



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

11-2014

Aereo and Copyright's Private-Public Performance Line

Glynn S. Lunney Jr

Texas A&M University School of Law, glunney@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law Commons](#)

Recommended Citation

Glynn S. Lunney Jr, *Aereo and Copyright's Private-Public Performance Line*, 162 U. Pa. L. Rev. Online 205 (2014).

Available at: <https://scholarship.law.tamu.edu/facscholar/358>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

ESSAY

AEREO AND COPYRIGHT'S PRIVATE-PUBLIC PERFORMANCE LINE

GLYNN S. LUNNEY, JR.[†]

The Copyright Act of 1976 provides to copyright owners the exclusive right to perform their copyrighted works publicly, but not the exclusive right to perform their works privately. As a result, to determine whether any given performance infringes a copyright owner's exclusive rights, we must draw a line between public and private performances. While drawing such a line might appear a simple task, it has proven surprisingly difficult. The current line between public and private performances is more a historical accident, coupled with historical path dependence, than a rational attempt to advance copyright's purposes.

On January 10, 2014, the Supreme Court granted certiorari in *American Broadcasting Cos. v. Aereo, Inc.*¹ By doing so, the Court has seized an opportunity to bring some rationality to copyright's line between public and private performances. In this pending case, the respondent, Aereo, uses thousands of tiny antennae to capture television broadcast signals, which then transmit the signals to its subscribers over the Internet.² The question presented is whether Aereo "publicly performs" the copyrighted works carried in the television broadcast signals that are captured and retransmitted.³

[†] McGlinchey Stafford Professor of Law, Tulane University Law School. I would like to thank James Grimmelman for his help facilitating this Essay's publication, and Tyler Ochoa, David Post, and Rebecca Tushnet for their helpful comments on the *Aereo* issues.

¹ 134 S. Ct. 896 (2014), *granting cert. to* WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

² *See generally Aereo*, 712 F.3d at 680-83 (detailing Aereo's transmission system from the subscriber's perspectives, and with regard to its technical aspects).

³ Brief for Petitioners at i, *Aereo*, 134 S. Ct. 896 (No. 13-461).

Unfortunately, the answer to this question is not clear from the relevant statutory language. The petitioners insist that Aereo's service is the technical equivalent of cable, and as such, is a public performance.⁴ Aereo counters that its service is the technical equivalent of a thousand rooftop antennae on a thousand private homes, and as such, is a private performance.⁵ Two judges on the Second Circuit panel below agreed with Aereo and held that Aereo had not publicly performed the copyrighted television programs at issue.⁶ The third, agreeing with the petitioners' characterization, dissented.⁷

Ultimately, however, both sides misused their analogies. Aereo is not the technical equivalent of either a cable provider or a thousand rooftop antennae. Rather, Aereo is the technical equivalent of both. Regardless of whether the focus is on cable providers, rooftop antennae installers, or Aereo, each service acts as an intermediary enabling individual consumers to receive broadcast signals and watch copyrighted television programs in the privacy of their own homes. Treating Aereo as analogous to only a cable provider, or only rooftop antennae, will not work.

Instead of employing superficial analogies or the siren call of technical neutrality, I suggest that we look at the underlying economics. When Congress enacted the Copyright Act of 1976, Congress expressly required cable providers to obtain public-performance licenses for the private performances they enable.⁸ However, Congress refused to require such licenses for rooftop antennae installers.⁹ Though historical path dependence undoubtedly played a role, a rational basis exists for this distinction. Specifically, cable providers enjoy a substantial degree of market power, arising from the naturally monopolistic character of their service. In contrast, rooftop antennae installers do not.

This distinction creates three important differences in the economic consequences that follow when the public-performance right covers an intermediary's activities. First and most specifically, an intermediary's market power determines the extent to which a licensing fee, if one is required, would be paid by the intermediary itself—rather than passed along to consumers in the form of higher prices. Thus, the congressional

⁴ See *id.* at 26-31 ("Aereo . . . is no more a mere equipment provider than a cable or satellite company; it is clearly performing the content it uses to market its service.").

⁵ See Brief for Respondent at 16, *Aereo*, 134 S. Ct. 896 (No. 13-461) (emphasizing that Aereo's technology relies on individual antennae assigned to each user).

⁶ See *Aereo*, 712 F.3d at 696 (affirming the judgment for Aereo below).

⁷ See *id.* at 696-97 (Chin, J., dissenting) (labeling Aereo's retransmission system a "sham").

⁸ Copyright Act of 1976, Pub. L. No. 94-553, § 111(c)(1), 90 Stat. 2541, 2551 (codified at 17 U.S.C. § 111(c)(1) (2012)).

⁹ *Id.* § 110(5) (2012).

distinction identifies those cases where a licensing requirement would not double-charge consumers for watching television. Second, the intermediary's market power also determines the extent to which the intermediary earns rents—or profits in excess of normal returns on the costs of providing its services. Therefore, the market-power distinction identifies instances where rents accrue, and where a license requirement would force the intermediary to share a portion of those rents with the copyright owners whose works helped generate them. Third and finally, the market-power distinction determines the extent to which a licensing fee, if required, would represent an additional source of revenue for copyright owners, rather than simply cannibalize existing advertising-based revenue streams. It thus identifies those instances where a licensing fee will most substantially increase revenue to copyright owners.

The market-power distinction thus provides a rational basis for distinguishing between cable providers and rooftop antennae installers. Though both serve as intermediaries that enable otherwise identical private performances, one enjoys market power, while the other does not. That difference, on its own, fully justifies Congress's decision to treat cable and antennae installers differently under the Copyright Act's public-performance right.

When we extend this analysis to Aereo, the key question becomes whether Aereo is more likely (i) to have market power arising from the naturally monopolistic character of its service, like cable, or (ii) to face a competitive marketplace, like antennae installers. Though Aereo's service may be the technical equivalent of both cable and antennae installers, it is the economic equivalent of only one. Whatever temporary lead-time advantage Aereo may presently have, there is nothing unique about the service it provides. Given the technology that Aereo employs, anyone can set up a similar service. Once the legality of its business practice becomes clear, we should fully expect other parties to do so. As a result, Aereo is far more likely to face the same sort of competitive marketplace that antennae installers face than to enjoy cable's natural-monopoly position. Aereo's activities should not, therefore, constitute a public performance.

The following explores these issues in more detail. Part I explores the historical background and the Second Circuit's analysis of the *Aereo* case. Part II then develops the argument for distinguishing public and private performances by focusing on whether the intermediary at issue is likely to have market power. Part III concludes.

I. HOW CABLE TELEVISION CAME TO BE A PUBLIC PERFORMANCE,
AND WHAT THAT MEANS FOR *AEREO*

Aereo is not the first case to come before the Court regarding the proper scope of the public-performance right. In the years leading up to the Copyright Act of 1976's enactment, the Court faced a similar public-performance question. In *Fortnightly Corp. v. United Artists Television, Inc.*¹⁰ and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,¹¹ the Supreme Court confronted the question of whether, under the Copyright Act of 1909, community antenna television ("CATV") systems, which captured public television broadcasts with a few large antennae and retransmitted them to their subscribers, were publicly performing the copyrighted television programs contained in the broadcasts.¹² The Court held that the CATV systems were not.¹³ In the Court's view, a broadcaster performs a copyrighted television program when it selects the program for broadcast, converts it into electronic signals, and then transmits those signals as radio waves for public reception.¹⁴ In contrast, members of the public who use antenna and television sets to convert those electronic signals back into the visual images and audible sounds do not perform a copyrighted television program.¹⁵ Between these two roles, the Court concluded that CATV "falls on the viewer's side of the line"¹⁶ and thus did not perform the copyrighted television programs it broadcasted.¹⁷

However, Congress expressly rejected this outcome when it enacted the Copyright Act of 1976.¹⁸ In the 1976 Act, Congress added a "transmit"

¹⁰ 392 U.S. 390 (1968).

¹¹ 415 U.S. 394 (1974).

¹² See *id.* at 396-97; *Fortnightly Corp.*, 392 U.S. at 391-93.

¹³ *Teleprompter Corp.*, 415 U.S. at 412-15 ("CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor."); *Fortnightly Corp.*, 392 U.S. at 399-402 ("[A] CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals.").

¹⁴ *Fortnightly Corp.*, 392 U.S. at 397-98.

¹⁵ *Id.*

¹⁶ *Id.* at 399.

¹⁷ The Court explained that "a CATV system [merely] provides a well-located antenna with an efficient connection to the viewer's television set." *Id.* Similarly, "[i]f an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set." *Id.* at 400. Thus, the Court concluded that "the only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur." *Id.*

¹⁸ See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984) (holding that the 1976 Act required cable operators to pay royalties for retransmitting copyrighted material); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 469 n.17 (1984) (Blackmun, J., dissenting) (remarking that the Court's previously "narrow interpretation of 'perform'" had been "completely overturned" by the 1976 Act).

clause to the definition of performing a work “publicly” specifically to reach the CATV systems’ retransmissions.¹⁹ In particular, section 101 of the Act provides: “To perform a work ‘publicly’ means . . . to transmit . . . a performance . . . to the public.”²⁰ Section 101 further provides: “To ‘transmit’ a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”²¹ With these definitions, Congress made it a public performance to transmit or retransmit broadcast signals that contain copyrighted works. Because CATV systems, and cable providers generally, transmit such signals to the public, their transmissions fall within the scope of the copyright owner’s public-performance right. While watching a television program in the privacy of one’s own home remains a private performance, capturing and transmitting broadcast signals to the public is a public performance of the copyrighted television broadcasts carried in the signals. Under the 1976 Act, a cable provider must therefore obtain a public-performance license. However, to ensure that the need to obtain such licenses did not discourage investment in cable systems, Congress provided a statutory license in the 1976 Act to cover cable providers’ retransmissions.²²

In *Aereo*, the petitioners argue that the transmit clause functionally covers Aereo’s activities.²³ Just like cable, Aereo uses antennae to capture broadcast signals that contain performances of copyrighted television programs. Furthermore, just like cable, Aereo then retransmits those signals, and the embedded performances, to its subscribers. While the individual subscribers receive the performances in different places—each in their own homes—that, too, is just like cable. Given that Congress defined “publicly” performing a work specifically to ensure that cable retransmission is a public performance, the petitioners argue that Aereo’s activities must also be public performances.

Aereo, on the other hand, insists that the transmit clause does not reach its activities. Its service, Aereo argues, is not the equivalent of cable, but

¹⁹ Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2543 (codified at 17 U.S.C. § 101 (2012)); see also H.R. REP. NO. 94-1476, at 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5677 (“[A] cable television system is performing when it retransmits the broadcast to its subscribers.”).

²⁰ 17 U.S.C. § 101.

²¹ *Id.*

²² 17 U.S.C. § 111(d). Rather than negotiate with copyright owners individually, cable providers need only pay a compulsory licensing fee set by the Copyright Office. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 685-86 n.8 (2d Cir. 2013), cert. granted *sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 896 (2014).

²³ *Aereo*, 712 F.3d at 693 (“Plaintiffs argue that holding that Aereo’s transmissions are not public performances exalts form over substance, because the Aereo system is functionally equivalent to a cable television provider.”).

rather the equivalent of installing rooftop antennae.²⁴ While Congress defined public performance to reach cable retransmission, it refused to give copyright owners an exclusive right to perform their works privately.²⁵ Just as under the 1909 Act, watching a television program in one's own home remained a private performance, and as such, falls outside the scope of the copyright owner's exclusive right. Because such performances are private, a company that sells and installs rooftop antennae to enable consumers to watch a television broadcast in the privacy of their own homes also remains outside the scope of the copyright owner's exclusive right. Such activity remains outside the copyright owner's exclusive right even if a company installs rooftop antennae on thousands of homes.²⁶ In Aereo's view, that is all Aereo is doing. Unlike traditional cable or CATV systems, Aereo does not use just a few large antennae to capture a broadcast signal, and then retransmit that one captured signal to all of its subscribers. Rather, it uses thousands of tiny antennae, each one specifically assigned to an individual subscriber. In Aereo's view, if installing rooftop antennae does not infringe the public-performance right, then neither should its service.

Two of the three judges on the Second Circuit panel agreed with Aereo's characterization, while the third agreed with the petitioners'.²⁷ Curiously, both the majority and the dissent insisted that the statute's plain language is unambiguous and dictates their result.²⁸ The statute's language is not, however, unambiguous. A careful parsing of the statutory language reveals at least three potential ambiguities. The first arises from the phrase

²⁴ See generally *id.* (adopting Aereo's argument and noting that "[i]t is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private"). The Second Circuit further found "no reason why the result [in favor of finding a private performance] should be any different when [a] rooftop antenna is rented from Aereo and its signals transmitted over the Internet: it remains the case that only one person can receive that antenna's transmissions." *Id.*

²⁵ Copyright Act of 1976, Pub. L. No. 94-553, §§ 107-12, 90 Stat. 2541, 2546-60 (codified as amended at 17 U.S.C. §§ 107-13 (2012)) (listing various "[l]imitations on exclusive rights").

²⁶ As Justice Stewart explained, writing for the Court in *Fortnightly Corp.*, "mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting," since under such a scheme, "many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397 (1968).

²⁷ See *supra* notes 6-7 and accompanying text.

²⁸ Compare *Aereo*, 712 F.3d at 695 ("[The statutory] language and its legislative history . . . compels the conclusion that Aereo's transmissions are not public performances."), *with id.* at 698 (Chin, J., dissenting) ("It is apparent that Aereo's system fits squarely within the plain meaning of the statute.").

“to transmit”²⁹ and the question of volition. In the Aereo set-up, an antenna picks up the signal, and a wire or cable carries the signal to the individual subscriber’s home. If this constitutes a transmission, who transmits the performance at issue: Aereo by creating the system, or its subscriber by selecting a program for viewing? The second ambiguity arises from the phrase “a performance”³⁰ and its interaction with Aereo’s multiple, individually assigned antennae. Is each antenna capturing and transmitting the same performance or is each antenna capturing and transmitting a separate performance? The third ambiguity arises from applying the phrase “to the public”³¹ to Aereo’s multiple, individually assigned antennae. Since each antenna is individually assigned, each antenna transmits the signal to only one subscriber. Is such a transmission “to the public”?

We could of course resolve each of these ambiguities, as both the majority and the dissent in the Second Circuit implicitly did, by pretending that Aereo’s service is either (i) the technical equivalent of a cable system,³² or (ii) the technical equivalent of a thousand rooftop antennae on a thousand private homes.³³ If Aereo’s service were the technical equivalent of just one of these, then one could simply adopt the corresponding legal treatment and resolve the ambiguities accordingly. The problem is that Aereo’s service, as a technical matter, is the equivalent of *both* cable providers and rooftop antennae installers.

II. FINDING A SENSIBLE PATH FORWARD

Rather than pretend that a search for the right technical equivalent can provide meaningful guidance, we ought instead to look for economic equivalence. Specifically, we should determine whether, given its market position, imposing on Aereo the duty to obtain public-performance licenses for its activities would have economic consequences more similar to (i) those that follow from requiring cable systems to obtain such licenses, or (ii) those that would follow if we were to require companies that sold and installed rooftop antennae to obtain such licenses.

The underlying economics indicate that the key difference between cable providers and rooftop antennae installers is the fact that cable providers are

²⁹ 17 U.S.C. § 101.

³⁰ *Id.*

³¹ *Id.*

³² *Aereo*, 712 F.3d at 697 (Chin, J., dissenting) (“Aereo is doing precisely what cable companies, satellite television companies, and authorized Internet streaming companies do.”).

³³ See generally *id.* at 690 (noting that “[n]o other Aereo user can ever receive a transmission from that copy”).

likely to have market power, while rooftop antennae installers are not. The economic consequences of extending public-performance rights to these intermediaries depends, in three important ways, on whether they enjoy market power. First, market-power presence determines whether public-performance licensing fees will come out of the intermediary's pocket, or, alternatively, be passed along to consumers. In the absence of market power, any licensing fee imposed on the intermediary will simply be passed along to consumers in the form of higher prices for the intermediary's service.³⁴ Consumers already pay for private performances of the television programs by making themselves available to watch associated commercials.³⁵ Charging consumers twice, once in the form of advertisements and a second time in the form of a passed-along licensing fee, is neither fair nor efficient. It is unfair because it forces some consumers to pay twice for broadcast television, while others pay only once—based purely on the fortuitous happenstance of whether a consumer's residence is well located to capture television broadcasts using an antenna. It is inefficient because, by raising prices, it creates deadweight loss.³⁶

Second, the presence of market power determines whether the intermediary will earn rents from the performances of the copyrighted television programs at issue. Where market power and its associated rents are present, extending the public-performance right to cover the intermediary's activities enables copyright owners to capture (or recapture) from the intermediary a share of the rents their works make possible.

Third, market-power presence determines the extent to which a public-performance licensing fee offers copyright owners a new revenue source. As discussed, in the absence of market power, a licensing fee will be passed along to consumers. The licensing fee thereby reduces the money consumers have available to spend on the products and services advertised on the television programs they watch. Rather than creating an additional source of revenue for copyright owners, imposing a licensing requirement on intermediaries that lack market power will tend to cannibalize the revenue

³⁴ This trend is well known in economics. See, e.g., HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 294-96 (5th ed. 1999) (explaining the extent to which a tax on producers will be passed along to consumers, and showing that the effect on consumers depends on supply elasticity (market-power presence)).

³⁵ Whether consumers directly infringe copyrighted television programs by recording them and then skipping the commercials when they play back the programs is a separate question. See generally *Fox Broad. Co. v. Dish Network L.L.C.*, 723 F.3d 1067, 1075 (9th Cir. 2013) (holding that "commercial-skipping does not implicate Fox's copyright interest because Fox owns the copyrights to the television programs, not to the ads aired in the commercial breaks").

³⁶ See generally VARIAN, *supra* note 34, at 296-98 (explaining "the lost value to the consumers and producers due to the reduction in sales of the good").

copyright owners would otherwise earn from advertising associated with their copyrighted television programs.

As a result, if Congress were to extend the public-performance right to reach intermediaries that operate in a competitive market (like rooftop antennae installers), the resulting licensing fee would simply be passed along to consumers in the form of higher prices. It would force consumers to pay twice for watching the copyrighted works at issue. Consumers would pay both the customary charge for broadcast television programs by watching (or making themselves available to watch) associated commercials, as well as a surcharge in the form of a licensing fee tacked on to the price of a rooftop antennae. Moreover, no part of the licensing fee would be paid out of the pocket of the intermediary—the rooftop antennae installers—nor would imposing such a fee enable copyright owners to recapture some of the rents that the installers were earning from enabling the performances at issue. In a competitive market, antennae installers would not earn any rents from their services, or from the performances of the copyrighted works that their services make possible.³⁷ Rather, they would earn only normal, competitive returns on the costs of installing antennae. For the same reason, extending the public-performance right to intermediaries facing a competitive marketplace also would not offer copyright owners a new revenue source. Whatever additional money they could collect from a public-performance license would, in a competitive market, come directly from consumers. The public-performance license would thereby reduce the revenue copyright owners earn from their existing, advertising-based revenue stream.

In contrast, if Congress extends the public-performance right to reach intermediaries with market power, such as cable providers,³⁸ the consequences

³⁷ However, even in a perfectly competitive market, non-marginal participants may earn some rents. These rents do not arise from the copyrighted works, but rather from, for example, an antennae installer's exceptional skill and talent. There is no reason to extend the public-performance right to enable copyright owners to claim a share of the rents exceptional individuals earn from their own talents.

³⁸ During the 1970s, pervasive price regulation limited the cable companies' ability to exploit their market power. When the industry was deregulated following the Cable Franchise and Communications Policy Act of 1984, the full extent of cable's monopoly power became apparent. As then-Senator Al Gore stated: "Precipitous rate hikes of 100 percent or more in one year have not been unusual since cable was given total freedom to charge whatever the market will bear." 135 CONG. REC. S5692 (daily ed. May 18, 1989); see also Kathleen A. Carroll & Douglas J. Lamdin, *Measuring Market Response to Regulation of the Cable TV Industry*, 5 J. REG. ECON. 385, 385 (1993) (finding evidence in prices that cable possessed "elements of natural monopoly"). Cf. John W. Mayo & Yasuji Otsuka, *Demand, Pricing, and Regulation: Evidence from the Cable TV Industry*, 22 RAND J. ECON. 396 (1991) ("[W]hile regulation did not lead to economically efficient . . . prices for basic cable service, it did act to keep prices below monopoly levels.").

would be quite different. Cable providers are likely earning rents from their transmissions of copyrighted works. Given their market power, part of the public-performance licensing fee—and in some cases, the entire fee—would come out of those rents.³⁹ It would not be passed—at least not in its entirety—to consumers. Consequently, imposing such a fee on cable providers does not raise the same concern about double-charging consumers as imposing a fee on antennae installers. Moreover, because an intermediary with market power earns rents from the performances of copyrighted works, imposing such a fee would also enable copyright owners to share in the rents that the intermediary earns from the performances of copyrighted works. Therefore, the fee both prevents the intermediary from unjustly enriching itself on

Some may argue that cable either does not presently or will not in the future have significant market power. Compare, e.g., SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 2, 64, 113, 172 (2013) (arguing that cable will have a monopoly over high-speed Internet access), with Christopher S. Yoo, *Technological Determinism and Its Discontents*, 127 HARV. L. REV. 914, 918-28 (2014) (reviewing CRAWFORD, *supra*) (arguing that digital subscriber line (DSL) services or wireless broadband services may limit cable's market power over Internet access). However, at the time that Congress enacted the Copyright Act of 1976, it is fair to characterize cable as having had significant market power over its subscribers.

³⁹ This, too, is a well known result in economics. See generally VARIAN, *supra* note 34, at 401-05 (explaining the concept of economic rent). The licensing-fee portion that comes from the intermediary's pocket and the portion that comes from the consumers' both depend on the elasticity of supply and demand in the market, as well as the nature of the licensing fee (e.g., lump-sum, percentage of revenue, or per-play).

For an example of a case where no part of the licensing fee would be passed to consumers, consider radio stations. Because of limitations on the permissible broadcasting spectrum and the need for a Federal Communications Commission (FCC) license, radio stations often enjoy a degree of market power arising from natural-monopoly characteristics. They are therefore likely to make some degree of monopoly profits from their performance of musical works. By recognizing those performances as public, the current scheme enables the copyright owners in musical works to negotiate for a share of those profits.

Moreover, no part of the radio station's licensing fee is likely to be passed to consumers. Whether or not a radio station must pay a public-performance royalty, the airtime that the radio station devotes to advertisements will remain unchanged. Increasing advertising airtime increases the airtime that the station can sell, but it will eventually begin to reduce the price the station can charge for advertisements—both by increasing the supply of airtime available, and by leading the station's audience to switch to other stations. A radio station determines the fraction of airtime devoted to advertisements by balancing these two marginal effects to maximize its revenue. The existence or absence of a licensing fee will not change the station's analysis. Thus, any licensing fee that the radio station pays will not be passed to consumers.

However, this trait does not mean that a license requirement and its corresponding fee come without cost. Requiring a public-performance license from radio stations reduces the stations' profitability. This reduction will not have much impact in larger markets, where a radio station will remain sufficiently profitable such that the radio dial will still be full. However, the reduction is likely to reduce the number of radio stations in less populous and rural markets, where radio stations are more likely to operate at the margins of profitability.

another's works, while offering copyright owners an additional source of revenue. While a cable provider's rents come out of consumers' pockets and thus have a similar tendency to cannibalize advertising revenue, a licensing fee allows copyright owners to capture some of the revenue that would otherwise go from consumers to the cable provider in any event.

Overall, market power provides a sensible reason for Congress's decision to distinguish between cable providers and antennae installers on the public-performance issue. The fact that cable providers generally have market power, while antennae installers do not, provides a sensible basis for requiring a license (and an associated fee) from one intermediary, but not the other.

Here, the underlying economics of Aereo's service indicate that its market situation is more similar to that of an antennae installer than a cable provider. However, the key difference between Aereo and traditional cable is not the use of many, rather than just a few, antennae to collect the signal. Rather, the key difference between Aereo and a cable provider is the fact that a traditional cable provider transmits the broadcast over its *own* cable network to its subscribers' homes, while Aereo transmits a signal over the Internet from an antenna to an individual home.

The suggestion that this difference in transmission method is key may seem strange at first blush: Why should it matter whether the retransmission occurs over a company's own cable network or the Internet? Yet, after rationalizing the public-performance right, this distinction emerges as the material difference between cable and Aereo. The difference in transmission method determines the extent to which, because of natural-monopoly considerations, a company will have market power over the transmission.

The natural-monopoly character of cable arises not merely from its high fixed and low marginal costs, but also from government sanction. For a company to transmit a signal over its own wires, it has historically been necessary to lay cable, whether copper wire or fiber optic, to each and every individual home and business. Negotiating for permission to lay cable across private property can prove expensive and often impractical. To overcome these difficulties, cable companies usually rely on the delegated power of eminent domain to obtain the necessary easements. Counties and municipalities typically delegate their power of eminent domain to only one cable provider. As a result, in most markets, there is only one cable service.⁴⁰

⁴⁰ This is certainly true where the author lives. On this issue more generally, see MARK COOPER, CABLE MERGERS AND MONOPOLIES: MARKET POWER IN DIGITAL MEDIA AND COMMUNICATIONS NETWORKS 19-38 (2002) (discussing the long tradition of cable monopolies, "born with franchise monopoly service territories in the 1970s").

While other options, such as satellite, exist, these alternatives differ from cable in important ways (e.g., cable companies lay and transmit over their own lines, while satellite companies do not), such that cable retains considerable market power.

Aereo, by contrast, may have some initial market power because of its entrepreneurial skill and risk-taking, but it does not have any natural monopoly power. So long as Internet service providers may not discriminate between the bits they carry,⁴¹ anyone can set up a similar service and compete with Aereo. If Aereo continues to earn rents from its service, competitors will likely enter the market once legal rules become clear. Aereo's market situation is thus more similar to that of rooftop-antennae companies than it is to the cable service providers'. Just as with antennae installers, extending the public-performance right to Aereo's activities would not enable copyright owners to recapture a share of the rents Aereo earns from the performances Aereo makes possible. Facing a pending competitive market, Aereo, just like antennae installers, will not earn (or at least will not earn for long) any rents from its performances—only a reasonable return on the cost of its service. Similarly, instead of requiring a licensing fee paid solely from Aereo's pockets, extending the public-performance right to Aereo would lead to Aereo's customers being charged twice: first through advertisements associated with the copyrighted programs, and second through the passed-along licensing fee. This fee would also reduce, on a dollar-for-dollar basis,⁴² the money consumers have available to spend on advertised products. Instead of offering copyright owners a new and additional revenue stream, a licensing fee would instead tend to cannibalize copyright owners' existing advertising revenue stream.

This approach thus suggests that the Second Circuit resolved *Aereo* correctly. Given the underlying economics, Aereo's activities are analogous

⁴¹ Nondiscrimination's effect on the market is one of the reasons that the net-neutrality debate is so important. *See generally* *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (striking the FCC's net-neutrality rules, but not the FCC's power to reimpose them on a case-by-case basis under section 706 of the 1996 Telecommunications Act).

⁴² This phrase distinguishes between the differing effects of a licensing fee in competitive versus naturally monopolistic markets. In a competitive market, the fee is simply passed to consumers. Thus, every dollar amount of the licensing fee comes directly from consumers thereby reducing (by the same dollar amount) the amount that consumers have available to spend on advertised products.

In contrast, in the monopolistic market, the intermediary absorbs part of the fee. While part of the licensing fee may be passed to consumers, each dollar in licensing-fee revenue will come partly from the intermediary's rents and partly from consumers. As a result, in the monopolistic market, one dollar paid through a licensing fee will reduce the amount that consumers have available to spend by less than one dollar.

to a thousand rooftop antennae installed on a thousand private homes, not to a cable service provider. The Court should therefore interpret the public-performance right's ambiguous language so that the right does not reach Aereo's activities.⁴³

III. A RATIONAL PUBLIC-PERFORMANCE RIGHT

In this essay, I suggest that we should define the public-performance right to reach those intermediaries likely to possess market power due to the natural-monopoly character of their service. This approach not only suggests the proper resolution in *Aereo*, but it also explains and justifies some otherwise puzzling distinctions in the Copyright Act.⁴⁴ While this approach

⁴³ This approach also suggests that if a cable provider were to use a thousand tiny antennae and then to assign one to each individual homeowner, subsequent cable transmissions would remain public performances so long as the signals are transmitted over the cable provider's own wires. Some may argue that treating Aereo's thousand tiny, individually assigned antennae differently from a cable provider's thousand tiny, individually assigned antennae stretches the statutory language further than it can bear. To the extent that the same result would apply in both cases, the appropriate solution is to exclude Aereo from the scope of the public-performance right today and worry about the cable provider possibility if and when it arises. First of all, such an approach obtains the correct answer in the case presently before the Court, instead of choosing an incorrect answer for fear of how cable providers may respond in the future. Second, even if cable providers legally could switch to Aereo's model in order to avoid the licensing fees, they may not choose to do so. Third, if cable providers do begin to switch to thousands of tiny, individually assigned antennae, at some point, their actions may then spur congressional action. Even so, it is still preferable to define the public-performance right narrowly in this case and place the burden on copyright owners to persuade Congress to rewrite relevant statutory language if and when it becomes necessary. As the addition of the transmit clause in response to the *Fortnightly Corp.* and *Teleprompter Corp.* cases demonstrates, *see supra* notes 18-22 and accompanying text, copyright owners have the ability to persuade Congress to revise the scope of their rights when it becomes necessary and desirable to do so.

⁴⁴ For example, the public-performance right reaches broadcasters but not companies that manufacture and sell televisions and radios. Both enable private performances of copyrighted works, so why should one be liable for a public performance but not the other? In *Fortnightly Corp.*, the Court explained that this distinction arose historically by treating broadcasters as exhibitors, and the viewer as "a member of a theatre audience." *Fortnightly Corp. v. United Artists Television, Inc.* 392 U.S. 390, 398 (1968). In other words, "[b]roadcasters perform," while "[v]iewers do not perform." *Id.*

However, under the definition of "perform" in the 1976 Act, this distinction can no longer hold. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2543 (codified at 17 U.S.C. § 101 (2012)) ("To 'perform' a work means . . . in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."). Under this definition, both broadcaster and viewer could theoretically "perform" a work; both broadcaster and viewer could "show" a recorded motion picture in the viewer's home. Nevertheless, treating broadcasters' actions as a public performance, while treating as private the actions of all the other companies that make it possible for consumers to watch television in their own homes, remains sensible to the extent broadcasters, but not television manufacturers, have market power arising from the natural-monopoly character of their markets.

does not explain the outcomes in all of the cases dealing with the public-performance issue,⁴⁵ it provides a rational basis for distinguishing between intermediaries, all of which offer goods or services that ultimately enable private performances of copyrighted works.

Where the intermediary at issue likely has market power arising from the natural-monopoly character of their service, one can plausibly justify extending the public-performance right to cover that intermediary's activities. However, where the intermediary faces a more competitive market, as Aereo will, one should not extend the public-performance right to the intermediary's activities. In such a case, any licensing fee would be passed to consumers through higher prices for the intermediary's service. Because the licensing fee would be passed to consumers, requiring a license would have three unattractive economic consequences. First, it would force consumers to pay twice for the same performance. Second, for copyright owners, a licensing fee would not recapture a share of the rents that the intermediary was earning from the copyrighted works. Third, the licensing fee would not provide copyright owners a new and additional source of revenue.

As long as Congress gives copyright owners an exclusive right to perform their works publicly, but not an exclusive right to perform their works privately, courts will have to draw a line between the two kinds of performances. In cases where an intermediary provides a good or service that enables members of the public to perform a copyrighted work privately, the intermediary's likely market power provides a sensible basis for drawing that line.

A market-power explanation can similarly justify the outcome in the noteworthy case involving Cablevision, *Cartoon Network, LP v. CSC Holdings, Inc.* See 536 F.3d 121, 139 (2d Cir. 2008) (holding that providing a remote digital video recorder that subscribers could use to record and transmit copyrighted television programs does not infringe the public-performance right). Though the defendant in that case was a cable provider and thus likely had market power, it did not have market power with respect to the remote storage digital video recorder service at issue. For that particular service, if Cablevision tried to charge a monopoly price, consumers could simply substitute a competitively priced set-top digital video recorder.

⁴⁵ For example, the proposed approach suggests that the Third Circuit resolved the public-performance issue incorrectly in both *Columbia Pictures Industries, Inc. v. Redd Home, Inc.*, 749 F.2d 154 (3d Cir. 1984), and *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986). However, given that the Third Circuit may have incorrectly decided both cases, this application serves more as a feature than as a flaw of the proposed approach. As I have explained elsewhere, these cases represent the motion picture industries' attempt to overturn the first sale doctrine with the public-performance right. See Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 903-04 (2001) ("[W]hen movie rentals first became popular, a group of movie studios set out to obtain a judicial ruling barring such rentals. Recognizing that the first sale doctrine posed a substantial obstacle . . . , the studios began by suing a video rental that offered in-store viewing." (footnote omitted)).

Preferred Citation: Glynn S. Lunney, Jr., *Aereo and Copyright's Private–Public Performance Line*, 162 U. PA. L. REV. ONLINE 205 (2014), <http://www.pennlawreview.com/essays/4-2014/Lunney.pdf>.

