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OMISSION BY "PARTICULAR TRANSMISSION": PREVENTING THE CIRCUMVENTION OF THE TRANSMIT CLAUSE

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Brad M. McBride

I. Introduction

As technology has advanced, the way we consume content has drastically changed. By operating a DVR[1], visiting networks' websites[2], or using third-party services[3], an individual is capable of consuming a wide-variety of content at any time, from nearly any location. The current system strikes an amazing balance between allowing subscribers to consume content at their convenience, while maintaining a viable licensing and advertising system that allows networks to fund the large budgets of creating high-quality content. This Comment proposes a new interpretation of the Transmit Clause that will allow courts to preserve this balance as technology continues to progress and content consumption becomes increasing more complicated.

With new mediums through which subscribers can access content, courts and legislators have been forced to carefully examine the laws in place designed to protect all parties' interests. On the one hand, sound public policy dictates that the public should be able to benefit from advances in technology that make content consumption more convenient. With the explosion of video recording devices and mobile media, the public should be able to access content at their leisure and from a location of their choice.

[1] A Digital Video Recorder (hereafter referred to as a "DVR") is a device that allows a subscriber to record content to be watched later. When the subscriber accesses the programming after the initial broadcasting they are able to pause, rewind, and fast-forward (as they are accessing a full recording.) For further description of the capabilities of a DVR see *http://ww2.cox.com/residential/lasvegas/tv/digital-video-recorder.cox*

[2] E.g. http://www.cbs.com/watch/; http://watchabc.go.com/live; http://www.fox.com/full-episodes/; http://watchdisneychannel.go.com/.

[3] For example Hulu, Netflix, and Amazon. See http://www.hulu.com/, http://www.netflix.com/, and http://www.amazon.com/b/ref=sa_menu_aiv_piv?ie=UTF8&node=2676882011.

Furthermore, by making programming available on more platforms and in more places, information has a wider reach; more people now have greater access to national/local news, Presidential debates and entertainment, all of which may have been inaccessible in the past.

Importantly however, on the other hand, copyright owners[4] must be able to generate enough revenue to cover the expansive costs of creating the entertaining content, reporting the world's news, and bringing the public its favorite events like Sunday Night Football. Just focusing on content-creation costs, the public's favorite television shows have astronomical budgets; for example, the HBO series Game of Thrones reportedly costs $6 million dollars *per episode* to produce, and the pilot alone had a tab of up to $10 million.[5] Even broadcast network channels like FOX (that do not charge monthly subscription fees) can spend up to $4 million dollars on one episode of primetime programming.[6] In addition to their original programming, the major broadcast networks also must expend substantial funds to cover the important news around the world.

The desired balance between these competing ideals arises from the application of copyright law. The United States' system of copyright law is essential in promoting the creation and dissemination of works of authorship. The copyright holder of a work retains certain, exclusive rights that together, allow the copyright holder to share the work with the public without giving up the ability to control the work afterwards.[7] One of the

[4] In this context, and in most situations involving the Transmit Clause (see below), copyright owners will be networks. This includes: all the major broadcast networks such as NBC, ABC, FOX and CBS; all cable networks such as CNN, TBS, ESPN, etc; and paid networks such HBO and Showtime, and services like Netflix and Hulu.

[5] http://www.eonline.com/news/318306/holy-flaming-warships-how-expensive-is-game-of-thrones-anyway.

[6] *Id.*

[7] "…the owner of copyright under this title [§106] has the exclusive rights to do and to authorize any of the following:

rights that a copyright owner has is the exclusive right to perform and display the work publicly.[8]

The exclusive public performance right gives networks (i.e., copyright owners) the ability to require licenses to display their content. In other words, because content providers have the sole ability to display their work to the public, they are able to charge fees if others would like authorized use to display the work as well. The television[9] industry is built upon this foundation. Currently, major networks and their affiliates engage in negotiations with service providers[10] for licenses to broadcast their channels. Through these negotiations, service providers enter into contracts with a long list of networks, thereby giving the ultimate users/subscribers the ability to choose from a host of different channels and networks.

The ability to regulate the public performances of their works is crucial to both of the networks' two revenue sources, the retransmission fees mentioned above, and

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(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

[8] See subsections (4)-(6), *supra note 7*. 17 U.S.C. §106(4)-(6).

[9] The television industry is clearly not the only market that is heavily influenced by the public performance rights; the growth of MP3's and websites such as YouTube allow the public to consume performances as well, affecting the music industry, Broadway plays, etc. The television industry however, will be the main focus of this Comment.

[10] The term 'service provider' refers to the entity that ultimately transmits broadcasts to subscribers. This term would include: cable providers such as Verizon, Time Warner, and Cox; and satellite providers such as Dish, and DirectTV.

advertising fees for commercials.[11] First, if wide-spread, unauthorized performances were permitted, the networks would have significantly less leverage when negotiating the retransmission licenses for the service providers.[12] Second, by controlling the retransmission of their works, networks are able to track viewership and obtain rating results from companies like Nielson.[13] Networks are then able to present accurate marketing information to advertisers and obtain large sums of money for commercial-spots, based on the network's ratings.[14]

At this point it is important to recognize a key element of the current television system that poses a threat to the public performance rights (and the revenue associated with them) of the network copyright owners. Major broadcast networks still broadcast their signal over-the-air for use by the public, without the need to obtain a paid cable or satellite service. By utilizing an antenna, an individual is capable of receiving at least the main networks via their television, including NBC, FOX, ABC, CBS and PBS, all free of charge. Congress has agreed to allow the networks to use 'government airways' for free, in exchange for providing closed captioning and an emergency alert system.[15] However, the networks are the still spending all the time, money, energy, and creativity on producing the original programming, and building the infrastructure that ultimately transmits and distributes the programming.[16] It is by these free, over-the-air broadcasts

[11] Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See* Hearst Stations Inc. v. Aereo, Inc., 2013 WL 5604284, at *1 (D. Mass. Oct. 8, 2013).
[16] *Id.*

that over 50 million Americans are able to enjoy the major network channels, regardless of their financial ability to pay for cable, simply by using a standard antenna.[17]

Recently, there has been a movement to exploit these free, over-the-air broadcasts of network broadcasts. Services such as Aereo[18] have begun to take advantage by capturing the broadcast, altering its nature, and then retransmitting it to the public without paying for the performance license. These services are operating within a technological loophole that has been created by a misunderstanding by the courts.

In 2008, the Second Circuit examined the Copyright Act's public performance right and analyzed the intricacies of the statute in Cartoon Network, LP v. CSC Holdings, Inc. (hereafter "*Cablevision*").[19] In a landmark decision, the court held that the Act only prohibits *public* performances and further, if a "particular transmission" of a performance is limited to only one subscriber, it is considered a *private* performance.[20] Following the precedent set by *Cablevision*, savvy tech companies devised systems that would allow the retransmission of broadcasts to the masses without being classified as a public performance.[21] The Second Circuit faced the same issue in recent litigation surrounding a service that allows subscribers to watch and record live television using any internet-enabled device, WNET, Thirteen v. Aereo, Inc. (hereafter "*Aereo*").[22] Guided by the

[17] http://www.forbes.com/sites/jeffbercovici/2013/04/08/holy-cow-two-of-the-big-four-tv-networks-are-considering-going-off-the-air/

[18] Aereo operates a website that allows subscribers, for a small monthly fee, to access live television through their website, on any computer, tablet, or smart phone. The channels available to Aereo's subscribers are limited to those that are being broadcasted for free, over-the-air by the major networks including NBC, CBS, ABC, and FOX. Aereo captures the signals and retransmits them in a more convenient medium to its subscribers, while simultaneously offering a cloud-based DVR that allows the subscriber to record and save programming for later use. For further explanation and citation *see infra* Part II.B.3.

[19] Cartoon Network LP, LLLP v. CSC Holdings, Inc, 536 F.3d 121 (2nd Cir. 2008) (hereinafter referred to as *"Cablevision"*).

[20] *See id.* at 139.

[21] E.g., Aereo, FilmOn X, and BarryDriller as discussed in this Comment.

[22] *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2nd Cir. 2013).

form-driven precedent of *Cablevision*, the court found that Aereo's system used thousands of small, separate antennas that sent individualized transmissions to a particular subscriber at a time.[23] Per *Cablevision*, the Second Circuit then held that the individualized transmissions were private performances and thus Aereo was not infringing on the broadcaster's public performance rights.[24] While other courts have ruled against Aereo-like systems and expressed concern with *Cablevision*, the Second Circuit remains the only Court of Appeals to have ruled on the issue.

Following the Second Circuit's decision and subsequent denial of an *en banc* hearing in July 2013, Aereo has begun a rapid expansion to new cities across the country. Broadcasters have already expressed their concerns that Aereo and copycat systems will seriously jeopardize their business models from several angles.[25] Some of the major networks have even threatened to completely eliminate the free over-the-air transmissions.[26] To be clear, there is no law or ordinance requiring the networks to broadcast their programming for free. The networks may cease this service at any time. Thus, by turning a profit off the free broadcasts offered by the major networks, Aereo and other services like it, may ultimately end up punishing millions of innocent Americans who rely on free television.

The importance of clarifying the Copyright Act's public performance right cannot be overstated: Without statutory guidance and agreement among the courts, copyright owners may resort to extreme measures to protect their works thereby limiting the availability of essential works such as news broadcasts and weather reports. This

[23] *See id.* at 690.
[24] *Id.* at 696.
[25] *See supra* note 17.
[26] *Id.*

Comment seeks to introduce a new interpretation of the public performance right, which incorporates the ideals of this nation's courts while providing a more straightforward standard that protects the fundamental purpose behind copyright law.

Part II examines the public performance right, focusing on the Transmit Clause. This Part will conduct a thorough analysis of the public performance right and the Transmit Clause by examining statutory language, legislative history, and the relevant case law. Part III discusses the recent developments with respect to copyright owners in the television industry, highlighting the adverse effects of the flawed interpretation of the Transmit clause. In Part IV, a new standard is introduced. In this Part, I discuss a new interpretation of the Transmit Clause that embraces the ideas of copyright while providing the requisite clarity to prevent untenable results suggested by courts. Further, I will discuss the several justifications for the new standard, visiting social and economic policy issues related to the new standard. In Part V, I will revisit relevant case law through the lens of the new standard, illustrating the ease of application and justifiable outcomes of the standard. Part VI briefly reviews the aforementioned topics and concludes the paper.

II. The Transmit Clause

In the 1976 Copyright Act, one of the goals of the legislators was to reverse two Supreme Court decisions that had produced unacceptable results in the eyes of Congress.[27] In those cases, the Court held that retransmission of a broadcast using an antenna installed on a hill with lines running individual homes was *not* a performance under the 1909 Copyright Act.[28] Congress believed that this "narrow construction" of the

[27] *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 709-711 (1984).
[28] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 469 n. 17 (1984).

performance statute did not adequately protect the rights of copyright owners, thus in the 1976 Copyright Act, Congress overturned that construction and replaced it with a broad definition of 'perform' in Section 101.[29]

A. "The Transmit Clause" of the 1976 Copyright Act (§101)

Before specifically addressing Congress' adoption of the Transmit Clause, it is helpful to briefly examine the statute through a wider lens. Copyright law, generally speaking, is designed to foster the creation and dissemination of creative works.[30] By giving a copyright owner certain exclusive rights, an author may share their work with the public while retaining the ability to control the work. One of the exclusive rights that a copyright owner retains over the work is the public performance right.[31] Under Section 106 of the 1976 Copyright Act, the "owner of a copyright … has the *exclusive right*: (4) …to *perform* the copyrighted work *publicly*."[32]

Section 101 defines specific terms to assist courts in determining what constitutes a 'public performance' under Section 106(4). Section 101 states:

> "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."[33]

With respect to the term "publicly", Section 101 is explicit:

> "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

[29] *Id.*
[30] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
[31] 17 U.S.C. 106(4)-(5).
[32] *Id. (emphasis added).*
[33] 17 U.S.C. 101.

> 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."[34]

As subsection (1) focuses on performances to one audience in a particular place, this Comment will solely discuss subsection (2), referred to as the "Transmit Clause".

The Transmit Clause has been recognized by the courts as being a tricky piece of legislation to interpret and apply.[35] Broken-down, the essential elements of the Transmit Clause read as follows: "*to transmit*…*a performance*…*to the public*, by means of *any process or device*, whether the members of the public…receive it in the same place *or in separate places* and at the same time or at different times."[36] Section 101 explains that to "transmit" is to "*communicate* [a performance] by *any device or process* whereby images or sounds are received beyond the place from which they are sent."[37] The language of the Transmit Clause and the definitions of terms within the Clause will be focus of this Comment, as the Transmit Clause has been interpreted by courts across the country with widely varying results.[38]

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[34] *Id.*
[35] *See Cablevision*, 536 F.3d at 136.
[36] 17 U.S.C. 101.
[37] *Id.*
[38] Compare *Aereo*, 712 F.3d 676, *with* Fox Television Stations, Inc. v. FilmOn X LLC, 2013 WL 4763414 (D.D.C. Sept. 5, 2013).

B. Analyzing What Constitutes a Public Performance Under the Transmit Clause

1. Cases and Legislative History Leading to the 1976 Copyright Act

An examination of the case law surrounding the Transmit Clause necessarily begins prior to the adoption of the statute. In 1968 and 1974, the Supreme Court heard *Fortnightly Corp. v. United Artists Televison* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, (collectively referred to hereinafter as "*Fortnightly/Teleprompter*"), where the Court was presented with facts that raised new issues caused by technological innovation.[39] In *Fortnightly/Teleprompter*, individuals lived in remote, mountainous locations where the terrain prevented residents from receiving the broadcasts of more distant stations through the ordinary rooftop antennas.[40] As a result, most of the residents in these communities became customers of the defendant's community antenna television (CATV) services.[41] The CATV system was rather simple; the defendant erected antennas on hilltops and then ran cables from the antenna to individual households to provide broadcasts previously inaccessible.[42] Subscribers paid a flat monthly rate for this service.[43] After examining the defendants' systems, the Court reversed the decision of the Court of Appeals and held that the CATV operators were *not* engaged in the public performance of the works being broadcast.[44]

It is important to discuss *Fortnightly/Teleprompter* when interpreting the Transmit Clause because Congress specifically sought to reverse the Supreme Court's decisions, and update the public performance rights in order to close technological

[39] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); and Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).
[40] *See Fortnightly*, 392 U.S. at 390-91.
[41] *Id.*
[42] *Id.* at 392.
[43] *Id*. at 393.
[44] *Id*. at 400-401.

loopholes created by the rulings.[45] The 1976 Copyright Act, by adopting the Transmit Clause, proscribed the new methods of circumventing copyright law using technological innovations and created a process-neutral statute to continue the "function-driven" purpose of copyright law.[46] In other words, Congress made it clear that copyright law is focused on protecting the rights of copyright owners regardless of the means infringers utilize. Specifically, Congress defined the term "transmit" broadly in order for further this goal:

> "The definition of 'transmit' … is broad enough to include *all conceivable forms and combinations of wires and wireless communications media*, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' *and if the transmission reaches the public in any form*, the case comes within the scope of clauses (4) or (5) of section 106."[47]

By this language, it is clear that Congress embraced the idea of evolving technology and sought to create a statute that was adaptable to changing circumstances.

2. Cablevision

One of the first cases to truly challenge the adaptability of the Transmit Clause recently reached the Second Circuit. In *Cablevision*, content providers brought suit against Cablevision seeking to enjoin the cable company's digital video recorder (DVR) system.[48] The content providers claimed that Cablevision's DVR violated their exclusive

[45] *See Capital Cities*, 467 U.S. at 709.
[46] *See FilmOn X*, 2013 WL 4763414, at *11.
[47] H.R. Rep. No. 94-1476, at 64 *reprinted in* 1976 U.S.C.C.A.N. at 5678.
[48] *See Cablevision*, 536 F.3d at 121.

public performance right under section 106(4) of the Copyright Act; specifically, the networks argued that Cablevision's DVR retransmitted performances to the public by allowing subscribers to watch copyrighted works after the initial broadcast via a recorded copy of the performance stored on Cablevision's server.[49] Cablevision conceded that its DVR system performed the copyrighted works in question; however Cablevision argued that these performances were private.[50] Cablevision pointed out that the DVR system made individualized copies of the copyrighted works for its subscribers and each subscriber received a separate transmission of the performance, even if multiple users request the same underlying work.[51]

The district court granted summary judgment in favor of the copyright owners, holding that "Cablevision would transmit *the same program* to members of the public, who may receive the performance at different times…," thereby violating the public performance right under the Transmit Clause.[52] In a surprising decision, the Second Circuit reversed the district court, holding that Cablevision's DVR system involved *private* transmissions rather than public ones.[53] The court closely examined the Transmit Clause and ultimately concluded that the language of the Clause "speaks of people capable of receiving a *particular* 'transmission'…."[54] In reaching this conclusion, the court conflated the terms "performance" and "transmission" using confusing reasoning and citing a case that pre-dated the Transmit Clause by 45 years; the court noted that "[t]he fact that the statute says 'capable of receiving the performance,' instead of 'capable

[49] *Id.* at 125.
[50] *Id.* at 126.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 139.
[54] *Id.* at 135.

of receiving the transmission,' underscores the fact that a transmission of a performance is itself a performance."[55] The court was then forced to implement a tedious four-part test in order to fit its new "particular transmission" interpretation into the existing case law and legislative intent.[56] The Second Circuit recognized the possible consequences of the convoluted new system it had implemented, noting that "this holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network…."[57] In the end, the court held that each particular transmission was assigned to an individual subscriber and thus did not constitute a public performance under the court's understanding of the Transmit Clause.[58]

3. Aereo Litigation

Following the Second Circuit's ruling in *Cablevision*, a tech-savvy company devised a system to function within the safety of the *Cablevision* ruling, while allowing the company to retransmit copyrighted works to thousands of individuals. Thus, the

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[55] *Id.* at 134 (*citing* Buck v. Jewell-La Salle Realty Co., 283 U.S. 191 (1931)).

[56] To address the gaping hole created by introducing the "particular transmission" language into the Transmit Clause, the Second Circuit had to establish four guideposts to prevent circumvention of the statute:

> "[*Cablevision*] establishes four guideposts…First and most important, the Transmit Clause directs courts to consider *the potential audience of the individual transmission*…Second and following from the first, private transmissions…should *not* be aggregated. **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**. Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work. In such cases, these 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. Fourth and finally, any factor that limits the potential audience of a transmission is relevant to the Transmit Clause analysis."

Aereo, 712 F.3d at 689 (emphasis added). (Note the bolded language, highlighting the courts overall misunderstanding of the purpose of the Transmit Clause.)

[57] *Cablevision*, 536 F.3d at 139.

[58] *Id.* at 139.

court had an opportunity to revisit the Transmit Clause and the its decision in *Cablevision*.

In *Aereo*, the major broadcast networks claimed that Aereo captured and retransmitted their free, over-the-air broadcasts to the public without paying for a retransmission license.[59] Aereo operates a website where anyone with an internet connection can log-in and access live transmissions of the free network channels such as NBC, ABC, FOX and CBS; each user also has a separate, designated space on Aereo's servers where subscribers can store programs using a built-in DVR.[60] Aereo argued that it was not performing the copyrighted programming *to the public*, but rather it was engaging in private performances through multiple transmissions of the same programming.[61] Aereo claimed that under *Cablevision*, their system could not be liable for infringing on the exclusive public performance right because, like the DVR system, Aereo's system was designed to send a particular transmission to only *one* subscriber, constituting a private performance.[62] Based on the *Cablevision* holding, the Second Circuit was then forced to examine the technical design of Aereo's system.

Aereo is a website that allows its subscribers to access the major networks free, over-the-air broadcasts outside of the traditional "bunny-ear" antenna and television. Aereo has sites in several cities across the US that house thousands of tiny, dime-sized antennas, all of which are wired into Aereo's system.[63] Aereo's service works in the following way: (1) a subscriber logs onto the website, (2) one of the many dime-sized antennas in the closest location is assigned to that subscriber temporarily, (3) the

[59] *See Aereo*, 712 F.3d at 680.
[60] *Id.* at 680-82..
[61] *See generally id.* at 693.
[62] *Id.*
[63] *Id.* at 682.

subscriber then chooses a network to watch, (4) the assigned antenna is tuned to the correct broadcast frequency and begins receiving the signal, (5) the feed is then placed into Aereo's system where three buffer copies are made of various size (quality), (6) if the subscriber wishes to simply watch live, the buffer copy associated with the subscriber's bandwidth is then streamed on a 6-7 second buffer delay, (7) if the subscriber chooses to record, they may still watch the program live, but a separate copy will also be placed onto Aereo's server in the subscriber's designated space for later playback which may be rewound, fast-forwarded and paused.[64] Aereo claims that its service is not engaged in public performance because each antenna is only broadcasting a particular transmission to one subscriber.[65] Therefore, even if 50,000 subscribers are all tuned to a broadcast of the Super Bowl, each subscriber is receiving a private transmission that they alone are receiving.

In the *Aereo* opinion, the Second Circuit carefully revisited the *Cablevision* ruling, including the case law and legislative history that led to the court's conclusion in the landmark decision.[66] Despite the express warning by the court in *Cablevision* regarding the narrow scope of the holding, the Second Circuit ultimately concluded that the "particular transmission" test precluded liability on Aereo's behalf.[67] The court itself noted that while "Aereo may in some respects resemble a cable television system, we cannot disregard…that [the Transmit Clause], as interpreted by this Court in *Cablevision*, compels the conclusion that Aereo's transmissions are not public performances."[68] The Second Circuit went on to justify the holding in *Aereo*, noting that there had been

[64] *Id*.
[65] *Id.* at 693.
[66] *Id.* at 686-89.
[67] *See id.* at 696.
[68] *Id.* at 695

substantial reliance on the *Cablevision* test and "many media and technology companies" have specifically designed their systems around the *Cablevision* holding, "seek[ing] to avoid public performance liability by creating user-associated copies…."[69]

In his dissenting opinion, Judge Chin condemned the majority's form-driven analysis, calling Aereo's system a "sham".[70] Judge Chin noted that there was no sound reason for Aereo's utilization of the dime-sized antennas, and that "the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law."[71] Further, in the dissenting opinion, Judge Chin makes two very important points: (1) Aereo's system of antennas and other equipment "clearly is a 'device or process'" within the meaning of the Transmit Clause, and (2) "[e]ven assuming Aereo's system limits the potential audience for each transmission, and even assuming each of its subscribers receives a unique recorded copy, Aereo *still* is transmitting the programming 'to the public'".[72]

Judge Chin reiterated his position in an additional dissent after the broadcasters' petition for an en banc hearing was denied.[73] In this subsequent dissent, Judge Chin directly attacked the *Cablevision* precedent, arguing that the Second Circuit should review *Aereo* en banc so that the court could overrule the *Cablevision* decision, free from the constraints of stare decisis.[74] Ultimately, Judge Chin claims that the legislative

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[69] *See id*. at 695 n. 19.
[70] *Id.* at 697.
[71] *Id.*
[72] *Id.* at 698.
[73] WNET, Thirteen v. Aereo, Inc., 722 F.3d 500 (2nd Cir. 2013) (en banc) [hereafter "*Aereo en banc dissent*"].
[74] *Id.* at 506. The "stare decisis" doctrine binds a court "by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Aereo*, 712 F.3d 695.

history and decisions by other courts in the nation[75] clearly show that the Second Circuit's decisions in *Cablevision* and *Aereo* do not align with the purpose and aim of the Transmit Clause.

4. BarryDriller and FilmOn X

While the Second Circuit is the highest court to have examined the Transmit Clause as applied to Aereo-like systems, it is not the only court to have reviewed the issue. Following the decision in *Aereo*, unbound by the Second Circuit's holding, a California district court held that an Aereo-like system infringed on the copyright holder's public performance rights.[76] In *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC* (hereafter "*BarryDriller*"), the district court examined the defendant's system named Aereokiller; the court expressly noted that the system at issue was "technologically analogous" to Aereo.[77] The court went on to acknowledge that under the Second Circuit precedent of *Cablevision* and *Aereo*, the Aereokiller system would not be subject to liability, however the court refused to adopt the Second Circuit interpretation.[78] Ruling in favor of the copyright owners, the California court took the opportunity to explain its departure from the Second Circuit precedent.

First, the court pointed out the Second Circuit's convoluted justification[79] for the "particular transmission" in *Cablevision*.[80] The California court argued that this was

[75] Judge Chin focuses on the decision by a California court, which held that an Aereo-like system infringed on the copyright owner's exclusive public performance rights. *Aereo en banc dissent*, 722 F.3d at 504 n. 11 (*discussing BarryDriller*, 915 F. Supp. 2d 1138).
[76] *See generally BarryDriller*, 915 F. Supp. 2d 1138.
[77] *Id.* at 1140.
[78] *Id.* at 1146.
[79] As mentioned in this Comment, in *Cablevision*, the Second Circuit concluded that "the fact that the statute says 'capable of receiving the performance' instead of 'capable of receiving the transmission' *underscores the fact that a transmission of a performance is itself a performance.*" *Cablevision*, 536 F.3d at 134 [emphasis added].
[80] *BarryDriller*, 915 F. Supp. 2d at 1144

clearly not the only possible reading of the statute, and further reasoned that "transmitting a performance to the public *is a public performance*. It does not require a 'performance' of a performance."[81] The court goes on to note that the statute does *not* require that two members of the public receive the performance from the same particular transmission.[82]

After rejecting the Second Circuit's interpretation of the Transmit Clause, the California court reexamined the history leading up to the 1976 Act, including *Fortnightly/Teleprompter* and Congress' legislative intent to overrule the decision.[83] The court concluded that Congress found that "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and … copyright royalties should be paid by cable operators to the creators of such programs."[84] Applying Congress' view to the Aereokiller system, the California court held that the defendant's "unique-copy transmission argument" based in *Cablevision* and *Aereo* was misguided, and defendant's retransmissions infringed on the copyright holder's public performance rights.[85] Significantly, the court expressly dismissed the views of the Second Circuit, discounting the decisions in *Cablevision* and *Aereo* and concluding that those rulings were not binding in the Ninth Circuit.[86]

Moreover, in a recent decision, another district court held that an Aereo-copycat system was subject to liability. In *Fox Television Stations, Inc. v. FilmOn X LLC* (hereafter "*FilmOn X*"), the court expressly recognized the vast chasm between our nation's courts, observing that "this case could just boil down to a binary choice between

[81] *Id.* at 1144.
[82] *Id.*
[83] *See id.* at 1146.
[84] *Id.*
[85] *Id.*
[86] *Id.*

the reasoning of the Second Circuit in *Aereo* or the California district court in *BarryDriller*".[87] The district court quoted the *Aereo* decision in order to highlight the flawed reasoning of the Second Circuit, where the Second Circuit claimed that "perhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality, [but under *Cablevision*], technical architecture *matters*."[88] The district court went on to claim that this "technical architecture"-focused analysis was erroneous because entities would be able to unlawfully capture and retransmit copyrighted works without a license, simply by utilizing individual antennas and unique copies even when the antennas and copies are functionally unnecessary.[89]

The court in *FilmOn X* ultimately sided with the California district court's ruling in *BarryDriller*.[90] The court supported this position, claiming that the Second Circuit "misconstrued" the Transmit Clause and the *Cablevision* decision effectively rewrote the clause.[91] The court relied on the legislative history for the 1976 Act as a clarification of the Transmit Clause, which said "[e]ach and every method by which…a performance or display [is] picked up and conveyed is a 'transmission,' and if the transmission reaches the public in any form, the case comes within the scope of [the exclusive public performance right]."[92]

The significance of these district court decisions cannot be understated. Even with on-point Second Circuit precedent clearly pointing towards one result, these courts

[87] *FilmOn X*, 2013 WL 4763414, at *4.
[88] *Id.* at *7.
[89] *Id.* at *8.
[90] *Id.* at *1.
[91] *Id.* at *10.
[92] *Id.* at *12.

have upheld the fundamental ideals of copyright law, and emphatically rejected the Second Circuit's flawed interpretation of the Transmit Clause. While the California rulings have marked an important step in protecting the rights of copyright owners, they merely represent one viewpoint and thus Aereo and other copycat services may simply forum shop, seeking refuge within "*Cablevision*-jurisdictions".

III. The Dangers Posed by the Current Interpretation of the Transmit Clause

The Transmit Clause, by nature, deals with situations where the transmitting entity can choose one location from which they are able to send performances to distant places. As such, the ability to forum shop presents a huge hole in the copyright owner's ability to protect their work. Currently, as a result of *Cablevision* and *Aereo,* this exact circumstance is coming to fruition.[93] As infringing services are able to circumvent liability by utilizing individualized transmissions in certain jurisdictions, copyright owners cannot be assured that unauthorized public performances of their work will be held accountable. With this loophole in existence, copyright owners may go to unprecedented lengths to protect their work.

Judge Chin of the Second Circuit, in a separate dissenting opinion in *Aereo*, expressly acknowledged the extreme consequences of this, noting "[t]o protect their copyrighted material, FOX, Univision, and CBS have reportedly threatened to move their free public broadcasts to paid cable if Aereo is permitted to continue its service."[94] To be clear, Judge Chin is referring to the networks' stated threats to completely cease with their free, over-the-air broadcasts. It can be reasonably assumed that if two of the major four networks are considering removing their free, over-the-air broadcasts, the other two

[93] *See supra* note 17.
[94] *Aereo en banc dissent*, 722 F.3d at 502.

are pondering the same idea. If the major networks were to all cut their over-the-air broadcasts, the public will have absolutely no access to any television programming without a satellite or cable subscription.

As mentioned in Part I, over 50 million Americans still rely on the free, over-the-air broadcast as their only source of television. Considering the widespread availability of cable and satellite service providers, it can be reasonably assumed that a large portion of the 50 million Americans who use over-the-air broadcasts do so out of financial necessity. Thus, for the vast majority of individuals being affected, they do not have the means to simply subscribe to a cable/satellite service, if the free broadcasts were to end. Television not only allows the public to consume its favorite entertainment and sports, it is also crucial in maintaining an informed society. Broadcast television programs convey important weather updates, current events, and coverage of political debates, world news, etc. If all the major networks were to restrict access in order to prevent Aereo and copycat services from committing infringement, immeasurable harm will come to the innocent public.[95]

Even if the major networks do not decide to cease with their over-the-air broadcasts entirely, the public may see sizeable reductions in the amount of content presented on these broadcasts. Recently, the National Football League (NFL) and Major League Baseball (MLB) issued statements and legal filings, echoing sentiments by FOX and CBS.[96] The two professional sports leagues have threatened to move all games to cable television if Aereo and copycat services are permitted, even if the networks still

[95] *See supra* note 17.
[96] A "friend of the court" filing with the U.S. Supreme Court was made on November 12, 2013. *See* http://www.cnbc.com/id/101207880.

have the over-the-air broadcast available.[97] The longstanding American pastime of tailgating with portable televisions and antennas would be dead as we know it. Even more important, this would mean a key shift in the nature of television; major networks may be forced to limit the reach of their own programming by "blacking-out" some events on their over-the-air broadcast. In other words, even if NBC has rights to Sunday Night Football, the network may be forced to blackout the game on its broadcast feed, limiting the audience to cable service subscribers. This would mark the first time that an over-the-air viewer was not entitled to the same content available to a satellite or cable subscriber, with respect to the major broadcast networks.

In addition to the harm done to the public, the networks (and other copyright owners) would also suffer unjust harm. By removing the over-the-air broadcast to protect their works where the law fails, the networks lose a large portion of the viewer-base. When selling advertising space and negotiating license agreements, networks will suffer a loss of leverage, as their audience and potential reach shrinks. Consider the following example: the Super Bowl draws over television 100 million viewers, and brings in over $265 million of advertising revenue for the network that broadcasts the game.[98] If the network was forced to abandon the over-the-air broadcast of the game it follows that there will be at least a small drop in overall viewership. Even if viewership were to drop by a mere 10% (10 million less viewers), economics suggest that ad revenue would suffer a similar loss, which ends up being over $26 million in this example.

While the Super Bowl example may seem a bit overreaching with respect to ad revenue and viewership, a loss of $26 million seems minute in comparison to the total

[97] *Id.*
[98] *See* http://www.nielsen.com/us/en/newswire/2013/super-bowl-xlvii-draws-108-7-million-viewers-26-1-tweets.html; *see also* http://www.forbes.com/pictures/emdm45hje/1-super-bowl-xlvi-2012/.

potential losses. By alienating over 50 million potential viewers, the major broadcast networks will suffer an across-the-board drop in advertising revenue and licensing, all self-inflicted to remedy a broken legal regime.

The next Part of this Comment will propose a new interpretation of the Transmit Clause that will provide the desired clarity, uniting our nation's courts, and giving copyright owners the protection the law affords them.

IV. A Clarification of the Transmit Clause and a Workable Standard for Courts

This Part of the Comment sets forth a new standard for the interpretation of the Transmit Clause, and defines what constitutes a "public performance". First, the standard is presented and explained. Then, the justifications for the proposed standard are discussed, visiting important policy issues surrounding the matter.

A. The Standard

I propose a new standard for determining what constitutes a public performance under the Transmit Clause of the 1976 Copyright Act. This standard rejects the "particular transmission" interpretation of the Second Circuit in *Cablevision* and *Aereo*, largely adopting the position of the district courts in *BarryDriller* and *FilmOn X*.

As intended by Congress when enacting the Transmit Clause, this Comment proposes that the Clause be interpreted to capture all transmissions of a copyrighted work to the public, *regardless* of whether the performance is transmitted using multiple private transmissions. An important underpinning of the proposed standard is that courts should apply an entity-driven approach, focusing on retransmissions of copyrighted works emanating from one particular *entity*. This approach was suggested by the plaintiffs in

Aereo, however it was raised within the context of aggregating "particular transmissions" and was rejected for not complying with *Cablevision*.[99]

Under the proposed standard, the vital inquiry is to identify the potential audience of all transmissions of a performance coming from the specific entity in question. This standard refocuses the courts' attention, shifting the analyses to a desirable, function-based approach. The standard is to be applied as follows: when determining whether a party is subject to liability for violating a copyright owner's exclusive performance right, the court should examine the entire potential audience of the retransmissions of a performance by the party. In other words, the court looks at the underlying copyrighted performance and asks if the defendant retransmits that performance to the public, either using one centralized retransmission or many individualized retransmissions. As mentioned, this proposed standard uses an entity-focused approach, looking at every retransmission emanating from that entity to determine the potential audience of a performance. By focusing on the entity rather than particular transmissions, the proposed standard furthers the goals of copyright law and prevents infringers from escaping liability under a form-driven loophole.

It can be said that the proposed standard closely resembles the aggregation method discussed by the court in *Cablevision*. There, the court noted that the "particular transmissions" could be aggregated *if* they originated from the same copy of the underlying performance; the Second Circuit cited *Redd Horne*, in which particular retransmissions in viewing rooms at a video store may be aggregated because the video

[99] *Aereo*, 712 F.3d at 691.

store used the same video tape over-and-over.[100] In essence, the proposed standard adopts this aggregating of retransmissions, importantly however, the standard ignores whether the retransmissions originate from one particular copy of the work. By ignoring the method used to retransmit a copyrighted work, the standard departs from *Cablevision*'s narrow caveat with respect to aggregation. Rather, the new standard adopts a broader approach to aggregation, properly combining the potential audience of *all* the transmissions of a copyright work from one entity, even if multiple, individualized copies are used for the retransmission.

In discussing the aggregating of transmissions, it is extremely important to mention that this Comment in no way adopts the convoluted interpretation of the Transmit Clause that has been articulated by the Second Circuit. This Comment does not believe that the "particular transmission" language or analysis should be read into the statute at any level. The aforementioned analysis pertaining to aggregation is meant to clearly illustrate the reach and application of the proposed standard, but to be clear, this aggregation is the natural and necessary result of an entity-focused approach to the Transmit Clause.

A final note to be made regarding the proposed standard would be to point out that by focusing on one entity, the standard preserves the ability of an individual to benefit from time-shifting and other conveniences provided by technology. The fact that one particular entity, such as Aereo, may be found liable for retransmitting a work to the

[100] *See* Cablevision, 535 F.3d at 139. "Aggregation" is the act of combining individualized (private) transmissions in order to reformulate the potential audience. In *Redd Horne*, the private performances of a videotape to a single customer at a time were aggregated because all the transmissions originated from the same copy (the video tape). Thus, the potential audience in *Redd Horne* was all the customers who received a transmissions of a particular videotape, making the performances "public". *See generally* Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984).

public via individual transmissions, would not mean that all retransmissions of that work are now universally considered public. In other words, if Aereo were found liable for the unauthorized public performance of the Super Bowl using personalized transmissions, that does *not* mean that every single transmission of the Super Bowl, even those transmitted by those other than Aereo, are automatically deemed to be public as well. Thus, an individual may still use in-home DVR's to space-shift[101] and "retransmit" the Super Bowl to themselves in another room of their home, without fear that that transmission will now be deemed public due to Aereo's conduct. While this may seem straightforward and unnecessary to expressly mention, the Second Circuit articulated this particular fear when discussing the aggregation of transmissions coming from a particular entity, and the subsequent consequences of such a standard.[102]

In sum, the proposed standard applies an entity-focused interpretation of the Transmit Clause and rejects the "particular transmission" language imputed into the statute by *Cablevision*. The standard examines the total potential audience of a copyrighted work that is being retransmitted by the specific entity in question, regardless of the means used. An entity is only liable if *their* transmission(s) of a copyrighted work ultimately reach the public. This proposal provides a clear, workable formula to guide courts in determining whether a defendant is guilty of violating a copyright owner's exclusive public performance right under the Transmit Clause.

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[101] Space-shifting refers to the movement a recorded program to a different medium. For example, space-shifting would include recording a program in one bedroom on a DVR, and then using a DVR in the living room to watch that recorded program.

[102] The Second Circuit expressed fear that if aggregation was allowed in order to determine the total potential audience of a copyrighted performance, then *all* the transmissions involved in the aggregation must bear the same categorization (whether "public" or "private"). The court felt that a line could not be drawn between different entities, and thus one entity's conduct could affect the categorization of another entity's transmission. *See Cablevision*, 536 F.3d at 136.

B. Justifications for the Standard

The proposed standard finds support in a host of areas. Lawmakers and courts alike have articulated interpretations of the Transmit Clause that share common and fundamental ideals regarding the protection of copyright law for authors. These ideals are heavily represented by the proposed standard, and thus the standard is grounded from a variety of perspectives discussed below.

1. Plain Language

While the proposed standard may appear to be a novel, unique interpretation of the Transmit Clause, i.e. the entity-driven analysis and natural aggregation of retransmissions, the standard is really a straightforward interpretation of the plain language of the statute. When interpreting a statute, the general rule is that a court "must first determine whether the statutory text is plain and unambiguous."[103] Further, in the analysis of a statute, the court must "look to the provisions of the whole law, and to its object and policy."[104] Finally, the Supreme Court has expressly said that courts should accord broadly written statutes a broad interpretation because "the fact that a statute can be applied in situations not expressly anticipated by Congress does *not* demonstrate ambiguity. It demonstrates breadth."[105] The proposed standard embraces this general approach to the statutory interpretation, focusing on the plain and unambiguous language of the Transmit Clause.

As discussed in Part II, the Transmit Clause says that to publicly perform a work is " to transmit ... a performance ... of the work ... to the public, by means of any device or process, whether the members of the public ... receive it in the same place or in

[103] *FilmOn X*, 2013 WL 4763414, at *13 (*quoting* Carcieri v. Salazar, 555 U.S. 379, 387 (2009)).
[104] *Id.* (*quoting* U.S. Nat'l Bank of Or. V. Indep. Ins. Agents of Am., Inc. 508 U.S. 439, 455 (1993)).
[105] *Id*. (*quoting* PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001)).

separate places and at the same time or at different times."[106] First, the proposed standard is in line with the "plain and unambiguous" language of the statute. The standard looks at the entity in question and asks if they retransmit the work to the public either by a single transmission, multiple individualized transmissions, or some other method. The Transmit Clause specifically states that it is a public performance even if "members of the public...receive it...in separate places and...at different times."[107] By disregarding the manner of the retransmission and instead focusing on the entity's ultimate reach with respect to a copyrighted performance, the proposed standard is clearly aligned with this plain and unambiguous language.

Second, when comparing the proposed standard with the "object and policy" of the Transmit Clause, it is clear that the standard embraces the big picture purpose and aim of the "whole law." The object of copyright law with respect to public performance rights is that an author should be encouraged to exhibit their work for enjoyment by the masses, while retaining control and benefit of that performance and future performances. The Transmit Clause is designed to protect this right by enacting a process-neutral statute that prevents unauthorized persons from publicly performing a copyrighted work via transmission by any means. The proposed standard furthers this object and policy, giving copyright owners the control over performances of their work by removing technological-based loopholes established by the flawed reasoning of the Second Circuit.

Finally, the proposed standard accords the Transmit Clause the appropriate breadth intended by Congress. As mentioned, a statute's broad language should not be interpreted as ambiguity; rather, this language demonstrates the intended broad reach of

[106] 17 U.S.C. 101
[107] *Id.*

the statute.[108] The plain language of the statute exhibits exceptional breadth by incorporating broad, sweeping language such as "to transmit *or otherwise communicate*," "by means of *any* device or process," and "receive it in the same place *or* in separate places *and* at the same time *or* at different times."[109] This broad language used in the Transmit Clause makes perfect sense, as the statute seeks to address conduct that utilizes technology and therefore *must* be drafted broadly in order to adapt with the blistering pace of technological innovation and unforeseeable inventions. Unlike the Second Circuit, who sees ambiguity in the broad language, this Comment's standard recognizes that the language represents intent for a wide-reaching statute. The proposed standard applies a process-neutral, entity-focused approach that captures infringing conduct by ignoring the particulars means used to transmit a copyrighted work, thereby embracing the breadth of the statute.

The foregoing analysis makes clear that the proposed standard seeks to establish a workable test incorporating the plain language of the statute. By examining the text of the Transmit Clause at multiple levels, this Comment's standard is well-grounded and simply synthesizes the language and goal of the statute.

2. Congressional Intent

If a court is still unclear as to the meaning of the Transmit Clause despite the plain language discussed above, the legislative history clearly indicates Congress' intent behind the statute and clears up any possible confusion surrounding the meaning. The Transmit Clause was adopted in the 1976 Copyright Act and was an express declaration

[108] *See* cases cited *supra* note 99.
[109] 17 U.S.C. 101

by Congress in response to two Supreme Court cases in 1968 and 1974.[110] As discussed in Part II, Congress sought to overturn the decisions in *Fortnightly* and *Teleprompter* and specifically render the individual-transmission-based system illegal by enacting a broad statute that captured transmissions by "any device or process".[111] In doing so, the Congress made clear that it did not want liability to turn on the technical details of an entity's retransmissions.

To prevent any confusion with respect to the breadth of the Transmit Clause, Congress took extra steps to ensure that the statute was as flexible as possible. In the definitions portion of the Act, Congress separately defined "device" and "process" to include "[any] now known or later developed."[112] Further, the legislative history supports this broad interpretation, saying "[t]he definition of 'transmit' … is broad enough to include *all conceivable forms and combinations* of wires and wireless communications … including *but by no means limited* to radio and television broadcasting as we know them."[113]

The proposed standard fully complies with this legislative intent. In focusing on the entity at issue, as opposed to the particular means or transmissions used, the standard can capture all culpable conduct and destroys the opportunity to avoid liability by exploiting technological loopholes. Take the *Aereo* case for example, the proposed standard would be able to easily cut-through Aereo's complex retransmission system by simply looking at Aereo and asking if their system, as a whole, performs a copyrighted work to the public, at the end of the day. This example helps to illustrate the standard's

[110] *Sony Corp*., 464 U.S. at 469 n. 17; *H.R. Rep* No. 94-1476, at 63.
[111] *Id.*
[112] 17 U.S.C. 101.
[113] *H.R. Rep* No. 94-1476, at 63.

appropriate interpretation and application of the Transmit Clause as envisioned by Congress, who claimed that "if the transmission reaches the public in any form, the case comes within the scope" of the public performance right.[114]

3. Judicial Interpretation

The Second Circuit's decision in *Cablevision* provided the foundation for the "particular transmission" analysis that has guided courts in determining whether a transmission of a copyrighted work constitutes a public performance. While *Cablevision* presents a viewpoint that stands diametrically opposed to that of this Comment and the proposed standard, it is important to address this case when introducing the new standard, as it is has become an unfortunate landmark in this area of the law and followed in *Aereo*. The court in *Cablevision* was unable to adopt the broad interpretation of the Transmit Clause intended by Congress, fearing that if an inquiry focuses on the potential audience of a *performance* as opposed to a particular transmission, it would lead to untenable results of unjustified liability. In other words, the court said that if the analysis looked at a performance and deemed it to have a public audience, then each transmission would necessarily constitute a public performance; thus, if a "hapless customer…records a program in his den and later transmits the recording to a television in his bedroom" he would be violating the public-performance right (even though that individual would clearly not be performing the work to the public).[115]

Without giving any credit to this unrealistic proposition, the proposed standard actually accommodates the Second Circuit and quells their fear without having to overhaul the statute as done in *Cablevision*. By focusing on the entity, the "hapless

[114] HR Rep 94-1976, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678.
[115] *Cablevision*, 536 F.3d at 136.

customer" could never be found liable for publicly performing the work because his retransmission from the den to the bedroom at no point reaches the public. Therefore the new standard's entity-based approach, as opposed to the "particular transmission" approach, protects innocent individuals from liability based on the underlying classification of a particular copyrighted performance, yet does not create loopholes within the statute in order to do so.

While the proposed standard ultimately stands in opposition to the Second Circuit in *Cablevision* (and *Aereo*), the standard finds direct support in the decisions in *BarryDriller* and *FilmOn X*. In those cases, California district courts held that the Second Circuit's unique transmission analysis was misguided and held that a system that retransmits a copyrighted performance to the public, regardless of the means, is liable to the copyright owner.[116] In those cases, the court didn't expressly state that the analysis should be an entity-driven one, but their reasoning clearly exhibits this thought process.[117] The court in *FilmOn X* pointed out that the "mini-antennas are networked together so that a *single* tuner server and router, video encoder, and distribution endpoint can communicate with them all."[118] The court goes on, "[t]he television signal is captured by FilmOn X and passes through FilmOn X's single electronic process…."[119] Here, the court is ignoring all the individualized transmissions that result from the mini-antennas and concluding that they all ultimately go through FilmOn X's system, referring to FilmOn X as the "original source."[120] This is simply the embodiment of the proposed

[116] *See generally FilmOn X*, 2013 WL 4763414, at *13-15; *also BarryDriller*, 915 F. Supp. 2d at 1143-1146.
[117] *Id.*
[118] *FilmOn X*, 2013 WL 4763414, at *14.
[119] *Id.*
[120] *Id.*

standard, which looks at the entity as the "original source" and asks if they transmit a work to the public, considering every single component and data piece that passes through their system. Thus the proposed standard not only accommodates the Second Circuit's unreasonable qualms, but also finds substantial support in the decisions of the California courts.

4. Public Policy Issues

The proposed standard finds support from both a statutory and judicial standpoint, but the final area is especially important. From a public policy standpoint, the proposed standard strikes an important balance between preserving copyright owners' rights and encouraging dissemination of works of authorship. The protections afforded to copyright owners, including the exclusive public performance right, are designed to encourage the sharing of the work with the masses. Without the safeguards provided by the Transmit Clause and the 1976 Copyright Act more generally, copyright owners may resort to greatly limiting the exhibition of their works in order to maintain control.

The proposed standard provides the necessary assurance to copyright owners (including the networks) that they can freely share their works without worrying that a method may be devised by a particularly innovative entity to exploit their work. Networks such as FOX and CBS may continue to broadcast their programming to the millions of Americans who rely on it, and may successfully seek redress against services like Aereo who devise systems to gain commercial profit retransmitting the broadcast without a proper license.

In addition to providing copyright owners with the necessary protections to facilitate distribution and exhibition, the proposed standard sets realistic bounds to the

copyright owner's ability to control the work. By focusing on the particular entity at issue, an individual may still benefit from time and space-shifting technology such as the DVR. Even if the Super Bowl is viewed by millions of people across the country, an individual (or single entity) can retransmit a performance of the Super Bowl to himself and a private audience at a different time and different place, because the performance is a private one. Put simply a cable subscriber can record the Super Bowl on his DVR in his bedroom, and then retransmit the program to his living room and watch the game with his son without fear of liability under the new standard. Thus, the standard provides the public with right to consume content on their terms, while striking an important balance of protecting copyright owners' rights. By striking this balance, the proposed standard furthers the policy goal of providing sufficient protection to justify distribution of copyrighted works to the public, including the invaluable over-the-air broadcasts provided free of charge by the major networks.

In sum, the proposed standard finds validity in the plain language of the Transmit Clause, the legislative intent behind the statute, judicial opinions, and important public policy concerns. In the next Part of this Comment, the proposed standard will be applied to some of the landmark cases discussed thus far.

V. Reexamining Case Law Under the New Standard

By applying the new standard to the case law discussed in this Comment, I will seek to demonstrate the ease of application and desirable outcomes. The cases not only include landmark decisions from the Second Circuit and California district courts, but also cases that have become an integral part of the current legal landscape surrounding the Transmit Clause.

A. Fortnightly / Teleprompter

The facts of *Fortnightly* and *Teleprompter* are largely the same. Decided in 1968 and 1974 respectively, these cases have been expressly proclaimed to be inspiration for the Transmit Clause.[121] The cases, discussed in Part II, involved an entrepreneur who installed a large antenna on the top of hills in areas with bad reception, and retransmitted over-the-air broadcasts to members of surrounding communities, for a fee.[122] The so-called subscribers would have an individual transmission sent from the antenna to their home. [123]

Under the proposed standard, the entrepreneur would clearly be liable for the fee-based service he is providing. The inquiry would look at the entrepreneur and his system and ask, as a whole, does he transmit copyrighted works to the public. The answer is easy to find and completely reasonable; the entrepreneur is absolutely publicly performing because he is using his antennas to retransmit to multiple subscribers, it is irrelevant if he is using individualized transmissions to each home.

Though the result provided by the proposed standard would overturn the Supreme Court, twice, this is exactly what the Congress had in mind when enacting the law.[124] Thus, with respect to *Fortnightly*/*Teleprompter*, the proposed standard is both easy to apply and produces the desired results.

B. Cablevision

The Second Circuit's decision in *Cablevision* involved a confused parsing of the language of the Transmit Clause.[125] Through the lens of the proposed standard,

[121] *See Sony*, 464 U.S. at 469 n. 17.
[122] *Fortnightly*, 392 U.S. at 391-94.
[123] *Id.* at 400.
[124] *See supra* note 118.
[125] *See generally Cablevision*, 536 F.3d at 134.

Cablevision becomes another simple decision. In that case, Cablevision operated an RS-DVR system in which every subscriber received an individualized transmission of a copyrighted performance.[126] The transmissions were copies that were made from the original stream that Cablevision received from the networks.[127]

Under this Comment's standard, Cablevision's RS-DVR system would be infringing on the copyright owners' public performance right if Cablevision did not obtain an additional license above and beyond their broadcast license. If a court examines Cablevision's system, it becomes clear that the RS-DVR system retransmits copyrighted works to the public because a huge number of subscribers may receive retransmissions of the same copyrighted performance. It does not matter that each subscriber receives a unique transmission, because the analysis simply focuses on Cablevision and asks if they transmit a performance to the public regardless of how it gets there.

C. BarryDriller / FilmOn X

As mentioned in Part III, the proposed standard finds direct support in the California district court opinions in *BarryDriller* and *FilmOn X*.[128] It follows that the outcomes of those cases would remain unchanged if re-examined under the proposed standard.

D. Aereo

The most important case to reexamine under the new standard is the Second Circuit's decision in *Aereo*.[129] The court's decision in this case is especially important

[126] *Id.* at 124-26.
[127] *Id.*
[128] *See supra* note 110.
[129] *Aereo*, 712 F.3d 676.

for two reasons: first, the case has recently been granted certiorari, presenting an opportunity for the Supreme Court to settle the issue and provide a universal standard to unite the nation's courts; second, Aereo's system presents the most effective method to circumvent copyright laws, leading to copycat services popping up all around the country, including the ones discussed above. Aereo's system is described in detail in Part II, but a quick summary is helpful; Aereo owns thousands of tiny antennas that they store on circuit boards in a variety of cities across the country. Aereo connects these antennas to their system which then acts as a circuit board, redirecting antennas to particular subscribers allowing the user to watch live copyrighted broadcasts as well as offering a remote DVR service.[130] It is important to note that while Aereo's system uses individualized transmissions that are only sent to a single subscriber, all of these transmissions ultimately pass through Aereo's system at some point, and Aereo owns all of the hardware involved in this massive retransmission.[131]

The Second Circuit permitted this conduct by Aereo, claiming that unfortunately, the technical details mattered and thus Aereo's transmissions were private.[132] The proposed standard would overturn the court's decision, and this Comment encourages the Supreme Court to do the same. Under the standard, the technical details *do not* matter and Aereo is publicly performing the copyrighted works. Although each individual transmission is viewed only by a private audience, the proposed standard looks at *all* the transmissions of a performance that Aereo is responsible for and uses this as the potential audience. Because Aereo's system allows thousands of subscribers to receive a

[130] *See supra* note 64 and accompanying text.
[131] *Id.*
[132] *See supra* note 88.

transmission of the same performance, the system is performing the work to "members of the public".

By simply focusing on Aereo and their entire system, including all the hardware they own, the proposed standard captures the unauthorized performances. As expressly noted by the courts, Aereo's system is actually an inefficient setup, designed specifically to circumvent liability by exploiting a loophole created by *Cablevision*. The proposed standard remedies this untenable result after a straightforward analysis and holds Aereo to the same licensing requirements as legitimate cable and satellite providers, thereby alleviating the aforementioned concerns of the major networks and content providers such as the FOX and the NFL.

VI. Conclusion

Despite clearly broad language and unambiguous terms, the Transmit Clause has been subject to intense scrutiny and varying interpretations among the courts in this country. The proposed standard offers an alternative interpretation which synthesizes case law, statutory language, and legislative intent. The standard embraces the ideals of the California district courts and addresses potential fears expressed by the Second Circuit. The standard can be applied in any situation, without fearing that technological innovation will render it worthless.

With the major networks and professional sports leagues threatening to remove the free, over-the-air broadcasts relied on by millions of Americans for news and entertainment, the urgency of the issue cannot be understated. Courts across the country stand divided on their interpretation of the Transmit Clause and technologically creative and innovative companies are beginning to forum shop and take advantage of statutory

loopholes created by the nation's courts. The time has come for the Supreme Court to examine the Transmit Clause, and this Comment purports that the proposed, entity-driven approach presents the most flexible standard, which embraces the fundamental ideals of copyright law.