5-1-2013

Aereo & ivi: The Need For Change to the Current Copyright Compulsory Licensing Scheme

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Introduction:

"Copyright law has abandoned its reason for being: to encourage learning and the creation of new works. Instead, its principal functions now are to preserve existing failed business models, to suppress new business models and technologies, and to obtain, if possible, enormous windfall profits from activity that not only causes no harm, but which is beneficial to copyright owners."[1] Technology and consumer demand have outpaced the current copyright law, and there is a glaring need for the development of a new compulsory licensing system to account for transmission of copyrighted content over the internet.[2] "[N]ew, highly popular content delivery systems that don't fit comfortably into any existing licensing scheme. And that lack of fit is not because the folks who designed the existing licensing schemes considered but rejected inclusion of the new delivery systems. *Au contraire*, the folks who drafted the existing copyright laws had no idea that such delivery systems would ever exist."[3] As a result, recent decisions by the courts have led to technicalities and interpretations which allow for usage and business models that appear contrary to the legislative intent of Congress and the position stated by the Copyright Office.[4] Changes need to be made to the Copyright laws to allow for both the public to enjoy copyrighted works through additional avenues and to allow for providers to still be able to exploit their substantial investments and utilize more cost effective and efficient mechanisms of distributing the content other than what is currently being prescribed by the courts. Since the

Copyright laws have no express language referencing internet transmission services, courts were required to analyze legislative history and intent to determine if these internet transmission services fall within the scope of the current Copyright legislation. Congress should remove the ambiguity the courts currently encounter when having to analyze new popular technologies in a Copyright context by adopting amendments to the Copyright Act. As technology has rapidly developed, new platforms, such as those used over the internet, are created and do not fit into the existing licensing scheme simply because they did not exist at the time the laws were drafted.

According to a recent study, the average cable television bill is currently $86 per month, and that cost could rise to $200 by the year 2020.[5] The same study has also shown that as television programming licensing fees have risen, cable television rates have grown an average of 6 percent while US household income has remained flat over the same timeframe.[6] Additionally, a report from the Bureau of Labor Statistics states that in the last 10 years, the cost of cable and satellite services has increased 43%.[7] While high consumer demand for television programming exists, according to another industry survey, approximately 2.65 million subscribers canceled their cable TV subscriptions between 2008 and 2011 to opt for low-cost internet video streaming subscription services or other free video platforms, and they estimate 3.58 million subscribers will cancel their subscriptions in 2012.[8] This process of canceling expensive cable subscriptions in exchange for low-cost TV channel subscription through over-the-air ("OTA") free broadcast through antenna, or over-the-top ("OTT") broadcast over the Internet is commonly referred to as "cutting the cord."[9]

In 2011, consumer spending on the streaming video industry in the United States is estimated to be $2.83 billion, nearly 3 times the amount spent in 2010, and by 2016, industry estimates have US consumer spending growing to $6.68 billion.[10] According to the Digital

Entertainment Group, total sales in 2012, which included OTT services such as Netflix and Hulu, rose to $3.94 billion and sales of subscription streaming services rose to $579.2 million.[11] These OTT services typically offer many popular television programs, sometimes the day after its original broadcast, and there is evidence that suggests people who aren't interested in live programs such as sports are more prone to cut the cord.[12] With the rapid growth the OTT industry is experiencing and growing consumer demand for alternatives to traditional television viewing, several startup companies have attempted to deliver a product that provides what consumers desire, an OTT solution of live network broadcasts.

In September of 2010, ivi, Inc announced the release of its product that “transforms a computer into a television.”[13] The ivi application would enable “anyone with an Internet connection to "cut the cord" and watch live broadcast television anywhere in the world, anytime. The easy-to-use, over-the-top (OTT), online cable system is the first traditional television experience available on the Internet.”[14] Amidst the growing number of frustrated cable subscribers that are seeking alternatives to allow them to “cut the cord” and use an OTT solution, “ivi offers a fresh, innovative and affordable approach to live television by providing an online cable system for those consumers who are increasingly expressing discontent with cable's antiquated content delivery methods, limited options, and high subscription costs.”[15]

On March 14, 2012 a similar product to ivi’s OTT offering, was launched to residents of New York City. Aereo, Inc “enables consumers to use an individual antenna to access live, HD television broadcasts on web-enabled devices and to record up to 40 hours of programming through their Remote DVR. No cable required.”[16] According to Aereo Founder & CEO Chet Kanojia, “Technology is changing rapidly and consumers have embraced innovation that simplifies access to entertainment. People no longer want to be tethered to their TVs or cable boxes. Consumers are demanding more flexibility and value; Aereo delivers just that. This truly groundbreaking technology will usher in a new era of choice in the broadcast marketplace, making the consumers the ultimate winners."[17]

As expected, the major broadcast companies filed suit to enjoin these companies from streaming their programming alleging infringement of their copyrighted works through unauthorized retransmission.[18] Despite the similarities in both companies' offering, the courts yielded different results on preliminary injunctions. On February 22, 2011, the U.S. District Court for the Southern District of New York issued a preliminary injunction[19] barring ivi from streaming any of the content protected by the plaintiffs' exclusive rights under the Copyright laws. This District Court decision was later affirmed by U.S. Court of Appeals for the 2nd Circuit.[20] However, despite the apparent precedent, on July 11, 2012 the U.S. District Court for the Southern District of New York denied a preliminary injunction sought by the same major broadcast companies against Aereo, Inc.[21] The key difference between the two cases lies in not in what the two companies offered but in how the companies structured their relevant technology, namely the number of antennas. In order to understand how antennas essentially allowed Aereo to continue to conduct their business, but prevented ivi from continuing to operate, a summary of the relevant sections of the Copyright Act and case law will demonstrate how we arrived at this apparent discrepancy.

Relevant Copyright Law

Section 106 of the Copyright Act of 1976 grants owners of copyright certain exclusive rights: to reproduce copies of their works; to prepare derivative works based upon their copyrighted work; to distribute copies of their copyrighted work to the public; to perform the copyrighted work publicly; to display the copyrighted work publicly; and to perform the copyrighted work publicly by means of a digital audio transmission.[22] These exclusive rights are subject to limitations outlined in sections 107 through 122 of the Act.[23]

Section 107 of the Copyright Act limits the exclusive right of the copyright owner if the use of the copyrighted work is determined to be fair use.[24] In order to determine when a particular use constitutes fair use, the following factors will be considered: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.[25]

Section 111 of the Copyright Act establishes a limitation on the exclusive rights of the Copyright owner by granting an exemption to cable systems and creating a compulsory licensing scheme for these cable systems and copyright owners. [26] A "secondary transmission" is defined as "the further transmitting of a primary transmission simultaneously with the primary transmission." [27] A "cable system" is defined as “a facility…that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations …, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”[28]

Differences between ivi & Aereo rulings. Do internet transmission services such as ivi qualify as Cable Systems under §111?

ivi captures over-the-air broadcasts of copyright owners television programming and simultaneously, without the copyright owners’ consent, streams those broadcast signals over the

Internet to ivi subscribers who have downloaded the ivi TV player.[29] ivi claims that they are entitled to a compulsory license to perform the owners' over the air broadcast since they are a "cable system" as defined in Section 111 of the Copyright Act.[30] The district court analyzed ivi's claim by reviewing the historic context, statutory text, and administrative record.

Prior to Congress enacting the exemption to the Copyright Act in 1976 for the cable companies, the Supreme Court held that cable retransmissions were not a "performance" for copyright purposes.[31] "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set."[32] When the Supreme Court battled with the decision on how to deal with legislation that could not have accounted for unforeseen technological advances, it understood that it should not limit itself to reliance on the ordinary meaning of the statute's words and legislative history. "…[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change." [33] Later, in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, the Court reaffirmed its decision in *Fortnightly* and held that cable systems did not constitute a "performance" under the Copyright Act.[34] The distance over which the cable systems distributed the content did not constitute copyright infringement despite the fact that the programming was not available through use of an antenna. "[T]he development and implementation of these new functions, even though they may allow CATV systems to compete more effectively with the broadcasters for the television market, are simply extraneous to a determination of copyright infringement liability with respect to the reception and retransmission of broadcasters' programs."[35] Following these rulings by the Supreme Court, Congress recognized the benefits that cable systems provided society by facilitating increased access to broadcast television, but they also were determined to compensate copyright owners for the benefit the cable systems were providing consumers.[36] Congress codified the current exemption for cable systems into Copyright Act under § 111.

The *WPIX* district court examined the congressional intent and guiding principles from the Copyright Office and concluded that Congress did not intend to sanction the use of a compulsory license by ivi, which was "a company so vastly different from those to which the license originally applied."[37] The court cited differences in the ivi's architecture, in ivi's nationwide rather than local reach, and ivi's refusal to comply with FCC regulations as evidence of ivi not being able to classify itself as a cable system pursuant to § 111.[38]

The *WPIX* court also found the position of the Copyright office regarding Internet transmissions to be persuasive in arriving to its conclusion.[39] The Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for § 111 compulsory licenses. In 1992, the Copyright Office asserted that Congress intended that entities who sought compulsory license under §111 would also be subject to FCC regulations.[40] In 1997, the Copyright Office reiterated its position on cable compulsory licenses for entities regulated by the FCC, and added that the provider of broadcast signals be "inherently localized transmission media of limited availability to qualify as a cable system."[41] In 2000, the Register of Copyrights testified before a House Sub-Committee on Courts and Intellectual Property that retransmission of television programming over the internet were not entitled to § 111 compulsory license since when the §111 was created, it was tailored to an already heavily regulated industry whereas the internet lacks this sort of regulation.[42] In 2008, at the behest of

Congress, the Copyright Office issued the "Satellite Home Viewer Extension and Reauthorization Act Section 109 Report" ("SHVERA Report").[43] In the SHVERA Report, the Office again reiterated its previous position.

> The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner. Such a measure, if enacted, would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy. In addition, a government-mandated Internet license would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution of broadcast programming."[44]

The Copyright Office continued to hold this position in 2011. [45]

The *WPIX* district court proceeded to conclude that since ivi was unlikely to demonstrate it would be deemed a cable system under §111, WPIX demonstrated a likelihood of success on the merits, and WPIX's motion for a preliminary injunction against ivi was granted.[46]

On appeal, the Second Circuit upheld the preliminary injunction enjoining the defendant from live Internet streaming of television programs, holding that the defendant is not entitled to a compulsory license to stream plaintiffs' copyrighted programming because it is not a "cable system" under §111 of the Copyright Act.[47] The Second Circuit held that since the statutory text was ambiguous whether ivi was entitled to a compulsory license under §111, a review of statute's legislative history, development and purpose as well as the view of the administrative agencies that oversee the licensing scheme would provide any guidance.[48] After reviewing the legislative history, the Second Circuit agreed with the lower court and concluded that Congress, by not expressly altering the language of §111 or codifying a separate provision (e.g. §119 for satellite providers), did not intend for § 111's compulsory license to extend to Internet retransmissions.[49] The Second Circuit also agreed with the Copyright Office's interpretation that internet transmission providers do not constitute cable systems under §111.[50]

The emergence of the DVR, the Cablevision case, and the framework for Aereo's legal argument.

In an ironic twist, a cable system provider, Cablevision, established the current judicial framework for its yet unforeseen competitor, Aereo, in a ruling that shaped the infrastructure model which Aereo relied on to win its preliminary injunction. In 1999, TIVO launched the debut of the digital video recorder (DVR) which it later integrated with satellite provider DirecTV.[51] Cable system providers followed suit by providing its customers with set-top DVR boxes that allow its customers to record programs to these set-top DVR boxes for later viewing. The Supreme Court previously held that use of recording devices in this context was not copyright infringement.[52] In *Sony v. Universal City Studios*, the Supreme Court, in 1984, held that VCRs/BetaMAXs were legal to sell and use even if customers were to use such devices to record programs to watch at a later time.[53] The Court held that practices such as "time-shifting" (recording live television for later home viewing) constituted "fair use" and were non-infringing uses. [54]

Cablevision decided to take the *Sony* ruling a step further by moving the recording device out of the viewer's home and placing the actual recording device in their own facility.[55] Cablevision termed this DVR Plus which was a remote storage digital video recorder (RS-DVR). The television networks and copyright owners filed suit to enjoin Cablevision from deploying this RS-DVR alleging that Cablevision infringed upon their exclusive rights to duplicate and publicly perform their copyrighted works.[56] Fox claimed that Cablevision stored a copy of their copyrighted works on both the Cablevision servers and the RAM of the DVR system, and this infringed on Fox's right to reproduce.[57] Cablevision argued that this did not constitute infringement since they were passive participants in the recording process[58] and, similar to the VCR context in *Sony*, the end-users initiated the recording process through a process in which Cablevision provided the technology.[59] Additionally, Fox claimed that Cablevision violated their exclusive right to perform their copyrighted works publicly when Cablevision transmitted copies of the copyrighted programs to the end users without permission.[60] Cablevision argued that they did not perform the work publicly since it was the end-user who determined what to record, and even if they did "perform" the work, it was not a public performance since it was transmitted to only the end-user.[61] Under the Copyright Act, "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."[62] The Copyright Act defines how a work is performed "publicly" as either "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 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."[63]

The *Fox* court held that Cablevision had infringed the exclusive rights of the copyright owners by making unauthorized copies of the owners' works which were publicly performed and required Cablevision to obtain compulsory licenses in order to release its DVR Plus.[64] The *Fox* court stated that Cablevision's reliance on the *Sony* decision was misguided since the DVR was not a standalone product in the same way a VCR is.[65] Further, a consumer requires the "continuing and active involvement" of Cablevision to record the programming on a DVR as opposed to a VCR which does not require the continued involvement from the manufacturer.[66]

However, on appeal, Cablevision prevailed.[67] First, the Second Circuit reversed the lower's court interpretation that Cablevision made unauthorized copies of the copyrighted programs because the buffer copies stored on Cablevision's RAM failed to meet the requisite requirements, embodiment and duration, for the work to be considered "fixed" under the Copyright Act.[68] The Second Circuit used the plain language of the Copyright Act's definition of "fixed" to determine that a work must be embodied in a medium that can be perceived or reproduced and must remain embodied for a period of more than a transitory duration.[69] Under this framework, the Second Circuit determined that while Cablevision's systems satisfied the embodiment requirement, these systems did not satisfy the duration requirement since these "buffer copies" utilized by Cablevision were embodied for only a transitory period and subsequently discarded.[70]

Next, the Second Circuit considered the copies of the works stored on Cablevision's servers and whether these constituted infringement of the copyright owners' right to reproduce. In order for direct liability to have occurred, "something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner."[71] The Second Circuit held that the copies produced by Cablevision's DVR system were made by the end-user, and Cablevision's involvement in providing the technology does not amount to direct liability.

Lastly, the Second Circuit considered whether through its RS-DVR, Cablevision transmitted a performance of the copyrighted works to the public.[72] The Second Circuit determined that the relevant fact in establishing whether a transmission is made to the public is to discern who is capable of receiving the performance being transmitted.[73] Cablevision argued that since a separate copy was stored and playback to the consumer was provided from this separately stored copy, this does not constitute a transmission to the public.[74] So, while the court acknowledged that Cablevision "performed" the programs by providing the RS-DVR, they did not transmit them to the "public" since it was stored specifically for the specific end-user that recorded the program.

What constitutes a private transmission?

In *Aereo*, plaintiffs, ("ABC"), moved for a preliminary injunction, asserting that Aereo was directly liable for copyright infringement by publicly performing ABC's copyrighted works. Aereo allowed its subscribers to access over-the-air broadcast television through antennas and hard disks located at Aereo's facilities.[75] Unlike ivi, Aereo characterized itself as a technology platform rather than a cable company. Rather than arguing that its business model is entitled to a compulsory license under §111 of the Copyright Act, Aereo characterized its offering as a means whereby subscribers "rent a remotely located antenna, DVR... in order to access content they could receive for free and in the same manner merely by installing the same equipment at home."[76] Aereo structured its business model around the Second Circuit Cablevision ruling by using thousands of individual antennas to capture over the air television transmissions, dedicating antennas to specific end-users, and storing separate copies of the programs for each individual user.[77] In the context of the Cablevision ruling, Aereo contended that since their system creates a unique copy of the performance at the request of and transmitted only to a specific end user, that these performances are not to the "public" and as a result, a non-infringing use of ABC's performance rights.[78]

ABC argued that Aereo's facts should be distinguished from the Second Circuit's ruling in the Cablevision case and characterizes Aereo's system as merely a "technological gimmick."[79] ABC further contended that the copies stored on Aereo's system are "merely facilitating the transmission of a single master copy—in this case, the broadcast signal—rather than as copies from which a distinct transmission is made."[80] The district court rejected ABC's argument holding that the copies in Aereo's case are not "materially distinguishable" from the copies in the Cablevision case, and those same copies were transmitted to the end user as opposed to the transmission from the over the air broadcast signal.[81]

What is the Public's Interest?

The Copyright Owner's Interest

Since the plaintiffs in both the ivi and Aereo cases were seeking a preliminary injunction, they were required to establish a likelihood of success on the merits, a likelihood of suffering irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. While the ivi and Aereo courts came to different conclusions as to whether plaintiffs were likely to succeed on the merits and, as a result, potentially be granted a preliminary injunction, both courts came to a similar conclusion on whether an injunction was in the public interest.

As reiterated in *ivi*, copyright law inherently balances two competing public interests: rights of the users in being able to access creative works broadly versus the rights of the copyright owners in rewarding and incentivizing creative efforts.[82] In this context, it is the right of the public to access television programming through other avenues besides the traditional television set versus the copyright owners' rights to monetize their work and provide an economic incentive to continue to create programming that may be enjoyed by the public.[83] The district court stated that if the copyright owners would lose control over their works or potential revenue sources, they would lose valuable incentives to continue to create programming. The Second Circuit Court of Appeals cited a delicate balance between enabling broad public access and enabling a convenience to copyright works, and agreed with the district court that granting a preliminary injunction against the defendant would not be a disservice to the public since it would not inhibit the public's ability to consume but merely makes it less convenient.[84]

Despite the Aereo court denying a preliminary injunction based on the likelihood of success on the merits, the Aereo court sided with the copyright owner's interest and agrees with the ivi court's analysis of the strong public interest in protecting the financial incentive as motivation to increase "the store of public knowledge."[85] The Aereo court actually cited the ivi court's analysis in preserving the copyright owner's substantial investment in the development of these programs.[86] Defendants and *amici* argued that public interest would be disserved by an injunction since it would limit availability of the programming broadcast; however, the Aereo court rejected this argument since there are numerous methods for the public to access the programming other than Aereo's service.[87] The court also rejected the argument put forth by *amici* that there is a strong public interest in free access to and reception of broadcast television noting that while Aereo is a business that may facilitate access to broadcast television, it does not provide free access to broadcast television and merely facilitating access to copyrighted material is too broad an argument in favor of a public interest since it would also seemingly include infringing behavior (i.e. distribution of bootleg copies) that also increases access.[88]

The individuals' rights to access content

In the *amici* brief on behalf of Aereo, *amici* also urge the Court to be guided by the principle that copyright seeks a balance between the owner's incentives and the public's right to access and argues that Aereo's lawful business does not remove the financial incentive to create and exploit content since it will not interfere with an advertising based business model.[89] *Amici* argue that television viewers today have multiple legal methods to "watch TV": either via the functionally equivalent traditional TV reception or via personal time-shifting mechanisms which were found to be non-infringing fair use in *Sony*.[90] *Amici* further argued that the public perception of what constitutes "watching TV" is evolving, and regardless of the product or device used, the Copyright owner could not limit how the customer views a program that he already has lawful access.[91] *Amici* compared two viewers one sitting at a baseball game with a portable TV and one sitting in his living room, and by limiting the TV receiver technology that can be used, the courts would be denying the public the benefits of technological advances.[92] Copyright owner's ability to license their content would still exist, and merely, because a legitimate competitive offering potentially reduces the licensing fees that these owners would have collected previously, it does not become a "legally cognizable harm."[93] *Amici* argue that the copyright owner's allegation of Aereo's continued conduct would result in a loss of advertising revenue, interference with their ability to collect retransmission fees from cable operators, and disruption of development with potential markets are unfounded. *Amici* point out that these same harms plaintiff allege can occur through lawful introductions of competitive technology.[94] *Amici* characterize Aereo as a lawful competitive challenge to the established norms, and incumbents would naturally be resistant to potentially dramatic technological changes to the status quo.[95]

Amici further argues that the public interest would not be served by enjoining innovative new services such as Aereo since it would harm the competition and innovation in a fast-growing industry with increased consumer demand.[96]

Examples from other companies & other industries.

2000 - In *Twentieth Century Fox v. ICRAVETV*, defendant ICRAVE, based in Canada, was found to have infringed on the exclusive rights of the plaintiff. ICRAVE was enjoined from transmitting the programming they had received via a **single** antenna in Canada over the internet via their website.

2009 – In *ABC v. Hang 10 Technologies*, CBS Corp., Walt Disney Co.'s ABC and News Corp.'s Fox television networks dropped a lawsuit against Hang 10 Technologies.[97] According to the complaint, Hang 10 retransmitted programming from WABC-TV, WCBS-TV and Fox's WNYW without permission. Hang 10 Technologies Inc. agreed to stop unlicensed transmission of copyrighted programming from New York City TV stations to subscribers. Hang 10 also agreed it wouldn't reproduce the programming and the logos of ABC, CBS and Fox without authorization. Hang 10 transmitted to mobile phones for $2.99 a month.[98] "We are hopeful that the major broadcasters will see our service as a way to massively increase their revenue since VuiVision can be viewed anywhere in the world, not just in the United States," said Hang 10 owner, Daniel Gallic.[99]

2010 – FilmOn TV launched a product similar to ivi in September of 2010 (an OTT service which provided subscribers with numerous broadcast television stations and copyrighted programming from those stations), and the major broadcast networks sought an injunction claiming that FilmOn TV's service infringed their exclusive rights under the Copyright Act.[100] In a settlement reached with the networks, they agreed to a consent judgment and a permanent injunction was issued on administrative grounds which forced FilmOn to pay $1.6 million to the major networks.[101] However, FilmOn continues to operate, plans to provide its own original content, and fully intends to add the networks back to their subscription service as a result of the Aereo ruling by using multiple antennas to receive on-air transmissions.[102]

2011 – *Warner Bros. Entm't, Inc. v. WTV Sys*. Here, the internet transmission company, Zediva, relied on the first sale doctrine which allowed video stores that has purchased DVDs to rent these DVDs to its customers. Zediva provided its customers with access to DVDs which Zediva purchased.[103] To operate their service, Zediva purchased hundreds of DVD players and installed them at its data center in Santa Clara, California.[104] Subscribers would select the movie they wished to watch, and Zediva would place the corresponding DVDs in its DVD players, with each DVD remaining in its respective DVD player while it is transmitted to its subscribers.[105] Unlike the other streaming services, Zediva does not convert a movie into a digital file on its servers that it can distribute to many users. Instead, Zediva compared its service to a brick and mortar video rental store.[106]

Unlike the Second Circuit ruling in the Cablevision case, the California district court ruled that Zediva was transmitting performances of Plaintiffs' copyrighted works, and that these transmissions were not private transmissions but public transmissions.[107] The court cited a previous case, which involved hotel guests who rented movies in their hotel rooms which stated:

> The argument that On Command's system involves not "transmissions" but "electronic rentals" similar to patrons' physical borrowing of videotapes is without merit. On Command transmits movie performances directly under the language of the definition. The system "communicates" the motion picture "images and sounds" by a "device or process"—the equipment and wiring network—from a central console in a hotel to individual guest rooms, where the images and sounds are received "beyond the place from which they are sent." The fact that hotel

> guests initiate this transmission by turning on the television and choosing a video is immaterial.[108]

Here, the court used a different basis than the Second Circuit (discern who is capable of receiving the performance being transmitted, i.e. the end-user) to determine what constituted a public performance. The court held that Zediva's transmissions are "to the public" because the relationship between the transmitter of the performance and its customers, is a commercial, "public" relationship regardless of where the viewing takes place.[109] 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.[110] The court concluded that *Warner Bros* demonstrated a likelihood of success on the merits, a likelihood of irreparable injury, the balance of hardships weighed in their favor, and the public interest supported issuance of an injunction and, as a result, granted the preliminary injunction against Zediva.

Conclusion

> [T]these cases demonstrate that the current compulsory licensing system is failing to keep up with the times. The result is resistance, induced by out-dated laws, to innovation of new products, services and technology. The results of such innovation can deliver content from a copyright owner to the consumer and – in theory at least – the concept of compulsory licenses is designed to facilitate the legal delivery of that content to the consuming public. But the existing legal scheme was not designed to, and thus cannot easily accommodate, this fastest growing area of content delivery. As a result, whenever a good product is created, the content owners move quickly to restrict its easy implementation.[111]

It is clear that the evolution of the internet and widespread use of computers have altered the way in which the public consumes entertainment. There is demand for content to be available through other means other than traditional means such as a TV and DVD player. It is clear that the copyright owners have a right and require an incentive to keep producing the content that the public currently enjoys. They are entitled to licensing and broadcast fees that are now exclusively paid to them by the cable and satellite providers. However, as the law is currently written and being interpreted by the courts, these outcomes have beed criticized as a "legal fiction."

> The obvious answer is to change the law. If *Modern Family* is broadcast to everyone in the country for free, then why shouldn't I be able to snatch a copy that you put online? After all, bits are fungible; if I had recorded the show, then "my" copy would be exactly the same as "your" copy. Indeed, since all digital copies are the same, there's no such thing as *my* copy and *your* copy. *They're all equal*. It makes no sense whatsoever, then, that I am allowed to capture *Modern Family* when it flies over the air from ABC, but I'm *not* allowed to do so when it flies over BitTorrent. It's a legal inconsistency that's screaming out for a fix.[112]

Companies are perpetuating this legal fiction by modeling their businesses to fit the current legal interpretations of what constitutes fair use, what defines a cable system, and what defines transmission to the public. "That's what Aereo does. It perpetuates the legal fiction that digital copies are somehow distinct."[113] So, while these new companies are essentially offering the same product, courts have prevented some these businesses from continuing to operate while allowing others to continue to operate.

These judicial interpretations are razor thin and the discrepancies in interpretations of what constitutes a transmission to the public by the *Cablevision* and *Zediva* courts provide no value to the content owners, the would-be distributors, and the consumers. In *Aereo,* it is perfectly fine for a user to view streaming content over the internet without permission from the copyright owner as long as individual copies are maintained by the provider for each user. However, in *Zediva*, it constitutes infringement if that same provider used a single saved copy to provide the content to the same end users. Here, there is no difference to the end-user experience, but a burden is imposed on the provider to maintain multiple copies for each end user. Similarly, in *ivi* if you use a single antenna to receive on-air transmissions to rebroadcast over the internet to multiple users, it constitutes infringement. However, in *Aereo*, if you use thousands of tiny antennas located on your facility and rebroadcast the transmissions received on those thousands of tiny antennas to thousands of end users, it is non-infringing. Again, no change to the end user experience, but an additional burden put on the providers to fit their business model into the currently inefficient judicial blueprint. These discrepancies in interpretation of the outdated Copyright laws in *Aereo, ivi, Cablevision,* and *Zediva* may eventually lead to a circuit split between the Second and Ninth Circuits, which would potentially lead to the Supreme Court issuing an interpretation on the meaning of a transmission to the public. The Supreme Court, in *Fortnightly*, stated “While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries."[114]

This demonstrates a need to change the law, but how should it be changed? The laws should be written in a way that is “platform or device neutral” so that the laws do not become outdated when new technology is developed. Current laws only contemplated that programming would only be viewed on a television. Congress did not anticipate the proliferation of computers and mobile devices as potential platforms to “watch TV.”

Historically, Congress has accounted for technological innovations which it did not previously consider by codifying amendments to the Copyright Act to include innovations such as cable systems (§111) and satellite providers (§§ 119 and 122). This would resolve the discrepancy by subjecting these OTT internet providers to the same compulsory licensing scheme which cable systems and satellite providers are subject to. This would allow companies like ivi who were willing to pay the necessary compulsory licenses required for a cable system to continue to operate, to compensate the copyright owners appropriately, to drive innovation within the industry, and to provide the consumers with a better product.

Alternatively, Congress could also clarify the meaning of a public performance. This obviously was written a time when only radio and television were considered, and the proliferation of new platforms spurred by the internet would not have been known. This would prevent situations such as the one the OTT and TV industry is facing now when courts must determine Congressional intent, derive a definition based on different factors, and conclude different results.

Another more likely alternative would be to completely eliminate or replace the current compulsory licensing scheme. Congress has already directed the Copyright Office to explore alternatives to the current compulsory licensing structure and to issue a Report on market based alternatives to statutory licensing.[115] The Report provided recommendations for carrying out a repeal of the statutory licensing provisions by addressing: (1) possible methods for implementing a phase-out; and (2) possible mechanisms for ensuring a timely and effective phase-out' and (3) possible legislative or administrative actions that may be appropriate in achieving a phase out.[116]

A key observation from the Report was the Copyright Office's determination that while it did ensure the efficient and cost-effective delivery of television programming in the United States, the current statutory licensing scheme is an artificial construct created in an earlier era.[117] The report advocated for copyright owners to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122.[118] It acknowledged that business models based on sublicensing, collective licensing and/or direct licensing are largely undeveloped in the broadcast retransmission context, but they are feasible alternatives to securing the public performance rights necessary to retransmit copyrighted content in many instances.[119]

The first of the marketplace alternatives explored in the Report was sublicensing agreements. These sublicensing agreements are essentially non-exclusive contracts that would allow a broadcast station to authorize others in the secondary distribution chain to retransmit performances of all of the programs transmitted on the station's signal.[120] Broadcasters would have to clear all rights in the programs they carry for ultimate performance by third party distributors. This clearly would allow for OTT distribution and provides more flexibility to the current scheme. Of the three alternatives considered by the Copyright Office, sublicensing seemed to be the "least problematic", the "most efficient", and the one with the "most potential" according to DirectTV, AT&T, and Verizon.[121] Sublicensing has also been favored as an alternative to statutory licensing by both the Copyright Office and the FCC for over twenty years.[122] It is a particularly attractive alternative to statutory licensing insofar as it minimizes transaction costs associated with a complex marketplace transaction. Sublicensing may also be the easiest marketplace alternative to implement.[123] While the information related to success of actual sublicensing of programming is limited, the Office concluded that sublicensing of retransmission rights may not be a significant burden for broadcast stations.[124]

The second alternative that the Report explored was collective licensing.[125] It would allow copyright owners "to voluntarily join and authorize an organization to: (1) negotiate licenses with cable operators and satellite carriers for the retransmission of broadcast television programming; (2) collect royalties for the use of these works; and (3) distribute the royalties among the respective copyright owners."[126] This would presumably be similar to the design currently utilized in the radio industry where performing rights organizations such as ASCAP, BMI and SESAC set the rates, monitor use of the works, and enforce compliance with applicable obligations. Collective licensing schemes are currently being used in other countries such as Canada and numerous European countries as either a mandatory or voluntary collective.[127] This model would not require legislation to define a statutory licensing system since the stakeholders would negotiate the rates, but it would likely require legislation to authorize the equivalent performing rights organization to issue licenses and for copyright owners to license their works through these organizations.[128] One of the benefits of this model would be the reduction in transaction costs through efficiencies in the negotiation process via a centralized organization.[129] Another benefit would be the potential knowledge already obtained in the music industry's collective licensing scheme. A collective licensing scheme would also have added benefit of providing the flexibility to charge different rates for different types of uses. Instead of charging the same statutory rate, the collective agency could charge lower rates for known instances of lower audiences (e.g. daytime programming, reruns) and higher rates for higher audiences (e.g. evening programming, special events). A collective organization would also be in a better position to determine the current market rate because "its decision could be informed by usage rates, ratings information, or other economic data that is typically used to set licensing fees."[130] Collective agencies could also be formed by the copyright owners of similar content. This would ensure that each of the similarly situated owners' interests would be accounted for. "For example, the professional sports leagues might be inclined to form collective organizations to license the public performance of football, basketball, baseball, and hockey games that are shown on broadcast television. Similarly, independent production and distribution companies could form a collective organization in order to improve their bargaining power relative to the major user groups."[131] Several of the commenters opposed to the collective licensing scheme have cited potential monopolization of the content and anti-competitive behavior by the collective agency as concerns, but the Report stated that "Congress may specifically need to determine whether there is a potential for anti-competitive practices within the market for the retransmission of broadcast television programming, and if so…would need to establish 'rules of conduct' in order to address those concerns."[132] The Report concluded that collective licensing could work; however, it raised concerns over the lack of a current agency to oversee the process and merely replacing one form of government supervision with another.[133]

The last alternative the Report considered was Direct Licensing.[134] As the name suggests, a cable operator or satellite carrier would have to negotiate with each copyright owner of a specific broadcast program for the right to perform the work publicly.[135] Direct licensing was considered the least practicable option by a majority of the parties due to the cost of obtaining the rights for each and every type of copyrighted content and it was characterized as a "logistical nightmare."[136] While the Report acknowledged the potential difficulty a scheme that was exclusively Direct Licensing would pose, it noted that if used in conjunction with the other schemes explored, there were potential benefits with this alternative.[137] One of the high level proposals that would coincide with a Direct Licensing model would be the development of a Digital Copyright Exchange which would provide a centralized licensing database that would promote efficiencies and reduce risk of infringement.[138] While the direct licensing proposal may superficially appear to be cumbersome, the Report noted that 90% of the content which required a license was owned by seven companies (CBS, Disney, Discovery, FOX, NBC Universal, Time Warner, and Viacom).[139] The Report still concluded that the remaining 10% of the broadcasting available would still be a substantial burden for the cable companies and satellite providers to negotiate licenses and would still likely be prohibitively high given the amount of available broadcast programming.[140] Thus, due to the high transaction cost associated with obtaining that remaining 10% not held by the major producers, direct licensing for cable companies and satellite providers does not appear "to be a feasible alternative to acquire the public performance rights for *all* broadcast content for *all* stations."[141] However, in the context of online distribution the Report concluded that

> [D]irect licensing is the marketplace model widely embraced for online video distribution and it very much looks like the favored approach to get broadcast and other content to online video consumers. This is especially true for the younger generation who spend most of their viewing time on devices besides the television set and at a time of their own choosing rather than one dictated by a set program schedule. New technologies and new ways of accessing content must be recognized and be taken into consideration as the debate about the repeal of the statutory licenses continues.[142]

The Report also cited a recent examination by the FCC in its approval of Comcast's acquisition of NBC Universal in January 2011 which recognized the importance of the emerging online video marketplace which has expanded opportunities for copyright owners, increased choices available for consumers, drive innovation within the industry, and lower prices.[143]

Lastly, the Report acknowledged that "business models may emerge that incorporate [sublicensing, collective licensing and/or direct licensing] in part or in combination, and technology will continuously inform the practices of both licensors and licensees."[144] Over time, marketplace licensing should evolve in a variety of innovative ways, subject to investment and experimentation in the marketplace.[145] Many commenters warned against a one-size fits all approach to a proposed post-statutory licensing scheme, and the Report acknowledged that a broadly defined, market-driven, private Hybrid Licensing approach would allow the marketplace to function efficiently with minimal government interference.[146] The Report cited the desire to avoid any alternative that would merely replace one statutory scheme with another or would require significant government oversight.[147]The hybrid approach would allow for the limitations of any single approach to be balanced with the strengths of the other licensing options, and provide flexibility within the marketplace to adopt the licensing approach that would best fit the particular business model of the relevant stakeholder.[148]

This solution is the most flexible and, as a result, the most viable since it would face the least amount of resistance from both Congress and the companies impacted by the change to the existing licensing scheme. New OTT distributors of content would have knowledge of the licensing requirements and associated costs to enter the market, and would not have to guess as to how a court would interpret their business model. “The Internet has become an integral part of the video distribution chain as more and more content, including broadcast content, is migrating online, and that the marketplace can be trusted to provide solutions for getting broadcast programming to the public.”[149]

Endnotes

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[24] U.S. Copyright Act, 17 USC § 107 - Limitations on exclusive rights: Fair use
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