distinction would treat a straight-to-online audio-visual work differently than a broadcast or cablecast episode that is also available online. And it should make no difference whether the customer sets the DVR at home, sets a remotely located DVR (as in *Cablevision*), or obtains the program on an online service. Nor should it matter if the "copy" used as a substitute is a digital version of the copy sent to the distributor-licensee.

Online viewing of broadcasted programs operates as a form of place-shifting (if viewed simultaneously with the distributor's transmission) or time-shifting/place-shifting (if not simultaneous) for much of the public.[138] Online viewing constitutes a separate, subsequent performance. But it makes little sense to require distributors to pay additional fees because some viewers forget to set a VCR or DVR to record or decide not to pay the additional fees imposed by the cable operators for its DVR service.

For the major broadcast networks whose programming is free to watch (and record, via VCR, DVD, or DVR) over the air, making content available online allows these networks to extend their audiences to the DVR-less and

> additional players away from license-fee paying technologies and toward free technologies like Defendants'. The availability of Plaintiffs' content from sources other than Plaintiffs also damages Plaintiffs' goodwill with their licensees.

Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012), *appeal docketed sub nom.* Fox Television Stations, Inc. v. Aereokiller, LLC. Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013). A preliminary injunction was also granted against a service similar to Aereo in Fox Television Stations, Inc. v. FilmOn X LLC, No. CV 13-758, F. Supp. 2d, 2013 WL 4763414 (D.D.C. 2013), *appeal docketed,* No. 13-7146 (D.C. Cir. Sept. 17, 2013).

137. If the user performed the recording for a substantial number of persons, it is possible the first clause would trigger, but there could be a fair use defense. For example, a bar that tapes an Olympic event that is on linear TV that airs in the middle of the night for replay when the bar is open, and makes no separate charge, should be excused from liability.

138. The U.S. Supreme Court has stated that since time-shifting expands public access to freely broadcast programming, the popular practice yields societal benefits. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984).

those with poor television reception (as in rural areas), which is part of Aereo's strategy and was the basis for cable television's creation in the 1940s.[139] Moreover, as cable systems increasingly move to Internet protocol ("IP") format for distribution—AT&T's U-Verse is already an all-IP video provider—distinguishing between VCR, DVD, DVR, and IP-delivered content on specialized networks or via the public Internet makes decreasing sense, just as any distinction between digital and analog delivery did prior to over-the-air TV's transition to digital in 2009.[140]

Courts have explicitly prohibited requiring two licenses for the same use of a work. The principle formed the basis of the "through-to-the-viewer" (also referred to as "through-to-the-audience") license; the cable industry established that BMI was not entitled to treat the transmission from the uplink to the satellite and down to the cable headend as a public performance separately compensable from the performance received by the viewer at the end of the transmission.[141] As a practical matter, this means that HBO's PRO licenses cover the cable operator's performance through to the viewer's receiving device (e.g., TV set, iPad, or computer).[142] This principle should also apply to the purely online world,[143] with the added complication that

139. Note that cable's compulsory copyright license regime only charges for distant signals, not for carriage of local signals. *See* BRENNER ET AL., *supra* note 13, § 9:15, :17. Local broadcasters do collect under the separate retransmission consent right, created in the 1992 Cable Act, 47 U.S.C. § 325(a) (2012).

140. *See* Amy Schatz & Christopher Rhoads, *Shift to Digital TV Sends Late Adapters Scrambling*, WALL ST. J., June 13, 2009, http://online.wsj.com/article/SB124480704993709781.html.

141. Nat'l Cable Television Ass'n v. Broad. Music, Inc., 772 F. Supp. 614, 650 (D.D.C. 1991) (deciding that BMI's practice of issuing split licenses was incompatible with the BMI Consent Decree).

142. In setting the through-to-the-audience rate in *United States v. ASCAP* (*In re Turner Broad., Inc.*), 782 F. Supp. 778, 794 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992), the court found that ASCAP's Consent Decree prohibits collecting multiple fees per music use to "all industries in which it was potentially applicable." Whether receiving devices like tablets are covered by current licensing agreements was disputed by Viacom in its distribution agreement with Time Warner Cable in 2011 but was settled the following year. *See* Don Jeffrey & Edmund Lee, *Viacom Settles Dispute with Time Warner Cable over IPad Viewing*, BLOOMBERG.COM (May 16, 2012), http://www.bloomberg.com/news/2012-05-16/viacom-settles-with-time-warner-cable-over-viewing-on-ipads-1-.html.

143. This is essentially the result in the *Cablevision* case. *Cablevision II*, 536 F.3d 121, 138–39. In *ASCAP v. MobiTV*, 681 F.3d 76, 78 (2d Cir. 2012), the appeals court upheld the district court's use of wholesale rather than retail revenues as the basis for computing a public performance license. The through-to-the-viewer concept in cable does not use the larger retail revenue number in computing the value of the music. This is because the purchaser of the music rights is the network (e.g., HBO), not the retail customer. The price paid by the customer includes fees paid to the distributing cable operator. And in *RealNetworks and Yahoo! III*, 627 F.3d 64, 75 (2d Cir. 2010), the court found that the digital

performances may be through-to-the-viewer on the viewer's schedule. Is a performance still "through-to-the-viewer" even if the viewer watches it as a video on demand ("VOD") offering on the cable system or as an online offering on a TV Everywhere platform? The answer should be yes.

Two principles emerge from the foregoing discussion. First, it is artificial at best and rearward at worst to base the public performance license on whether the performance emanates from a single digital copy or a dedicated digital copy assigned to each performance. To do so is to tether the physical copy world to the digital one. The policy may make sense when deciding whether the right to copy has been infringed.[144] Thus, we expect that a copy downloaded on a Kindle is subject to the owner's right to control copies. But that relatively straightforward application of copyright to digital content to determine the right to copy does not explain why a performance that uses a dedicated digital copy (such as in *Cablevision)* is not a public performance but a performance that uses a common copy (such as in *YouTube*) is.[145] For statutory support for this principle, one can look to the fair use provisions in sections 107(1) and (4) of the Copyright Act.[146] A fair use inquiry implicitly includes a consideration of whether a subsequent performance is or is not a substitute for an already-paid-for-performance and is explicitly called out in those subsections.

Second, it does not make sense to differentiate downloaded-pause-perform copies differently from downloaded-no-pause-perform copies. Courts have not addressed this distinction precisely, and semantics add to

download of a song does not constitute a compensable public performance of that song. *See* Stephen Kramarsky, *Public Performance in the Digital Age*, *Law Technology News*, LAW.COM (Nov. 19, 2009), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202435609971 (noting the trend of unwillingness to charge twice for both downloading and performance rights).

144. In the physical world, we do not allow a person who buys a book to make complete photocopies of it without obtaining a license. *See* NIMMER & NIMMER, *supra* note 56, § 8.02. At the same time, the single copy of a book may be passed around and read without additional license. The latter use of the book is not likely to be a satisfactory substitute for the former.

145. *Cf.* Capitol Records, Inc. v. MP3Tunes, LLC, 821 F. Supp. 2d 627, 649–50 (S.D.N.Y. 2011) (finding no "master copy" of songs from which other online copies are made but approving a system that "eliminates redundant digital data").

146. The Copyright Act provides the fair use provisions:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; . . . and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2012).

some of the problem. For instance, courts have used "streaming" to convey two quite distinct online events: sometimes streaming refers to a real-time feed of a linear channel, like a broadcast service; other times it refers to downloading a YouTube clip seen only by one user at a time.[147] Instead of using the pause/no-pause distinction, courts should focus on the differences between the audiences that determine whether a performance is "public." This brings the analysis back to the Public Place Clause as a way to apply the Transmit Clause in the streaming context, in addition to the "substitution" test just discussed.

B. CRITERION TWO: THE PUBLIC PLACE CLAUSE'S "SUBSTANTIALITY" REQUIREMENT

The definition of public performance in the statute is not based on a line between substitution and origination, although the statute supports this interpretation because Congress considered both the Public Place Clause and the Transmit Clause as ways to identify public performances. But when are performances wholly originated as VOD or online "public"? The Copyright Act's legislative history suggests that "public" in public performance has meaning in the Transmit Clause, just as it does in the Public Place Clause:

> Under the bill, as under the present law, a performance made available *by transmission to the public at large* is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as . . . subscribers of a cable television service.[148]

The House Report on the Act makes it clear that whether any particular number of viewers actually watches a transmitted performance is immaterial.[149] But the highlighted clause requires that the transmission is made available "to the public at large" to qualify as a public performance. In

147. *Compare RealNetworks and Yahoo! III*, 627 F.3d at 74 ("A stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission."), *with id.* at 69 ("For example, a user can enjoy the specific song or music video he desires from an 'on-demand' stream in Yahoo! Search.").

148. H.R. REP. NO. 94-1476, at 64–65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677–78 (emphasis added).

149. *Id.*

a broadcast or cablecast linear performance, the transmission is made to the entire viewer or subscriber base; the potential audience is always more than a few.

In VOD, the path to the viewer differs. A transmission is made to the cable system headend's server from a program source, to await a customer's possible request to view. But unless and until a customer orders that VOD content, it never reaches the public.[150] The same principle applies to online content—if no one ever visits the webpage or chooses to view the posted video, the content never reaches the public.[151] In short, public performance requires either a measurable audience or one that is predicted to be substantial. If neither occurs, the performance should not be considered public for copyright purposes.

This interpretation of the Transmit Clause—that the actual number of viewers is immaterial, but only so long as the transmission is actually to a predicted substantial public—gains support by the words of that Clause used to define "publicly." In the "separate places / different times" clauses, the statute requires that "*the public capable* of receiving the performance . . . *receive* it."[152] If no one orders a VOD program, no one actually "receives" it, and the work would not be performed publicly.

This condition precedent—that a copyrighted audio-visual work be distributed to and perceived simultaneously by the public—is the working assumption behind a linear channel, whether broadcast over the air or streamed live online. It is why it makes sense that the words of the Transmit Clause classify radio and broadcast/cablecast linear transmissions as public performances. Even if no one winds up watching a particular program, the distributor assumes that the service will be viewed by a substantial segment

150. *See* Carrie Nation, *What is VOD Technology?*, HOUS. CHRON., http://smallbusiness.chron.com/vod-technology-14311.html (last visited Oct. 5, 2013) ("Before it is delivered instantly to your home, the show or movie is first put into digital format, and stored on a video server. When a video on demand request is made, the movie is compressed and transmitted through the cable or broadband connection."). Until a subscriber orders content, the file sits at the server. *Id.*

151. The United States District Court of the Southern District of New York reached a similar conclusion as to why ringtone downloads do not constitute a public performance: the ringtones once downloaded may never actually be played (the user may choose another ringtone) and even if played, they may never be played in public. *In re* Cellco Partnership, 663 F. Supp. 2d 363, 377 (S.D.N.Y. 2009). A TV receiver is similarly "capable of receiving" a performance. But no one would seriously conclude that TV receivers in a show room not wired for cable are capable of receiving a transmission; or that a TV receiver outside of a TV station's coverage area is "capable" of receiving a performance from that station. To be "capable" must mean that the performance can be and at some point is received.

152. 17 U.S.C. § 101 (2012) (emphasis added).

of the public, to generate an audience for the accompanying advertising or to justify the subscription price. If this assumption proves wrong, at some point a lightly viewed program is cancelled. Otherwise the expenditure for its programming and channel capacity would make no sense.

But that is not the working assumption behind every audio-visual work on the Internet. As the cost of distribution is nearly zero to post a video to YouTube, the myriad economic considerations that go into linear distribution, including production, distribution, and marketing costs, do not apply. It is therefore logical to differentiate between direct-to-VOD or direct-to-online programming (i.e., content not also available on a separately licensed linear network) that is significantly viewed by set-top-box-equipped viewers or those viewing on the web; and such programming that might be viewed only by a few customers or perhaps none at all.

Looked at this way, the Public Place Clause in the Act's definition of public performance informs its companion Transmit Clause. The first clause declares a public performance when the performance is at a place where a "substantial number of persons . . . is gathered."[153] This language does not modify the Transmit Clause, to be sure. But it suggests a common-sense requirement of predicted substantiality be imposed on liability under the Transmit Clause, where a linear broadcast is not involved. Absent evidence that a "substantial number" of viewers are likely to view a particular VOD or nonlinear online offering, it should not be deemed to be publicly performed.

How does this second criterion square with *Cablevision*? The short answer is that the first test (substitution), not the second (substantiality), would govern. It is worth recalling that *Cablevision* rejected the plaintiffs' view that the *potential* recipients of the linear transmission should be counted in determining whether the one-to-one RS-DVR playback transmission was publicly performed.[154] Instead, the Second Circuit found that the RS-DVR "transmission" went to one recipient: "the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission."[155]

This seems correct in the RS-DVR situation, but it creates a large exception in the online context. As noted, as a technical matter, every unicast stream is but a single one-to-one transmission. Even a simulcast of an admittedly publicly performed linear network, on the Internet, is a single transmission, separately established for each person seeking access to the file.

153. *Id.*
154. *Cablevision II*, 536 F.3d 121, 137 (2d Cir. 2008).
155. *Id.*

For example, the simulcast of C-SPAN.org is a unicast, in reality. If the test is whether an online performance is a single, one-to-one transmission, then every performance is not "public": there can never be "public" performances on the Internet.

Cablevision reached its conclusion because it was concerned with the "hapless customer" whose liability (or Cablevision's) turned on whether some other unknown party had "transmitted" the same program by ordering and playing a copy.[156] The court focused on a "potential" audience that could, in its view, unfairly trigger liability.[157]

Thus, the correct way to analyze the *Cablevision* case is under the first, not second, criteria: the RS-DVR performance merely substituted for a public performance *already under license* to Cablevision for use by its subscribers on the plaintiff linear networks. The transmission system in *Cablevision* was not the Internet but the closed cable system available only to the operator's subscribers. *Cablevision* should not be read to exclude "public" out of any online transmission; unicasts of one-to-one transmissions to a substantial audience are publicly performed. Web-only clips or segments made for on-demand cable viewers, if actually viewed in large numbers, should be covered by the Transmit Clause.[158]

C. APPLYING THE "SUBSTITUTE" AND "SUBSTANTIAL AUDIENCE" TESTS

1. DVR and RS-DVR

Cablevision illustrates how the first criterion works. Assume a program that had been recorded on a network DVR had been under a performance license when it appeared on the original linear broadcast or cablecast

156. *Id.* at 136.

157. *Id.* at 135 ("[The Transmit Clause] speaks of people capable of receiving a particular 'transmission' or performance,' and not of the potential audience of a particular 'work.' "). The traditional focus of the "transmit" clause—broadcasting—did not consider the actual numbers of people listening or viewing a work, only the number capable of doing so. Only the one customer who ordered an RS-DVR is capable of receiving a transmission of that copy, so the court did not undo the traditional reading of the clause.

158. *Cf.* H.R. REP. NO. 90-83, at 29 (1967) (A public performance occurs "where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed *at the initiative of individual members of the public*.") (emphasis added). While the 1967 report contemplated computers and other information retrieval systems, the Internet—a combination of interlinked computers—was first introduced in the late 1960s and could not have been in the contemplation of the report writers in 1967. *Internet History*, COMPUTER HISTORY MUSEUM, http://www.computerhistory.org/internet_history/ (last visited Oct. 5, 2013) (describing the first host-to-host connection on October 29, 1969). In addition, this House Report did not accompany the 1976 Copyright Act.

transmission. Its replay on the RS-DVR would substitute for a transmission that had already been licensed for public performance. There is no reason that the PRO should collect an additional public performance fee for a VOD performance rendered at "different times."

2. Video on Demand ("VOD")

Increasingly, cable operators also offer linear content on demand (e.g., HBO on Demand features the network's series and movies). Indeed, from a capital expenditure viewpoint, VOD plays can be viewed as a more economical version of RS-DVR, since such a network-based system does not require the operator to furnish DVR-capable, set-top box equipment in the home. Instead of waiting for the customer to push the "record" button, everything authorized by the content owner is, or eventually could be, put into the on-demand listings.[159]

Assume that the cable operator already has a reproduction license to make the VOD server copy.[160] The underlying linear content that is available on a particular cable system channel but also available on demand is subject to a public performance license. Adding VOD use will likely not increase the total amount of public performance of the work beyond what the linear audience could generate. Calling up the shows on VOD is simply a substitute for linear (or DVR/VCR) viewing.[161] The network performance license should be viewed as covering these additional on-demand performances under the first "substitution" criterion.

However, not all performances of VOD content substitute for a linear or DVR-recorded version. Cable companies also post VOD-only programming. In particular, recent first-run releases are frequently available on demand at about the same time that the film is released to DVD or, in some cases, in

159. Cable operators vary in the amount of content offered to customers, with Comcast's Xfinity platform being among the most robust. *See* Brian Stelter & Amy Chozick, *Viewers Start to Embrace Television on Demand*, N.Y. TIMES, May 20, 2013, http://www.nytimes.com/2013/05/21/business/media/video-on-demand-viewing-is-gaining-popularity.html. But not all non-premium linear content is available on the on-demand platform. For instance, ABC's *Modern Family* was not available as VOD in 2011. Stuart Miller, *On-Demand Viewing Poses a Test for Broadcasters*, N.Y. TIMES, May 1, 2011, http://www.nytimes.com/2011/05/02/business/media/02episodes.html.

160. Under section 102's exclusive rights to copy and distribute, VOD copies must be authorized by license, and not all content owners choose to license content for VOD. *See* 17 U.S.C. § 102 (2012). Much of the *Cablevision* opinions concern whether the customer or the cable operator created the playback copy. The Second Circuit, reversing the District Court on this finding, held that the customer, not Cablevision, made the fixed copy. *Cablevision II*, 536 F.3d 121, 139. In VOD, the playback copy is made under license by the cable operator.

161. Indeed, there may be less value to the operator where the VOD performance allows skipping commercials or promotional spots that are part of the VOD play.

theaters.[162] Additionally, operators (and program networks) make thousands of older films and VOD-only programs available to the VOD (or online) platform. There is no pre-existing relevant linear performance of these programs, and so there is no pre-existing license covering the VOD performance. When these programs are transmitted on VOD, it is necessary to decide whether their performance is public.

This issue, which arises even more prominently in online video (discussed *infra*, Section V.C.3), is how to distinguish VOD programming that may be infrequently or never actually played from VOD content where the use is significant. For instance, a cable operator may agree to post public service videos, which may be viewed only rarely, as part of a franchise agreement or community service commitment.[163] On the other hand, an older holiday children's film, not seen on a linear network, and directly licensed from the copyright owner, may receive thousands of requests during certain periods. Here the second criterion would apply if the VOD performances involve a "substantial" number of transmissions. Thus some, but not all possible, works offered on the VOD are publicly performed and require separate licensing. The VOD distributor's PRO license should reflect this distinction between substantial and non-substantial use of a particular program.

3. Online Video Streaming

The two criteria can also determine whether an online video streaming performance requires a public performance license. Where viewing the

162. Content owners have changed the distribution patterns for post-theatrical runs of feature films; much of this strategy is influenced by the worldwide illegal copying on the Internet. The highest margins are associated with purchases of DVDs, but in many cases, prices for new DVD releases have dropped to the $10–20 range from the $70–90 range ten years ago. Wal-Mart and Amazon dropped prices in 2009. Michelle Chapman, *DVD Prices Drop at Online Giants in New Retail War*, BOSTON.COM (Nov. 7, 2009), http://www.boston.com/business/technology/articles/2009/11/07/dvd_prices_drop_at_online_giants_in_new_retail_war/. The decline in retail rentals and the expansion of TV homes equipped with digital boxes to purchase on-demand movies has made cable and online VOD (such as Vudu and Amazon Prime) increasingly important distribution channels. *See* Mike Isaac, *From Apple to Vudu: 8 Netflix Alternatives Compared*, WIRED (Sept. 21, 2011, 6:30 AM), http://www.wired.com/gadgetlab/2011/09/netflix-alternatives/all/.

163. Public access programming, much of which receives few viewers, may be more conveniently found on VOD than on a linear channel because VOD is searchable whereas linear access programming is not always on a regular schedule. A sample agreement for VOD carriage can be found at Brian T. Grogan, Negotiating PEG Channel Carriage Lessons from Retransmission Content, 2012 National Association of Telecommunications Officers and Advisors Annual Conference (Sept. 27–29, 2012), http://www.natoa.org/events/PEGChannelCarriageGrogan.pdf (last visited Oct. 6, 2013).

programming online is a substitute for the linear broadcast or cablecast version, the linear performance license should cover the online viewing. There is no policy reason to require a second payment for the online viewing generally.[164]

Where online video content is not part of a linear network offering (by far the largest share of online content, if assuredly not always the most watched),[165] the "substantial," not the "substitute," criterion makes the most sense to apply. Many, if not most, online videos are not substantially watched. For instance, one unofficial source suggests there are over 1.3 billion YouTube videos,[166] and it is unlikely that the majority are performed substantially (and there are many that are not performed on devices in the United States).[167] The same viewing pattern may be true of videos on other sites populated by user-generated content.

It will be necessary to define "substantial" in this context, as well as made-for-VOD. One way to approach this is to translate what the words "members of the public" in the Transmit Clause mean, as a practical matter, in the broadcasting context. A TV broadcast that regularly reaches only hundreds or even a few thousand listeners or viewers, outside of the smallest markets, is unlikely to remain viable. An accurate test would quantify the online equivalent of a viable linear program audience. In other words, how many views per month would a video require before that video, in the linear context, would be deemed to have reached a substantial audience? In the broadcasting context, program ratings that exceed failing or cancelled linear programs would amount to "substantial." The online equivalent of "too small to succeed" for a linear channel would fail to qualify the program as "publicly performed" under the Transmit Clause.[168] On the other hand, a

164. One exception would be an online version of a linear program that is likely to be significantly viewed over and over (e.g., a famous blooper, the final episode of a popular program). In such cases, it is likely the program will not be the online version of a current linear program.

165. YouTube established early limits to the length of posted programming to avoid unlicensed carriage of TV episodes and movies. *See supra* note 16.

166. *How Many Videos Are There on YouTube?*, HOWMANYARETHERE.NET, http://howmanyarethere.net/how-many-videos-are-there-o-youtube/ (last visited Oct. 6, 2013).

167. *See Statistics*, YOUTUBE, http://www.youtube.com/yt/press/statistics.html (last visited Oct. 6, 2013) ("YouTube is localized in 56 countries and across 61 languages").

168. For example, the trombone fanfare music sheet for "Low Rider" was viewed 216 times before the Author's view. *Low Rider Trombone Fanfare Sheet Music*, METACAFE.COM, http://www.metacafe.com/watch/yt-ib2W1WSrJ70/low_rider_trombone_fanfare_sheet_music/ (last visited Aug. 13, 2009).

popular music video, like *Harlem Shake Miami HEAT Edition*, has been performed over 40 million times, and its performance online is public.[169]

This chart summarizes when an online or VOD performance would require a license:

Table 1: VOD Public Performance and Licensing Requirements

NO LICENSE REQUIRED; NO PUBLIC PERFORMANCE	LICENSE REQUIRED; PUBLIC PERFORMANCE
Performance substitutes for already licensed linear performance	
Original performance with no substantial number of persons in audience	Original performance with substantial number of persons downloading/streaming

How might licensees and the PROs attempt to establish a cut-off? Access to ratings from online measurement services (or the website's own records of VOD sales) would help to develop a formula, but several factors to consider are apparent. Take the example of an online feature film not part of an otherwise licensed linear service. A distributor could tally how many times a month a direct-to-VOD or direct-to-online work is performed per month. Say the film is viewed 5,000 times on the distributor's platform. If this film were carried by a linear network, would that number of views be viable to remain on the network schedule? And given the potential audience for online viewing—that is, all those with access to the program's service—what should be the reasonable cut-off to determine substantiality as percentage of customers? For Netflix or Hulu Plus, the denominator might be the number of subscribers. For YouTube, Hulu or other non-subscription websites, the denominator might be the average number of viewers of video content per month.

The main point of the test proposed here is that some, but not all, online audio-visual works should be deemed "publicly" performed. The net result is that in rate-setting by negotiation or rate court, PROs and their distributing licensees should agree that less than all "streaming" needs a license. As "non-experimental" licenses develop,[170] this Article recommends use of the

169. *Harlem Shake Miami HEAT Edition*, YOUTUBE, http://www.youtube.com/watch?v=Ir2TdfSwH8g (last visited Mar. 23, 2013).

170. PROs have offered experimental licenses for online uses, recognizing that nascent online businesses will try different revenue models. *See, e.g.*, *ASCAP Experimental License Agreement for Non-Interactive Services—Release 5.2*, AM. SOC'Y COMPOSERS, AUTHORS AND PUBLISHERS, http://www.ascap.com/~/media/files/pdf/licensing/digital/non-interactive licenseagreementr5_2.pdf (last visited Oct. 6, 2013); *SESAC Internet License Agreement*, SESAC, http://www.sesac.com/pdf/internet_ATH_2008_click.pdf (last visited Oct. 6, 2013).

"substitutions" or "substantiality" criteria in applying the Transmit Clause, rather than relying on the "single copy" test of *Cablevision* and *Aereo* or the hard-to-apply "separate places" / "different times" language of the statute.

VI. PUBLIC PERFORMANCE AND PROS: ARE THERE ALTERNATIVES FOR AUDIO-VISUAL WORKS?

It is worth considering whether there are other ways of thinking about paying for a public performance, in the context of online audio-visual works, that more directly tie into the value that the owners of a film or television show place on the synchronized music. In other words, does the concept of a separate public performance license for audio-visual works really make sense anymore? Or should these rights be part of the parcel of rights obtained by content owners in order to benefit composers when the audio-visual work is first created, causing PROs to cease collecting for audio-visual performances?

The role of PROs in collecting for public performances of audio-visual works is well established.[171] But, this role was hardly inevitable when necessity led to ASCAP's creation in 1914, before the existence of audio-visual works. ASCAP was founded to correct an economic injustice experienced by composing giants of early 20th century popular music like Victor Herbert, Irving Berlin, and John Philip Sousa.[172] Having written

171. The first television public performance license was negotiated in 1949. *History*, *supra* note 10. Motion picture theater public performance licenses for compositions existed starting in the 1920s, but litigation led to their incorporation in the synchronization licenses when the movies were created:

> ASCAP had begun licensing motion picture theater exhibitors in the 1920s during the "silent movie" era, when the only music performed in a theater was played live (such as by a piano player). Because theaters did not know in advance what music was going to be played, it made sense to cover these performances under a blanket license in order to avoid any question of copyright liability. Even after the creation of "talking pictures," in which music was pre-recorded with the motion picture, ASCAP continued to license performance rights to the motion picture theater exhibitors. Thus, when a motion picture theater exhibitor received a movie from a producer, all of the rights needed for that exhibitor to display the film came "in the can" of film, except for the music performing rights.

Id.

172. It is interesting to speculate on how composers of music that was publicly performed before the 20th century were compensated, if at all. Congress established the copyright owner's exclusive right to publicly perform music in 1897. Act of Jan. 6, 1897, ch. 4, Stat. 481 (codified at 17 U.S.C. § 106(4) (2012)). Sales of piano rolls and sheet music existed in the 19th century, and musicians who wanted to play a composer's work would have to acquire copies of the orchestration, which the composer could authorize to be

popular compositions, their publishers could generally control the reproduction of their creations in piano rolls or sheet music. And, they could control, more or less, the licensing of dramatic rights if stage shows were involved—a Broadway version of a Berlin song would quickly be detected.

But an orchestra might publicly perform a song in a restaurant with no payment to the composer for the use of his work. This occurred in a dinner room of Shanley's Restaurant in New York. The restaurant owner did not obtain rights from the composers, who only by accident would learn about the use of their compositions.[173] The need to detect and collect for such uses led to creating a system so that composers could benefit when their songs were performed. As Oliver Wendell Holmes wrote, "If music did not pay, it would be given up."[174]

This early case demonstrated the need to license performance rights separately and led to the creation of ASCAP, formed and continually governed by composers and their representatives.[175] BMI, formed in 1939, is owned by broadcasters,[176] and SESAC is privately owned.[177] It could be

copied and distributed by a publisher. But it is also worth noting that some of humankind's greatest compositions occurred without the competitive spur of copyright, although religious and royal commissions provided incentive to compose in many instances.

173. Herbert v. Shanley Co., 242 U.S. 591, 594 (1917). John Church Company's comedy march, "From Maine to Oregon," was performed in the dining room of the Vanderbilt Hotel for dinner guests; music from Victor Herbert's "Sweethearts" was performed by singers at Shanley's Restaurant on Broadway. *See id.*; Leonard Allen, *The Battle of Tin Pan Alley*, 181 HARPER'S MAG. 514, 516 (1940).

174. *Herbert*, 242 U.S. at 594.

175. ASCAP was accused of monopolizing performance rights and entered into several consent decrees. *See* United States v. ASCAP, 1940–43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941), *amended*, No. 42-245, 1950 WL 42273, 1950–51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. July 17, 1950), *amended*, No. 41-1395, 2001 WL 1589999, 2001–02 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. June 11, 2001).

176. Formed as a non-profit-making performing rights organization, BMI was founded by radio executives to provide competition to ASCAP in the field of performing rights for music writers and publishers. *History*, *supra* note 10. Accused of monopolizing the licensing of performance rights by creating an illegal copyright pool, BMI agreed to a consent decree similar to ASCAP's 1941 decree. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *amended*, No. 64-CIV-3787, 1994 WL 901652, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. Nov. 18, 1994) [hereinafter BMI Decree]. It too has a rate court in the event that licensees and BMI cannot agree to terms.

177. Representing a small minority of the royalty pool owners (between three and ten percent: a disputed number that itself makes it harder to determine its licensing fees—BMI and ASCAP control the rest), SESAC was founded in 1930 to assist European composers with securing rights in the United States. It was purchased by private equity in 1992 and signed marquee writers like Bob Dylan and Neil Diamond. Unlike ASCAP and BMI it is not subject to Department of Justice Consent Decree. *About SESAC*, SESAC, http://www.sesac.com/About/History.aspx (last visited May 9, 2013).

argued that the orchestras that bought a composer's sheet music could have purchased at the same time a performance right to allow them to play the songs publicly. But such rights bundling would have disserved those who only wanted sheet music for personal use, a common home use of music in the early twentieth century (along with player piano rolls).

Similarly, high transaction costs of licensing each radio or Internet performances of compositions make PROs and their offer of a nonexclusive blanket license an essential part of rewarding composers when their songs are played. Detection, licensing, collection, and disbursement would likely be impossible for individual composers in many contexts, although PROs do not nominally have exclusivity to license a composer's work.[178] A non-collective approach seems unworkable in these cases,[179] and blanket licensing has been upheld for use by nightclubs and bars,[180] radio stations,[181] television networks,[182] and local stations, including their syndicated programming.[183]

The advent of separate public performance licenses of music in audio-visual works, distinct from the right to synchronize the composition to a visual work, became an important turning point for PROs. It expanded their licensing domain—and enhanced the justification for PROs' looking back,

178. Movie theater owners successfully challenged the ability of ASCAP and BMI to obtain exclusive licenses for music performances from their members and affiliates, preventing theaters from negotiating directly with composers for rights to individual compositions. *See* Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948). The ASCAP consent decree was amended in 1951 to require ASCAP to grant a blanket license to anyone requesting it, but prohibiting ASCAP from acquiring exclusive music performing rights and from interfering with the right of its members to issue a performance license. United States v. ASCAP, 1950–51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950). The BMI consent decree was similarly amended in 1966. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966).

179. As Professor Lionel Sobel observed:

> ASCAP's enforcement activities have never been criticized. The Justice Department and the courts always have recognized that it would be impossible for individual composers and music publishers to police the public performance of their works. Thus, in this regard, there seems to be a consensus that ASCAP performs an essential service.

Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the 'Economic Realities' of Blanket Licensing*, 3 LOY. L.A. ENT. L. J. 1, 3–4 (1983).

180. BMI v. Moor-Law, Inc., 527 F. Supp. 758 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982); BMI v. Grant's Cabin, Inc., No. 77-1192C(1), 1979 WL 1063 (E.D. Mo. 1979).

181. K–91, Inc. v. Gershwin Publ'g Corp., 372 F.2d 1, 7 (9th Cir. 1967).

182. CBS v. ASCAP (*CBS-remand*), 620 F.2d 930 (2d Cir. 1980).

183. Buffalo Broad. Co. v. ASCAP, 744 F.2d 917 (2d Cir. 1984); United States v. ASCAP (*In re* Shenandoah Valley Broad., Inc.), 208 F. Supp. 896, 897–98 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir. 1964).

the split of public performance from synchronization rights seems unnecessary. Why, other than bolstering ASCAP's *raison d'etre*, did it make sense to split synchronization and public performance licensing when they could have been granted at the same time?[184] The origin of that split as an exercise in turf-building is less mischievous than might first appear, however.

As chronicled in the *Alden-Rochelle* case,[185] theaters began obtaining blanket licenses from ASCAP in 1923 to cover the music played by pianists, organists and orchestras that accompanied films.[186] With the advent of sound movies, ASCAP negotiated public performance licenses based on seating capacity.[187] In 1947, ASCAP proposed a new formula that would have hiked the theater license fees by as much as 1500%.[188] This threat led theater owners to seek a new rate, with fee increases of 25–30%.[189] The fee dispute led non-signatory movie theater owners to allege that ASCAP's licensing terms violated the antitrust laws.[190] In 1948, the theater owners in *Alden-Rochelle v. ASCAP* successfully prevented ASCAP from issuing performance licenses on the original 1947 terms and restrained ASCAP members from refusing to grant joint performance-synchronization rights licenses to movie producers.[191]

The same year, a court denied ASCAP members recovery against theaters that had publicly performed music without a license.[192] More substantially,

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184. *See supra* note 171.

185. Alden-Rochelle v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948), *amended*, 80 F. Supp. 900 (S.D.N.Y. 1948).

186. *Alden-Rochelle*, 80 F. Supp. at 892–93.

187. *Id.* at 892.

188. *Id.* at 895.

189. *Id.*

190. *Id.* at 896.

191. *See id.* at 894–96. As the Second Circuit explained in *CBS v. ASCAP*, 562 F.2d 130, 133 (2d Cir. 1977):

> The problem was special to the theatre exhibition industry which was required at that time to take an ASCAP blanket performance license in order to exhibit motion pictures, the synchronized music of which had already been licensed to the motion picture producer. The specific holding . . . in *Alden-Rochelle, Inc.* . . . was that it was unlawful for ASCAP to require the motion picture producer to contract with distributors that the film would be shown only in theatres having an ASCAP *performance* license. In broader terms, the decision held that ASCAP was a combination in restraint of trade because the members had transferred all their non-dramatic performing rights to ASCAP and were barred from individually assigning such rights to motion picture producers.

Id. (emphasis added).

192. M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

Alden-Rochelle pointed to a loophole in the 1941 ASCAP consent decree, which allowed ASCAP to require its members to pool all of their licensing revenues, including revenues received by members who directly licensed music.[193] That rule made it unlikely that any composer or publisher would ever grant separate public performance licenses to producers.[194] A 1950 amendment to the Consent Decree prohibited ASCAP from requiring members to pool fees they received when directly issuing their own performance licenses.[195]

The economic consequence for music publishers was incorporation of the expected value of U.S. domestic theatrical public performance rights into the value of the synch license granted to the movie producer. The audio-visual work, which is a derivative work of the composition, cannot be created without the synchronization license. So, the creation of that license also presents the opportunity to assign a value for a movie theater public performance license. In other words, the price of the license paid by the firm producer to create the audio-visual work also included the public performance license needed to perform the finished work in movie houses. As a general result, then, movie theaters do not obtain public performance licenses from PROs when exhibiting motion pictures.[196]

There are three observations about this late-1940s litigation that bear on the public performance licenses in audio-visual works outside of motion picture theaters. First, music was initially unattached to the visual work being created by silent movie producers. Music performed in theaters by pianists or organists fit snugly into the justification that led to ASCAP's creation, that is, that composers could not easily license or monitor performances of music in thousands of theaters. So, pre-talkie motion picture theaters using live accompanists were unquestionably suitable for ASCAP licenses. But, that suitability did not make ASCAP's later audio-visual licensing regime inevitable or necessarily desirable. Even when talkies developed, the audio portion was provided by publicly performing sound from a separate disc.[197] The early commercial soundtracks were not printed on the film print itself (which had been tried unsuccessfully by Western Electric in the early 1920s),

193. *Alden-Rochelle*, 80 F. Supp. at 892.

194. *See also* United States v. ASCAP, 1950 Trade Cas. No. 62,594 at ¶ 63,752 (S.D.N.Y. 1950) (incorporating the *Alden-Rochelle* holding that prohibited ASCAP from issuing performance licenses to movie theaters).

195. *Id.* at ¶ 63,754 (creating, with the 1950 amendment, the rate court process when a user is dissatisfied with the fee that ASCAP demanded).

196. RON SOBEL & DICK WEISSMAN, MUSIC PUBLISHING 40 (2008).

197. DONALD CRAFTON, THE TALKIES: AMERICAN CINEMA'S TRANSITION TO SOUND, 1926–1931, 59–60 (1997).

but issued on separate phonograph records to exhibitors.[198] Warner Brothers' Vitaphone system, used from 1926 to 1931, was the only commercially successful sound-on-disc system; the discs were recorded at thirty-three and one-third rpm and played on a turntable, physically coupled to the projector motor of the film being projected.[199]

Second, from a copyright standpoint, because of the early separation of sound and pictures, there was no synchronization license needed to create the first sound pictures. Synchronization of sound to picture occurred only upon performance in the theater, not when the film print was created, as was the case with live organ or piano performances in silent movie theaters.[200] So, ASCAP's traditional role collecting for performances heard in a public venue fit well with the advent of early talkies like *Don Juan* (1926) and *The Jazz Singer* (1927).

Third, the requirement that writers and publishers license the public performance of their music in movies coincident with the granting of synchronization rights is inextricably tied up in the resolution of complaints with ASCAP's practices identified in *Alden-Rochelle* and the resulting, binding changes to the ASCAP Consent Decree.[201] In other words, ASCAP agreed to

198. *Id.*

199. *Id.*

200. The transition was opposed by the musicians who were losing their jobs:

> The evil face of that campaign was the dastardly, maniacal robot. The Music Defense League spent over $500,000, running ads in newspapers throughout the United States and Canada. The ads pleaded with the public to demand humans play their music (be it in movie or stage theaters), rather than some cold, unseen machine. A typical ad read like this one from the September 2, 1930 *Syracuse Herald* in New York:
>
> > Tho' the Robot can make no music of himself, he can and does arrest the efforts of those who can.
> >
> > Manners mean nothing to this monstrous offspring of modern industrialism, as IT crowds Living Music out of the theatre spotlight.
> >
> > Though "music has charms to soothe the savage beast, to soften rocks or bend a knotted oak," it has no power to appease the Robot of Canned Music. Only the theatre-going public can do that.

Matt Novak, *Musicians Wage War Against Evil Robots*, SMITHSONIAN.COM (Feb. 10, 2012), http://blogs.smithsonianmag.com/paleofuture/2012/02/musicians-wage-war-against-evil-robots/.

201. Films released to theaters before *Alden-Rochelle* and the Consent Decree modification were exhibited under ASCAP licenses paid by theaters and presumably had no public performance license granted should the movie be re-released to theaters after 1950. Outside of a few classics, however, pre-1950s films were not re-released to theaters. While *Alden-Rochelle* did not directly outlaw ASCAP's separate licensing of performance rights, the court viewed the practice with skepticism and led to the combined synch-public performance license, which was common practice prior to the case for producer's licensed musical compositions that were not in the ASCAP repertoire:

cover performances of film music in theaters to settle other liability questions.

As is often the case with consent decrees, however, what is not excluded is arguably permitted; television in particular was not covered. ASCAP began to license broadcast networks and local TV stations as a result.[202] One might ask why broadcasters did not seek to extend the *Alden-Rochelle* concept of requiring performance licenses to be issued at the time the synchronization license is granted. There may have been several reasons. For one thing, a lot of early television was live and there was no significant output of audio-visual works where synchronization licenses were required. Much of the available filmed programming was low-budget and did not rely on well-known (and pricey) musical accompaniment.[203] For another, major TV networks and station owners were radio station owners as well[204] and were used to paying

> Unquestionably it would be a simpler and a proper arrangement for the owner of the copyright to deal directly with the producer on both the synchronization rights and the performing rights, and thus have the motion picture producer acquire both rights at the same time, so that he in turn could rent the film without requiring the exhibitor to obtain the performance rights from Ascap. But that in some way the value of the performing rights would be claimed by the copyright owner and eventually would be passed on to the exhibitor, I have no doubt at all. The ultimate result would be that the exhibitor would not be separately charged for the performance rights, as he now is through Ascap, but he would be charged for those rights in the total rental he would pay for the film.

Alden-Rochelle v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948), *amended*, 80 F. Supp. 900 (S.D.N.Y. 1948).

202. *History*, *supra* note 10 ("The first ASCAP television licenses were negotiated in the 1940s. ASCAP initially offered free licenses to television broadcasters.").

203. *See* Jim Davidson, *Television Transmission Methods for Dummies or "Is It Live or Is It Kinescope?,"* *CLASSIC TV* INFO (May 15, 2005), http://www.classictvinfo.com/Essays/TVTransmission.htm. Davidson states:

> A live broadcast was, of course, the most basic method of disseminating a television broadcast. It required nothing more than putting actors in front of a camera and transmitting their images to viewers' TV sets. Post-production was non-existent because there was no film to edit. The lack of post-production made live cheaper than film, which was important in the days when budgets were low because the bulk of advertising dollars hadn't yet migrated from radio to TV.

Id.

204. While not all television pioneers came from radio, NBC and CBS—the leading radio networks and station owners—were among the first to experiment with the service. Christopher Anderson, *National Broadcasting Company*, MUSEUM BROADCAST COMM., http://www.museum.tv/archives/etv/N/htmlN/nationalbroa/nationalbroa.htm (last visited Mar. 16, 2013).

for public performance licenses for these transmissions. Furthermore, film library content made available to broadcasters early on was often old as the movie industry viewed television as a threat to its core theatre business rather than a part of a sequential distribution chain that today includes the Internet as well. The music rights granted by publishers to film producers did not include public performance licenses to their synchronized compositions for distribution by technologies "whether now known, or hereinafter invented," a phrase that is often included as boilerplate in grant of creative rights today.[205] From the producers' side, there was no incentive to reopen old agreements and agree to pay performance rights unless broadcasters refused to license their works.

Perhaps more importantly, the transaction costs that favor purchasing a blanket license, if reasonably priced, outweighed the years of litigation which would have slowed down the business plans of the new television medium. Broadcasters were more interested in priming the pump, with content that would attract viewers and TV set buyers, than dickering out the terms of a public performance license that would also cover live performances already suited to ASCAP's blanket license. Then, too, BMI was owned by radio broadcasters; its owners could hardly be blamed for consigning *Alden-Rochelle* to its unique time and history and promoting blanket licenses for television. The same consideration may have influenced online providers like YouTube and Yahoo, nascent technologies in this century, whose initial rate disputes with ASCAP were not over whether rates applied, but instead how much needed to be paid.[206]

> NBC began experimental broadcasts from New York's Empire State building as early as 1932. By 1935 the company was spending millions of dollars annually to fund television research. Profits from the lucrative NBC radio networks were routinely channeled into television research. In 1939 NBC became the first network to introduce regular television broadcasts with its inaugural telecast of the opening day ceremonies at the New York World's Fair of 1939. RCA's goal was to produce and market receivers and programs, to become the driving force in the emerging industry.

Id.

205. *See* Frederick C. Boucher, *Blanket Music Licensing and Local Television: An Historical Accident in Need of Reform*, 44 WASH. & LEE L. REV. 1157, 1166 (1987).

206. United States v. ASCAP (*In re* YouTube), 616 F. Supp. 2d 447 (S.D.N.Y. 2009); *RealNetworks and Yahoo! II*, 559 F. Supp. 2d 332 (S.D.N.Y. 2008), *rev'd in part RealNetworks and Yahoo! III*, 627 F.3d 64 (2d Cir. 2010), *cert denied*, 132 S. Ct. 366 (2011); *see also supra* text accompanying notes 18, 19.

For these reasons—and perhaps others[207]—when movies were distributed to television stations in the 1950s, agreements for synchronization licenses did not include a public performance license for television exhibition. PROs treated these transmissions (eventually extending to cable networks and now online) as public performances outside the grant of theater performance and sought an additional performance license payment, subject to the protection of the rate court.[208]

Once a subsequent method of exhibition of an audio-visual work is established and underway, however, there is no obvious reason why the performance rights of composers necessarily need to be licensed separately by the exhibiting medium. In other words, now that linear, VOD, and online performances are known methods of distribution, owners of audio-visual works can determine the value of performance and pay composers as part of the initial licensing process. This forward-looking, producer-centric scheme to determine economic benefits applies to other creative contributions to a film. A film is a derivative work of many separate copyrighted (and non-copyrighted, though creative) elements: the screenwriter's script, choreography, music, sound recordings and some visual elements. Film owners obtain rights to exhibit and perform these works in subsequent markets through guild agreements or bi-lateral negotiations. Payments for acting performances, while not separately copyrightable from their fixation in films, are also dealt with at the outset of a work with expected residuals or other income depending on the work's success.

In short, there are no PROs for script writers, directors, or other above-the-line talent[209] who rely on guild agreements on dickered terms, or any other contributors to an audio-visual work. If the distributor of an audio-

207. The ASCAP rate court, in place today to determine a reasonable price of a license in the absence of a negotiated rate, did not exist prior to the 1950 Consent Decree modification. Recall, it was ASCAP's proposed steep rate increase that caused theater owners to file an antitrust lawsuit against ASCAP. *See supra* notes 165–69.

208. While the first television public performance licenses were granted in the 1940s, the amount to be paid, and whether the license should be per-program or a blanket, has been much disputed by TV stations and networks. The broadcast industry created its "All-Industry Television Station Music License Committee" in 1949 to devise a licensing regime. For a discussion of the Committee's history and litigation, see *History*, *supra* note 10. Cable operators pay for public performances of content they locally perform (e.g., inserted advertising, locally produced programs) while public performance of music in content from satellite delivered networks are paid "through to the viewer" by the networks. *See also* BRENNER ET AL., *supra* note 13, § 9:34.

209. "Above the line" refers to costs associated with major creative talent, for example, lead actors, directors, producers, and writers. Films with expensive special effects (and few stars) have more "above the line" budget costs for technical aspects. "Below the line" refers to other production costs.

visual work (such as a studio) has the right to license content to a particular medium, its licensee (such as HBO) does not have to separately negotiate with all of the creative contributors, (save for the one exception of composers). Instead it looks to the film owner to make those payment arrangements, and its license fee will cover those payments. The ASCAP rate court recognized that the PRO approach is an exception to production compensation schemes in *In re MobiTV*, noting that "pricing the public performance right at the time the content is first sold gives direct and immediate feedback to content producers about the value of a component of their product."[210]

But as observed, when films move to television, there are significant transition issues that make it difficult to implement the rate court's reasonable suggestion. First, there are disincentives for the composer/publisher's side and the producer's side to add public performance rights to a synchronization agreement. The owner of a composition in high demand for a film can command a higher synchronization license and, through PROs, carve out the performance license for later payments. Plus, it will not have to determine the present discounted value of a performance license that might be needed for media yet to be invented. It is not surprising that publishers and composers would rather rely on the PRO collection and distribution process, whatever its shortcomings in identifying and rewarding particular music use, than to try to do it as a standalone publisher. For its part, the producer has no interest in paying for public performance licenses if those costs can be sloughed off to future distributors like broadcast, cable, and online. So, no one has much incentive to determine the public performance license fee for compositions used in audio-visual works at the time all other rights are negotiated.

Second, restructuring the process for reasons short of a government fiat is unlikely. It took a court decision and a Consent Decree modification to bring the movie theater public performance rights into the production budget. That result covered one kind of exhibition for what parties must have believed would not have been, in most cases, a lengthy term. The duration of theatrical exhibition of a movie is minute compared to the possibly perpetual, so-called long tail availability and performance (public or not) of that content online.[211]

210. *In re* MobiTV, 712 F. Supp. 2d 206, 246 (S.D.N.Y. 2010).

211. Chris Anderson, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

VII. CONCLUSION

This brief history points to two observations about public performance rights and online video. First, PROs are beneficial to creating efficiencies in some aspects of public performances. PROs filled an inevitable need to deal with myriad music performances that occur publicly in clubs, theaters, restaurants, and other venues for which the transaction costs of obtaining a license are prohibitive. And blanket licenses work for linear transmissions. Radio or Internet airplay of compositions could be tied only to songs for which a direct license is obtained. But, the utility of dealing with three PROs (on a blanket or per-song basis) instead of thousands of publisher contacts is desirable.

Second, logic would suggest a different path for public performance rights for audio-visual works. When an audio-visual work is created, all other intellectual property interests for their subsequent public performances seem to be managed by licensing. When new, not contemplated uses arise, as with video cassettes or web players, guilds like the Writers Guild of America set fees with producers, not with each sequential distributor. Only composers, whose music is part of the production, create a separate performance pay window which every distributor must face.

No doubt, the current arrangement of separately-negotiated public performance rights through PROs is likely to benefit a publisher. Having a separate, sequential negotiation for each public performance enhances a composer's ability to analyze values and to collect more on subsequent uses, relying on the expertise and heft of PROs. Every new distribution window is a source of new performance revenues. Guild agreements for writers, actors, or directors may not cover such performances or lag behind new media. The net result for song owners may exceed what would be obtained through the kinds of front-loaded arrangements other creative contributors like screenwriters make at the beginning of a project. It also allows composers to test their entitlement to public performance payments in new, uncharted rights areas, such as streaming, that may not be spelled out at the time the audio-visual work is created. This is the season of litigation we are currently in. As the lyric in this Article's title advises, when traveling by boat downstream, anything more than gentle rowing can upset the enterprise.

A change to an ex ante system—where a producer negotiates all public performance licenses up front—would be difficult, unlikely to occur voluntarily, and perhaps not worth the commotion to a market beset with technological disruptions. And, all of the extant millions of audio-visual works for which no combined synchronization/public performance fees have been set would still need PRO licenses. Plus, PROs are here to stay, necessary whenever public performances occur or audio works are

performed on the radio or Internet. So it may simply be too much to suggest that we transition to a license-at-the-outset regime, however logical it may be. The cost of transition is too formidable.

But it is worth observing, in trying to calculate what the performance rights are worth in streaming, that there is a less contentious, alternative scheme: namely, spelling out at the time the audio-visual work is created the payments due to publishers when that derivative work is publicly performed. PROs are now part of cyberspace, and the benefits of blanket licensing help promote new technology. But courts should be careful not to assume every performance online is public.