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Copyright Takeover: Balancing Art and Technology After Aereo

Nicole Webster

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**COPYRIGHT TAKEOVER: BALANCING ART AND
TECHNOLOGY AFTER *AEREO***

Nicole Webster*

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INTRODUCTION

In America, policy is a primary concern in creating, implementing, and interpreting the law. What happens when policy interests conflict? Which rights dominate? In the context of media broadcast, transmission, and storage, the Supreme Court of the United States has recently skirted these questions when balancing the competing interests of technological innovation and copyright law. Over the centuries, Congress has legislated increasingly in favor of copyright interests, overturning Supreme Court jurisprudence to the contrary. However, the Constitution provides Congress with the power to advance both the arts and sciences.¹ Congress should allow science to advance, in the form of technological innovation, in balance with protecting original works of authorship.

As technology continues to develop in the form of new devices and new means to perform, display, and access digital content, the inherent conflict between protecting original works of authorship and fostering technological innovation will increase. As discussed in this Article, copyright is federal statutory protection of original works of authorship.² “‘Copyright’ literally means the right to copy. The term has come to mean that body of exclusive rights granted by law to authors for protection of their work.”³ Pertinent to this Article are 17 U.S.C. § 106(4) and (5), which grant the copyright owner the exclusive right to “perform”⁴ and “display,”⁵ respectively, “motion pictures and other audiovisual works . . . publicly.”⁶

In the 2014 *American Broadcasting Companies, Inc. v. Aereo, Inc.* ruling (“*Aereo*”),⁷ the Supreme Court interpreted the Copyright Act’s “public performance” and “transmit” clauses in such a way that content retransmission through cloud services or remote storage equipment clearly breach the copyright owner’s exclusive right to “perform” or “display” her works.⁸ Yet, in the same opinion, the Court expressly

1. U.S. CONST. art. I, § 8, cl. 8.

2. *United States Copyright Office: A Brief Introduction and History*, LIBRARY OF CONGRESS: UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html>.

3. *Id.*

4. 17 U.S.C. § 106(4) (2016).

5. 17 U.S.C. § 106(5) (2016).

6. 17 U.S.C. § 106(4)–(5) (2016).

7. *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2502–03 (2014) (Through its “servers, transcoders, and thousands of dime-sized antennas,” Aereo’s subscribers received broadcast television over the Internet for a monthly charge. Television producers, distributors, and broadcasters sued, alleging copyright infringement.).

8. Matt Schruers, *Why Aereo Matters to the Cloud: A Primer*, DISRUPTIVE COMPETITION PROJECT (Mar. 4, 2014), <http://www.project-disco.org/intellectual-property/030414-why-aereo-matters-to-the-cloud-a-primer/> (Broadcasters’ definition of

refused to address whether copyright infringement occurs in “cloud computing, remote storage DVRs, and other novel issues.”⁹ *Aereo*’s narrow ruling¹⁰ suggests that the Supreme Court may be wary of creating a blanket rule for retransmission in light of the broadening technological mediums and capabilities.¹¹

When the Copyright Act¹² is enforced against media transmission technologies such as the DVR and cloud computing,¹³ technological development is stifled to the detriment of our society.¹⁴ Where the Court declines to rule, certain companies and technologies will continue to boom, but other entities and devices such as *Aereo*’s antenna¹⁵ may not be so fortunate.¹⁶ Additionally, potential innovations may be precluded from entering the market for lack of investment due to the unpredictable nature of the courts in this context.

This Article will explore the history of the Copyright Act and its application to the transmission of copyrighted works in the media.¹⁷ Because of the 1976 Amendment to the Copyright Act and the

public performance in *Aereo* is very similar to “multiple people stor[ing] their own, unique, lawfully acquired copy of the latest hit single in the cloud, and then play[ing] it to themselves *over the Internet*,” which is exactly what cloud storage technologies like Dropbox, SkyDrive, iCloud, and Google Drive enable.)

9. *Aereo*, 134 S. Ct. at 2511 (“We agree with the Solicitor General that [q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which Congress has not plainly marked [the] course, should await a case in which they are squarely presented.”).

10. Ruchir Patel, *The Legal Lag Behind Emerging Technology: Aereo - Innovation or Exploit?*, BOSTON COLLEGE INTELLECTUAL PROP. & TECH. FORUM, July 16 2015, 1, 4; see also *infra* note 243 and accompanying text.

11. Consistent with the Supreme Court’s holding, *Aereo* has since been applied narrowly, only relevant to community antenna television provider cases. *Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 719 (S.D.N.Y. 2014) (finding that issues regarding third party domains “are beyond *Aereo*’s reach”).

12. 17 U.S.C. § 101 (2016), et seq.

13. Enforcement thus far has been selective. See Patrick Hughes, *Aereo’s Online TV Service Violates Copyright Law, High Court Rules*, 32 WESTLAW JOURNAL COMPUTER AND INTERNET 3 (2014) (“The court said it has yet to consider if public performance rights are infringed by such actions as the remote storage of content.”).

14. Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547, 548 (2009) (“DMCA [Digital Millennium Copyright Act], section 1201 is unconstitutional.”).

15. *Aereo*’s antenna transmits subscribers broadcast television programming over the Internet, essentially simultaneously with the broadcast. *Aereo*, 134 S. Ct. at 2503.

16. Ali Sternburg, *8 Passages from the Supreme Court’s Aereo Decision that May Have Negative Implications for the Cloud*, DISRUPTIVE COMPETITION PROJECT (June 25, 2014), <http://www.project-disco.org/intellectual-property/062514-8-passages-supreme-courts-aereo-decision-may-negative-implications-cloud> (“The certainty provided by *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2008) (popularly known as *Cablevision*) led to additional investment in U.S. cloud computing companies ranging from \$728 million to \$1.3 billion during the two years after the decision.”).

17. All discussion will be regarding economic rights, not moral rights.

Supreme Court's narrow ruling in *Aereo*,¹⁸ it is unclear which technologies will survive Supreme Court review without congressional action. With a somewhat arbitrary delineation on the books, technological business prospects have become increasingly murky. This uncertainty, combined with Congress's clear favoring of copyright interests in duration and scope, unbalances the competing interests of technology and art.

At the heart of regulating media transmissions are three major issues:

- (1) Whether an entity "transmits" such that it "publicly performs";
- (2) Which governmental body is in the best position to regulate media transmissions: Congress or the Court; and
- (3) Whether it is in the People's interest to protect copyright (original works of authorship) over science (technological innovations).

To explore these issues, Part II of this Article will cover background information on the history of United States copyright laws, describe the current federal copyright statutory scheme, and review penalties for copyright infringement.¹⁹ Part III will present the problem: that Congress has caused copyright interests to take over technological innovation and public access to art.²⁰ Part IV will introduce Title 17's Compulsory Licensing scheme, provide an overview of how jurisprudence has regulated media transmissions of copyrighted content, and review the recent *Aereo*²¹ decision in light of the 1976 Amendment to the Copyright Act.²² Finally, Part V will propose two methods to protect authors' interests to their works without stifling technological development, in the form of expanding the Copyright Act's compulsory licensing provision²³ and limiting copyright duration.²⁴ This solution aims to provide both copyright owners and technology innovators a just result compatible with constitutional objectives.²⁵

18. Patel, *supra* note 10, at 1, 4; *see also infra* note 243.

19. *See infra* Part II.

20. *See infra* Part III.

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

22. *See infra* Part IV.

23. 17 U.S.C. § 111 (2016).

24. *See infra* Part V.

25. *See infra* Part VI.

I. BACKGROUND: HISTORY OF FEDERAL COPYRIGHT IN THE UNITED STATES

A. *Origins and Elements of Federal Copyright in the United States*

For over two centuries, the United States has officially recognized a need to protect authors' works in order to promote the development of art and science.²⁶ The United States Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²⁷ Today, technology embodies the term "useful arts."²⁸ "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"²⁹ Congress initially wielded this power in May of 1790 when it enacted the first federal copyright law.³⁰

This first copyright law designated only "maps, charts and books."³¹ Later statutory enactments recognized music, drama, and works of art.³² Within two weeks of enacting the first copyright law, a work was registered with the U.S. district court clerks.³³ In 1870 – almost a century later – copyright functions were centralized in the Library of Congress.³⁴ Since then, "the Copyright Office has registered more than 33,654,000 claims to copyright and mask works³⁵ and provided many millions of deposits . . . [to its] collections."³⁶ Today,

26. U.S. CONST. art. I, § 8, cl. 8.

27. U.S. CONST. art. I, § 8, cl. 8.

28. See Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH. L. REV. 50, 54 (1949).

29. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

30. *United States Copyright Office: A Brief Introduction and History*, LIBRARY OF CONGRESS: UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html>.

31. *Wheaton v. Peters*, 33 U.S. 591, 660 (1834) (quoting Copyright Act, 1 Stat. 124 (1790)).

32. Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,606 (June 22, 2012) (to be codified at 37 C.F.R. pt. 201).

33. *United States Copyright Office: A Brief Introduction and History*, LIBRARY OF CONGRESS: UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html>.

34. *Id.*

35. A "mask work" is a series of three-dimensional images that are layered to form a semiconductor chip. 17 U.S.C. § 901(a)(2) (2016); see also *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1561 (Fed. Cir. 1992).

36. *United States Copyright Office: A Brief Introduction and History*, LIBRARY OF CONGRESS: UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html>.

the Copyright Office registers half a million copyright claims and records over 11,000 documents with hundreds of thousands of titles every year; it also “collects for later distribution to copyright holders a quarter of a billion dollars in cable television, satellite carrier, and Audio Home Recording Act compulsory license funds.”³⁷

1. *Scope of Copyright Protection*

“The Copyright Clause . . . empowers Congress to *define* the scope of the substantive right.”³⁸ Thus, “Congress’s power to bestow copyrights is broad.”³⁹ However, this is not a grant of omnipotence as only original works may be protected,⁴⁰ for a limited duration,⁴¹ from public performance⁴² unless licensed.⁴³ Congress has wielded its legislative power many times to include more types of works, to extend the duration of copyright, and to clarify copyright holders’ exclusive rights, most notably in 1909, 1976, and 1988.⁴⁴

The history of the federal Copyright Act reveals its expansive amplitude in its recognition of original works of authorship. “The two fundamental criteria of copyright protection [are] originality and fixation in tangible form”⁴⁵

a. *Original Works of Authorship*

Initially, “[a] work must be original to be copyrightable.”⁴⁶ “Original” in the copyright context means that the author independently created the work (as opposed to copying it from other works) and thus generated the work with at least some small degree of creativity.⁴⁷

Unlike a patent, which protects the idea itself, copyright protects only the expression of the idea.⁴⁸ To illustrate, where two authors each

37. *Id.*

38. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

39. *Golan v. Gonzales*, 501 F.3d 1179, 1183 (10th Cir. 2007).

40. “The *sine qua non* of copyright is originality.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

41. “[A] copyright must be limited in duration.” *Golan*, 501 F.3d at 1184.

42. 17 U.S.C. § 106 (2016).

43. 17 U.S.C. § 111 (2016) (compulsory licensing provisions for cable systems).

44. For a timeline of amendments beginning in 1909, see 1–TL NIMMER ON COPYRIGHT (2015).

45. *Feist Publ’ns*, 499 U.S. at 355 (quoting H.R. Rep. No. 94–1476, at 51 (1976)).

46. *Darden v. Peters*, 488 F.3d 277, 286 (4th Cir. 2007); *Feist Publ’ns*, 499 U.S. at 346 (“Originality is a constitutional requirement.”).

47. *Feist Publ’ns*, 499 U.S. at 345.

48. *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Dollcraft Indus., Ltd. v. Well-Made Toy Mfg. Co.*, 479 F. Supp. 1105, 1113 (E.D.N.Y. 1978) (“[C]opyright law protects an individual’s concrete expression of his own idea.”); see also 17 U.S.C. § 102(b) (2016) (“In no case does copyright protection for an original work of authorship extend to any idea,

independently make their own map of the same territory, and the maps are perfectly identical, “each [author] may obtain the exclusive right to make copies of his own particular map, and yet neither will infringe the other’s copyright.”⁴⁹ “The copyright protects originality rather than novelty or invention – conferring only ‘the sole right of multiplying copies.’”⁵⁰

Over time, Congress has offered protection to more types of works. First, only maps, charts, and books were protected.⁵¹ Then, legislation included designing, engraving, and etching.⁵² In 1831, musical compositions were added, followed by dramatic compositions in 1856, and then photographs and their negatives in 1865.⁵³ Today, the Copyright Act denotes eight categories of works of authorship: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”⁵⁴ This expansion of types of works protected over the history of the Copyright Act, and the current list of categories in which authors may find protection for their work, reveals the inclusive nature of the Copyright Act’s scope.⁵⁵

b. Fixed in a Tangible Medium of Expression

The second criteria for copyright protection is that it be “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise

procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”)

49. *Mazer*, 347 U.S. at 217–18 (citing *Fred Fisher, Inc., v. Dillingham*, 298 F. 145, 150–51 (S.D.N.Y. 1924) (“[T]wo directories, independently made, are each entitled to copyright, regardless of their similarity, even though it amount [sic] to identity. Each being the result of original work, the second will be protected, quite regardless of its lack of novelty.”)); see also *Feist Publ’ns*, 499 U.S. at 346 (“[A]ssume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

50. *Mazer*, 347 U.S. at 218 (quoting *Jewelers Circular Pub. Co. v. Keystone Publ’g*, 281 F. 83, 94 (1922)).

51. *Id.* at 208 (“In 1790 the First Congress conferred a copyright on ‘authors of any map, chart, book or books already printed.’”).

52. *Id.*

53. *Id.* at 208–09.

54. 17 U.S.C.S. § 102(a) (LexisNexis, Lexis Advance through PL 114-288); see also *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 48 (D. Mass. 1990) (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664) (“[T]he designation ‘works of authorship’ is not meant to be limited to traditional works of authorship such as novels or plays. Rather, Congress used this phrase to extend copyright to new methods of expression as they evolve.”).

55. See 17 U.S.C. § 102 (2016).

communicated, either directly or with the aid of a machine or device.”⁵⁶ The fixation requirement first appeared in the 1976 Amendment to the Copyright Act,⁵⁷ but its appearance denotes only greater flexibility in Congress’ intent to protect more works.⁵⁸ Former versions of the Copyright Act, from the first federal copyright statute in 1790 (listing maps, books, charts)⁵⁹ to the Copyright Act of 1909, merely listed specific works of authorship that could qualify for protection.⁶⁰ Yet congressional intent of inclusivity has been expressed since the 1909 Act, wherein section 5 provided that, regarding listed works for registration, “the above specifications shall not be held to limit the subject-matter of copyright . . . , nor shall any error in classification invalidate or impair the copyright protection secured under this Act.”⁶¹

Similar to the original work of authorship requirement, fixation is easily achieved. Here, Congress’ intent to protect a wide range of works is evidenced by the words “*any tangible medium of expression, now known or later developed.*”⁶² This language demonstrates that Congress had technological development in mind when it sought to protect original works of authorship. Additionally, by outlining categories of works of authorship⁶³ and having a broad definition of “fixed,”⁶⁴ as opposed to presenting a finite list of certain works,⁶⁵ copyright protection is effectively available to a wider range of possible works than could otherwise be predicted⁶⁶ or listed.

For the purposes of this Article, it is important to note that it is well-established that television shows⁶⁷ and movies are protected under

56. 17 U.S.C. § 102(a) (2016).

57. 17 U.S.C. §§ 101–102 (1976).

58. Copyright Act, 35 Stat. 1075 (1909).

59. Copyright Act, 1 Stat. 124 (1790).

60. See 17 U.S.C. § 5 (1909) (listing books, periodicals, lectures, sermons, addresses, dramatic or dramatico-musical compositions, maps, works of art (including models or designs), reproductions of a work of art, drawings or plastic works of a scientific or technical character, photographs, prints and pictorial illustrations).

61. Copyright Act, 35 Stat. 1075 (1909).

62. 17 U.S.C. § 102(a) (2016) (emphasis added).

63. 17 U.S.C. § 102 (2016).

64. “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.” 17 U.S.C. § 101 (2016).

65. See *Mazer v. Stein*, 347 U.S. 201, 208–210 (1954).

66. “Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.” *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 48 (D. Mass. 1990) (citing H.R. REP. NO. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664).

67. See *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (“A

the Copyright Act's "motion pictures and other audiovisual works" category.⁶⁸ While a live television broadcast is not *per se* eligible for federal copyright protection,⁶⁹ if it is simultaneously recorded and transmitted,⁷⁰ or the work broadcasted is a copyrighted writing,⁷¹ it will qualify for protection.⁷² Even characters⁷³ and commercials⁷⁴ are copyrightable.

c. Copyright Duration

Under the Constitution of the United States, Congress has the task of defining the scope of authors' limited private monopoly to their works, to ensure the public obtains access.⁷⁵ While authors are initially vested with the copyright to their work,⁷⁶ some reproductions of the work are in the public domain.⁷⁷ Congress cannot allow copyright to exist in perpetuity.⁷⁸ "[A]n infinite copyright would deprive the public

[television] program is a particularized form of expression, not an idea" and is therefore copyrightable.).

68. 17 U.S.C. § 102(a)(6) (2016).

69. "Motion pictures do not include 'live telecasts that are not fixed simultaneously with their transmission.'" 1-2 NIMMER ON COPYRIGHT § 2.09 n. 29.

70. 17 U.S.C. § 101 (2016); *see also* H.R. REP. NO. 94-1476, at 52-53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 ("[A]ssuming it is copyrightable-as a 'motion picture' or 'sound recording,' for example-the content of a live transmission should be accorded statutory protection if it is being recorded simultaneously with its transmission."); *accord* 1-1 NIMMER ON COPYRIGHT § 1.08 ("Because most television and many radio stations now customarily record their live broadcasts on video or audio tape simultaneously with the live transmission, the effect of the above provision would apparently render such broadcasts eligible for statutory copyright.").

71. "[A] live television broadcast of a play or musical composition presents underlying material that itself qualifies as a writing . . . [T]he broadcast itself is still not a writing; but because the work being broadcast is a writing, the authors' exclusive rights include the control of unauthorized broadcasts." 1-1 NIMMER ON COPYRIGHT § 1.08.

72. *See* 1-1 NIMMER ON COPYRIGHT § 1.08.

73. Especially distinctive characters, such as James Bond, Godzilla, and Rocky Balboa, have been afforded copyright protection. "[C]opyright protection 'may be afforded to characters visually depicted in a television series or a movie.'" *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008) (quoting *Olson v. NBC.*, 855 F.2d 1446, 1452 (9th Cir. 1988)).

74. *Nichols Agency, Inc. v. Enchanted Child Care, Inc.*, 537 F. Supp. 2d 774, 782 (D. Md. 2008) (quoting 17 U.S.C. § 102(a) (2007) ("[C]ommercials fall into the category of 'motion pictures and other audiovisual works.'")).

75. *Eldred v. Ashcroft*, 537 U.S. 186, 204-05 (2003) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

76. 17 U.S.C. § 201(a) (2016).

77. *Sony*, 464 U.S. at 433; *see also* *Warner Bros. Entm't v. X One X Prods.*, 644 F.3d 584, 596 (8th Cir. 2011) ("[A]s a general proposition, the public is not limited solely to making exact replicas of public domain materials, but rather is free to use public domain materials in new ways (*i.e.*, to make derivative works by adding to and recombining elements of the public domain materials).").

78. "Congress cannot 'create[] a species of perpetual . . . copyright.'" *Golan v. Gonzales*, 501 F.3d 1179, 1183-84 (10th Cir. 2007) (quoting *Dastar Corp. v. Twentieth*

of the benefit—the right to use and enjoy the expression—that it is supposed to receive in exchange for the grant of monopoly privileges to the author for a discrete period of time.”⁷⁹

A modern example can be found in Warner/Chappell Music’s enforcement of its copyright on the “happy birthday” song lyrics.⁸⁰ The company had earned about \$2 million a year in royalties for all renditions of the song,⁸¹ despite the fact that it only owned the copyright to the melody, not the lyrics.⁸² The company’s profits endured for more than eighty years to the public’s detriment⁸³ until a federal court ruled on this matter, thus officially releasing the “happy birthday” lyrics for all to use.⁸⁴

d. Term Measurement

An essential question in copyright protection is when an author’s term of exclusive rights begins. Start dates that have been considered for measuring the term include the date of creation, the date of registration with the Library of Congress, the date of first public dissemination,⁸⁵ the life of the author, and the date of publication.⁸⁶ There are certain issues with each, but the common theme is that there will always inevitably be a gap⁸⁷ between when the work is created, or is in the initial stages of creation, or is disseminated, and the date that it is registered or published.⁸⁸ Moreover, there are some instances where

Century Fox Film Corp., 539 U.S. 23, 37 (2003)).

79. *Golan*, 501 F.3d at 1184 (citing *Dastar*, 539 U.S. at 33–34) (“The rights of a . . . copyright holder are part of a carefully crafted bargain under which, once the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution.”).

80. See *Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp. 3d 975 (C.D. Cal. 2015).

81. Christine Mai-Duc, *All the ‘Happy Birthday’ song copyright claims are invalid, federal judge rules*, LA TIMES, Sept. 22, 2015, <http://www.latimes.com/local/lanow/la-me-ln-happy-birthday-song-lawsuit-decision-20150922-story.html>.

82. See *Marya*, 131 F. Supp. 3d at 1002–03.

83. See Mai-Duc, *supra* note 81.

84. See *Marya*, 131 F. Supp. 3d at 1002–03.

85. “The word ‘dissemination’ is used here in the sense of making the work known to others by whatever means its nature permits.” Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 72 (1961), <http://copyright.gov/history/studies/study30.pdf>.

86. Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 70–74 (1961), <http://copyright.gov/history/studies/study30.pdf>.

87. See *id.* at 74. This is not true of terms set for the “life of the author,” but for reasons set forth in Part IV(B)(3) of this Article, *infra*, “life of the author” is not the term that should be used for copyright protection.

88. Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 70–74 (1961), <http://copyright.gov/history/studies/study30.pdf>.

dissemination to the public does not constitute publication,⁸⁹ so if publication were the criteria for initializing copyright, some works would be unprotected even though the public had experienced them.

Accordingly, Congress has not been consistent in its measurement of the protected term. In 1790, the term began when the title was recorded in the clerk's office.⁹⁰ In 1909, published works received copyright protection from the date of publication, and unpublished works received copyright protection from the date of their registration with the Copyright Office.⁹¹ In 1976, Congress again altered its method.⁹² Unlike the 1790, 1831, and 1909 Acts, the 1976 Act protected works created by identified natural persons from the date of the work's creation until 50 years after the author's death.⁹³ Additionally, "[f]or anonymous works, pseudonymous works, and works made for hire, the 1976 Act provided a term of 75 years from publication or 100 years from creation, whichever expired first."⁹⁴ The latest amendment to the Copyright Act, the Sonny Bono Copyright Term Extension Act ("CTEA"), retains the 1976 measurement methods⁹⁵ and does not require registration for copyright protection.⁹⁶

e. Term Duration

In contrast with the incongruous methods for measuring the start of the copyright term, consistent throughout the versions of the Copyright Act is the availability of two terms of copyright protection.⁹⁷ Though the duration of the terms have changed with each amendment,⁹⁸ a copyrighted work is afforded protection over a term,

89. There are "uncertainties as to what constitutes publication" such that "it is difficult in many situations to determine whether or when publication occurred." Additionally, "[w]orks which are performed for millions through the medium of radio and television are thought to be unpublished in the copyright sense if no copies through which the work can be visually perceived have been distributed." Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 70–71 (1961), <http://copyright.gov/history/studies/study30.pdf>.

90. Copyright Act, 1 Stat. 124 (1790).

91. Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 70 (1961), <http://copyright.gov/history/studies/study30.pdf>.

92. *Eldred v. Ashcroft*, 537 U.S. 186, 194–95 (2003) (citing Copyright Act §§ 302–304, 90 Stat. 2541 (1976)).

93. *Id.* (citing Copyright Act § 302(a), 90 Stat. 2541 (1976)).

94. *Id.* at 195 (citing Copyright Act § 302(c), 90 Stat. 2541 (1976)).

95. See 17 U.S.C. § 304 (2016).

96. 17 U.S.C. § 408(a) (2016) ("registration is not a condition of copyright protection").

97. Copyright Act, 1 Stat. 124 (1790) (renewal of second term conditioned upon a second recording within six months before expiration of the first term).

98. See *infra* notes 101-114 and accompanying text.

with a second term of equal or lesser duration possible upon renewal.⁹⁹ Either the author or a designated class of beneficiaries may renew.¹⁰⁰

With each amendment to the Copyright Act, Congress has exercised its constitutional authority¹⁰¹ to extend the duration of the existing copyright term.¹⁰² The first copyright act in 1790 provided that copyright would endure for 14 years, and could be renewed for a second term of 14 years¹⁰³ if the author applied for renewal within one year of the end of the first term.¹⁰⁴ “Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years).”¹⁰⁵ The 1976 Copyright Act provided copyright protection from the date of creation until 50 years after the author died.¹⁰⁶

The Sonny Bono Copyright Term Extension Act (CTEA) of 1998 was “the fourth major duration extension of federal copyrights.”¹⁰⁷ The CTEA essentially “[r]etain[ed] the general structure of the 1976 Act,” but added another 20 years of protection for works created by natural persons, making copyright endure through the author’s life plus 70 years.¹⁰⁸ “For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first.”¹⁰⁹ In addition, any copyright in its term of renewal when the CTEA became effective (October 27, 1998),

99. See *infra* notes 103-106 and accompanying text.

100. Copyright Law Revision Studies, *Renewal of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 31, at 110-11 (1961), <http://copyright.gov/history/studies/study31.pdf> (Copyright Act of 1790 § 1: “executors, administrators or assigns”; Act of 1831: “author’s widow and children”); Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 77 (1961), <http://copyright.gov/history/studies/study30.pdf> (1909 Act: “author’s widow, widower, children, the author’s executors, or the next of kin”); 17 U.S.C. § 304(a)(1)(C) (the widow, widower, or children of the author, the author’s executors, or the author’s next of kin).

101. U.S. CONST. art. I, § 8, cl. 8.

102. *Golan v. Gonzales*, 501 F.3d 1179, 1181-82 (10th Cir. 2007); *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (“Text, history, and precedent . . . confirm that the Copyright Clause empowers Congress to prescribe ‘limited Times’ for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”).

103. *Eldred*, 537 U.S. at 194.

104. Copyright Act of 1909, section 23, lines 7-23.

105. *Eldred*, 537 U.S. at 194.

106. *Id.* at 193.

107. *Id.* at 194-195 (citing 17 U.S.C. § 302(a) (2002)).

108. *Id.* at 195-96 (citing 17 U.S.C. § 302(a) (2002)); *Golan v. Gonzales*, 501 F.3d 1179, 1181-82.

109. *Eldred*, 537 U.S. at 196 (citing 17 U.S.C. § 302(c) (2002)).

receives protection for 95 years from the date its copyright was originally secured.¹¹⁰

| | Term Start Date | 1st Term | 2nd Term |
|------|--|---|------------------------|
| 1790 | Registered | 14 yrs. | 14 yrs. |
| 1831 | Published | 28 yrs. | 14 yrs. |
| 1909 | Published / Registered | 28 yrs. | 28 yrs. |
| 1976 | Natural Persons: Creation | Natural Persons: 50 yrs. from author's death | 47 yrs. ¹¹¹ |
| | Anonymous / Works Made for Hire: Publication or Creation | Anonymous / Works Made for Hire: 75 or 100 yrs.; first to expire | |
| 1998 | Natural Persons: Creation | Natural Persons: 70 yrs. from author's death | 67 yrs. ¹¹² |
| | Anonymous / Works Made for Hire: Publication or Creation | Anonymous / Works Made for Hire: 95 or 120 yrs.; first to expire | |

Extensions in duration have been applied to both future and existing copyrights.¹¹³ “History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”¹¹⁴ Furthermore, policy considerations prevent putting an author in a worse position after the passage of a new act.¹¹⁵

Since its 1998 enactment, the CTEA has since been challenged,¹¹⁶

110. 17 U.S.C. § 304(b) (2016).

111. “[C]opyright may be renewed for a second term of forty-seven years.” *Capano Music, a Div. of Britone, Inc. v. Myers Music, Inc.*, 605 F. Supp. 692, 694 (S.D.N.Y. 1985) (citing Copyright Act, 90 Stat. 2541 (1976)); 3–9 NIMMER ON COPYRIGHT § 9.05.

112. 17 U.S.C. § 304(a) (2016).

113. “Thus, in common with the 1831, 1909, and 1976 Acts, the CTEA’s new terms apply to both future and existing copyrights.” *Eldred*, 537 U.S. at 196.

114. *Id.* at 200.

115. *Id.* at 204; accord, Symposium, *The Constitutionality of Copyright Term Extension*, 18 CARDOZO ARTS & ENT. L.J. 651, 694 (2000) (“[S]ince 1790, it has indeed been Congress’s policy that the author of yesterday’s work should not get a lesser reward than the author of tomorrow’s work just because Congress passed a statute lengthening the term today.”).

116. Petitioners to the action argued, *inter alia*, that “[e]xtending an existing copyright without demanding additional consideration . . . bestows an unpaid-for benefit on copyright

but was upheld on constitutional grounds.¹¹⁷ “Nothing before this Court warrants construction of the CTEA’s 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.”¹¹⁸

2. *Transmissions*

When copyright subsists pursuant to Title 17, section 102 of the United States Code, section 106 “grants the copyright holder ‘exclusive’ rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies.”¹¹⁹ There is no infringement where there is no copying.¹²⁰ In congruence with technological development,¹²¹ Congress legislated to protect new forms of copying¹²² now available through technological transmission.¹²³

Over time, the technology with which to transmit images, sounds, and motion pictures has developed and increased the range of ways works of art can be transmitted. For over a century, Congress has attempted to account for new ways to ‘copy’ protected works by granting copyright owners the exclusive right to perform their works publicly.¹²⁴

The concept of “public performance” first appeared in 1856, approximately sixty-six years from the enactment of the first federal statute.¹²⁵ The act of January 6, 1897 further extended public

holders and their heirs, in violation of the *quid pro quo* requirement.” The Court “demur[red] to petitioners’ description of the Copyright Clause as a grant of legislative authority empowering Congress ‘to secure a bargain—this for that,’” reasoning that “Congress could rationally seek to ‘promote . . . Progress’ by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term.” *Eldred*, 537 U.S. 186, 214–15.

117. *Id.* at 199 (holding the 1998 Sonny Bono Copyright Term Extension Act constitutional).

118. *Eldred*, 537 U.S. at 209. “The CTEA’s baseline term of life plus 70 years . . . qualifies as a ‘limited Tim[e]’ as applied to future copyrights.” *Id.* at 199.

119. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432–33 (1984) (citing 17 U.S.C. § 106).

120. *Mazer v. Stein*, 347 U.S. 201, 218 (1954).

121. “Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.” *Sony*, 464 U.S. at 430.

122. *Id.* at 430 (“From its beginning, the law of copyright has developed in response to significant changes in technology.”).

123. “The fortunes of the law of copyright have always been closely connected with . . . technological improvements in means of dissemination . . .” *Id.* n. 12 (citing Foreword to B. Kaplan, *An Unhurried View of Copyright*, vii–viii (1967)).

124. “[A]ny person entitled thereto . . . shall have the exclusive right . . . to perform or represent the copyrighted work publicly . . .” Copyright Act § 1(d)–(e), 35 Stat. 1075 (1909).

125. “The author’s public performing rights were first included in statutory copyright in

performing rights to musical works.¹²⁶ Similarly, player pianos and perforated roles of music preceded the Copyright Act of 1909,¹²⁷ which added works prepared for oral delivery and created the “for profit” limitation.¹²⁸ When the public performance provision¹²⁹ was enacted, “its purpose was to prohibit unauthorized performances of copyrighted musical compositions in such public places as concert halls, theaters, restaurants, and cabarets.”¹³⁰ Commercial radio allowed instantaneous performance to distant and separate audiences who used their radio sets to turn the broadcast to audible form.¹³¹ Later, Congress passed the Sound Recording Amendment of 1971¹³² to address “record piracy” issues arising from the development of the audio tape recorder.¹³³ Likewise, “innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the Copyright law.”¹³⁴ Furthermore, technology that enabled retransmission of television programs by cable or microwave systems prompted the 1976 enactment of a compulsory licensing scheme¹³⁵ for cable companies.¹³⁶

Manifest in the legislative history of the Copyright Act, and in present-day judicial interpretation of the terms “public performance” and “to transmit,” is the ever-broadening scope of the ‘limited private monopoly’¹³⁷ that is copyright. Technological innovation has spurred

respect to dramatic works by the act of August 18, 1856.” Copyright Law Revision Studies, *Limitations on Performing Rights*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 16, at 81 (1960), <http://copyright.gov/history/studies/study16.pdf>.

126. *Id.*

127. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 430 n. 11 (citing *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908)).

128. Copyright Law Revision Studies, *Limitations on Performing Rights*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 16, at 81–82 (1960), <http://copyright.gov/history/studies/study16.pdf>.

129. “Copyright Act of 1909, 17 U.S.C. s 1(e), ‘(t)o perform the copyrighted work publicly for profit.’” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975).

130. *Twentieth Century Music*, 422 U.S. at 157 (citing H.R.Rep. No. 2222, 60th Cong., 2d Sess. (1909)).

131. *Id.* at 157–58 (Federal courts established that “the broadcast of a copyrighted musical composition by a commercial radio station was a public performance of that composition for profit—and thus an infringement of the copyright if not licensed.”).

132. “To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.” UNITED STATES STATUTES AT LARGE, PL 92–140, October 15, 1971, 85 Stat. 391.

133. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 n. 11 (1984).

134. *Sony*, 464 U.S. at 430 n. 11.

135. 17 U.S.C. § 111(d)(2)(B) and § 111(d)(5) (1976).

136. *Sony*, 464 U.S. at 430 n. 11.

137. *Twentieth Century Music*, 422 U.S. 151, 156; *Sony*, 464 U.S. at 431–32; Harper &

Congress to expand authors' copyrights, to the detriment of transmissions technology.

B. Penalties for Copyright Infringement

Since 1790, the Copyright Act has, in some form, granted certain recovery to the copyright owner. Over time, criminal penalties for willful infringement have been added, with threat of more to come.¹³⁸ Consequently, infringers could face double liability in the form of civil and criminal penalties.

Anyone who violates any of the copyright owner's exclusive rights is an infringer.¹³⁹ The first federal statute provided that an infringer would be civilly liable, and that he must "forfeit and pay the sum of fifty cents for every sheet which shall be found in his . . . possession . . ." ¹⁴⁰ Over time, the amount of damages increased by type of work under the statute,¹⁴¹ and copyright offenders could also be halted from infringing upon owners' rights through injunctive relief.¹⁴² The 1909 Act also laid out the penalty for willful infringement, establishing that knowing and willful for profit copying, or aiding and abetting of such copying, makes one guilty of a misdemeanor.¹⁴³ The same section gave the court discretion to impose a criminal penalty upon conviction, in the form of a fine from one hundred to one thousand dollars and/or imprisonment up to one year.¹⁴⁴

1. Types of Penalties

Today, the same types of penalties are imposed, to a greater degree. "The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work."¹⁴⁵ Remedies include: injunctions, impoundment and destruction of violating reproductions, actual damages (including any additional profits), and attorney's fees.¹⁴⁶ Regarding damages, the copyright owner may elect to recover an award of statutory damages instead of

Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985); *see also* Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 9 (1966) (regarding patents).

138. *See infra* notes 151–161.

139. *Sony*, 464 U.S. at 433; 17 U.S.C. § 501(a) (2016).

140. Copyright Act § 2, 1 Stat. 124 (1790).

141. For example, "[i]n the case of dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance." Copyright Act § 25(b), 35 Stat. 1075 (1909).

142. Copyright Act § 25(a), 35 Stat. 1075 (1909).

143. Copyright Act § 28, 35 Stat. 1075 (1909).

144. Copyright Act § 28, 35 Stat. 1075 (1909).

145. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433–34 (1984) (citing 17 U.S.C. §§ 502–505 (1983)).

146. *Sony*, 464 U.S. at 433–34 (citing 17 U.S.C. §§ 502–505 (1983)).

actual damages and profits.¹⁴⁷ The Copyright Act also includes a provision that the prevailing party may recover full costs and reasonable attorney's fees,¹⁴⁸ giving copyright owners even more reason to sue and transmission technology innovators even more reason to be wary. Furthermore, in the aggregate, statutory damages¹⁴⁹ may become astronomical where there are multiple instances of infringement such that the final figure awarded may be so gross as to violate substantive due process.¹⁵⁰

2. Willful Infringement

Amendments to the Copyright Act and subsequent judicial interpretation have widened the threshold for liability. Though “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,”¹⁵¹ and there are “limitations on liability relating to material online,”¹⁵² the ever-expanding range of copyright protection is likely to impact current and future transmission technologies.¹⁵³ Additionally, because transmission technology providers may now be held directly liable¹⁵⁴ (as opposed to secondarily liable¹⁵⁵) for copyright infringement,¹⁵⁶ there is greater exposure to criminal liability.¹⁵⁷ Moreover, the willfulness requirement¹⁵⁸ is easier to meet, as transmission technology providers know that transmissions without a license constitute copyright infringement.¹⁵⁹ In 2014, the White House

147. 17 U.S.C. § 504(c)(1) (2016). *See also* 17 U.S.C. § 504(c)(2) (2016) (“In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.”).

148. 17 U.S.C. § 505 (2016).

149. 17 U.S.C. § 504(c)(1) (2016).

150. J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 526–(2004) (“Congress should modify the Copyright Act’s minimum statutory damage provision because, when massively aggregated in the file-sharing scenario, it imposes an unconstitutional grossly excessive penalty.”).

151. *Sony*, 464 U.S. at 434.

152. 17 U.S.C. § 512 (2016).

153. *See infra* Part IV(B)(2).

154. *See ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (transmission technology provider found liable for direct infringement); *See infra* Part IV(B)(2).

155. “Most suits against equipment manufacturers and service providers involve secondary-liability claims.” *Aereo*, 134 S. Ct. at 2512 (Scalia, J. dissenting).

156. “The defendant may be held directly liable only if the defendant *itself* ‘trespassed on the exclusive domain of the copyright owner.’” *Id.* at 2513 (quoting *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)) (emphasis in original).

157. *See* 17 U.S.C. § 506 (2016).

158. “[W]illfully” as used in 17 U.S.C. § 506(a) connotes a ‘voluntary, intentional violation of a known legal duty.’” *United States v. Liu*, 731 F.3d 982, 990 (9th Cir. 2013).

159. *But see Aereo*, 134 S. Ct. at 2511 (“We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not

and the Department of Justice urged Congress to make willful, unlicensed streaming of copyrighted content a felony,¹⁶⁰ but the Senate bill introduced to amend the criminal penalty provision was not enacted.¹⁶¹

II. THE PROBLEM: CONGRESS FAVORS COPYRIGHT DESPITE THE PUBLIC INTEREST

Through its ever-growing Copyright Act, Congress favors copyright to the detriment of the public interest in promoting advancements in both science and art. Though technological developments continue to create new ways to experience art that may infringe upon copyright holders' exclusive rights, Congress has lost sight of the original purpose of copyright as framed in the United States Constitution.¹⁶² By continually expanding copyright owners' limited private monopoly,¹⁶³ Congress is handicapping the public¹⁶⁴ and stripping copyright of its utilitarian purpose of promoting "Progress of Science and useful Arts."¹⁶⁵ Furthermore, as the Court follows congressional copyright legislation,¹⁶⁶ technological innovation will be increasingly inhibited in the realm of developing media data transmissions,¹⁶⁷ unless Congress amends the Copyright Act¹⁶⁸ to benefit the public at large rather than a limited range of "owners" who

before us . . . [such as] cloud computing, [remote storage] DVRs, and other novel issues not before the Court . . .").

160. Bill Donahue, *White House Says Streaming Online Should Be Felony*, LAW 360 (Nov. 19, 2014, 4:30 PM), http://www.law360.com/technology/articles/597696?nl_pk=73d4406b-27b3-4e54-adf0-b7212b7778bd&utm_source=newsletter&utm_medium=email&utm_campaign=technology; Monica Rodriguez, *On the Legality of Watching Unlicensed TV Streams*, Intellectual Property & Technology Forum at Boston College Law School (Mar. 23, 2015), <http://bciprf.org/?p=1654>.

161. *See* 18 U.S.C. § 2319 (2016); *see also* S. 978 (112th), GovTrack, <https://www.govtrack.us/congress/bills/112/s978>.

162. *See* U.S. CONST. art. I, § 8, cl. 8.

163. *See supra* Part III(B).

164. The longer works are kept from the public domain, the longer, the public must wait to enjoy the art, create derivative works, and learn. "Potential users of [original works of authorship] include not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others." *Eldred v. Ashcroft*, 537 U.S. 186, 250 (2003). *See also infra* Part V(B).

165. U.S. CONST. art. I, § 8, cl. 8. "[T]he financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself." *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 543–44 (2d Cir. 1964).

166. *See infra* Part IV(B)(1).

167. *See Eldred, infra*, note 278 and accompanying text.

168. *See infra* Part V(B).

may or may not have created the work.¹⁶⁹

III. ANALYSIS: REGULATION OF MEDIA TRANSMISSIONS TO COPYRIGHT'S ADVANTAGE

The history of the battle between copyright owners and media transmission technologies providers yields a prevailing outcome favoring copyright owners.¹⁷⁰ Whenever the Court sides with the technology provider, Congress eventually amends the Copyright Act to override the Court's decisions, and in effect, increases the scope of protection for the copyright owner.¹⁷¹ The determination of whether copyrights or transmissions technologies prevail ultimately turns on judicial interpretation of terms "public performance" and "transmit" in view of legislative history and intent.¹⁷²

A. *Compulsory Licensing*

Compulsory licensing for cable systems, now codified in Title 17, section 111, emerged in 1976 as a solution to balance broadcasters' and cable systems' competing interests.¹⁷³ Where the courts had previously held that signal amplification resulting in secondary transmission of broadcasted content did not constitute public performance,¹⁷⁴ the 1976 Amendment made clear that cable companies must license the copyrighted content they enable their subscribers to view.¹⁷⁵

When cable was first introduced, the majority of cable television programming consisted of secondary transmissions, i.e. others' broadcasted signals.¹⁷⁶ Such secondary transmissions enabled "the unforeseen emergence of cable television as a full competitor to broadcast television."¹⁷⁷ Essentially, television broadcasting stations would emit their shows' signals, and cable television systems would

169. See *infra* notes 279–283 and accompanying text.

170. See *infra* Part IV(B).

171. See *infra* Part IV(B)(2).

172. See *infra* Part IV(B).

173. "Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such programs carried on distant broadcast signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710–11 (1984).

174. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968); see also *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 412-15 (1974).

175. "The Copyright Office is the administrative agency charged with overseeing the compulsory license scheme of Section 111." *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 604 (S.D.N.Y. 2011) *aff'd*, 691 F.3d 275 (2d Cir. 2012).

176. 2–8 NIMMER ON COPYRIGHT § 8.18.

177. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1181 (D.C. Cir. 1989).

capture those signals, amplify them, and then transmit them by cable or microwave over wire to their paying subscribers.¹⁷⁸

Despite federal protection for publicly performed works, cable television systems were not interested in paying licensing fees or royalties to copyright owners¹⁷⁹ for the content they transmitted.¹⁸⁰ This set the stage for the dispute regarding what constitutes “public performance.” In 1968, the Supreme Court took *Fortnightly Corp. v. United Artists Television, Inc.* (“*Fortnightly*”) under review.¹⁸¹ The Court held that cable television systems do not “perform” copyrighted works within the meaning of the 1909 Copyright Act, sections 1(c) and 1(d).¹⁸² Though the statutory language must be read through a lens of “drastic technological change,” the Court reasoned that enhancing the viewer’s capacity to receive the broadcaster’s signals did not constitute a “performance.”¹⁸³

In opposition to the Supreme Court’s interpretation, Congress amended the Copyright Act to add compulsory licensing for cable systems.¹⁸⁴ Without compulsory licensing, cable systems would have to negotiate for the rights to every work. Congress decided that copyright owners deserved compensation, but also that cable systems would need to be able to operate sustainably.¹⁸⁵ “[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.”¹⁸⁶

However, the statute applies only to cable systems; it does not give the same rights to any other transmissions technology.¹⁸⁷ Since “1999, the Copyright Office explicitly rejected the claim that Internet retransmission services could qualify for a Section 111 license.”¹⁸⁸ This is important because there is a significant public interest in providing

178. 2–8 NIMMER ON COPYRIGHT § 8.18.

179. 2–8 NIMMER ON COPYRIGHT § 8.18.

180. “Cable television systems receive the signals of television broadcasting stations, amplify them, and then transmit those signals by cable or microwave, and ultimately send the signals by wire to their paying subscribers.” 2–8 NIMMER ON COPYRIGHT § 8.18.

181. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

182. *Id.* at 402. Sections 1(c) and 1(d) of the 1909 Copyright Act set forth the copyright owner’s exclusive rights of performance and delivery of the copyrighted work. Copyright Act, 35 Stat. 1075 (1909).

183. *Id.* at 396, 401.

184. 17 U.S.C. § 111 (1976).

185. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711 n. 15 (1984) (citing H.R. Rep. No. 94–1476, at 89 (1976)).

186. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711 n. 15 (1984) (citing H.R. Rep. No. 94–1476, at 89 (1976)).

187. 17 U.S.C. § 111 (2016).

188. *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 604 (S.D.N.Y. 2011) *aff’d*, 691 F.3d 275 (2d Cir. 2012).

fast and easy access to a wide range of content, which developing transmission technologies can support. However, because such technologies are not granted the same compulsory licensing that cable systems receive, they are left to struggle to license each separate work.¹⁸⁹ Congress has acknowledged this system as “impracticable and unduly burdensome.”¹⁹⁰ Granting one type of technology a licensing scheme thus frustrates the innovation of new technologies¹⁹¹ that could be revolutionary in transmissions and mass communication.

B. Media Transmissions Jurisprudence – Redefining “Public Performance”

Amendments to the Copyright Act have tipped the scales in favor of copyright owners in cases against transmission technology providers for copyright infringement, as the Court has found that a greater range of parties “publicly perform” within the meaning of the Copyright Act.

1. Regulation Prior to the 1976 Amendment

“Under the relevant Supreme Court decisions¹⁹² prior to 1976, it was not a copyright violation for cable television stations to retransmit the signal of broadcast stations.”¹⁹³ Under the 1909 Copyright Act, “which lacked any analog to the Transmit Clause, a cable television system that received broadcast television signals via antenna and retransmitted these signals to its subscribers via coaxial cable did not ‘perform’ the copyrighted works and therefore did not infringe copyright holders’ public performance right.”¹⁹⁴ At the time, the Supreme Court distinguished broadcasters (active performers) from viewers (passive beneficiaries), though viewers supply their own

189. *Crisp*, 467 U.S. at 711 n. 15 (citing H.R. Rep. No. 94-1476, at 89 (1976)).

190. *Id.*

191. Amanda Asaro, *Stay Tuned: Whether Cloud-Based Service Providers Can Have Their Copyrighted Cake and Eat it Too*, 83 *FORDHAM L. REV.* 1107, 1111 (2014) (proposing “a compulsory licensing scheme specific to cloud-based service providers”).

192. “The relevant history of the Transmit Clause begins with two decisions of the Supreme Court, *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*” *Cnty. TV of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1199 (D. Utah 2014) (quoting *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 685 (2d Cir. 2013) *cert. granted sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) *rev’d and remanded sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014)) (internal citations omitted).

193. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989).

194. *WNET Thirteen*, 712 F.3d at 685, *cert. granted sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) *rev’d and remanded sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (citing *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399–401 (1968)).

equipment for viewing the performance.¹⁹⁵

The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.¹⁹⁶

Accordingly, the Court held in *Fortnightly* that a community antenna television (“CATV”) system did not publicly perform because it “no more than enhances the viewer’s capacity to receive the broadcaster’s signals; it provides a well-located antenna with an efficient connection to the viewer’s television set.”¹⁹⁷ The viewer could have similarly “erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, [and] he would not be ‘performing’ the programs he received on his television set.”¹⁹⁸ Hence, “the reception and distribution of television broadcasts by the CATV systems . . . did not constitute a ‘performance’ within the meaning of the Copyright Act, and thus did not amount to copyright infringement.”¹⁹⁹

Similarly, in *Teleprompter Corp. v. Columbia Broad. Sys., Inc.* (“*Teleprompter*”), the reception and transmission of “broadcast beams by means of special television antennae owned and operated by Teleprompter,” was not public performance where transmission was made through “cable or a combination of cable and point-to-point microwave to the homes of subscribers,” and subscribers’ own television sets converted the electromagnetic signals into images and sounds.²⁰⁰ Even new functions added to the CATV service did not make Teleprompter an infringer. “The copyright significance of each of these functions—program origination, sale of commercials, and

195. 2–8 NIMMER ON COPYRIGHT § 8.18.

196. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 161 (quoting *Fortnightly*, 392 U.S. at 398–99).

197. *Fortnightly*, 392 U.S. 390, 399.

198. *Id.* at 400.

199. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 398 (1974) (citing *Fortnightly*, 392 U.S. 390).

200. *Teleprompter*, 415 U.S. at 399–400.

interconnection—suffers from the same logical flaw: in none of these operations is there any nexus with the defendants’ reception and rechanneling of the broadcasters’ copyrighted materials.”²⁰¹

2. Regulation After the 1976 Amendment

After these two essential decisions in favor of transmissions technology,²⁰² Congress stepped in with the 1976 Amendment to add and define the terms “to transmit” and “public performance,”²⁰³ with the purpose of abrogating both *Teleprompter* and *Fortnightly*.²⁰⁴

[A] sing[er] is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing when he or she plays a phonorecord embodying the performance or communicates it by turning on a receiving set.²⁰⁵

Furthermore, “Congress intended to cover all transmission activity in its broad definition of transmit.”²⁰⁶ “[U]nder the broad definitions found in § 101 of the [1976] Act, a transmission is a public performance whether made directly or indirectly to the public and whether the transmitter originates, concludes or simply carries the signal.”²⁰⁷ “The concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.”²⁰⁸

201. *Id.* at 404-405. “[T]his Court has in two recent decisions explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance, when the broadcaster himself is licensed to perform the copyrighted material that he broadcasts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 160-61 (citing *Fortnightly*, 392 U.S. 390; *Teleprompter*, 415 U.S. 394).

202. *Teleprompter*, 415 U.S. at 403-5.

203. 17 U.S.C. § 101 (1976).

204. *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014) (“History makes plain that one of Congress’ primary purposes in amending the Copyright Act in 1976 was to overturn this Court’s determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act’s scope.”).

205. *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 685 (2d Cir. 2013), *cert. granted sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) *rev’d and remanded sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5663).

206. *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 593 F. Supp. 808, 12 (D. Minn. 1984) *aff’d*, 777 F.2d 393 (8th Cir. 1985).

207. *Id.* at 813 *aff’d*, 777 F.2d 393 (8th Cir. 1985).

208. *Id.* at 811-12 (quoting H.R. Rep. No. 94-1476, at 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5676).

Like the language for determining whether a work of authorship is “fixed,”²⁰⁹ the Transmit Clause’s language, “‘any device or process’ is ‘broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them.’”²¹⁰ The Transmit Clause incorporates public performance, which is defined in 17 U.S.C. § 101:

To perform or display a work ‘publicly’ means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to *transmit* or otherwise communicate *a performance* or display of the work to a place specified by clause (1) or to the public, by means of any *device or process*, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²¹¹

Even after the 1976 Amendment, courts were split regarding interpretation of “public performance.” In one case, a hotel did “not violate section 106(4) by providing in-room videodisc players and renting videodiscs to its guests.”²¹² There, the court reasoned that there was no public performance because “[t]he movies are viewed exclusively in guest rooms, places where individuals enjoy a substantial degree of privacy, not unlike their own homes.”²¹³ Significant to the lower-court decisions in *Aereo*,²¹⁴ the *Cartoon Network* (“Cablevision”) case held that a cable company’s DVR system did not violate owners’ copyrights where the customer “made” the copies, the cable company’s embodiments of copyrighted programs were not “fixed,” and playback transmissions were not performances “to the public.”²¹⁵

209. See *supra* notes 56-66 and accompanying text; 17 U.S.C. § 102(a) (2016).

210. *Hubbard Broad*, 593 F. Supp. 808, 811–12 (quoting H.R. Rep. No. 94–1476, at 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664).

211. *Fox TV Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 45 (D.D.C. 2013) *reconsideration denied*, 968 F. Supp. 2d 134 (D.D.C. 2013).

212. *Columbia Pictures Indus. v. Prof’l Real Estate Inv’rs, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989); see 17 U.S.C. § 106(4) (1976).

213. *Columbia Pictures*, 866 F.2d at 281.

214. *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 375 (S.D.N.Y. 2012) *aff’d sub nom. WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) *cert. granted sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) *rev’d and remanded sub nom. ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

215. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008) (Playback of copies by means of cable company’s remote storage digital video recorder system (RS-DVR) did not directly infringe content providers’ right under 17 USCS

In contrast, a district court found copyright infringement where, without license to the transmitted content, FilmOn X, an internet-based television service, assigned each of its subscribers a temporarily assigned antenna and hard-drive directory.²¹⁶ With FilmOn X's service, "the mini-antennas [were] networked together so that a single tuner server and router, video encoder, and distribution endpoint [could] communicate with them all" and FilmOn X captured the television signal to pass through the "single electronic transmission process of aggregating servers and electronic equipment."²¹⁷ The court reasoned that "[t]he non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute 'the public' under the transmit clause."²¹⁸ Additionally, an earlier case involving Aereo, Inc. held that the company had infringed on copyright.²¹⁹ "The definitions in the [Copyright] Act contain sweepingly broad language and the Transmit Clause easily encompasses Aereo's process of transmitting copyright-protected material to its paying customers."²²⁰

3. *The United States Supreme Court's Interpretation of the 1976 Amendment*

Today, technological innovation continues to catalyze amendments to expand the Copyright Act's scope. Authors retain the exclusive right to "perform"²²¹ and "display"²²² their work publicly. Indeed, the 1976 Amendment to the Copyright Act actually expanded the scope of liability, with the addition of the definitions of "to transmit" and "public performance."²²³ The Supreme Court of the United States recently decided to settle the varying interpretations of these clauses in *American Broadcasting Companies, Inc. v. Aereo*,

§ 106(4) to publicly perform their copyrighted works because such transmissions were not performances "to the public" within meaning of 17 USCS § 101 where each RS-DVR playback transmission was made to single subscriber using single unique copy produced by that subscriber.).

216. *Fox TV Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C.) *reconsideration denied*, 968 F. Supp. 2d 134 (D.D.C. 2013).

217. *Fox TV Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 47-48 (D.D.C.) *reconsideration denied*, 968 F. Supp. 2d 134 (D.D.C. 2013).

218. *FilmOn X LLC*, 966 F. Supp. 2d at 48 (quoting *Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011)).

219. *Cnty. Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1198 (D. Utah 2014).

220. *Cnty. Television of Utah*, 997 F. Supp. 2d at 1198.

221. 17 U.S.C. § 106(4) (2016).

222. 17 U.S.C. § 106(5) (2016).

223. Compare Copyright Act § 101, 90 Stat. 2543-44 (1976) with Copyright Act, 35 Stat. 1075 (1909); see *supra* Part III(B)(2).

*Inc.*²²⁴

“For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast.”²²⁵ Much of the programming is copyrighted, and Aereo neither owns nor licenses the works.²²⁶ “Aereo’s system is made up of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse.”²²⁷ To watch a television show, the subscriber selects the currently airing show he wants to watch from a menu on Aereo’s website.²²⁸ That selection prompts the Aereo’s server to tune an antenna, which is dedicated to that specific subscriber, to the broadcast airing the selected show.²²⁹ Via a transcoder, the signals the antenna receives are translated “into data that can be transmitted over the Internet.”²³⁰ The same server saves the data for the subscriber in his specific folder on Aereo’s hard drive and then streams the show to the subscriber’s screen after a few seconds of programming have been saved to the folder.²³¹ The subscriber is able to view the entire show through this stream, only a few seconds behind the broadcast.²³²

“In Aereo’s view, it does not perform. It does no more than supply equipment that ‘emulate[s] the operation of a home antenna and [digital video recorder (DVR)].’”²³³ However, in view of legislative intent and history behind the 1976 Amendment,²³⁴ the Court brought self-proclaimed ‘equipment-providers’²³⁵ within the purview of liability under the Copyright Act, though precedent²³⁶ would have held otherwise. “Because Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach, Aereo is not simply an equipment provider.”²³⁷

The Court’s ruling confirmed that to perform an audiovisual work means “‘to show its images in any sequence or to make the sounds accompanying it audible,’”²³⁸ and erased the Court’s former line

224. *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

225. *Id.* at 2503.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Aereo*, 134 S. Ct. at 2503.

231. *Id.*

232. *Id.*

233. *Id.* at 2504.

234. *See infra* IV(B)(1–3).

235. *Aereo*, 134 S. Ct. at 2504.

236. *See supra* Part III(B)(1).

237. *Aereo*, 134 S. Ct. at 2501.

238. *Id.* at 2505–6 (quoting 17 U.S.C. § 101 (1976)).

between broadcaster and viewer with respect to performing a work.²³⁹ In interpreting “public performance,” the Court reasoned, “[t]he Act thereby suggests that ‘the public’ consists of a large group of people outside of a family and friends.”²⁴⁰ Additionally, “‘the public’ need not be situated together, spatially or temporally” for a public performance to occur in violation of the Copyright Act.²⁴¹ Accordingly, “the subscribers to whom Aereo transmits television programs constitute ‘the public’” under the Act.²⁴²

4. *Aereo’s Aftermath*

By holding in favor of copyright and against media transmissions technology, the Court has empowered Congress’ ever-expanding scope of copyright. Though the Court essentially limited *Aereo* to its facts,²⁴³ and expressly declined to consider “whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content,”²⁴⁴ its ruling endangers technological innovation because even self-titled ‘equipment providers’ may “publicly perform.”²⁴⁵

“The majority, Justice Scalia said, reached its conclusion ‘only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard (‘looks-like-cable-TV’) that will sow confusion for years to come.’”²⁴⁶ Furthermore, “a decision in the Networks’ favor will stifle technological innovation and imperil billions of dollars of investments in cloud-storage services.”²⁴⁷

239. *Id.* at 2505 (“Congress enacted new language that erased the Court’s line between broadcaster and viewer, in respect to ‘perform[ing]’ a work.”).

240. *Id.* at 2510.

241. *Id.*

242. *Id.* at 2509.

243. “In other cases involving different kinds of service or technology providers, a user’s involvement in the operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act.” *Id.* at 2507.

244. *Id.* at 2511.

245. Hughes, *supra* note 13, at 3 (“The court said it has yet to consider if public performance rights are infringed by such actions as the remote storage of content.”); *accord* WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 280 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1585 (2013) (“Additionally, the growth of ‘cloud-based systems,’ or virtual platforms where content resides remotely on a distant server, further highlights the uncertainty as to whether an Internet retransmission service is or utilizes a facility that receives and retransmits television signals.”); *but see Aereo*, 134 S. Ct. at 2510 (“Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies.”).

246. *Copyright Infringement*, 26 BUS. TORTS REP. 290, 294 (2014).

247. *Aereo*, 134 S. Ct. at 2518 (Scalia, J., dissenting).

Justice Scalia's prediction may already be coming true, as since the Supreme Court's decision, Aereo was forced to file for Chapter 11 bankruptcy.²⁴⁸

Though the Court held that Aereo's activities were substantially similar to CATV companies such that it infringed under the Copyright Act,²⁴⁹ the Copyright Office later denied the company a compulsory license,²⁵⁰ which would have enabled it to continue its business provided that it comply with the rules of Title 17, section 111 and pay royalties to the copyright owners.²⁵¹ Consequently, \$95 million in venture capital equity has been squandered on technology that has been given no way to survive the onslaught of regulation.²⁵² Aereo's creditors are each claiming in the range of \$117,000 to \$600,000,²⁵³ and potentially tens of millions in damages to the broadcasters that hold contingent claims against it.²⁵⁴

In the holding that launched Aereo's demise, the Court recommended that "commercial actors or other interested entities" seek action from Congress to address their concerns "with the relationship between the development and use of such technologies and the Copyright Act."²⁵⁵ Similarly, "the dissenters predicted that Congress may decide that the Copyright Act 'needs an upgrade.'"²⁵⁶

IV. PROPOSAL

A. *Return to a Balance*

The mouth of the Copyright Act has become so great as to

248. Pete Brush, *Aereo Files for Ch. 11 in Bid to Dodge Copyright Suits*, LAW 360 (Nov. 21, 2014, 10:59 AM), http://www.law360.com/media/articles/598433?nl_pk=168332d2-9841-4bc9-9ea4-274664e5dda0&utm_source=newsletter&utm_medium=email&utm_campaign=media.

249. *Aereo*, 134 S. Ct. 2498, 2506.

250. In a letter to Aereo, "the Copyright Office says that . . . 'internet retransmissions of broadcast television' still fall outside the scope of their ability to license under section 111." Kate Cox, *Copyright Office Disagrees with Aereo That Aereo is a Cable Company Now*, CONSUMERIST (July 17, 2014), <http://consumerist.com/2014/07/17/copyright-office-disagrees-with-aereo-that-aereo-is-a-cable-company-now/>, also available at http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf.

251. 17 U.S.C. § 111 (2014). "Section 111 creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts." *Aereo*, 134 S. Ct. at 2506.

252. Andrew Scurria, *Aereo Plans to Shop Infringing Streaming IP in Ch. 11*, LAW 360 (Nov. 24, 2014, 3:30 PM), <http://www.law360.com/articles/598816/aereo-plans-to-shop-infringing-streaming-ip-in-ch-11>.

253. Brush, *supra* note 248.

254. Scurria, *supra* note 252.

255. *Id.* at 2511.

256. Hughes, *supra* note 13, at 4.

swallow technological innovation. Every congressional amendment has enlarged its hungry jaw further, reaching a wider range of works, audiences, and performances, for a longer and longer duration. While it is important to compensate authors as encouragement and reward for their work, the original purpose of awarding a limited private monopoly has been lost in the money feast on original sales, retransmission fees,²⁵⁷ and infringement penalties;²⁵⁸ copyright has become more about compensating the copyright owner than about promoting art for society. Consequently, both art and science suffer.

The principal purpose of the Copyright Act of 1976 is to “promote progress of the ‘useful arts’ . . . by rewarding creativity, and its principal function is the protection of original works, rather than ordinary commercial products that use copyrighted material as a marketing aid.”²⁵⁹ Like patent law, copyright law rewards the owner as a secondary consideration.²⁶⁰ “[Copyright law] is intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.”²⁶¹

B. Amend the Copyright Act

In view of the messy legislative history and flip-flopping media jurisprudence,²⁶² it is crucial that Congress legislate clearly and with the mindset that technological innovation is fast-paced and unpredictable. Additionally, the foremost consideration should be the Constitution itself, which grants Congress its power to establish copyright protection to advance both arts and sciences.²⁶³ To balance these competing interests, Congress should amend the Copyright Act to (1) allow compulsory licensing for any transmission technology, and (2) grant an author exclusive rights under a single term of a ten-year duration,²⁶⁴ not renewable by any person or corporation, with the term determined by the date of creation.²⁶⁵

257. “CBS . . . said earlier this year that it’s going to make \$1 billion a year in retransmission fees by 2017, and \$2 billion by 2020.” Bill Donahue, *FCC Chair Debuts Plan to Treat Web TV Like Cable*, LAW 360 (Oct. 28, 2014, 8:00 PM), <http://www.law360.com/articles/591356/fcc-chair-debuts-plan-to-treat-web-tv-like-cable>.

258. See *supra* Part I(B).

259. *Quality King Distrib. v. Lanza Research Int’l*, 523 U.S. 135, 151 (1998).

260. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (internal quotations omitted).

261. *Id.*

262. See *supra* Part III(B).

263. U.S. CONST. art. I § 8 cl. 8.

264. Or briefer.

265. Measurement of the copyright term should remain as specified under 17 U.S.C. § 302(c). See *supra* Part I(A)(1)(i)(e) term duration chart.

1. Congress is in the Best Position to Create Balance

“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.”²⁶⁶ “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”²⁶⁷ Furthermore, the Court will ultimately defer to Congress’ legislation just as it did in *Aereo*,²⁶⁸ so it is important that Congress determine United States copyright policy.

2. Compulsory Licensing for Any Transmission Technology

Compulsory licensing should not be limited to cable systems.²⁶⁹ Rather, section 111 of Title 17 should reflect the encompassing language of section 102²⁷⁰ and allow any technology, “now known or later developed” to be permitted a compulsory license under the Copyright Act.

As technologies have developed,²⁷¹ Congress has continued to amend the Copyright Act to protect copyright owners. The Copyright Act should be similarly amended to allow new technologies to transmit works to the public. Congress should incorporate to the compulsory license section broad language that would account for any current and future transmission technology. Allowing other technologies to license in bulk rather than piecemeal would allow greater competition in the media transmission industry, which is in the interest of the public (access to copyrighted media), the economy (competition fosters business), and technological innovation (transmission and telecommunication technologies would be championed and stimulated, rather than suppressed).²⁷²

3. Ten-year Copyright Term

At the time the Constitution was enacted in 1790, the Framers could not have anticipated the technology we have today and the rapid pace at which it evolves. Consequently, Congress’ discretion to

266. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

267. *Sony*, 464 U.S. at 431.

268. *See supra* Part III(B)(3).

269. *See* 17 U.S.C. § 111 (2016).

270. 17 U.S.C. § 102(a) (2016); *see supra* Part I(A)(1)(i)(b).

271. *Sony*, 464 U.S. at 462 n. 9 (Congress has been “spurred” to action when “significant developments in technology and communication” render the Copyright Act inadequate with regard to protecting copyright owners.).

272. *Aereo’s demise may have been prevented if it had been permitted to obtain a compulsory license. See Bill Donahue, Aereo Can’t Use Compulsory License, Judge Says*, LAW 360 (Oct. 23, 2014, 4:22 PM), <http://www.law360.com/articles/589934>.

continue expanding copyrights is nearly boundless, so long as there is some time limitation on the grant of exclusive rights to copyright owners. This burden is easily met so long as Congress does not bestow rights in perpetuity to authors.

As evidenced by the significant extension of time²⁷³ added to the duration of exclusive rights for copyright holders nearly every time the Copyright Act is amended,²⁷⁴ Congress is wielding its power to the point of excess. Though being very inclusive in the scope of works protected promotes authorship, as intended under the Constitution, the consistent extension of copyright duration does not. Having a long-term grant of exclusive rights to original works of authorship is problematic for three reasons:

(1) It deprives the public of the ability to use original works to create derivative works for up to two lifetimes²⁷⁵ from when the work was first created;

(2) It rewards those “heirs, estates, or corporate successors” who did not create the work²⁷⁶ and will likely maintain and extend the monopoly for the second term, keeping the work from the public,²⁷⁷ and

(3) It inhibits the progress of technological innovation.²⁷⁸

a. Public Deprivation

First, granting a limited monopoly in copyright, like in patent, withholds works of significance from public use unless the author deems otherwise. Instead of withholding works, our society should consider releasing them for public use after the author receives compensation.

The Copyright Act “imposes upon the public certain expression-related costs in the form of (1) royalties that may be higher than

273. Most recently, “[t]he economic effect of [the Copyright Term Extension Act’s] 20-year extension—the longest blanket extension since the Nation’s founding—is to make the copyright term not limited, but virtually perpetual.” *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting).

274. See *supra* Part I(A)(1)(i)(c).

275. 17 U.S.C. § 302(a) (2016) provides for a term of seventy years after the life of the author; so if the author is young, and people live on average for about seventy years, the copyright term could be for approximately two lifetimes.

276. “[The CTEA’s] primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors.” *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting).

277. 17 U.S.C. § 304(a)(1)(C) (2016) allows certain others to renew the author’s copyright for a second term of sixty-seven years, during which time said beneficiaries could continue to benefit from royalties, so there is every reason to keep the work from the public domain.

278. “[The CTEA’s] practical effect is not to promote, but to inhibit, the progress of ‘Science.’” *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting).

necessary to evoke creation of the relevant work, and (2) a requirement that one seeking to reproduce a copyrighted work must obtain the copyright holder's permission."²⁷⁹ Higher royalties mean higher costs, which could limit dissemination of artwork to the public.²⁸⁰

Attempting to license works is an additional burden that could prohibit reproduction or creation of a derivative work even where an author would not object,²⁸¹ just because of the difficulty of obtaining permission.²⁸² This burden could also prohibit the public from learning about and researching protected works.²⁸³

Open-sourcing content, or releasing works into the public domain, would allow the public to build upon the art in society, furthering creativity, art, and expression. It would also provide a greater range of works for society to enjoy and from which to learn, for broadcasters and publishers to transmit, produce, perform, and exploit, and would enable the public to access both classic and newer works. Tesla Motors Inc. ("Tesla"), an electric car manufacturer and distributor, has successfully promoted this idea, and should serve as an example for copyright.

In June 2014, Tesla released its vehicle patents to the public for good faith use.²⁸⁴ Tesla's open-source approach promotes futuristic thinking and the idea that "[t]echnology leadership is not defined by patents, which history has repeatedly shown to be small protection indeed against a determined competitor, but rather by the ability of a company to attract and motivate the world's most talented engineers."²⁸⁵ Moreover, "Tesla shares barely moved after the company's announcement. The stock closed down 95 cents, or less

279. *Id.* at 248 (Breyer, J., dissenting).

280. *Id.*

281. The permissions requirement is prohibitive: "(1) because it may prove expensive to track down or to contract with the copyright holder, (2) because the holder may prove impossible to find, or (3) because the holder when found may deny permission either outright or through misinformed efforts to bargain." *Id.* at 250 (Breyer, J., dissenting).

282. *Id.* at 248 (Breyer, J., dissenting).

283. "Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope." *Id.* 250 (Breyer, J., dissenting).

284. Elon Musk, *All Our Patent Are Belong to You*, TESLA, (June 12, 2014), <http://www.teslamotors.com/blog/all-our-patent-are-belong-you>; Jerry Hirsch & Tiffany Hsu, *Elon Musk Opens Up Tesla Patents; It 'Isn't Entirely Altruistic'*, LA TIMES, June 12, 2014, 3:48 PM, <http://www.latimes.com/business/autos/la-fi-hy-elon-musk-opens-tesla-patents-20140612-story.html#page=1>; Brian Solomon, *Tesla Goes Open Source: Elon Musk Releases Patents to 'Good Faith' Use*, FORBES, (June 12, 2014, 1:21 PM), <http://www.forbes.com/sites/briansolomon/2014/06/12/tesla-goes-open-source-elon-musk-releases-patents-to-good-faith-use/>.

285. Elon Musk, *All Our Patent Are Belong to You*, TESLA, (June 12, 2014), <http://www.teslamotors.com/blog/all-our-patent-are-belong-you>.

than 1%, at \$203.52.”²⁸⁶ Elon Musk, chief executive officer of Tesla, reasoned, “You want to be innovating so fast that you invalidate your prior patents, in terms of what really matters. It’s the velocity of innovation that matters.”²⁸⁷

Similarly, the Copyright Act should reflect long-term thinking in favor of the public good, as opposed to extending the time for a few very lucrative works to make money.²⁸⁸ There is plenty of money to be made when new works are created, and new derivations of popular works may become equally popular. Accordingly, the duration of copyright should be limited so as to enable authors to be rewarded for their works, but then to also promptly enable the public to both use and enjoy said original works.

Authors will also benefit from this approach because it will increase the competition and range of works that may be created. Greater competition means more works and potentially more profit. Authors will be compensated, but publishers, broadcasters, and other interested transmitters of copyrighted works will need to compensate authors at the outset instead of making long-term royalty payments. Though this may be riskier than making royalty payments based on percentage of sales, most business investments involve some degree of risk. Moreover, there is nothing to suggest that shortening the duration of copyright would prevent authors from getting paid, as publishers, broadcasters, and the like will still need new content to distribute, and advertisers will still need audiences.

b. Non-Authors Rewarded

Second, instead of furthering the trend of taking works out of the public domain and limiting access, the public domain should be expanded. It is to both the author’s and the public’s advantage “to provide an adequate term of protection to make it commercially feasible for publishers and other distributors to aid him in exploiting his work,”²⁸⁹ as allowing the author to make money encourages artistic

286. See Hirsch & Hsu, *supra* note 284.

287. Mike Masnick, *Of Course Tesla Wasn’t Just Being Altruistic In Opening Up Its Patents: That’s The Whole Point!*, TECHDIRT, (June 23, 2014, 9:03 AM), <https://www.techdirt.com/articles/20140622/06531127647/course-tesla-wasnt-just-being-altruistic-opening-up-its-patents-thats-whole-point.shtml>; Ashlee Vance, *Why Elon Musk Just Opened Tesla’s Patents to His Biggest Rivals*, BLOOMBERG BUSINESSWEEK, (June 12, 2014, 4:52 PM), <https://www.bloomberg.com/news/articles/2014-06-12/why-elon-musk-just-opened-teslas-patents-to-his-biggest-rivals>.

288. See *supra* notes 286–87 and accompanying text.

289. Copyright Law Revision Studies, *Duration of Copyright*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong. 2d. Sess., Study 30, at 74 (1960), <http://copyright.gov/history/studies/study30.pdf>; *accord* Gilliam v. ABC, Inc., 538 F.2d 14, 23 (2d Cir. 1976) (“[C]opyright law should be

creation. However, the current duration of seventy years beyond the author's death is a grossly unnecessary grant of protection. Limiting the duration of exclusive copyright ownership to 10 years will "serve[] the ultimate purpose of promoting the 'Progress of Science and useful Arts' by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires."²⁹⁰

"The Clause authorizes a 'tax on readers for the purpose of giving a bounty to writers.'²⁹¹ Once that 'tax' has been paid, the work should be released. "[O]nly about 2% of copyrights between 55 and 75 years old retain commercial value—*i.e.*, still generate royalties after that time."²⁹² Of that two percent, "books, songs, and movies . . . still earn about \$400 million per year in royalties."²⁹³ In his dissent to a Supreme Court case upholding the constitutionality of the Copyright Term Extension Act of 1988, Justice Breyer reasoned, "one might conservatively estimate that 20 extra years of copyright protection will mean the transfer of several billion extra royalty dollars to holders of existing copyrights—copyrights that, together, already will have earned many billions of dollars in royalty 'reward.'²⁹⁴ Essentially, the rich are getting richer, at the public's expense.

The Constitution does not propose rewarding anyone other than the author of the work. Thus, those who have not made the works should not be permitted to monopolize works for the purpose of private profit. "The [Copyright] Clause exists not to 'provide a special private benefit,' but 'to stimulate artistic creativity for the general public good.'²⁹⁵ Additionally, shortening the copyright term will allow the public to benefit from original works of authorship and to create more works based on the originals.

c. Technological Innovation Inhibited

Finally, innovation is being crushed in copyright's hungry jaw. With all of the penalties for infringement,²⁹⁶ uncertainty as to what will constitute infringement given the narrow *Aereo* ruling,²⁹⁷ and lack of

used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.").

290. *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003).

291. *Id.* at 245 (Breyer, J., dissenting).

292. *Id.* at 248 (Breyer, J., dissenting) (citing E. Rappaport, CRS Report for Congress, Copyright Term Extension: Estimating the Economic Values (1998)).

293. *Id.*

294. *Id.* at 249.

295. *Id.* at 245 (Breyer, J., dissenting) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (internal citations omitted).

296. *See supra* Part I(B).

297. *See supra* Part III(B)(3).

viable alternatives to sustain business after the Court has ruled,²⁹⁸ it does not make sense to invest in innovative transmission technologies as an inventor, investor, or businessperson.

“[C]opyright was designed ‘primarily for the benefit of the public,’ for ‘the benefit of the great body of people, in that it will stimulate writing and invention.’”²⁹⁹ Copyright will serve this purpose if it is limited in duration to ten years. With the speed of technological innovation and the public interest in developing telecommunications, there is every reason to limit copyright to encourage innovation and investment therein.

Encouraging innovation will also increase accessibility to art works, which is desirable for both authors and the public. For authors, greater dissemination potentially means greater popularity, which means greater compensation from publishers, broadcasters, or other licensed distributors. For the public, works can be enjoyed via any available means – in person at a museum, in bed on a smart phone, on a plane using a tablet, at a friend’s house on a television screen, etcetera. Greater accessibility likely means more views, more purchases, and more advertising revenue.

This duration limitation will also enable competition in transmissions technologies and decrease cases of infringement, like *Aereo*, that completely quash transmission technology business. Currently, copyright law is overbroad,³⁰⁰ and so heavily litigated that new transmissions technologies do not stand a chance. “The primary objective of copyright” is “[t]o promote the Progress of Science.”³⁰¹ Therefore, authors should be rewarded with private monopolies only to the extent that the reward encourages authorship and does not suppress technological innovation. Limiting the copyright term to a ten-year duration could achieve this goal.

C. Application of Proposal to Aereo, Inc.

If this proposal were in effect, *Aereo, Inc.* would likely still be in business today, serving the public and developing new technology.³⁰² Likewise, artists would likely still produce works, as this proposal would incentivize the production of copyrightable works for a ten-year

298. See *Hughes, supra*, at note 245 and accompanying text.

299. *Eldred v. Ashcroft*, 537 U.S. 186, 247 (Breyer, J., dissenting) (quoting H.R.Rep. No. 2222, 60th Cong., 2d Sess., 6–7 (1909)).

300. *Eldred*, 537 U.S. at 211–12 (“The CTEA’s extension of existing copyrights categorically fails to ‘promote the Progress of Science,’ petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.”).

301. *Eldred*, 537 U.S. at 212 (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 349).

302. See *Patel, supra* note 10, at 1, 5.

term.

Alternatively, under a compulsory licensing scheme that would permit all types of transmission technologies,³⁰³ Aereo could have obtained a compulsory license for transmitting those works still copyrighted and the vastly greater number of works that would be in the public domain. The public would benefit from good prices and greater access to works,³⁰⁴ and Aereo could have used its profits to develop its transmissions capabilities, again serving the public through technological development.

Furthermore, copyright owners would obtain incentives to produce more works through the retransmission fees Aereo would pay; and those whose works had entered the public domain would have every reason to again produce more work to capitalize on the public demand for media. Thus, both science and art would develop with the aid of the other in a way that would benefit businesses, artists, and, most importantly, the public.

CONCLUSION

In conclusion, copyright is overwhelming the progression of transmission technology and is threatening the future of such innovation.

Congress should return to the underlying purpose of its constitutional grant of authority and limit copyright duration such that science may balance with art. I propose limiting the scope of copyright duration in accordance with the Constitution. This solution would balance the public's competing interests: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."³⁰⁵ Lest the public suffer from loss of both art and science, Congress should prevent copyright takeover. To do so, the interests of the public in accessing both innovative transmission technologies and works of art must be weighed over any private monetary interests.

303. *See supra* Part IV(B)(2).

304. *See supra* Part IV(B)(3).

305. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431–32 (1984).