

# BECOMING UNPLUGGED: WITHOUT A COMPULSORY LICENSE, INTERNET BROADCAST TELEVISION POWERS DOWN

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I. INTRODUCTION .....	122
II. BACKGROUND .....	125
A. <i>Relevant Parts of the Copyright Act of 1976</i> .....	125
1. Exclusive Right of Public Performance .....	125
2. Copyright Infringement .....	126
B. <i>Historical Development of Compulsory Licenses</i> .....	126
C. <i>Recent Developments – Broadcasting Without a License</i> .....	128
1. Circuit Split – Second and Ninth Circuits .....	129
2. Supreme Court – <i>American Broadcasting Company, Inc. v. Aereo, Inc.</i> .....	131
D. <i>The Problem – New Methods of Broadcasting</i> .....	132
III. ANALYSIS .....	132
A. <i>Broadcast Compulsory Licenses Remain Relevant</i> .....	133
1. The Initial Rationale for Implementing Compulsory Licenses .....	133
a. Mitigating Monopolistic Behavior .....	133
b. Easing the Burden Between Content and Service Providers .....	134
c. Dispute Resolution .....	135
d. Economically Beneficial to Underdeveloped Companies .....	136
2. Abandoning Compulsory Licenses .....	137
a. Statutory Licenses are Categorically Unconstitutional .....	137
b. Statutory Licenses are Commercially Obsolete .....	138
c. Unsuccessful Implementation of Public Policies .....	139
3. Rationale for Retaining, but Modifying Compulsory License Statutes .....	140

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B. <i>The Structure of Sections 111 and 119 Prevent Innovation</i> .....	141
1. Definitional Language is Too Narrow .....	141
a. Section 111 Defines Cable Broadcasting Systems .....	142
b. Section 119 Defines Satellite Broadcasting Systems .....	143
c. No Section Defines Internet Broadcasting Systems .....	143
2. Language Structure Excludes Alternative Broadcasting Methods .....	144
a. Supreme Court’s Rationale in <i>Aereo</i> .....	144
b. <i>Aereo</i> Subsequently Denied a License – Files Bankruptcy .....	145
c. Section 111 was Never Intended to Extend to Internet .....	146
d. Internet Broadcasting Technology is Materially Different .....	147
3. Narrow Language Restricts Options for Innovative Technologies .....	149
C. <i>Change in Broadcasting Form Necessitates a Change in Compulsory Licensing Language</i> .....	150
1. Broadcasting Methods have Developed Beyond the Licensing Language .....	150
a. Active Content Delivery Systems – Technical Structure of Cable and Satellite Services .....	151
b. Passive Content Delivery Systems – Technical Structure of Internet Broadcasting .....	151
c. Cable and Satellite Services are Bridging the Gap Between Content Delivery Systems .....	152
2. Existing Broadcasting Methods are Categorically Distinguishable .....	152
a. Active Content Delivery Systems are Similar Enough for Categorization .....	152
3. Proposal of Solutions .....	153
a. Rewrite the Licensing Statutes to Reflect the Technical Division of Methods .....	153
b. Benefits of this Solution .....	154
IV. CONCLUSION .....	154

## I. INTRODUCTION

“[I’m] sure this occasion must be as gratifying to you as it is to me and to the rest of us. . . . You’ve watched [television] come from the cradle and learn to creep, and today, I’m glad to say, marks a new epoch in the new

development of this child.”<sup>1</sup> On July 7, 1936, Radio Corporation of America (“RCA”), and the National Broadcasting Company (“NBC”) commenced the first public demonstration of television broadcasting with this message.<sup>2</sup> Now just a relic, the contents of this radio wave transmission were once considered valuable intellectual property that belonged to RCA and NBC as copyrighted material.<sup>3</sup>

At the time of the original transmission, the owners of this broadcasted material owned various rights in the work; by today’s standards, they would own the right to publically perform the copyrighted work.<sup>4</sup> However, at the time of this transmission, the world did not yet know of the videocassette recorder, a digital video recorder, or the Internet.<sup>5</sup> Although early on access to the broadcasted content was free, access was only achievable by those owning an antenna placed in such a way as to receive the clear signal.<sup>6</sup> But the world of broadcasting has changed incredibly since the world first was graced with television.<sup>7</sup> Instead of being required to own an antenna to acquire access to a signal transmitted by a broadcasting network, the consumer has the ability to gain access by other means.<sup>8</sup> Further, this access is supplemented by the ability to time-shift and place-shift the content, providing consumers with a more user-friendly experience.<sup>9</sup> The broadcasting network is no longer in exclusive control of when or even how the viewer can access or receive the content, and this has given rise to significant issues in the area of copyright law, most notably violations of public performance rights.<sup>10</sup> These developing methods of accessing content

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<sup>1</sup> Historycomestolife, *First Television Broadcast NBC/RCA July 7, 1936 Part 1 of 2*, YOUTUBE (Jan. 28, 2014), <https://www.youtube.com/watch?v=6iWJ5LObN2o>.

<sup>2</sup> *Early Electronic Television*, EARLY TELEVISION MUSEUM, [http://www.earlytelevision.org/rca\\_field\\_trls.html](http://www.earlytelevision.org/rca_field_trls.html) (last visited Apr. 15, 2016).

<sup>3</sup> Act of Aug. 24, 1912, Pub. L. No. 62-303, 37 Stat. 488; *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.09 (2015). Motion pictures, although not expressly included in the Copyright Act of 1909, was later added to sections 5(l) and (m) of the Act. *Id.*

<sup>4</sup> 1909 Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075; 17 U.S.C. § 106(4) (2012).

<sup>5</sup> *See generally* Elisha Hartwig, *Tech Time Machine: TV and Media Consumption*, MASHABLE, <http://mashable.com/2015/01/04/tv-media-tech-ces/> (last visited Apr. 15, 2016).

<sup>6</sup> Aditya Pisharody, *The Future of Television: Will Broadcast and Cable Television Networks Survive the Emergence of Online Streaming?* (May 2013) (unpublished B.S. thesis, New York University) (on file with the *University of Dayton Law Review*).

<sup>7</sup> *See generally* *Historical Periods in Television Technology*, FED. COMM. COMMISSION, <http://transition.fcc.gov/omd/history/tv/> (last visited Apr. 15, 2016).

<sup>8</sup> *See The Opportunities and Threats from Next Generation Television*, PAC. TELEVISION COUNCIL 1, 1 (2012), [http://www.ptc.org/ptc12/images/papers/upload/PTC12\\_T6\\_Rob%20Frieden%20%28Paper%29.pdf](http://www.ptc.org/ptc12/images/papers/upload/PTC12_T6_Rob%20Frieden%20%28Paper%29.pdf).

<sup>9</sup> *Id.*; Mark Huffman, *More Consumers are Getting Their TV from the Internet*, CONSUMERAFFAIRS (Apr. 25, 2014), <http://www.consumeraffairs.com/news/more-consumers-are-getting-their-tv-from-the-internet-042514.html>.

<sup>10</sup> Andrew Fraser, Note, *Television A La Carte: American Broadcasting Cos. v. Aereo and How Federal Courts’ Interpretations of Copyright Law are Impacting the Future of the Medium*, 20 B.U. J. SCI. & TECH. L. 132, 136 (2014) (“Consumers primarily used [the VCR] for ‘time-shifting’ purposes, meaning that they would record a program in order to view it at a later time.”); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984) (noting that the time-shifting capabilities of the VCR implicate public performance rights under copyright law, and they came under scrutiny by the Supreme Court in the mid 1980’s).

have shown consumers that their viewing options are increasingly customizable, and that cable and satellite providers may not be in their favor.

The specific problem this Comment addresses is the juxtaposition between rapidly innovative broadcasting technology and the relatively static nature of the relevant copyright laws concerning compulsory broadcast licenses. While innovative methods of broadcast television begin to emerge in an established content distribution market, the laws regarding base compensation for broadcasting copyrighted material remain stagnant.<sup>11</sup> In order to avoid taking two steps backward regarding innovative television broadcast methods, it is time to revisit the 1976 Copyright Act and reconstruct the language of broadcast compulsory licenses in a way that is mutually beneficial to both the copyright owners and the companies hoping to establish themselves in a developed market.

Part II illustrates and explains the exclusive rights granted to the broadcasting companies as copyright owners by providing a brief synopsis pertaining to the historical development and use of compulsory licenses in copyright. Further, this Part gives an overview of the case law landscape surrounding broadcast transmission and copyright licensing, and defines precisely what the problem is with the recent holding of the Supreme Court.

Part III of this Comment analyzes the current linguistic structure of copyright compulsory licenses concerning television broadcasting, and asserts that while the use of compulsory licenses remains necessary to encourage innovation with minimal risk while simultaneously protecting the rights of authors, the current statutory language fails at supporting innovative broadcasting technologies, and therefore requires a revision to remain consistent with the objective of copyright law. The current licensing structure hinders innovation by excluding unaccounted for technologies, like Internet broadcasting and other future technological developments on the horizon. This change in television broadcasting and the implementation of streaming television is founded on a single concept; the viewer wants control over their content.<sup>12</sup> Re-categorizing the compulsory licensing schemes to reflect this change will invite innovative broadcasting technologies and methods, while providing just compensation to copyright owners for the use of their works no matter the content delivery system. In order to accomplish these ends, the

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<sup>11</sup> ABC, Inc. v. Aereo, Inc. (*Aereo III*), 134 S. Ct. 2498, 2503 (2014) (ruling that retransmission of television broadcasts over the Internet without authorization from the copyright owners violated their public performance rights, and is an infringing activity). Subsequent to this ruling, Aereo was denied a compulsory license because it did not meet the statutory definition of a cable company and was forced to cease operating completely. See Megan Geuss, *Aereo Puts Operations on Hold, Refunds Customers Last Paid Month*, ARS TECHNICA (June 28, 2014, 7:40 PM), <http://arstechnica.com/tech-policy/2014/06/aereo-puts-operations-on-hold-refunds-customers-last-paid-month/>.

<sup>12</sup> Merrill Barr, *2013 is Television's Most Innovative Year in Decades*, FORBES (Dec. 2, 2013, 9:13 AM), <http://www.forbes.com/sites/merrillbarr/2013/12/02/2013-is-televisions-most-inavative-year-in-decades/>.

current statutory licenses must be reformed to account for both existing and future methods of broadcasting.

## II. BACKGROUND

Compulsory licensing pertaining to television broadcasting is narrow, despite the many complex concepts at work. This Part first describes the sections of the 1976 Copyright Act that are of significant relevance. Then, this Part examines the historical development and implementation of compulsory licenses throughout the history of copyright law, as well as the events leading to the licenses currently in effect. Next, this Part will provide a snapshot of the recent landscape of judicial input regarding copyright law, public performance rights, and the strict boundaries of the compulsory licenses for broadcast television. Finally, this Part will illustrate the problem regarding recent court holdings and the future of television broadcasting.

### *A. Relevant Parts of the Copyright Act of 1976*

Enacted in 1976, the Copyright Act serves “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .”<sup>13</sup> Within the various sections, the Act provides legal protection for numerous forms of creative and artistic works of authorship bearing a low modicum of creativity, however basic or complex.<sup>14</sup> The Act furthers the progress of useful arts by granting authors exclusive rights to exploit the economical fruits of their creativity. Among these rights, is the right of public performance, which is granted to the creators of audiovisual works.

#### 1. Exclusive Right of Public Performance

The content of a single broadcasted channel falls into the definition of an audiovisual work, and is thus the type of subject matter protected under the 1976 Copyright Act.<sup>15</sup> The owners of that content, in this case the broadcasting companies, enjoy certain exclusive rights in their work.<sup>16</sup> Among others, the owners of audiovisual works enjoy the exclusive right of public performance, and have a cause of action for infringement against those publically performing their works.<sup>17</sup> This right of public performance contemplates the owners’ ability to disseminate their works of authorship to the public, who, having no rights in the content itself, can freely enjoy it.<sup>18</sup> However, when an entity collects and redistributes the same content for profit,

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<sup>13</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>14</sup> 17 U.S.C. § 102(a) (2012).

<sup>15</sup> *Id.* §§ 101, 102(a)(6).

<sup>16</sup> *Id.* § 106.

<sup>17</sup> *Id.* §§ 106(4), 501(b).

<sup>18</sup> *Id.* § 101.

it gives rise to a copyright infringement cause of action.<sup>19</sup> Specifically, a secondary retransmission of content over a cable or satellite system without proper authorization is considered a violation of an author or owner's public performance rights.<sup>20</sup>

## 2. Copyright Infringement

When a third party violates any of the exclusive rights granted to copyright owners under the 1976 Copyright Act, that person or entity has infringed the rights of the copyright owner.<sup>21</sup> This violation provides the copyright owner with a cause of action against the infringing party for either direct or indirect infringement, depending on the nature of the violation.<sup>22</sup> However, that third party may be able to exercise, on a limited basis, some of the exclusive rights of a copyright owner by seeking permission from the copyright owner. Generally, this is obtained through some form of licensing agreement that grants the licensee limited or unlimited rights to exercise some or all of the exclusive rights for a limited or unlimited time in either a limited or unlimited geographical scope. Those details, usually decided through the course of negotiation, are up to the parties to decide. But undertaking the sometimes daunting task of private license negotiations may not be economically feasible for smaller license-seeking parties.<sup>23</sup> Alternatively, the potential licensee can seek to utilize a statutory, or compulsory license.<sup>24</sup>

### *B. Historical Development of Compulsory Licenses*

A compulsory license is an arrangement provided by the 1976 Copyright Act that "requires an owner of a copyrighted work to permit any person use of the copyrighted work for an established fee."<sup>25</sup> By operation, a copyright owner is compelled to license their work at a rate stipulated by the language set forth in the 1976 Act.<sup>26</sup> Today, there are several provisions in the 1976 Act that provide compulsory licenses for various types of works of authorship.<sup>27</sup> However, this was not always the case. The compulsory

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<sup>19</sup> *Id.* § 501(b).

<sup>20</sup> *Id.* § 501(c)–(e).

<sup>21</sup> *Id.* § 501(a).

<sup>22</sup> *Id.* § 501(b).

<sup>23</sup> H.R. REP. NO. 94-1476, at 89 (1976) ("[I]t would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.").

<sup>24</sup> See 17 U.S.C. §§ 111, 119.

<sup>25</sup> Alan M. Fisch, *Compulsory Licensing of Blacked-Out Professional Team Sporting Event Telecasts (PTSETS): Using Copyright Law to Mitigate Monopolistic Behavior*, 32 HARV. J. ON LEGIS. 403, 410 (1995) (internal citation omitted) (citing J. THOMAS MCCARTHY, MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 51–52 (1991)).

<sup>26</sup> *Id.* at 410.

<sup>27</sup> See 17 U.S.C. § 111 (secondary retransmission of broadcast cable television); *id.* § 115 (making and distribution of phonorecords); *id.* § 116 (public performance of musical compositions on jukeboxes); *id.* § 118 (use of music and works of art on public broadcasting); *id.* § 119 (satellite transmission for private home viewing).

licenses were developed over time as more innovative technologies developed and evolved to take the shape in which they exist today.

The first compulsory license was adopted in 1909 in response to exclusive licensing agreements held between music publishers and manufacturers of player piano rolls.<sup>28</sup> Composers of music brought claims of equity in court to enjoin producers of mechanical music rolls for use in connection with a player piano.<sup>29</sup> The Supreme Court held that “[the] perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.”<sup>30</sup> This holding permitted manufacturers of mechanical reproductions of musical compilations to profit off of the reproduction of the music without being bound to any licensing agreement, so long as the reproduction was mechanical in nature. Congress, in response, negated this holding by adopting the Copyright Act of 1909, effectively providing compensation to the musical composers for the mechanical reproduction of their compositions.<sup>31</sup>

As time progressed, new technologies gave birth to similar issues. The broadcasting and recording technology and development expanded the ways in which people could enjoy musical and audiovisual compositions.<sup>32</sup> Authors became increasingly frustrated by radio broadcast stations performing their compositions without receiving any form of payment whatsoever.<sup>33</sup> Radio broadcasters were enjoying the benefit of disseminating music without paying for it. The 1909 Copyright Act did not contain any protection for musical performances, and so the musical composers had little, if any, authority to request payment for playing their music over the air.<sup>34</sup>

This same problem was replicated in the growing television broadcast industry. Many cable television systems were engaging in broadcast retransmissions of distant television signals without compensating the broadcasting company or the copyright owner.<sup>35</sup> Copyright owners of the broadcasted content began to utilize the court system to attack cable television retransmission as infringing public performance under the 1909 Copyright

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<sup>28</sup> Fisch, *supra* note 25, at 418 (internal citations omitted); *see also* White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1 (1908).

<sup>29</sup> *White-Smith Music Publ’g Co.*, 209 U.S. at 18. Musical rolls that were manufactured and produced for use in connection with machines able to reproduce the musical compilations were not copies for the sake of the 1909 Copyright Act, and the manufacture thereof could not be enjoined by copyright law, therefore, the music rolls were not infringing copyrights owned by the musical composers. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Dan Garon, Note, *Poison ivi: Compulsory Licensing and the Future of Internet Television*, 39 IOWA J. CORP. L. 173, 179–80 (2013).

<sup>32</sup> *Id.* at 180.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 181.

Act.<sup>36</sup> Much like in 1908, when the Court was unconvinced that the music roll for the piano was a copy,<sup>37</sup> the Court in the 1960's was also unconvinced that cable broadcast retransmission systems were violating performance rights, and rejected the copyright owner's attempt to assert their rights.<sup>38</sup> Despite the failure in the courts, the copyright owners were not without options. By 1966, the broadcasters had convinced the Federal Communications Commission ("FCC") to create rules restricting cable television broadcast retransmission.<sup>39</sup>

Recognizing the growing tension between broadcasters and cable companies, Congress sought to bring the actions of cable companies within the borders of copyright law.<sup>40</sup> In doing so, Congress essentially did three things: (1) declared cable television retransmission a public performance of copyrighted work by enacting the Transmit Clause; (2) established a compulsory license scheme for rebroadcasted television; and (3) expressly defined what constitutes a cable system.<sup>41</sup> This revision of the copyright law effectively eliminated the *Fortnightly* and *Teleprompter* decisions and established rules that served to protect the interest of broadcasters and copyright owners.<sup>42</sup>

The use of compulsory licenses to protect both the interests of the copyright owner, as well as those hoping to utilize the copyrighted work to generate revenue is not a novel concept. Their development has taken shape over the course of 100 years and serves "as [an] interim arrangement[] to preserve a balance between the extremes of full and no liability during periods of technological or other change."<sup>43</sup> However, one of the primary concerns is that while "copyright law continue[s] to develop alongside technology, . . . [it is] not developing quickly enough."<sup>44</sup>

### C. Recent Developments – Broadcasting Without a License

The current landscape of case law pertaining specifically to Internet television broadcast and public performance rights is relatively novel, with

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<sup>36</sup> *Id.*

<sup>37</sup> *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908).

<sup>38</sup> *Teleprompter Corp. v. Colum. Broad. Sys., Inc.*, 415 U.S. 394, 409 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400–02 (1968); Garon, *supra* note 31, at 182.

<sup>39</sup> Garon, *supra* note 31, at 182. These promulgated rules became effective in 1972 and imposed requirements for cable providers that effectively prevented cable companies from directly competing with broadcasters. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 182–83.

<sup>42</sup> *Teleprompter Corp.*, 415 U.S. at 409; *Fortnightly Corp.*, 392 U.S. at 400–01; Tim Warnock, *Feature Story: What's in the Middle of an Aereo? Technology Versus the Copyright Act*, 50 TENN. B.J. 22, 24 (2014); *see also* Aereo III, 134 S. Ct. 2498, 2504–05 (2014).

<sup>43</sup> Michael Botein & Edward Samuels, *Compulsory Licenses in Peer-to-Peer File Sharing: A Workable Solution?*, 30 S. ILL. U. L.J. 69, 70 (2005).

<sup>44</sup> Amanda Asaro, Comment, *Stay Tuned: Whether Cloud-Based Service Providers Can Have Their Copyrighted Cake and Eat It Too*, 83 FORDHAM L. REV. 1107, 1116 (2014) (citing Kurt E. Kruckeberg, *Copyright "Band-Aids" and the Future of Reform*, 34 SEATTLE U. L. REV. 1545, 1546–50 (2011)).

many of the cases being decided within the last five years.<sup>45</sup> This is partially because the Internet itself is still infantile in comparison; other content delivery systems have been established for many years. But, the ability to access broadcast television online is becoming easier due to faster Internet speeds and this is breathing life back into the conversation.<sup>46</sup> Entrepreneurs with an eye toward the future of television, and the consumers' demand to reduce monthly household costs are driving this change.<sup>47</sup> The effect of increased Internet television broadcasting has impacted revenue generated by advertising efforts on the cable and satellite networks, and is forcing parties to the courtrooms to protect their business interests.<sup>48</sup> The plaintiffs in these cases are ultimately alleging copyright infringement, specifically through the operation of the Transmit Clause and the right of public performance.

Primarily two Circuits have faced these issues, but seemingly have been on different channels. While the Second Circuit found that Internet broadcast television, operating in a specific way, is not a public performance, the Ninth Circuit established exactly the opposite, even after considering the argument, discussion, and rationale conducted in the Second Circuit.<sup>49</sup> Due to the circuit split, the Supreme Court was recently called upon to determine to what extent, if any, does Internet broadcasting infringe authors' public performance rights, and ultimately agreed with the Ninth Circuit, and cut the power to Internet broadcast television. The issues in these cases generally turn on their respective interpretations of what it means to perform publicly, another's copyrighted work.

## 1. Circuit Split – Second and Ninth Circuits

In *American Broadcasting Company, Inc. v. Aereo, Inc.* (“*Aereo I*”), broadcasting companies collectively filed claims against an Internet broadcasting company by the name of Aereo for copyright infringement.<sup>50</sup> “Aereo’s system [provided] . . . access [to] free, over-the-air broadcast television through [small] antennas and hard [drive storage] . . . .”<sup>51</sup> A

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<sup>45</sup> See, e.g., *Aereo III*, 134 S. Ct. 2498; *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012); *Fox Television Stations v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012).

<sup>46</sup> See Huffman, *supra* note 9. Roughly one-third of consumers in the United States live in Internet-connected households that permit them to stream content through their television. *Id.*

<sup>47</sup> Mark Glaser, *Your Guide to Cutting the Cord to Cable TV*, MEDIASHIFT (Feb. 21, 2012), <http://mediashift.org/2012/02/your-guide-to-cutting-the-cord-to-cable-tv-updated-2012-edition052/>.

<sup>48</sup> Amadou Diallo, *Cable TV Model Not Just Unpopular But Unsustainable*, FORBES (Oct. 14, 2013, 9:05 AM), <http://www.forbes.com/sites/amadoudiallo/2013/10/14/cable-tv-price-hikes-unsustainable/>.

<sup>49</sup> *Compare ABC, Inc. v. Aereo, Inc. (Aereo I)*, 874 F. Supp. 2d 373, 375 (S.D.N.Y. 2012) (denying preliminary injunctive relief to prevent Aereo’s Internet broadcast television model from continuing to operate), and *WNET Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 680 (2d Cir. 2013) (affirming the denial for preliminary injunctive relief in *Aereo I*), and *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 136–40 (2d Cir. 2008) (holding transmission from a digital video recorder to a subscriber did not constitute a public performance), with *Fox Television Stations*, 915 F. Supp. 2d at 1143 (holding Internet broadcast television without proper authorization to be a public performance).

<sup>50</sup> 874 F. Supp. 2d at 376.

<sup>51</sup> *Id.* at 376–77.

subscriber using their service can either watch the content live or record it for later viewing, and can even use basic video control functions such as pause and rewind.<sup>52</sup> When a subscriber conducts either of these activities, they are doing so through a single antenna personally assigned to their account, which is used to isolate the content and provide it to the subscriber.<sup>53</sup> Since Aereo and its subscribers were conducting these activities without the proper authorization, the broadcasting companies filed suit alleging that their operation specifically infringed their right of public performance.<sup>54</sup>

The broadcasting companies, attempting to protect the integrity of their copyrighted works, filed a motion for preliminary injunction against Aereo to cease their operation.<sup>55</sup> The court was forced to determine the likelihood of success on the merits of the broadcasting companies' infringement claim.<sup>56</sup> The case would ultimately turn on whether or not Aereo's performance was considered a public or a private performance of the broadcasting companies' works.<sup>57</sup> Utilizing the precedent set in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,<sup>58</sup> the court reasoned that Aereo's antennas receiving a single signal and transmitting that signal to a single subscriber could not constitute a public performance, and denied the motion for a preliminary injunction.<sup>59</sup> This decision was affirmed on appeal, relying again on *CSC Holdings, Inc.*'s rationale.<sup>60</sup>

Subsequently, in *Fox Television Stations v. BarryDriller Content Systems*, Fox Television Stations, and many other broadcasting companies, brought claims of copyright infringement against various Internet television service providers.<sup>61</sup> After filing a motion for preliminary injunction, the court was called upon to consider the likelihood that Fox TV Stations and the other plaintiffs would succeed on the merits of their infringement claim against BarryDriller.<sup>62</sup> BarryDriller did not deny the fact that they retransmitted the content owned by the plaintiffs. Instead, they argued that it was analogous to Aereo's conduct, which at that time, was non-infringing.<sup>63</sup> Like in *Aereo I*, the outcome of this case turned upon the concept of public performance.<sup>64</sup> The court discussed at length the Second Circuit's reasoning for determining Aereo's service as lawful.<sup>65</sup> The opinion summarizes that the Southern

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<sup>52</sup> *Id.* at 377.

<sup>53</sup> *Id.* at 378.

<sup>54</sup> *Id.* at 376.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 381–82.

<sup>57</sup> *Id.* at 395–96.

<sup>58</sup> 536 F.3d 121 (2d Cir. 2008).

<sup>59</sup> *Aereo I*, 874 F. Supp. 2d 373, 396 (S.D.N.Y. 2012).

<sup>60</sup> *Aereo II*, 712 F.3d 676, 696 (2d Cir. 2013).

<sup>61</sup> 915 F. Supp. 2d 1138, 1140 (C.D. Cal. 2012).

<sup>62</sup> *Id.* at 1141.

<sup>63</sup> *Id.* at 1140–41.

<sup>64</sup> *Id.* at 1143–46.

<sup>65</sup> *Id.*

District of New York applied the analysis in *CSC Holdings, Inc.* “to find that a service that assigned each user a unique antenna, allowing each user to watch over the internet live or recorded television broadcasts received by the user’s . . . antenna, did not infringe the copyright holder’s right of public performance.”<sup>66</sup> However, the court in *Fox Television Stations* found this argument unpersuasive, as the Second Circuit’s precedent is not binding on the Ninth Circuit.<sup>67</sup> As a result, the court found that Fox TV Stations, Inc. and the other broadcast companies showed a likelihood of success on the merits of their copyright infringement claim, and issued the preliminary injunction against BarryDriller and the other Internet broadcast companies.<sup>68</sup> Unauthorized Internet broadcast television in the Ninth Circuit was effectively shut down.

## 2. Supreme Court – *American Broadcasting Company, Inc. v. Aereo, Inc.*

The U.S. Supreme Court’s most recent decision in *American Broadcasting Company, Inc. v. Aereo, Inc.* (“*Aereo III*”) has seemingly resolved the circuit split between the Second and Ninth Circuits over the issues of whether Internet broadcasting companies were infringing the authors’ right of public performance, and whether they were acting like a cable company, entitling them to a compulsory license under section 111.<sup>69</sup> The Court assimilated Aereo’s operation to that of the early community access television providers that gained popularity in the 1950’s, which eventually served the communities as the first cable providers.<sup>70</sup> Despite this description, the Court refused to opine whether Aereo would fit the statutory definition of a cable system, which would entitle them to a compulsory license.<sup>71</sup> However, the Court did decide that Aereo’s actions constituted a public performance, and were infringing those rights owned collectively by the broadcasting companies.<sup>72</sup>

In sum, the current landscape of copyright recognizes that Internet broadcasting companies are at least somewhat different from existing cable and satellite network providers. But what they should recognize is that this difference is fundamental, and significant enough to warrant a deeper inspection. While they do provide the consumer with a public performance of a copyrighted work, that public performance is at the request of the consumer’s input, much like in *Fox Broad. Co. v. Dish Network, LLC*.<sup>73</sup> Currently, the compulsory licensing scheme in place blocks Internet

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<sup>66</sup> *Id.* at 1145; 536 F.3d 121, 126 (2d Cir. 2008).

<sup>67</sup> 915 F. Supp. 2d at 1146.

<sup>68</sup> *Id.* at 1146–48.

<sup>69</sup> 134 S. Ct. 2498, 2503 (2014).

<sup>70</sup> *Id.* at 2506.

<sup>71</sup> *Id.* at 2512–13.

<sup>72</sup> *Id.* at 2511.

<sup>73</sup> 747 F.3d 1060, 1066–68 (9th Cir. 2014).

broadcasting from accessing and transmitting content that established systems readily have access to, and have had access to since the revision of the Copyright Act in 1976. In doing so, the 1976 Act is thwarting this innovative technology rather than promoting the progress of the sciences and useful arts.

#### *D. The Problem – New Methods of Broadcasting*

As broadcasting begins to take on a different form, new companies are popping up that seek to provide consumers with a new option for receiving television content through the Internet.<sup>74</sup> This new form of competition is causing cable networks and satellite broadcasting providers to alter their business models, which benefits the consumer by providing more choices about how to access their entertainment. However, because these newer models are cheaper, and equally as efficient, it is causing the broadcasting companies to lose negotiating power in licensing transactions. Since Internet broadcasting companies are forced to either negotiate private licenses, or infringe, many just simply do not have the ability to compete with established content providing services, and avoid doing so. This effect in reality harms the consumer because this option is no longer available.

### III. ANALYSIS

Compulsory licenses provide a benefit to developing service providers that are not financially stable enough to conduct private negotiations.<sup>75</sup> Despite increased skepticism about the extent of these benefits, compulsory licenses remain imperative to the development of alternative broadcasting methods. Compulsory license schemes remain necessary to harness innovation, but the current statutory language fails at supporting innovative broadcasting technologies, therefore requiring revision to remain consistent with the objective of copyright law. Since the narrowly drafted provisions of the 1976 Copyright Act pertaining to broadcast compulsory licenses lack any reference to Internet broadcasting, the relevant sections have become relatively ineffective. As such, the format of the broadcasting compulsory license ought to be amended in such a way that broadens the scope to encourage innovation.

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<sup>74</sup> Bryant McBride, *The Future of Broadcast Television*, MEDIADAILYNEWS (Dec. 30, 2014, 7:00 AM), <http://www.mediapost.com/publications/article/240772/the-future-of-broadcast-television.html>. It is predicted that in year 2015 and onward, traditional cable and satellite providers will have to consider offering over-the-top viewing options to their subscribers in order to remain relevant in the content distribution market, and to compete with providers such as Netflix and Hulu. *Id.*

<sup>75</sup> Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191, 202–03 (1990) (“[F]ree market negotiations between broadcasters and cable operators would result in unfairly costly copyright licenses, or in no licenses at all.”). Negotiating licenses on a signal-by-signal basis would not be conducive to the industry development because it would not be cost effective. *Id.* (citing Leslie A. Swackhamer, *Cable-Copyright: The Corruption of Consensus*, 6 COMM./ENT. L.J. 283, 295 (1983)); see also H.R. REP. NO. 94-1476, at 89 (1976).

### A. Broadcast Compulsory Licenses Remain Relevant

The use of compulsory licenses remains to be an important and beneficial part of the 1976 Copyright Act. In recent years, there has been plenty of commentary from legal scholars suggesting that Congress abandon the compulsory license statutes in the 1976 Act.<sup>76</sup> One of the primary arguments for abandoning the use of compulsory licenses is that they have been rendered obsolete by the increased sophistication and private negotiations taking place between service providers and content providers.<sup>77</sup> However, the variety of service providers has evolved and introduced a new format previously unknown—Internet broadcasting. While compulsory licenses may not be necessary anymore with respect to cable and satellite companies, continued use of compulsory licenses will continue to benefit Internet broadcasting service providers, as well as other innovative content delivery systems.

#### 1. The Initial Rationale for Implementing Compulsory Licenses

The initial rationales for implementing a statutory copyright license are still valid in today's marketplace. These rationales consisted of: (a) mitigating monopolistic behavior and favoritism; (b) easing the burden between content and services providers to conduct private negotiations, and providing them with a baseline for compensation; (c) engaging in dispute resolution; and (d) aiding underdeveloped companies in establishing their presence in a market.<sup>78</sup> Critics would suggest that these rationales are no longer prevalent,<sup>79</sup> but Internet broadcasting television is a primary example of why compulsory licenses are important.

##### a. Mitigating Monopolistic Behavior

One of the first cases to discuss the concept of compulsory licenses is *Standard Music Roll Co. v. Mills*, which was decided in 1917.<sup>80</sup> This case discussed statutory royalties, provided by the Copyright Act of 1909, pertaining to reproduction of mechanical music rolls for player pianos. In the rather brief discussion about licenses, the Third Circuit stated:

The object of these provisos seems to be the prevention of monopoly or favoritism in granting the right to reproduce a musical work mechanically. If the owner authorize[s] one

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<sup>76</sup> Swackhamer, *supra* note 75, at 305; Theresa M. Bevilacqua, Note, *Time to Say Good-Bye to Madonna's American Pie: Why Mechanical Compulsory Licensing Should be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 308–09 (2001).

<sup>77</sup> Swackhamer, *supra* note 75, at 306.

<sup>78</sup> Fisch, *supra* note 25, at 417 (citing Robert Cassler, *Copyright Compulsory Licenses—Are They Coming or Going?*, 37 J. COPYRIGHT SOC'Y U.S.A. 231, 232–35 (1990)); see also Botein & Samuels, *supra* note 43, at 70 n.3.

<sup>79</sup> Swackhamer, *supra* note 75, at 284.

<sup>80</sup> See generally 241 F. 360 (3d Cir. 1917).

person to reproduce the work mechanically, other persons also may reproduce it in a similar mechanical manner, subject to the payment of the statutory royalty.<sup>81</sup>

By implementing a statutorily enforced payment to a copyright owner, Congress gave those wishing to exploit the copyrighted work for profit a form of protection against infringement claims and encouraged the copyright owner to provide its works of art to the public through competitive means for compensation.<sup>82</sup> The statutorily enforced payments allowed content providers to compete in a market that they would not have otherwise had the opportunity to do so within the confines of copyright law.<sup>83</sup>

In the beginning, television broadcasters supported the concept of community access television because it provided a larger audience and permitted them to increase their revenue.<sup>84</sup> However, as the trend continued to grow, service providers began importing signals from distant transmitters without compensating the content providers.<sup>85</sup> In *Fortnightly Corp. v. United Artists Television, Inc.*, the Supreme Court concluded that passive retransmission of local signals did not constitute infringement under the 1909 Copyright Act, and therefore cable companies were not legally liable.<sup>86</sup> This finding seemingly halted the growth and development of the broadcasting industry since copyright owners were afforded no protection against the unauthorized dissemination of their works of art.<sup>87</sup> The copyright owners effectively put a tighter grip around the bundle of rights pertaining to their works in order to prevent others from using them. Recognizing the trouble this could cause to the development of the industry, the Cabinet Committee on Cable Television, producers, syndicators, broadcasters, and cable operators reluctantly reached a compromise that established the current compulsory licensing system.<sup>88</sup> This compromise not only established the unauthorized broadcasting of copyrighted works as an infringing act,<sup>89</sup> but it continued to prevent the broadcasting companies from exclusively licensing their content to a select few.<sup>90</sup> This benefitted the consumer by providing more than just a couple of limited options.

#### b. Easing the Burden Between Content and Service Providers

In 1976 the Copyright Act was revised, and Congress included

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<sup>81</sup> *Id.* at 363; Cassler, *supra* note 78, at 252; *see also* Fisch, *supra* note 25, at 417.

<sup>82</sup> Garon, *supra* note 31, at 175.

<sup>83</sup> *Id.* at 183.

<sup>84</sup> *Id.* at 180.

<sup>85</sup> *Id.* at 183–84.

<sup>86</sup> 392 U.S. 390, 400 (1968); *see also* Cate, *supra* note 75, at 199.

<sup>87</sup> Cate, *supra* note 75, at 199.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 202.

<sup>90</sup> *See supra* text accompanying note 29.

various compulsory licenses for different types of copyrighted works.<sup>91</sup> Specifically pertaining to broadcasting, this ultimately came as a response to the development of competing interests between service providers and content providers.<sup>92</sup> Prior to the copyright law revisions, television-broadcasting networks sought to establish that unauthorized transmission of copyrighted works constituted copyright infringement.<sup>93</sup> The judiciary did not agree.

In enacting the compulsory license statutes, with respect to cable companies, Congress stated that “it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.”<sup>94</sup> Congress recognized the parties’ interrelation—a developed broadcasting network owning banks of copyrighted works, on the one hand, and an unsophisticated content delivery system still in its infancy on the other.<sup>95</sup> In order to continue the development of this enterprise, Congress provided some middle ground through the licensing statutes to serve as a starting point for licensing copyrighted works. This middle ground proved to be a significantly beneficial aspect in the continued development of the cable broadcast industry.

### c. Dispute Resolution

Compulsory licenses helped resolve disputes involving infringement for delivering content without authorization, while bringing sought-after content to the consumer. Just prior to the adoption of the Copyright Act of 1976, broadcasters and copyright owners of audiovisual works sought to enjoin cable companies from broadcast retransmission, but ultimately failed to convince the judiciary to do so.<sup>96</sup> This attempt to seek legal protection was illustrative of the conflict between cable companies and content providers that had existed since the 1950’s and the rising trend of broadcasted works. Without the legal protection of their works, cable companies were permitted to retransmit broadcast television for free, disincentivizing the copyright owners from continuing to create works. The parties were not under any obligation to establish licenses or pay any fees. Recognizing this, when Congress enacted the Copyright Act of 1976, they did so in order to resolve the interests of the copyright owners as well as the cable providers. Effectively, they “filled a gap by resolving disputes between copyright

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<sup>91</sup> Botein & Samuels, *supra* note 43, at 70.

<sup>92</sup> *Id.* at 75.

<sup>93</sup> *Id.*

<sup>94</sup> H.R. REP. NO. 94-1476, at 89 (1976).

<sup>95</sup> *Id.* (“[T]he Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs.”).

<sup>96</sup> See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401–02 (1968).

owners and cable operators for a little more than a decade while the multichannel industry was developing [and] [a]s soon as relations between [the two] stabilized . . . the industries migrated to a private . . . system of negotiated settlements . . . .”<sup>97</sup> The use of compulsory licenses was an integral part of a developing industry, and that remains the case today regarding the Internet broadcasting industry.

#### d. Economically Beneficial to Underdeveloped Companies

Compulsory licenses are beneficial to help strike a balance between the competing interests of the service providers, the viewing public, and the copyright-owning broadcast companies.<sup>98</sup> The initial fee formulation of section 111 was “not based upon any economic empirical data but [was] hammered out in a last minute compromise between ‘the two industries most directly affected by the establishment of copyright royalties for cable television systems . . . .’”<sup>99</sup> Seemingly, the initial compulsory license fees were set at a rate that was below market standards “because small[] cable systems may be less able to shoulder the burden of copyright payments than larger systems.”<sup>100</sup> This seemingly low fee permitted companies hoping to capitalize on the broadcasting market a relatively low-risk entry, freeing up their resources for other purposes, such as increased signal strength and technological research and development.<sup>101</sup>

The compulsory license system was established for the benefit of smaller companies entering into the broadcast television market, and for the content providers to receive at least some, albeit minimal, compensation for use of their works.<sup>102</sup> Despite the fact that those cable and satellite companies have now become more sophisticated,<sup>103</sup> and can acquire licensing rights through private contract negotiation,<sup>104</sup> there are still smaller companies that would tend to benefit from continued use of compulsory licenses. This required minimal fee fosters innovative broadcasting technology and methods, and encourages the growth of the methods by which viewers receive their content. It not only compensates the copyright owners for use of their works, but also encourages smaller companies to offer services that fit into the copyright law.

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<sup>97</sup> Botein & Samuels, *supra* note 43, at 70 n.3.

<sup>98</sup> Garon, *supra* note 31, at 188.

<sup>99</sup> Swackhamer, *supra* note 75, at 297.

<sup>100</sup> *Id.* at 297–98.

<sup>101</sup> *Id.* at 306 (“An examination into the history of the development of the cable compulsory license reveals a desire to give the infant cable industry a financial break so that it could afford the costly process of laying cable.”).

<sup>102</sup> Cate, *supra* note 75, at 222 (explaining that the initial compulsory license scheme served as a subsidy for the infant cable industry).

<sup>103</sup> *Id.* at 220 (stating that the developments in the cable industry provided the service providers with the ability to negotiate effectively and efficiently to carry programming).

<sup>104</sup> *Id.* at 237.

## 2. Abandoning Compulsory Licenses

In the time since its adoption, there has been continuous criticism of the use of compulsory license statutes, namely that they are unconstitutional, that the sophistication of cable companies has rendered their use commercially obsolete, and that they are generally unsuccessful at implementing the underlying public policies.<sup>105</sup> While the arguments against the use of compulsory licenses are not without merit, neither the courts nor Congress have been convinced by them.<sup>106</sup>

### a. Statutory Licenses are Categorically Unconstitutional

It has been suggested by some legal scholars that the use of compulsory licenses is unconstitutional because it is completely adverse to the grant of exclusive rights under the Copyright Clause.<sup>107</sup> However, the constitutionality of compulsory licenses has never been argued or addressed in the courts, and therefore remains undecided.

The primary argument that compulsory licenses are unconstitutional extends from the idea that by forcing copyright owners to allow third parties certain limited rights through statute, the exclusivity of the bundled rights granted under the Constitution are rendered meaningless.<sup>108</sup> Simply put, by operation of the statutory language, the 1976 Copyright Act revokes a property right from the owner and gives it away for less than its fair market value. The operative language of the Constitution<sup>109</sup> serves to grant a limited monopoly to copyright owners, and the pressing argument is “[t]he incentives to attract private investment and further the creative endeavors of composers are destroyed when anything less than an exclusive right is granted.”<sup>110</sup> The argument is that use of compulsory licenses undermines copyright law, and directly conflicts with the intent of the Constitution to progress the useful arts in granting limited monopolies in their works of authorship.<sup>111</sup> Since the rights that are granted under the copyright law are restricted by compulsory licenses, they are no longer considered exclusive rights, making the incentives received far less valuable.<sup>112</sup>

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<sup>105</sup> Bevilacqua, *supra* note 76, at 293–94; Botein & Samuels, *supra* note 43, at 69; Cate, *supra* note 75, at 219–20.

<sup>106</sup> Bevilacqua, *supra* note 76, at 293–94.

<sup>107</sup> *Id.*; see also Bruce Schaffer, *Are the Compulsory License Provisions of the Copyright Law Unconstitutional?*, 2 COMM. & L. 1, 2–3, 24 (1980).

<sup>108</sup> Bevilacqua, *supra* note 76, at 293.

<sup>109</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>110</sup> Bevilacqua, *supra* note 76, at 294 (citing Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1136–37 (1977)); see also U.S. CONST. art 1, § 8, cl. 8.

<sup>111</sup> Bevilacqua, *supra* note 76, at 294.

<sup>112</sup> *Id.* at 294 n.66, 295 (“If [a composer] takes less than the statutory fee . . . [i]t puts the composer in a position where he can never ask for more than [the statutory fee], where he can never insist that his work be recorded, but where he’s faced with the prospect that, if somebody is interested in recording, he will get less [money] than the statutory fee.”).

The constitutional challenge is unfounded, as “the copyright laws are statutory, not derived directly from the Constitution.”<sup>113</sup> Since the Constitution only authorizes Congress to create a property right, it inversely implies that Congress also has the authority to limit, broaden, change, or abolish, the copyright law if it has a compelling interest to do so.<sup>114</sup> Although it remains to be seen whether or not a constitutional challenge to compulsory licenses would succeed in a courtroom, the current trend and status would likely uphold the use of compulsory licenses as constitutional.<sup>115</sup>

#### b. Statutory Licenses are Commercially Obsolete

Some commentators insist that since the service providers and content providers have increased their use of private contract negotiations for content delivery, the compulsory license is no longer necessary, and is virtually commercially obsolete.<sup>116</sup> The cable service providers of the 1960’s “had established [their] viability in the marketplace,”<sup>117</sup> but were still vastly underdeveloped in comparison to modern cable and satellite providers.<sup>118</sup> This lack of sophistication was found to be one of the supporting reasons for implementing the compulsory license, finding that private negotiations between all parties involved would simply be too burdensome on the cable companies.<sup>119</sup> By examining the historical development of the cable compulsory license, it is clear that it resulted from a desire to provide the infantile cable service industry with a financial break in order to establish their service without breaking the bank.<sup>120</sup> This is the same rationale that exists with respect to the Internet television option.

Since the early days of the cable compulsory license, these cable companies, and now satellite companies, have migrated into private contract negotiations with broadcasting networks to acquire public performance rights to broadcast copyrighted works.<sup>121</sup> Cable and satellite companies, having proven their viability in the marketplace, have grown into lucrative corporate giants that are able to carry the burden of private contract negotiation, pay higher fees, and negotiate for more than just what the basic compulsory

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<sup>113</sup> Fisch, *supra* note 25, at 414 (citing NIMMER & NIMMER, *supra* note 3, § 1.07).

<sup>114</sup> *Id.* at 415 (quoting *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 200 (1975)).

<sup>115</sup> I introduce the two opposing sides of this argument as an illustration that there is skepticism as to whether the implementation and continued use of compulsory licenses were initially within congressional power. However, the status as of the date of this Comment is that compulsory licenses were exercised with proper authority.

<sup>116</sup> Cate, *supra* note 75, at 220; Swackhamer, *supra* note 75, at 306.

<sup>117</sup> Swackhamer, *supra* note 75, at 285.

<sup>118</sup> *Id.* at 299.

<sup>119</sup> *Id.* at 295 (quoting H.R. REP. NO. 94-1476, at 89 (1976)).

<sup>120</sup> *Id.* at 306.

<sup>121</sup> U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 210 (2008), <http://www.copyright.gov/reports/section109-final-report.pdf>.

license would permit.<sup>122</sup> The development of the cable and satellite industries over the course of the past 50 years “vitiates the underlying rationale for the compulsory license.”<sup>123</sup>

The argument that the compulsory licenses are commercially obsolete arose prior to the boom of the Internet.<sup>124</sup> The rationale for implementing the compulsory license system was ultimately rooted in providing unsophisticated businesses a chance at establishing themselves as viable competitors.<sup>125</sup> The argument that using compulsory licenses are obsolete and unnecessary due to the development of these industries,<sup>126</sup> are unfounded as the arguments proceed from the limited view that cable and satellite are the only two available services. These arguments neglected to consider the possibility of broadcasting taking on a new form. Since the Internet is entering the broadcasting market and is competing with two very large and sophisticated competitors, it would be beneficial to the consumer to have a cost-effective content delivery option that would also allow the Internet broadcasting companies to avoid copyright liability by providing some compensation to the copyright owners. Internet broadcasting service providers would also benefit as they could offer a market alternative, and establish their position in the broadcasting industry.

### c. Unsuccessful Implementation of Public Policies

Another argument for abandoning the use of “compulsory licenses [is that they] have been less than successful in implementing public policy goals.”<sup>127</sup> The purpose of the copyright law is “to contribute to the public’s benefit and to foster creativity and innovation.”<sup>128</sup> Copyright law provides an incentive for authors to create works of authorship and share those works with the public in exchange for a limited monopoly and a bundle of rights to control those works.<sup>129</sup> The argument claims that compulsory license systems have paled in comparison to the growing trend of private license negotiations, since the industry has continued to develop.<sup>130</sup>

However, the compulsory licenses actually do implement public policy by providing statutory guidelines for payment of royalties to copyright

<sup>122</sup> Swackhamer, *supra* note 75, at 304.

<sup>123</sup> *Id.* at 305 (citing *Copyright/Cable Television: Hearing on H.R.1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870, and H.R. 5949 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 703 (1982) (statement of Bernard J. Wunder, Jr., Assistant Secretary for Communication and Information, National Telecommunications and Information Administration, U.S. Department of Commerce)).

<sup>124</sup> U.S. COPYRIGHT OFFICE, *supra* note 121, at 23.

<sup>125</sup> *Id.* at 122.

<sup>126</sup> Swackhamer, *supra* note 75, at 305 (“The growth and prosperity of the cable industry vitiates the underlying rationale for the compulsory license.”).

<sup>127</sup> Botein & Samuels, *supra* note 43, at 69.

<sup>128</sup> Asaro, *supra* note 44, at 1111.

<sup>129</sup> *Id.* at 1115.

<sup>130</sup> Botein & Samuels, *supra* note 43, at 77.

owners. Prior to their existence, the alternative was unauthorized dissemination of others' works without any form of royalty payments.<sup>131</sup> The form as it exists today reflects the public policy goals of copyright law by providing compensation to copyright owners, while also encouraging dissemination of works on a non-exclusive basis.<sup>132</sup> It illustrates the *quid pro quo* of intellectual property law exactly, just not in the most economically favorable way. The growing trend may be to pursue private licensing negotiations instead of acquiring a compulsory license, but that does not minimize the importance of compulsory licenses. Compulsory licenses were never meant as a substitute to privately negotiated licenses, but consequently serve as a starting point for developing companies.<sup>133</sup> The mere existence of compulsory licenses encourages start-up companies to enter an industry and operate legally rather than seek to do the same through improper means.

### 3. Rationale for Retaining, but Modifying Compulsory License Statutes

Compulsory licenses should remain a part of the Copyright Act. The initial rationale for their adoption into the 1976 Copyright Act still rings true today, but with minor differences. Internet broadcasting is still in its infancy, and is entering a very established, sophisticated, and competitive market. While it is still developing, compulsory licenses would provide Internet broadcasting service providers with a form of a safety-net allowing them to enter into the market without running the major risk of infringement lawsuits originating from copyright owners.

Many broadcast companies feel that compulsory licenses limit their exclusive rights.<sup>134</sup> However, the compulsory licenses do provide the broadcasting companies with a means of compensation for use, albeit a minimal amount, without the burden of private contract negotiations. Even still, the use of compulsory licenses does not bar either party from pursuing private contract negotiations, but serves simply as a benchmark for newly developing companies.<sup>135</sup> If the Internet broadcasting industry is going to survive, it is necessary to provide it the same benefits early cable and satellite companies enjoyed by maintaining the use of compulsory licenses.<sup>136</sup>

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<sup>131</sup> See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); see also *Standard Music Roll Co. v. Mills*, 241 F. 360 (3d Cir. 1917).

<sup>132</sup> See discussion *supra* Section III.A.1.

<sup>133</sup> Botein & Samuels, *supra* note 43, at 70 (“[T]hese licenses should be viewed as interim arrangements to preserve a balance between the extremes of full and no liability during periods of technological or other change.”).

<sup>134</sup> See *supra* note 104 and accompanying text.

<sup>135</sup> Botein & Samuels, *supra* note 43, at 86 n.3 (“As soon as relations between broadcasters and cable operators stabilized . . . the industries migrated to private law system of negotiated settlements under ‘retransmission consent’ statutory provisions.”).

<sup>136</sup> It is recognized that individual broadcast companies may wish to offer their content through the use of websites and mobile apps that would seemingly satisfy most viewers refusing to purchase cable and satellite subscriptions. However, this model would not offer the same benefits of an Internet broadcasting model that compiles the content of multiple broadcasters’ content in a single location. The Internet

The initial justifications for implementing the compulsory license system are centered on the concepts of enterprise development and sustainability. They are put in place to provide a starting point for developing business models, and without them, the underlying policies would not be given actual effect. Without compulsory licenses, content providers will continue to have a chokehold on the broadcast market, preventing the development of alternative distribution models, and stagnating the technological development of television. Arguments in favor of abandoning compulsory licenses are not without merit. However, in the wake of continued technological development, specifically regarding broadcasting and electronics, it is far more favorable to the industry as a whole to retain at least a foundational compulsory licensing scheme, and drafting it in such a way that is more adaptable to change.

### *B. The Structure of Sections 111 and 119 Prevent Innovation*

The policy goals that permeate copyright law include not only providing incentives for authors to create original works of authorship, but also encouraging the sharing of those works with the public.<sup>137</sup> The benefit compulsory licenses currently serve to developing technologies is vastly non-existent. Broadcasting compulsory licenses come in only two forms: that of cable systems and satellite systems.<sup>138</sup> The introduction of Internet broadcasting into this market challenges the narrowly drafted licensing provisions, but has ultimately failed to be read into the statutory definitions.<sup>139</sup> As a result, the potential next big innovation in broadcasting has been dealt a heavy blow. Internet broadcasting companies are not afforded the same benefits of the likes of cable and satellite services and are forced to develop their model from a more difficult position. The language, drafted in such a narrow fashion, thus prevents any innovative broadcasting service to enter the market and compete fairly with well-established service providers. As a result, the current structure of compulsory licenses acts to prevent innovation instead of promoting it.

#### 1. Definitional Language is Too Narrow

Cable provider compulsory licenses are described at length in section

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broadcasting companies would effectively be able to siphon viewers away from these single-channel website offers, but only because of the entire package they offer. The broadcasting companies would still be permitted to offer their own works online, as some currently do today, but their model would likely not be as appealing to the consumer who wants a one-stop-shop for their entertainment desires instead of having to visit various websites to search for content.

<sup>137</sup> Asaro, *supra* note 44, at 1114–15.

<sup>138</sup> See 17 U.S.C. §§ 111, 119 (2012).

<sup>139</sup> ABC, Inc. v. Aereo, Inc. (*Aereo II*), No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*21–22 (S.D.N.Y. Oct. 23, 2014) (“[N]othing in the Supreme Court’s opinion can be read as abrogating *ivi* because the Supreme Court limited its holding to a finding that Aereo performs like a cable system for purposes of the transmit clause, not that it is a cable system entitled to a § 111 license.”).

111<sup>140</sup> of the Copyright Act of 1976, while satellite provider compulsory licenses flow from section 119.<sup>141</sup> As far as television broadcasting is concerned, these are the only two compulsory licenses from which to choose, at the exclusion of other potentially viable broadcasting formats. As illustrated by the fallout of the *Aereo* decision, the technical configuration of an Internet broadcasting system cannot fit either of these definitions, and is thus read out of the 1976 Act.

a. Section 111 Defines Cable Broadcasting Systems

For the purposes of the 1976 Copyright Act, a cable system is defined as:

[A] facility[] . . . that in whole or in part receives signals transmitted or programs broadcast by . . . broadcast stations licensed by the Federal Communications Commission, and makes secondary [re]transmissions of such signals or programs . . . to subscribing members of the public who pay for such service.<sup>142</sup>

Essentially it is a commercial subscription service that collects broadcasted programs and makes them available to paying customers and “consists of a central antenna which receives and amplifies . . . signals . . . to the receiving sets of individual subscribers.”<sup>143</sup> With cable providers, the broadcasted signal and content is delivered through an existing network of antennas, ground wires, amplifiers, and receivers in the possession of individual subscribers.

On its face, Internet broadcasting companies are reflective of this definition. In the case of *Aereo*, they received signals broadcast by the FCC-licensed stations by using small antennae that were able to translate that signal into computer-readable data, and thereafter transmitted through the Internet.<sup>144</sup> Their operation is very similar to that of a cable system, differing only in the way that the content gets from point A to point B. However, courts were unwilling to conclude that Internet television fits this definition to the detriment of Internet broadcasting companies.<sup>145</sup> Perhaps the rationale for doing so is to force the hand of Congress to again wrestle with the language of the 1976 Copyright Act and improve it to make it more applicable to the

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<sup>140</sup> 17 U.S.C. § 111.

<sup>141</sup> *Id.* § 119.

<sup>142</sup> *Id.* § 111(f)(3).

<sup>143</sup> H.R. REP. NO. 94-1476, at 88 (1976).

<sup>144</sup> *Aereo III*, 134 S. Ct. 2498, 2503 (2014).

<sup>145</sup> *Aereo IV*, No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*21–22 (S.D.N.Y. Oct. 23, 2014); Keach Hagey, *Copyright Office Denies Aereo Request to be Classified as Cable System*, WALL STREET J. (July 17, 2014, 1:09 PM), <http://www.wsj.com/articles/copyright-office-denies-aereos-bid-to-be-classed-as-cable-system-1405616940>.

current and future technological instrumentalities.

b. Section 119 Defines Satellite Broadcasting Systems

Additionally, a satellite carrier is defined as:

[A]n entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission . . . to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution . . . .<sup>146</sup>

Recognizing that satellite service providers operated through a fundamentally different system of transmission and receipt of signals, Congress added this section to the 1976 Copyright Act in order to accord satellite service providers substantially the same licensing rights that cable service providers had held since 1976.<sup>147</sup> While there has been no recorded argument that Internet broadcast television would fit under this definition, it is highly unlikely, given that it cannot fit the definition of a cable system, that it would fit this definition either. Given the technological foundation, and the single signal distribution model, it can be deduced that Internet broadcast television simply differs too much to ever fit this definition. Internet broadcast television is left with no other lawful means of operation, short of burdensome private licensing negotiations.

The definitions illustrate that Congress has, on two occasions, modified the 1976 Copyright Act to account for innovation and to diversify the broadcasting market. The Act defines the two existing service providers in their own distinctive ways to the exclusion of other methods of broadcasting recently developed. With such rigid construction, these definitions act as a barrier to innovative technologies, rather than a nest egg.

c. No Section Defines Internet Broadcasting Systems

The language of the 1976 Copyright Act does not expressly provide for a comparable licensing provision for Internet broadcasting, and as a result is left unaccounted for. With these two types of broadcasting licenses expressly written into the 1976 Copyright Act, an alternative model is challenged to fit these definitions, or is found as infringing on public performance rights.

Internet television's best shot at being read into the copyright law would have been under the definition of a cable system. Since the door is

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<sup>146</sup> 17 U.S.C. § 119(d)(6).

<sup>147</sup> Botein & Samuels, *supra* note 43, at 80.

closed on that idea, Internet broadcasting is without an option because it is highly unlikely that there is an argument that Internet broadcasting fits into the definition of a satellite system. Without either definition at their disposal, Internet television is without any avenues to legally perform their operation.

## 2. Language Structure Excludes Alternative Broadcasting Methods

The licensing structure currently as written provides for two categories of content providers that are entitled to compulsory licenses.<sup>148</sup> The issue with this is that the technological foundations of television broadcasting are shifting, and there is no room for these alternative methods to seek to distribute content lawfully.<sup>149</sup> Since it has been held that Internet broadcasting business models violate content owner's public performance rights by not seeking a license,<sup>150</sup> and because these businesses cannot seek a statutory license,<sup>151</sup> they are put at a significant disadvantage in the market place. On a fundamental level, the technology driving Internet broadcasting technology is materially different than that of the cable and satellite service providers.<sup>152</sup> In fact, it is so different, that it does not fit the definition of either, and is unfortunately excluded from acquiring lawful distribution license without a huge financial burden.

### a. Supreme Court's Rationale in *Aereo*

In the recent *Aereo III* opinion, the Supreme Court mentioned numerous times, and ultimately concluded that *Aereo*'s activities were "highly similar to those of the CATV systems . . . that the 1976 amendments sought to bring within the scope of the Copyright Act."<sup>153</sup> However, this conclusion is not to be characterized as equating *Aereo*'s operation to that of a cable system, unfortunately.<sup>154</sup> The Court, in this instance, compared *Aereo*'s operation to existing cable systems for the sake of deciding whether or not they are "performing publicly" in violation of the 1976 Copyright Act, and not to indicate whether they fit the statutory definition.<sup>155</sup> The Court concluded that *Aereo*'s practices are highly similar to the activities that the 1976 Copyright Act amendments sought to bring within the scope of the law—namely that they perform copyrighted works publicly without proper authorization.<sup>156</sup> As an Internet broadcasting service, *Aereo* was conducting a service in a similar manner to other service providing companies by relaying content between broadcasters and viewers. However, this statement made by

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<sup>148</sup> See discussion *supra* Section III.B.1.

<sup>149</sup> U.S. COPYRIGHT OFFICE, *supra* note 121, at 19.

<sup>150</sup> *Aereo III*, 134 S. Ct. 2498, 2511 (2014).

<sup>151</sup> Hagey, *supra* note 145.

<sup>152</sup> See discussion *infra* Section III.B.2.d.

<sup>153</sup> 134 S. Ct. at 2511.

<sup>154</sup> *Id.* at 2506.

<sup>155</sup> *Id.* at 2507.

<sup>156</sup> *Id.* at 2511.

the Court was ultimately frivolous in aiding Aereo to continue to operate in some capacity.

b. Aereo Subsequently Denied a License – Files Bankruptcy

In response to the Supreme Court’s opinion, Aereo argued on remand that “in light of the Supreme Court’s holding in *Aereo III*, it should be considered a ‘cable system’ that is entitled to a compulsory license under § 111 of the Copyright Act . . . .”<sup>157</sup> The District Court opined that this argument “suffers from the fallacy that simply because an entity performs copyrighted works in a way similar to cable systems it must then be deemed a cable system for all other purposes of the Copyright Act.”<sup>158</sup> They further explain that the series of statements made in the Supreme Court’s opinion, stating Aereo’s operation is similar to a cable system, is different than a judicial holding that Aereo is in fact a cable system entitled to a compulsory license.<sup>159</sup> Simply put, the Supreme Court’s holding could not be characterized as reading Internet broadcasting into the statutory language of section 111, and so the District Court was not permitted to do just that. Thus, Aereo is not a cable system entitled to a compulsory license. It has no other lawful means, short of burdensome private contract negotiations, to conduct their operation properly.

As a result, Aereo has abandoned ship.<sup>160</sup> Its entire business was premised on its subscription service, and without the ability to partake in that business, Aereo was left in copyright limbo.<sup>161</sup> The results from the Court’s ruling, and the inability to obtain a compulsory license for failing to fit the established definitions, had a detrimental effect to the prospect of this new enterprise, and has limited consumer’s viewing options. This effect contradicts the purpose and public policy goals of copyright law.<sup>162</sup> Without the operation of their primary revenue-generating service, Aereo was left with no other choice but to file bankruptcy in the wake of the Supreme Court’s decision.<sup>163</sup> It is likely that any attempt to negotiate a license directly from the broadcasting companies would either be futile, or out of their reasonable price range, because they just do not have the same kind of market power to generate the same revenue similar to Internet content delivery companies like Netflix and Hulu.<sup>164</sup>

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<sup>157</sup> Aereo IV, No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*13 (S.D.N.Y. Oct. 23, 2014).

<sup>158</sup> *Id.* at 16–17.

<sup>159</sup> *Id.* at 17–18.

<sup>160</sup> Joe Mullin, *After a 3-Year Copyright Battle, Aereo Gives Up the Ghost*, ARS TECHNICA (Nov. 21, 2014, 10:37 AM), <http://arstechnica.com/tech-policy/2014/11/after-long-court-fight-aereo-files-for-bankruptcy/>.

<sup>161</sup> Geuss, *supra* note 11.

<sup>162</sup> Asaro, *supra* note 44, at 1111.

<sup>163</sup> Mullin, *supra* note 160.

<sup>164</sup> Nate Anderson, *Netflix Offers Streaming Movies to Subscribers*, ARS TECHNICA (Jan. 16, 2007, 11:02 AM), <http://arstechnica.com/uncategorized/2007/01/8627/>; *NBC Universal and News Corp.*

With Internet broadcasting start-ups like Aereo out of the picture, the cable and satellite providers will continue to rule the market, and maintain the freedom to increase the price of their service. This effect goes against public policy. The public performance right is supposed to encourage the dissemination of authorship without fear of piracy, but denying a license to which other models are entitled to only increases the control of certain parties and prevents the free market from operating as intended. It harbors monopolistic behavior and favoritism—one of the primary rationales for implementing compulsory licenses in the first place.<sup>165</sup> It places innovative business models lacking sufficient negotiation power at a significant disadvantage to models that have had over 50 years of dedicated development.

c. Section 111 was Never Intended to Extend to Internet

Additional support for denying a compulsory license to Aereo comes from the Second Circuit, where, in *WPIX v. ivi, Inc.*, the court concluded that:

the statute's legislative history, development, and purpose indicate that Congress did not intend for § 111 licenses to extend to Internet retransmissions; . . . the Copyright Office's interpretation of § 111 -- that Internet retransmission services do not constitute cable systems under § 111 -- aligns with Congress's intent and is reasonable . . . .<sup>166</sup>

If Congress had intended for section 111 to extend Internet broadcasting, there would be language indicating that intent within section 111, or it would have codified a separate section specifically for Internet broadcasting.<sup>167</sup>

Ultimately, the denial that Aereo is a cable system for purposes of section 111 implies that the only way for Internet broadcasting compulsory licenses to be effective is through legislation, and not judicial decree.<sup>168</sup> The current language is too rigid and narrow for innovative companies, such as Aereo, to make a winning argument for their entitlement to a compulsory

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*Announce Deal with Internet Leaders AOL, MSN, Myspace and Yahoo! to Create a Premium Online Video Site with Unprecedented Reach*, HULU (Mar. 22, 2007), [http://www.hulu.com/press/new\\_video\\_venture.html](http://www.hulu.com/press/new_video_venture.html) [hereinafter *NBC Universal and News Corp.*]. Netflix and Hulu are similar companies in that they offer various forms of content delivery. On the one hand, Netflix, which offers Internet streaming from a bank of copyrighted works, was initially established as a mail movie-rental business that predicted the potential of the Internet and built their model around it. Hulu, on the other hand, has a similar system to that of Aereo, except it has a legal right to do so, as it was developed as a joint venture between broadcast companies and Internet companies alike. While both of these systems are becoming supplementary to and, at times, even substitutes for, cable and satellite packages, they were able to do so by developing alternate revenue generating ventures and migrating their services into the Internet streaming market. Unfortunately, companies like Aereo did not enter the market in the same way.

<sup>165</sup> See discussion *supra* Section III.A.1.

<sup>166</sup> 691 F.3d 275, 284 (2d Cir. 2012); see also *Aereo IV*, No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*21 (S.D.N.Y. Oct. 23, 2014).

<sup>167</sup> *Aereo IV*, 2014 U.S. Dist. LEXIS 150555, at \*16–18 (citing *WPIX, Inc.*, 691 F.3d at 282).

<sup>168</sup> *Id.*

license. As deflating as that may be, it does illustrate the fact that Internet broadcasting is materially different from the established broadcasting methods. Perhaps the Court's intention in ruling that Aereo publically performed is their way of forcing the legislative hand to make the necessary changes sooner rather than later. But without any change in the 1976 Copyright Act, Internet broadcasting companies will continue to be locked out of the market and forced to partake in potentially costly private negotiations for these rights.<sup>169</sup>

#### d. Internet Broadcasting Technology is Materially Different

Cable, satellite, and Internet television providers are similar in that they offer paid subscription services permitting a viewer to access the broadcast transmissions.<sup>170</sup> But they differ in their levels of sophistication, technological make-up, and stages of development. The first two service providers have jointly developed sophisticated ways to work within the allotted radio frequencies permitted for television, while simultaneously resolving transmission issues.<sup>171</sup> Technologically speaking, however, Internet broadcasting operates through an entirely novel method of delivery.<sup>172</sup> The differences lie in how that transmission gets from point A to point B without distorting quality.

Utilizing a network of ground wires and dish antennae, the cable provider receives a signal either directly from a local antenna by wire, or from a distant signal by a dish antenna, scrambles the signal, and then transmits the scrambled information to consumers hooked into the network by coaxial or fiber optic cables.<sup>173</sup> However, this was not always the case. Broadcast television was initially conducted through the use of radio wave, or analog

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<sup>169</sup> While the option of a negotiated license is not precluded by the operation of a compulsory license, the realistic ability of a small start-up company such as Aereo to seek a negotiated license that is remotely comparable to the larger cable and satellite service companies is pretty hard to imagine. The television broadcast industry is driven by the viewer demand that is able to capture the large audiences to permit commercial advertisements in order to generate revenue. Numerically speaking, in terms of viewership, Internet broadcasting simply just does not have a powerful market share to be able to compete without a subsidy.

<sup>170</sup> Diallo, *supra* note 48.

<sup>171</sup> Tricia Goss, *Digital vs. Analog TV; What's the Difference?*, BRIGHT HUB (May 20, 2011), <http://www.brighthub.com/electronics/home-theater/articles/36552.aspx>.

<sup>172</sup> John Fuller, *How Internet TV Works*, HOW STUFF WORKS (Oct. 3, 2007), <http://electronics.howstuffworks.com/internet-tv.htm>; *see also Competition Issues in Television and Broadcasting 2013*, OECD 1, 27 (2013), <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf> (stating this novel method altered the existing dynamic between traditional service providers and broadcasting companies, and is posting a threat to the status quo).

<sup>173</sup> *How Cable Providers Operate*, ENLIGHTENME, <http://enlightenme.com/cable-providers/> (last visited Apr. 15, 2016) (stating the scrambling of the signals permits the cable providers to compress signals and ultimately transmit more content in significantly less space, increasing the amount of content they can transmit over the fixed amount of allotted radio waves); Curt Franklin, *How Cable Television Works*, HOW STUFF WORKS (Sept. 13, 2000), <http://electronics.howstuffworks.com/cable-tv.htm> (illustrating that MPEG compression allows the transmission of ten channels of video over a 6 megahertz bandwidth of a single analog channel).

transmission.<sup>174</sup> This primitive broadcast model was riddled with complications affecting the quality of the images and sounds.<sup>175</sup> Throughout the development of the cable industry, however, the providers were able to navigate these signal transmission issues in new and innovative ways.<sup>176</sup> The cable providers were able to navigate the topography of the land by sending their signals toward the sky to bring their signals to even more remote areas of the country.

Much like cable network providers, satellite television resolves the range and image distortion issues by transmitting their signals from satellites orbiting the earth.<sup>177</sup> Direct broadcast satellite providers acquire the broadcast signals from the various sources and transmit those signals to the satellites in orbit.<sup>178</sup> The satellite dish in orbit aids in receiving and re-transmitting the signal back down to the earth's surface providing a clear, unobstructed signal to a consumer with the proper equipment.<sup>179</sup> Simply enough, the satellite company operates very similarly to a cable network provider, except a satellite provider does not provide a pre-existing network of hard wires into which a consumer can plug; the "network" is contained in a subscriber's own home. The advantage behind satellite transmission is that it is an alternative way of solving the line-of-site issue that troubled early cable companies. Ultimately though, cable and satellite companies retain the control over the content that they transmit to the subscribers through the use of licensing, whether compulsory or privately negotiated.

Internet broadcast transmission is entirely different. It is without the line-of-site issues that were problematic to cable and satellite providers, and is thus less limited in both accessibility and content.<sup>180</sup> Many different models of Internet television are available to those who already have the necessary hardware to receive the signal; namely an Internet connection.<sup>181</sup> Instead of an intricate maze of reflected radio signals and translation into binary code for digital formatting, the Internet model intercepts the original transmission as a group of information and immediately translates that information into readable data, which is then "cast" over the Internet.<sup>182</sup> This rids the

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<sup>174</sup> Goss, *supra* note 171.

<sup>175</sup> *Id.*

<sup>176</sup> Franklin, *supra* note 173. Primarily, the line-of-site issues were resolved first by lengthy cables connected to antennas placed on high-points in a town that offered the most visibility, and therefore the clearest reception. *Id.* Later, this issue was resolved by relaying the originally received signal off of satellite dishes in orbit, receiving them at a single location, and then sending the combined signals to the consumers. *Id.*

<sup>177</sup> Karim Nice & Tom Harris, *How Satellite TV Works*, HOW STUFF WORKS (May 30, 2002), <http://electronics.howstuffworks.com/satellite-tv1.htm>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* The shape of the satellite is in the form of a dish to help focus the transmission and reception of signals, thus increasing the quality of the image and sounds. *Id.*

<sup>180</sup> Fuller, *supra* note 172.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

transmission of the issues that plagued early cable and satellite companies.

With technological innovations like cloud storage, the consumer is now benefitted with a host of viewing options that is fully customizable; a trait not offered by cable and satellite services. The consumer now has access to live broadcasts as well as on-demand programming, permitting consumers to watch whenever or wherever they wish.<sup>183</sup> Since the signal is carried to the consumer as data and not as radio waves, the consumer can isolate singular content and access programming from anywhere in the world without signal interference issues, thus providing a level of customization and access unprecedented in the broadcasting industry.<sup>184</sup>

Internet broadcasting is a good thing for the viewers and broadcasters alike because it offers the consumer an alternative option to access content, and increases the size of the audience for the broadcasters to reach. The Internet has taken the choice of content out of the hands of network providers, and given it to the consumer in a way that is fundamentally different from the existing broadcasting forms.<sup>185</sup> The manner in which copyrighted media is consumed and thus the way it is broadcasted to mass quantities of people is transforming.<sup>186</sup>

The significance of this new model of broadcasting is the difference it strikes from existing broadcasting forms.<sup>187</sup> Since content is becoming increasingly available through the Internet, the subscribers or users of the Internet model are given direct input regarding the content they wish to receive.<sup>188</sup> This takes the control of broadcasting content out of the hands of the broadcasting companies and existing network providers and places it directly into the hands of the consumer. Content can now consist of only what a subscriber wishes to have access to, and not a predetermined bundle of channels chosen by the network provider. The Internet has changed the broadcasting power dynamic, and the consumer now has the upper hand.

### 3. Narrow Language Restricts Options for Innovative Technologies

The language of the compulsory license sections restricts the legal options of innovative technologies, ultimately preventing their emergence into an established market to test their own viability. By interpreting the

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See *Competition Issues in Television and Broadcasting 2013*, *supra* note 172, at 27.

<sup>186</sup> *Id.*

<sup>187</sup> The level of customization and remote access is vastly different from the existing hard-wired services offered by cable and satellite companies. Internet television has given rise to the concept of place shifting, which allows a subscriber to enjoy their programming in more than just a single location, and on their own schedule. This experience alone is not traditionally available with a standard hard-wired subscription.

<sup>188</sup> Fuller, *supra* note 172; *Competition Issues in Television and Broadcasting 2013*, *supra* note 172, at 27.

language of the copyright compulsory licenses narrowly, the courts are restricting the innovative capacity of technology to provide content in newer delivery systems, like the Internet. If Internet broadcasting cannot be read into the compulsory license language, there is little chance any other delivery system will come close to doing so. The inability of Internet broadcasting to be read into the existing compulsory license statutes permits the cable and satellite industries to maintain their chokehold on the broadcasting industry. Without any legislative action, Internet broadcasting companies are left with limited options: risk infringement lawsuits from broadcasting companies, or abandon their efforts.

To this point, a sufficient remedy to this issue that would support Internet broadcasting companies still in their infancy to enter the television services market is to alter the compulsory licensing language to include Internet broadcasting, as well as other potential content delivery systems. Instead of just defining Internet systems, a modification to these sections should be based on the power of content control, rather than method of signal distribution. This type of division, as opposed to the currently narrow definitions of the various systems, anticipates the expansion of broadcast services beyond what is currently comprehensible.

### *C. Change in Broadcasting Form Necessitates a Change in Compulsory Licensing Language*

As the methods of broadcasting continue to change, it is becoming increasingly apparent that the compulsory licenses are ill-equipped to bring those methods within the confines of the 1976 Copyright Act. The methods are not only split on a technical level, but are divided by the concept of content control and which party has the most of it. Since Internet broadcasting is currently not afforded the same license as established service providers,<sup>189</sup> it is important to the survival of Internet broadcasting for compulsory licenses to be significantly changed. If Congress is able to approach this division categorically<sup>190</sup> in attempting to redraft these licenses, then Internet broadcasting may be brought into the boundaries of copyright law and encouraged to prosper by operating legally.

#### 1. Broadcasting Methods have Developed Beyond the Licensing Language

On a technical level, Internet broadcasting is fundamentally different from the established methods of broadcasting.<sup>191</sup> Despite this difference, an attempt to harmonize Internet broadcasting with the rigid definitions has been made, and was rejected by the courts.<sup>192</sup> Conclusively then, it seems as if

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<sup>189</sup> See discussion *supra* Section III.B.2.

<sup>190</sup> Cf. Asaro, *supra* note 44, at 1140.

<sup>191</sup> See discussion *supra* Section III.B.2.d.

<sup>192</sup> See discussion *supra* Section III.B.2.b.

broadcasting technology and methods have evolved to a point unforeseen by the drafters of the 1976 Copyright Act, and the subsequent drafters of the compulsory license statutes. This evolution posits a new way of examining the effectiveness of the definitions. Instead of thinking of service providers by the hardware they use to receive signals, they should be thought of under the model of who has control over their content,<sup>193</sup> because that is currently their most significant difference.

a. Active Content Delivery Systems – Technical Structure of Cable and Satellite Services

The coined term “Active Content Delivery System” contemplates a system in which the system itself is responsible for deciding which content a subscriber may access.<sup>194</sup> For example, larger companies like Dish Network and Time Warner Cable often participate in negotiations regarding the delivery of content, advertisement fees, and a whole host of other details that go into the final version that the consumer enjoys. This give and take between the broadcast companies like ABC and NBC, and the services providing companies is a necessary precursor that dictates which content is allowed to be transmitted and for what price.<sup>195</sup> While the compulsory license may not include the negotiation aspect of this relationship, the relationship itself is indicative of who has the power to control the content the viewer receives, namely the service provider. They actively participate in the choosing of content.

b. Passive Content Delivery Systems – Technical Structure of Internet Broadcasting

Another coined term, “Passive Content Delivery System” contemplates a system in which the viewer is in complete control of their experience, but only utilizing the system’s infrastructure as a means to an end. Instead of the service provider making choices about which content is going to be offered to the consumer, the consumer makes deliberate decisions about which content to access, and the Passive Content Delivery System does the leg-work of isolating the content to deliver it to the consumer. The Passive Content Delivery Systems are those that are operated in response to user input rather than large-scale distribution of signals.

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<sup>193</sup> See discussion *supra* Section III.B.2.d.

<sup>194</sup> Typically, the broadcasting companies and the service providers partake in a negotiation for what is called carriage licenses. These licenses, among other things, stipulate which signals the service provider can transmit from the broadcasting company to the subscriber on the other end. It is through this negotiation that the service provider takes an active role in deciding which content is made available to the consumer, and for what price. If no agreement is reached, generally, the service provider is not permitted to carry a certain signal. *Cable Carriage of Broadcast Stations*, FED. COMM. COMMISSION, <http://www.fcc.gov/guides/cable-carriage-broadcast-stations> (last updated Aug. 15, 2013).

<sup>195</sup> See *id.*

### c. Cable and Satellite Services are Bridging the Gap Between Content Delivery Systems

Both cable and satellite providers are migrating into the Internet broadcasting models, and developing their own content delivery systems that reinforce the reality of this needed change; their own delivery systems support the need for reevaluating the statutory language. For example, Hulu was created as a joint venture between Comcast and AOL.<sup>196</sup> Their innovative way of delivering content is a way of circumventing the content-owner and content-provider negotiations and just delivering the content to the consumer. However, Hulu accomplishes this in a way that is indicative of this model of content control; the user picks which program they wish to watch, and only that program is transmitted.<sup>197</sup> If Hulu were an independent company, like Aereo, they would be the poster-child of a passive broadcasting system, and be entitled to whatever corresponding licensing scheme is in place.

## 2. Existing Broadcasting Methods are Categorically Distinguishable

As it currently stands, the narrowly drafted compulsory license statutes provide definitions for only two types of content delivery systems, to the exclusion of other developing systems.<sup>198</sup> Technological innovation developed beyond the boundaries of the copyright law, gives rise to things, such as: digital recording and playback, cloud storage, and Internet television.<sup>199</sup> But these technological advances differ greatly from the initial design of television broadcast, which necessitates a more categorical approach to fitting these developments within copyright law.

### a. Active Content Delivery Systems are Similar Enough for Categorization

The Active Broadcasting Delivery systems on a technical level are similar, and therefore should be afforded similar compulsory licensing language that reflects their similarity. As illustrated above, the way in which cable and satellite companies acquire and transmit their signals, as well as the way they charge their subscribers is strikingly similar.<sup>200</sup> Their technological similarity would support a categorical approach to redefining the compulsory licenses.

Additionally, the Passive Content Delivery Systems are distinct enough from Active Content Delivery Systems to establish their own category regarding licensing. They may receive signals in similar fashion to those of

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<sup>196</sup> See *NBC Universal and News Corp.*, *supra* note 164.

<sup>197</sup> *About Hulu*, HULU, <http://www.hulu.com/about> (last visited Apr. 15, 2016).

<sup>198</sup> See discussion *supra* Section III.B.1.

<sup>199</sup> Asaro, *supra* note 44, at 1109.

<sup>200</sup> *Compare* 17 U.S.C. § 111 (2012), *with* 17 U.S.C. § 119.

the Active Content Delivery Systems, but because of the level of control over the content they provide to their subscribers, their system operates differently.<sup>201</sup> Instead of a multitude of transmitted signals from broadcaster to consumer that is predetermined, they may only collect a single isolated, or range of, frequencies and translate that information to data for distribution to the consumers. This ability to determine exactly what content is accessed will permit a more accurate accounting for the distribution of collected licensing fees, and aid broadcasting companies in making more informed decisions about which content to acquire and broadcast. The exciting part about this categorical approach is that it would allow Internet broadcast television to experiment with different effective ways of making the content accessible to the consumer without offending the copyright owner's rights.

### 3. Proposal of Solutions

Since the Court's ruling in *Aereo*, there has been some speculation on what should happen next. Most can agree that the most effective way to remedy the outcome of this case is by some form of legislative action or regulation.<sup>202</sup> While other scholars have opined on a solution,<sup>203</sup> and the FCC has since considered proposing new rules to fit Internet television into the compulsory licensing definitions,<sup>204</sup> this Comment seeks to propose an alternative; redraft the broadcast compulsory licenses to reflect a more categorical approach to innovative methods of broadcasting. Namely, instead of defining the different systems of broadcasting, the methods of content delivery should be defined categorically, as to include future innovative methods.

#### a. Rewrite the Licensing Statutes to Reflect the Technical Division of Methods

The language of the compulsory license statutes of the 1976 Copyright Act should be rewritten to reflect new categorical bifurcation. Instead of the broadcast compulsory licenses reflecting the means by which the content is provided to the consumer, the compulsory licenses should be reflective of who has control over the content, namely "Passive Content Delivery System" and "Active Content Delivery System." The standard definitions of these suggested compulsory licensing revisions would reflect

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<sup>201</sup> See discussion *supra* Section III.B.2.d.

<sup>202</sup> See *Aereo IV*, No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*23 (S.D.N.Y. Oct. 23, 2014) (quoting *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 282 (2d Cir. 2012)); Asaro, *supra* note 44, at 1140.

<sup>203</sup> Asaro, *supra* note 44, at 1140.

<sup>204</sup> Jacob Kastrenakes, *Huge FCC Rule Change Could Make Internet TV a Reality*, VERGE (Oct. 28, 2014, 5:15 PM), <http://www.theverge.com/2014/10/28/7086201/internet-tv-rule-change-proposed-fcc>; Tom Wheeler, *Tech Transitions, Video, and the Future*, FED. COMM. COMMISSION (Oct. 28, 2014, 2:48 PM), <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

the definitions illustrated in the previous section.<sup>205</sup>

One of the concerns may be the collection of the statutory fees, and how they should be calculated. The suggested form of the compulsory license can take a similar form from the already existing compulsory licenses to calculate fees and royalties paid, and would be more inclusive of developing technologies. A formula for calculating the proper royalty can be configured utilizing the number of subscribers, the number of views of a given program, and how often a subscriber uses the services to access content.<sup>206</sup> Since Internet relies on storable data for the transmission of the content, it is reasonable to believe that data can be used to track the precise number of views from a precise number of subscribers, ultimately providing a more accurate accounting of the royalties that should be paid under the statutory definition.

#### b. Benefits of this Solution

A wider scope of licenses will account for content delivery systems yet to be developed, such as mobile content delivery systems, for example, which will prove to be mutually beneficial to both content owners and content distributors. Setting a wider scope on the broadcasting methods that would fall into the purview of copyright law will provide assurance to copyright owners that the use of their works is compensated, and unauthorized performance of those works will be reprimanded. Similarly, content providers will have a better idea of where their developing technologies will fall with respect to the royalties they would have to pay.

With this categorical approach, an innovative company breaking into the broadcasting market will know that their model will fall into one of two groups, that they *must* seek the minimum license and pay the content owners, and that the threat of future copyright infringement litigation is minimized. This will continue to encourage the Active Content Delivery Systems to develop alternative methods, by which they could also capitalize on opportunities presented in the Passive Content Delivery Systems. Overall, a categorical approach, such as this suggested approach, will prove to be more inviting of technological innovation.

### IV. CONCLUSION

The use of compulsory licenses in the broadcasting world remains relevant, as new forms of broadcasting are beginning to emerge. Taking that into consideration, something needs to be done to allow these developments to grow and test their viability in an established market. While Congress is

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<sup>205</sup> See discussion *supra* Section III.C.1.

<sup>206</sup> 17 U.S.C. § 111(d) (2012) (describing the calculation of the royalty rates); 17 U.S.C. § 119(b)–(c) (describing the process of maintaining a license and the royalty rates).

likely to sit on its hands regarding copyright, as changing the copyright law is likely not on its radar in this modern era of congressional stagnation, perhaps the FCC's proposed rules will provide an effective remedy by simply being more inclusive of developing technologies. However, it will remain to be seen whether these regulations are adequate in the context of copyright law. Ultimately, some form of revision is imperative to resolve this issue before it spins out of control, whether it be regulatory solutions, or Internet broadcasting lobbyists increasing their presence in Washington to convince Congress to make the changes it needs.

