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Take the Airwaves and Run: How a Loophole in the Copyright Laws Is Helping Competitors Gain an Advantage in the Name of Public Interest

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**TAKE THE AIRWAVES AND RUN:
HOW A LOOPHOLE IN THE COPYRIGHT LAWS
IS HELPING COMPETITORS GAIN AN ADVANTAGE
IN THE NAME OF PUBLIC INTEREST**

*Mario Romero**

ABSTRACT

Live television broadcast feeds are copyrightable material. As such, the owners of these feeds have certain rights. Among these rights is the ability to perform the feeds publicly via retransmissions through any medium. If another company, such as a cable provider, wishes to feature these local broadcasts on their own cable channels, they must negotiate licensing fees with the broadcasters. The same applies to internet-streaming companies. Failure to negotiate and obtain a license to retransmit results in copyright infringement. Notwithstanding this licensing requirement, the copyright laws exempt certain infringing retransmissions from liability. One company, Locast, has invoked such an exemption to stream live television broadcasts over the internet without negotiating licensing fees. This comment reviews the history of the retransmission laws and provides an argument as to why this exemption should be revisited.

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I. INTRODUCTION

Imagine paying a lot of money for a reliable cable service where you can watch all your favorite local programming, including all the hottest live events from sports games to award shows, which are normally broadcast over the airwaves. Now, imagine preparing for weeks in advance to watch a highly anticipated live event only to turn on your television to find out that your cable company has blacked out the channel that was broadcasting the event. You are left in the dark. What is going on? You know you paid your cable bill on time, but you do not want to miss the action, so you decide to improvise and switch over to your television’s built-in antenna since the event is being broadcast on the same local channel; however, the signal is so weak that the image received is unwatchable. What do you do? This situation happens a lot more than one might realize. According to the American Television Alliance, the first seven months of 2019 “set the record for the highest number of television blackouts in history.”¹ But never fear, a new service is here to make sure that does not continue to happen. With this new service, called Locast, you can watch all your favorite local channels over the internet without worrying about any blackouts. And the best part about it is that it is free!

But how can that be possible when, in 2014, the US Supreme Court held that an internet streaming service called Aereo, Inc., which offered live, local broadcast television over the internet to its paying subscribers, had infringed local broadcasters’ copyrights?² The answer possibly lies in a loophole within the copyright laws. Within the laws are five exemptions from copyright infringement by secondary transmissions of works embodied in a primary transmission. In other words, there are exemptions to infringement for the

¹ Sara Fischer, *2019 Sees Record Number of TV Blackouts*, AXIOS (July 23, 2019), <https://www.axios.com/2019-sees-record-number-of-tv-blackouts-57161983-8fc9-487f-bbd3-9a57d89b39eb.html>.

² *See* ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 448 (2014).

retransmission of an originally broadcasted signal.³ Beginning with the first exemption enumerated in the law, there is an exemption for (1) retransmissions within hotels and other similar private lodgings that house guests;⁴ (2) retransmissions relating to “mediated instructional activities of a governmental body or an accredited nonprofit educational institution”;⁵ (3) retransmissions from retransmitters whose sole purpose is to provide the “wires, cables, or other communications channels” for such primary and secondary transmissions that are beyond their control;⁶ (4) retransmissions of “satellite carrier[s] pursuant to a statutory license”;⁷ and (5) retransmissions made by the government or “other nonprofit organization, without any purpose of direct or indirect commercial advantage.”⁸ It is this last exemption on which the legality of Locast’s operation hinges because Locast operates as a nonprofit organization.

Are internet-based, nonprofit organizations exempt from copyright infringement under the Copyright Act when they stream live, broadcast television signals to subscribers without licensing, or paying royalties for, the retransmission of the content? I argue that the answer to this question lies in the interpretation of the key phrase “without any purpose of direct or indirect commercial advantage.”⁹

This comment takes a brief look at the history of cable systems and the evolution of the Copyright Act regarding television broadcasts in Part II. It then examines the US Supreme Court case, *ABC, Inc. v. Aereo, Inc.*, and discusses how internet-streaming services currently operate within the bounds of the Copyright Act in Part III. Next, in Part IV, it will discuss and analyze a similar, yet distinct, case pending in the United States District Court, Southern District of New York, *ABC, Inc. v. Goodfriend*. It concludes by arguing that internet-based, nonprofit organizations such as Locast should not be permitted to invoke this exemption.

³ 17 U.S.C. § 111(a) (2020).

⁴ § 111(a)(1).

⁵ 17 U.S.C. § 110(2) (2020); *see also* § 111(a)(2).

⁶ § 111(a)(3).

⁷ § 111(a)(4).

⁸ § 111(a)(5).

⁹ *Id.*

II. A BRIEF HISTORY OF TELEVISION

A. *What Is a Copyright?*

The protection of intellectual property has been a core tenet of the United States since its inception.¹⁰ From an economic-incentive perspective, its protection “is necessary to encourage inventors, authors, and artists to invest in the process of creation.”¹¹ The consequences of not having such protection would mean that others could appropriate creative works and profit, or benefit from, their use without having to expend any efforts for their creation—economic or otherwise. Having no such protection would prevent “the original creators from reaping a reasonable return on their investment.”¹²

The US 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.”¹³ With this grant of authority, Congress has passed several Copyright Acts, the last major revision being the Copyright Act of 1976.¹⁴ It has had various minor amendments since then.¹⁵

The copyright laws protect “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁶ Such works include “(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.”¹⁷

Copyright protection grants the copyright owner several enumerated and exclusive rights. Particularly important to this discussion is the exclusive

¹⁰ See U.S. CONST. art. I, § 8, cl. 8.

¹¹ PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 2018: VOL. 1: PERSPECTIVES, TRADE SECRETS AND PATENTS* 19 (2018).

¹² *Id.*

¹³ U.S. CONST. art. I, § 8, cl. 8.

¹⁴ *Timeline 1950–1997*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-1997.html (last visited Mar. 5, 2020).

¹⁵ *Id.*

¹⁶ 17 U.S.C. § 102(a) (2020).

¹⁷ §§ 102(a)(1)–(8).

right “to perform the copyrighted work publicly.”¹⁸ And under the copyright laws, performing 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.¹⁹

Therefore, the owners of a copyrighted work have the exclusive right to present their works to the public however they want, whenever they want.

As the owners of intellectual property, copyright holders have the ability to parcel out their exclusive bundle of property rights to whomever they want, however they want on their own terms. This is the economic incentive previously mentioned.

*B. How Cable Companies Originally Infringed Broadcasters’
Copyrights by Retransmitting Their Feeds via Cable Systems*

Seven years after Philo T. Farnsworth invented the first television,²⁰ Congress passed the Communications Act of 1934 with the goal of promoting free television for the public.²¹ It granted exclusive licenses, free of charge, to several broadcasters on the condition that they offer quality programming free of charge to the public.²² To this day, “[w]hen an FCC license is granted, a [local television] station promises to manage its affairs in the public interest.”²³

As America moved away from the cities, which was where the broadcast television signals were originating from, and into the suburbs, the broadcast signals became weaker and had trouble reaching television sets the further

¹⁸ 17 U.S.C. § 106(4) (2020).

¹⁹ 17 U.S.C. § 101 (2020).

²⁰ *History of the Television*, BEBUSINESSSED, <https://bebusinesssed.com/history/history-of-the-television/> (last visited Mar. 5, 2020).

²¹ Reed Hundt & Karen Kombluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children’s Educational Television*, 9 HARV. J.L. & TECH. 11, 12 (1996).

²² *Id.*

²³ HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION: THE STANDARD GUIDE TO THE TELEVISION INDUSTRY* 3 (4th ed. 2006).

out the population went.²⁴ This left many households with little to no television channels to watch.²⁵ Cable operators saw an opportunity and stepped in to fill the void by establishing community antenna television (“CATV”).²⁶ CATVs work by capturing broadcast signals and distributing them directly into people’s homes via cable lines for a subscription fee.²⁷

During the 1960s, the growth of CATVs prompted broadcast television stations, as well as film studios, to sue the cable providers for infringing on their copyrights for publicly performing their works without having obtained a license from them. On June 17, 1968, the US Supreme Court ruled that CATVs did not violate the copyright laws because they were not “performing” the copyrighted signals; instead, they were merely amplifying the signals and retransmitting them to the public.²⁸ This, according to the Court, was something that individuals could already do for themselves given the right equipment.²⁹ Shortly thereafter, Congress passed the Copyright Act of 1976, which redefined “performing in public” to include transmission “to the public, by means of any device or process,” overruling the Supreme Court’s decision.³⁰ This new law protected the broadcasters’ rights and forced cable operators wanting to retransmit broadcast signals on their cable systems to license the rights to retransmit those feeds on their service. If they did not, the cable operators would be infringing on the broadcasters’ copyrights.

However, at the same time as Congress redefined public performance to include cable retransmissions, it also created a provision in the law that would allow cable operators to retransmit broadcast signals by obtaining a compulsory license subject to certain restrictions.³¹ But this compulsory license was limited only to “distant” signals as opposed to “local” signals.³²

Several years later, with the passage of the Cable Act of 1992, Congress gave broadcasters the option of either having their local signals retransmitted automatically on the cable systems without compensation, called the “must-carry requirement,”³³ or of negotiating with the cable companies for the right

²⁴ Patrick R. Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 J. MEDIA ECON. 23, 24, 28 (2003).

²⁵ *History of Cable*, CAL. CABLE & TELECOMM. ASS’N, <https://www.cable.org/learn/history-of-cable/> (last visited Mar. 5, 2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400–01 (1968).

²⁹ *Id.* at 400.

³⁰ 17 U.S.C. § 101 (2020).

³¹ 17 U.S.C. §§ 111(c)–(d) (2020).

³² H.R. REP. NO. 94-1476, at 90 (1976).

³³ 47 U.S.C. § 534 (2020).

to retransmit their signals, called the “retransmission consent right.”³⁴ Because local broadcast channels were the most lucrative channels for the cable systems, broadcasters chose the retransmission consent option and forced cable companies to negotiate with them for the right to retransmit their signals.³⁵ The power struggle between the two sides has led to countless blackouts on cable channels as both sides have continually failed to reach timely license-renewal agreements.³⁶

In 1996, Congress pushed for the transition from analog broadcast television signals to digital broadcast television signals (“DTV”).³⁷ It gave all broadcasters a hard deadline of June 2009 to make the switch.³⁸ Although the effects were not felt until much later, the change to DTV worsened the reception of broadcast television as the slightest interference interrupts the programming completely—digital television is an all or nothing affair.³⁹ Whereas a poor analog broadcast signal would result in a noisy but still manageable image, a poor digital broadcast signal results in a completely lost image.⁴⁰ Around the same time as the hard deadline to switch to fully digital television signals approached, companies such as Netflix, Microsoft, and Apple created a new market by providing media over the internet.⁴¹ These new platforms for transmitting (better known as streaming) media became known as over-the-top (“OTT”) platforms.⁴²

This change in technology led many consumers to abandon watching content from both local broadcast television stations and cable for the cheaper, more reliable OTT platforms. This put a heavy burden on the broadcast networks and the cable operators. Now, not only must they deal with each other, they have to deal with the threat of competing OTT services as well. In an era where there are an exorbitant amount of media companies and vast quantities of television shows and films to watch, having great

³⁴ 47 U.S.C. § 325 (2020); *see also* Meg Burton, *Reforming Retransmission Consent*, 64 FED. COMM. L.J. 617, 620–21 (2012); BLUMENTHAL & GOODENOUGH, *supra* note 23, at 49.

³⁵ Burton, *supra* note 34, at 620.

³⁶ *Id.* at 622.

³⁷ *Digital Television*, FED. COMM. COMM’N, <https://www.fcc.gov/general/digital-television> (last updated Aug. 9, 2016).

³⁸ *Id.*

³⁹ Brent Watkins, *What Are the Causes of Bad Digital TV Signals?*, TECHWALLA, <https://www.techwalla.com/articles/what-are-the-causes-of-bad-digital-tv-signals> (last visited Oct. 10, 2019).

⁴⁰ *Id.*

⁴¹ Alex Zambelli, *A History of Media Streaming and the Future of Connected TV*, GUARDIAN (Mar. 1, 2013, 5:00 PM), <https://www.theguardian.com/media-network/media-network-blog/2013/mar/01/history-streaming-future-connected-tv>.

⁴² *Id.*

content truly is king. Media companies must do everything they can to attract eyeballs and maintain viewership.

C. The Business of Television: The Importance of Retransmission Fees

To understand why broadcast networks go to great lengths to protect their programming and transmissions from unauthorized retransmissions and other forms of copyright infringement, a look into the business model of television is due.

It goes without saying that producing and licensing an episode of programming costs lots of time, money, and resources. For example, in 2006, “half-hour prime-time episode[s were] licensed to [] broadcast network[s] for \$500,000 to \$1,000,000, while an hour [prime-time episode could] cost . . . between \$1 million and \$5 million.”⁴³ In order to recoup the money spent on licensing a show and still make a profit, “most networks include about 20 commercial slots (each 30 seconds long) per hour, plus promotional spots for the network’s other programming.”⁴⁴ In the mid-2000s, a thirty-second commercial running during primetime could cost advertisers anywhere from around \$70,000 to \$600,000 for these high-demand timeslots on primetime.⁴⁵

Aside from commercial advertisements, broadcast networks earn a substantial portion of their income from retransmission consent fees, which were expected to be in the range of “more than \$10 billion” for 2019.⁴⁶ Retransmission consent fees are the fees that broadcast networks negotiate with cable companies for the right to retransmit their signals on their cable systems.⁴⁷ With “broadcast programming [being] the most popular programming on cable systems,”⁴⁸ they need each other to survive—broadcast networks need the money and cable operators need the network programming to attract and keep subscribers.

It is important to note that major broadcast networks do not control the entire programming schedule for a local channel.⁴⁹ Much of the programming

⁴³ BLUMENTHAL & GOODENOUGH, *supra* note 23, at 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Edmund Lee, *CBS, NBC, ABC and Fox Sue to Stop Locast, a Free Streaming Service*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/business/media/broadcast-networks-lawsuit-locast.html>.

⁴⁷ Roger Yu, *Retransmission Fee Race Poses Questions for TV Viewers*, USA TODAY (July 14, 2013, 9:00 AM), <https://www.usatoday.com/story/money/business/2013/07/14/tv-retrans-fees/2512233/>.

⁴⁸ Burton, *supra* note 34, at 620.

⁴⁹ BLUMENTHAL & GOODENOUGH, *supra* note 23, at 3.

time is filled by the local television stations themselves.⁵⁰ Because the major networks do not broadcast to consumers directly, the relationships they carry with local broadcasters are of vital importance because it is the local broadcasters' signals that are retransmitted on a cable system. And when there is an unauthorized retransmission, everyone up the chain stands to lose. Enter Aereo, Inc.

III. INTERNET RETRANSMISSIONS: *ABC, INC. V. AEREO, INC.*

A. *The Backdrop*

In early 2012, a startup company by the name of Aereo, Inc. ("Aereo") was getting ready to revolutionize the way we watch over-the-air television. Having raised \$20 million in venture capital, Aereo launched in New York City on March 14, 2012.⁵¹ A concrete jungle with many buildings standing in the way and interfering with broadcast airwaves, New York City was the ideal location to prove the utility of Aereo's service. For twelve dollars a month, Aereo's customers could watch local over-the-air broadcast television using an internet connection.⁵² For customers with poor reception, having this service meant that they could view and enjoy local programming without any issues at a fraction of the cost of paying for cable. Aereo not only allowed its subscribers to watch live broadcasts over the internet but also allowed its subscribers to record programming for later viewing.⁵³ Its service was made possible through the use of thousands of tiny, thumbnail-sized antennas stacked next to each other.⁵⁴ Each antenna was assigned to one subscriber along with a remote digital video recorder.⁵⁵

As part of its marketing campaign, Aereo positioned its service to be not only more reliable than trying to pick up ordinary television broadcast signals but also more reliable than viewing live television broadcasts via cable systems. As previously stated, cable systems tend to have frequent blackouts because they often fail to reach agreements on retransmission consent fee

⁵⁰ *Id.*

⁵¹ Christina Warren, *Aereo Gives New Yorkers Online Access to Live TV [Hands On]*, MASHABLE (Feb. 28, 2012), <https://mashable.com/2012/02/28/aereo-hands-on/>.

⁵² Matthew Moskovciak, *Aereo Brings Over-the-Air TV to the Cloud*, CNET (Feb. 14, 2012, 1:23 PM), <https://www.cnet.com/news/aereo-brings-over-the-air-tv-to-the-cloud/>.

⁵³ Kevin W. Yoegel, *The Aereo Loophole: A Retrospective Inquiry into the Legality of Antenna Farms and Internet-Based Television*, 87 TEMP. L. REV. 339, 342–43 (2015).

⁵⁴ Roger Parloff, *Aereo Is Leaving the Courts Dazed and Confused*, FORTUNE (May 21, 2012), <https://fortune.com/2012/05/21/aereo-is-leaving-the-courts-dazed-and-confused/>.

⁵⁵ *Id.*

renewals with broadcasters. Thus, during many occasions, cable subscribers wishing to view live television are often left in the dark. For example, on August 5, 2013, Time Warner Cable and CBS failed to reach an agreement over retransmission fees; this led to the subsequent blackout of CBS's channel on Time Warner Cable in eight markets.⁵⁶ By taking a clean broadcast signal and transmitting it over the internet, Aereo had those blacked-out channels available for viewing on its OTT platform. Cable operators, at one point, thought about recommending Aereo to their customers as a way of increasing their leverage on the negotiations with the broadcast networks.⁵⁷

B. *The Legal Battle*

Because Aereo was not paying any retransmission fees and because cable operators hinted that they would promote Aereo's service to their customers, broadcast networks saw a potential disruption to their very important revenue stream of retransmission consent fees. Thus, on March 1, 2012, several major broadcast networks teamed up to sue Aereo for copyright infringement.⁵⁸

The broadcast networks argued that "Aereo ha[d] no rights, under any license, statute or case law, to any of the copyrighted programming that [was] the basis of its subscription-only Internet service."⁵⁹ According to the complaint, Aereo was performing the broadcasters' works "publicly" as defined under the Copyright Act,⁶⁰ which states that performing a work "publicly" means "to transmit [a work]. . . to the public, by means of any device or process."⁶¹ Accordingly, Aereo needed to either pay the networks for privately negotiated licenses or obtain compulsory licenses per the Copyright Act's requirements to be able to retransmit the networks' signals legally.

Aereo responded by saying that everything it was doing was completely legal because it was only providing the technology that enabled its customers

⁵⁶ Scott Martin, *CBS Blackout Puts Start-up Aereo in Spotlight*, USA TODAY (Aug. 5, 2013), <https://www.usatoday.com/story/tech/2013/08/05/aereo-the-unlikely-beneficiary-in-time-warner-cbs-flap/2619467/>.

⁵⁷ *Id.* ("Time Warner may start recommending Aereo to concerned CBS customers as a bargaining chip if the dispute doesn't end soon.")

⁵⁸ ABC, Inc. v. Aereo, Inc., Docket No. 12-cv-01540-AJN-HBP (S.D.N.Y. Mar. 1, 2012).

⁵⁹ Complaint at 1, ABC, Inc. v. Aereo, Inc., Docket No. 12-cv-01540-AJN-HBP (S.D.N.Y. Mar. 1, 2012).

⁶⁰ *Id.* at 3.

⁶¹ 17 U.S.C. § 101 (2020).

to do what they, as individuals, were already legally entitled to do.⁶² It argued that individuals were already able to access over-the-air broadcast signals for free by using antennas and were allowed to record those signals for future viewing, a concept known as time-shifting.⁶³ Whether time-shifting taking place remotely and being transmitted from a remote location to the individual user counted as performing a work in public had already been decided by the Second Circuit in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*⁶⁴

In *Cartoon Network*, cable operator Cablevision offered its customers the ability to record copyrighted programming to a dedicated hard disk on Cablevision's servers for later viewing—a remote-server DVR (“RS-DVR”). In order for Cablevision's RS-DVR service to function, the subscriber would select a program to record, and during the live airing of that program, Cablevision's servers would take the data from the live signal and move it onto a “hard disk allocated to that customer.”⁶⁵ Later on, the customer could view the recorded material as if it were a traditional set-top DVR, which was legal.⁶⁶ The ultimate questions were (1) whether Cablevision made the recorded copies of the copyrighted works or whether it was the customer that made the copies by selecting to have the programming recorded, and (2) whether the transmission of the recorded signal from Cablevision's servers to the customer was considered a public performance. In addressing the first question, the Second Circuit held that the copies were made by the customer because it was made at the customer's request.⁶⁷ Regarding the second question, it held that “[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, . . . such transmissions are not performances ‘to the public,’ and therefore do not infringe any exclusive right of public performance.”⁶⁸ Thus, Cablevision's RS-DVR service was not considered to infringe the copyright holders' right of public performance.

Following this precedent and line of reasoning, the district court in *Aereo, Inc.*, sided with the defendant Aereo and denied the broadcast networks' request for injunctive relief.⁶⁹ On appeal, the Second Circuit agreed, stating that each transmission from Aereo's servers was “a *private*

⁶² Answer and Counterclaim at 1, *ABC, Inc. v. Aereo, Inc.*, Docket No. 12-cv-01540 (S.D.N.Y. Mar. 1, 2012).

⁶³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984).

⁶⁴ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008).

⁶⁵ *Id.* at 124.

⁶⁶ *Id.* at 125.

⁶⁷ *Id.* at 133.

⁶⁸ *Id.* at 139.

⁶⁹ See *ABC v. AEREO, Inc.*, 874 F. Supp. 2d 373, 395–96 (S.D.N.Y. 2012).

transmission that is available only to that subscriber.”⁷⁰ Then, the United States Supreme Court weighed in.

C. *The Final Judgment*

The Court first looked at the definition of “perform” to determine who performed a work transmitted from a dedicated server’s drive to the customer’s viewing device. First, the Court said that “to ‘perform’ an audiovisual work means ‘to show its images in any sequence or to make the sounds accompanying it audible.’”⁷¹ Then, it said that, given that broad definition, “both the broadcaster and the viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds.”⁷² The Court then looked at the Transmit Clause under the public performance definition, which states that a work is publicly performed when it is transmitted to the public by any device. Finally, it said that “an entity that acts like a [cable] system itself performs, even if . . . it simply enhances viewers’ ability to receive broadcast television signals.”⁷³ And since Aereo performs to many individuals the same copyrighted program, it was thus performing to the public; it did not matter that Aereo sent the programming to viewers individually.⁷⁴ Therefore, Aereo had infringed on the broadcast networks’ copyrights. This meant that the networks’ request for a permanent injunction should have been granted.

After the Supreme Court ruled that Aereo violated the broadcasters’ copyrights, Aereo attempted to apply for a compulsory license under Section 111 of the Copyright Act, but it was rejected because the US Copyright Office said that “*internet* retransmissions of broadcast television [fell] outside of the scope of the Section 111 license.”⁷⁵ Congress had defined cable systems in its creation of the law with no mention of internet transmissions.⁷⁶ Subsequently, Aereo filed for Chapter 11 bankruptcy and ultimately shut down.⁷⁷

⁷⁰ ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 438 (2014) (emphasis in original).

⁷¹ *Id.* at 441.

⁷² *Id.*

⁷³ *Id.* at 442.

⁷⁴ *Id.* at 448.

⁷⁵ Letter from Jacqueline C. Charlesworth, Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Aereo, Inc. (July 16, 2014) (on file with author) (emphasis added).

⁷⁶ See 17 U.S.C. § 111(f)(3) (2020).

⁷⁷ Jordan Crook, *Aereo Files for Chapter 11 Bankruptcy*, TECHCRUNCH (Nov. 21, 2014, 7:06 AM), <https://techcrunch.com/2014/11/21/aereo-files-for-chapter-11-bankruptcy/>.

Following the fall of Aereo, several OTT media streaming companies came into existence that properly negotiated licenses with the broadcast television networks to retransmit their signals, including OTT services such as Sling TV and Hulu.⁷⁸ However, the story of retransmitting broadcast signals over the internet without having to obtain a license was not over.

IV. INTERNET RETRANSMISSIONS: A POTENTIAL WORKAROUND

A. *The Copyright Exemption: 17 U.S.C. § 111(a)(5)*

With the passing of the Copyright Act of 1976, Congress created several exemptions from copyright infringement for retransmissions by cable companies.⁷⁹ The first exemption is for hotels and similar establishments that merely send broadcast signals to their guests' rooms.⁸⁰ The second exemption is for retransmissions that are for instructional purposes, in other words, retransmissions in an educational setting.⁸¹ The third exemption is for cable companies that have no control over the content or the receivers of the transmission—all the cable company would be doing is providing a means for others to communicate.⁸² This is similar to the Digital Millennium Copyright Act's "safe-harbor" provision, which protects internet service providers from "the infringing activities of their users and other third parties on the net."⁸³ The fourth exemption is for secondary transmissions made by satellite carriers.⁸⁴ And lastly, there is an exemption for when

the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of

⁷⁸ David Katzmaier, *Are Your Live Local Channels on a Streaming TV Service Yet?*, CNET (Aug. 17, 2018, 9:37 AM), <https://www.cnet.com/news/are-your-live-local-channels-on-a-streaming-tv-service-yet/>.

⁷⁹ 17 U.S.C. § 111(a) (2020).

⁸⁰ § 111(a)(1).

⁸¹ H.R. REP. NO. 94-1476, at 92 (1976).

⁸² § 111(a)(3).

⁸³ *Digital Millennium Copyright Act*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/ISSUES/DMCA> (last visited Dec. 19, 2020).

⁸⁴ § 111(a)(4).

maintaining and operating the secondary transmission service.⁸⁵

This clause applies to nonprofit “translators” or “boosters” that “do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception.”⁸⁶ Cable systems, as defined therein, do not apply for this exemption.

B. *Locast: A Free Internet-Retransmission Service*

Internet-streaming media companies are not considered cable systems.⁸⁷ Thus, in interpreting the fifth exemption’s language, David R. Goodfriend, a lawyer, professor, and former executive at Dish Network, founded Locast, a nonprofit, internet-streaming service established “specifically to challenge the broadcasters’ interpretation of the country’s copyright law.”⁸⁸

Locast considers itself a “digital translator” that “operates just like a traditional translator service, except instead of using an over-the-air signal to boost a broadcaster’s reach, [they] stream the signal over the internet to consumers located within select US cities.”⁸⁹

The largest broadcast television market is New York City, followed by Los Angeles, Chicago, Philadelphia, and Boston.⁹⁰ Locast’s service is currently offered in twenty-five markets, including these five markets.⁹¹ A double-edged sword, Locast helps broadcast networks increase viewership of their television channels while at the same time potentially disrupting their ever-important cable retransmission consent-fee revenues.⁹²

Being a nonprofit organization, Locast relies on donations to operate its service.⁹³ Although it offers its service free of charge to its subscribers, it will interrupt nondonating subscribers’ streams every fifteen minutes, requesting that they sign up for automatically renewing donations.⁹⁴ Locast’s

⁸⁵ 17 U.S.C. § 111(a)(5) (2020).

⁸⁶ H.R. REP. NO. 94-1476, at 92 (1976).

⁸⁷ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 282 (2d Cir. 2012).

⁸⁸ Lee, *supra* note 46.

⁸⁹ *About*, LOCAS (May 25, 2018, 8:00 AM), <https://www.locast.org/news/about/>.

⁹⁰ BLUMENTHAL & GOODENOUGH, *supra* note 23, at 6.

⁹¹ LOCAS, <https://www.locast.org/> (last visited Dec. 19, 2020).

⁹² Ethan Wolff-Mann, *Free TV App Could Disrupt Revenue for Networks, Thanks to an FCC Loophole*, YAHOO FIN. (Oct. 4, 2018), <https://finance.yahoo.com/news/free-tv-app-disrupt-revenue-networks-thanks-fcc-loophole-195908832.html>.

⁹³ *See Donate*, LOCAS, <https://www.locast.org/donate> (last visited Mar. 5, 2020).

⁹⁴ Barbara Krasnoff, *Locast Review: Free Local Programming with a Catch*, VERGE (Feb. 25, 2019, 12:10 PM), <https://www.theverge.com/2019/2/25/18236704/locast-review-streaming-free-local->

subscribers are not its only donors—corporations can donate, too. AT&T, which owns cable company U-verse, made a \$500,000 donation to Locast.⁹⁵

Recall that cable companies are required to license and negotiate retransmission consent fees from the broadcast networks. If cable companies decide they no longer want to offer local channels on their line-up, or if they fail to reach a renewal on their retransmission licensing term, the cable companies could point their customers to a service like Locast as a free, supplemental service. Indeed, this has already happened. AT&T had “encouraged its users to try Locast during [a recent] blackout.”⁹⁶ A brief look at the mobile and streaming platforms that make Locast available for viewing reveals that U-verse, Dish, and Tivo, which are all cable operators, have given Locast their support on their platforms.⁹⁷ Interestingly, Comcast, another major cable operator has not given its support to Locast—Comcast is the parent company of NBCUniversal, a television broadcast network.⁹⁸ If Comcast were to give Locast support on its Xfinity cable platform, it would place itself at odds with its own subsidiary.

C. Broadcast Networks Take Action

Watching these moves unfold, the broadcast networks took action against Locast’s parent company, Sports Fans Coalition, Inc., and David R. Goodfriend, its founder.⁹⁹ On July 31, 2019, ten big-name broadcast networks filed a complaint in the United States District Court, Southern District of New York for copyright infringement among other causes of action.¹⁰⁰

programming-tv (“[E]very 15 minutes, the broadcast is interrupted by a request for the membership contribution. Actually, the broadcast isn’t just interrupted—it’s completely stopped. After the plea for money is over, you aren’t returned to your program, but bounced back to the programming grid.”).

⁹⁵ Lee, *supra* note 46.

⁹⁶ *Id.*

⁹⁷ LOCAS, <https://www.locast.org> (last visited Mar. 5, 2020).

⁹⁸ *About NBCUniversal*, NBCUNIVERSAL, <http://www.nbcuniversal.com/about> (last visited Mar. 5, 2020).

⁹⁹ *See generally* Complaint for Damages and Injunctive Relief, ABC, Inc. v. Goodfriend, No. 1:19-cv-07136 (S.D.N.Y. July 31, 2019).

¹⁰⁰ *Id.*

V. A CLOSER LOOK AT 17 U.S.C. § 111(A)(5)

A. *An Argument for Locast: A Literal Reading of 17 U.S.C. § 111(a)(5)*

A breakdown of the elements of the exemption in Section 111(a)(5) of the Copyright Act would require that the infringing transmission: (1) “not [be] made by a cable system” but “by a governmental body, or other nonprofit organization”;¹⁰¹ (2) “without any purpose of direct or indirect commercial advantage”;¹⁰² and (3) “without charging the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission.”¹⁰³

As established post-*Aereo, Inc.*, internet-streaming companies are not considered cable systems.¹⁰⁴ Locast is also a nonprofit organization. Thus, the first requirement is met. And since Locast alleges it is operating without any purpose of direct or indirect advantage, requirement number two is met. Lastly, it does not charge its customers for its service—it merely solicits donations, which it says are “solely . . . for paying Locast’s expenses for equipment, bandwidth, and operations to help run the service.”¹⁰⁵ On its face, all the elements have been met, and thus “Locast fits squarely within this Congressionally-designated exception to infringement.”¹⁰⁶

Perhaps, Locast should prevail as interpreted.

B. *An Argument for the Broadcasters: Interpreting “Without any Purpose of Direct or Indirect Commercial Advantage”*

Again, a retransmission will not be considered infringement on the primary transmission when “[1] the secondary transmission is . . . made by a . . . nonprofit organization, [2] without any purpose of direct or indirect commercial advantage, and [3] without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary

¹⁰¹ 17 U.S.C. § 111(a)(5) (2020).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Letter from Jacqueline C. Charlesworth, *supra* note 75.

¹⁰⁵ Answer to Amended Complaint and Counterclaims, at 44, *ABC, Inc. v. Goodfriend*, No. 1:19-cv-07136 (S.D.N.Y. July 31, 2019).

¹⁰⁶ *Id.* at 2.

transmission service.”¹⁰⁷ The statutory language in Section 111(a)(5) does not dictate to whom the direct or indirect commercial advantage will be attributed. It is left open for interpretation. Is it *any* direct or indirect commercial advantage? Or does the direct or indirect commercial advantage have to be solely for the nonprofit organization?

With Locast, there is arguably a commercial advantage, whether it be considered direct or indirect does not matter, as either of these will prevent the use of this exemption.¹⁰⁸ Nonprofit organizations may obtain a commercial advantage regardless of their nonprofit status. In its report on the Copyright Act of 1976, the House stated

The line between commercial and “nonprofit” organizations is increasingly difficult to draw. Many “non-profit” organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad “not for profit” exemption could not only hurt authors but could dry up their incentive to [create].¹⁰⁹

Regarding the same “without any purpose of direct or indirect commercial advantage” language included in Section 110(4) of the Copyright Act, the House Report stated that “public performances given *or sponsored in connection with* any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for . . . the performance.”¹¹⁰

For example, a stage owner could offer a free show to the public by finding donors, which could be profit-making enterprises. This is the definition of a sponsor. A “sponsor” is “a person or an organization that pays for or plans and carries out a project or activity.”¹¹¹ Even if the stage owner does not promote or advertise that the show is being sponsored by a donor company, the donor company may promote to its customers that the stage owner is putting on a show available to them for free, creating goodwill with its customers. With that, there would be an indirect commercial advantage

¹⁰⁷ 17 U.S.C. § 111(a)(5) (2020).

¹⁰⁸ *Id.*

¹⁰⁹ H.R. REP. NO. 94-1476, at 62–63 (1976).

¹¹⁰ *Id.* at 85 (emphasis added).

¹¹¹ *Sponsor*, MERRIAM-WEBSTER (2019).

because the public performance would be “sponsored in connection with a profit-making enterprise”¹¹²

In this instance, Locast is the stage owner putting on a public performance. It accepts donations from profit-making enterprises, such as cable systems. Locast then offers the performance free of charge to the public. These cable systems promote the free showing by sending their customers to Locast. And therein lies an indirect commercial advantage. A cable system does not have to negotiate any retransmission consent fees with the broadcast networks; it can just send its customers to view the same broadcasts on a service, which it hosts on its own platform, for less money than it takes to pay retransmission consent fees.

Looking at the high cost of retransmission fees, Locast’s service will offer tremendous value in terms of savings to the economic interests of some of its largest donors—cable companies. And these companies will enjoy that benefit to the extent that they donate and promote Locast to their own subscribers. One industry analyst has stated that “donating to Locast is the single smartest move” a cable company can make because “it offers the potential to slow or even reverse . . . retrans[mission] costs.”¹¹³

Also, Locast, being a subscription service, collects subscriber data. Locast has admitted that it “maintains anonymized, aggregated data about users’ viewing habits,”¹¹⁴ and although it claims not to offer that data to third parties, it may one day decide to publish or put such valuable information to use. Lastly, Locast’s subscribers need internet access to use its streaming service, and, in order to have internet access, its subscribers need to pay an internet service provider—which happen to be, for the most part, cable systems.¹¹⁵ Interestingly, Locast has a page on its website with the caption, “This free TV app could disrupt revenue for the big networks.”¹¹⁶ Such a statement makes it seem as if it were in competition with the networks.

As a final point, Locast states it is “like public broadcasting,” which asks for contributions from its viewers.¹¹⁷ However, there is a difference between Locast and public broadcasters such as PBS: Locast does not pay for the

¹¹² H.R. REP. NO. 94-1476, at 85 (emphasis added).

¹¹³ Ben Munson, *Donating to Locast Is the ‘Single Smartest Move’ any MVPD/vMVPD Can Make—Analyst*, FIERCEVIDEO (July 9, 2019, 12:10 PM), <https://www.fiercevideo.com/video/donating-to-locast-single-smartest-move-any-mvdp-vmvdp-can-make-analyst>.

¹¹⁴ Answer to Amended Complaint and Counterclaims, *supra* note 105, at 9.

¹¹⁵ *TV & Internet Packages*, DISH, <https://www.dish.com/internet/bundles/> (last visited Mar. 5, 2020); *AT&T Internet Plans*, AT&T, <https://www.att.com/internet/> (last visited Mar. 5, 2020).

¹¹⁶ *This Free TV App Could Disrupt Revenue for the Big Networks*, LOCAST, <https://news.locast.org/this-free-tv-app-could-disrupt-revenue-for-the-big-networks/> (last visited Mar. 5, 2020).

¹¹⁷ *Id.*

content it distributes, whereas public broadcasters, like NPR, do pay for the content they air by either producing the content themselves, acquiring the content, or receiving the content from other nonprofit organizations.¹¹⁸

As the complaint filed against the defendants in *ABC, Inc. v. Goodfriend* states, “Locast is not the Robin Hood of television; instead, Locast’s founding, funding, and operations reveal its decidedly commercial purposes.”¹¹⁹

VI. CONCLUSION

Currently, this exemption—17 U.S.C. § 111(a)(5)—has never been tried in court. There is no precedent that says whether nonprofit, internet-streaming companies can do what Locast is doing. How should “without any purpose of direct or indirect commercial advantage” be interpreted? Whether such an organization, backed by donations from cable companies, can exist and compete with broadcasters’ rights to seek retransmission fees is a question that has yet to be answered. From a copyright owner’s viewpoint, allowing Locast to continue operating would decrease the economic incentive behind the copyright laws. As it stands, if a company like Locast can get away with copyright infringement, the future of local broadcast television looks bleak as the networks would lose the leverage they have over retransmission consent fees.

¹¹⁸ *Public Radio Finances*, NPR, <https://www.npr.org/about-npr/178660742/public-radio-finances> (last visited Mar. 5, 2020).

¹¹⁹ Complaint for Damages and Injunctive Relief, *supra* note 99, at 3.