The Past, Present, and Future of Internet Retransmissions of Cable Television: A Suggested FCC Regulatory Framework

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1. Introduction

In the twentieth century, broadcast television and the Internet both contributed substantially to the development of American culture and society. Slowly but surely, the two are merging, with the technological benefits of the Internet impacting how and where America views cable television content.[2] Today, viewers no longer watch cable content exclusively by appointment with their televisions.[3] Content is now available on-demand and through streaming services such as Netflix and Hulu.[4] The phenomenon of on-demand and streaming cable content has become extremely popular. In fact, Netflix accounted for 31.6% of all downstream Internet traffic in North America during prime time hours in 2013.[5]

The advent of the Internet has also led some firms to experiment with streaming *live* cable content on devices besides the television, such as laptops,

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[2] Michael Marriott, 'Merging TV With the Internet' *New York Times* (New York City, 28 September 2000) <http://www.nytimes.com/2000/09/28/technology/merging-tv-with-the-internet.html> accessed 10 December 2014.

[3] Jesse Cryderman, 'Buyers Guide to Next-Gen Video Platforms' (*Pipeline*, April 2014) <http://www.pipelinepub.com/video_and_content/content_delivery_networks> accessed 10 December 2014.

[4] Adam B. VanWagner, 'Seeking a Clearer Picture: Assessing the Appropriate Regulatory Framework for Broadband Video Distribution' [2011] 79 Fordham L Rev 2909, 2920.

[5] Eliana Dockterman, 'Netflix Used 10 Times More Than Amazon and Hulu Combined' (*Time*, 11 November 2013) <http://entertainment.time.com/2013/11/11/netflix-used-10-times-more-than-amazon-and-hulu-combined> accessed 5 April 2016.

smartphones, and tablets.[6] However, these innovations are proving to be much less successful, mostly because such firms are operating without the permission of cable networks,[7] which would likely have been prohibitively expensive for startup firms to obtain.

Three independent firms—Ivi, Aereo, and FilmOn—have recently encountered legal resistance for streaming live television online.[8] In 2012, several television producers sued Ivi for copyright infringement after the firm began streaming live copyrighted cable content. Ivi argued that it was entitled to a section 111 compulsory licence, which would have allowed it to reproduce the content of cable networks without infringing their copyrights.[9] The Second Circuit disagreed, holding that Ivi did not qualify as a 'cable system' as required by section 111 of the Copyright Act.[10] A similar group of plaintiffs also sued Aereo and FilmOn.[11] Raising a different defence, both firms claimed that they did not 'publicly perform' for purposes of the Copyright Act and thus did not infringe any copyrights.[12] The Supreme Court ultimately rejected this contention, holding that live streaming services do in fact 'publicly perform'.[13] In doing so, however, the Court likened Aereo to a 'cable system'.[14] Aereo viewed this as an overruling of the Second Circuit's *Ivi* decision and subsequently filed for a compulsory licence from the Copyright Office, but the Copyright Office denied their application.[15]

This article will provide a history of cable television, compulsory licences, and Internet retransmissions of cable content before ultimately arguing that section 111 of the Copyright Act could encompass Internet retransmissions if the FCC regulated those retransmissions and required them to be localised. Section 2, Part A will discuss the commercial rise of cable television and the technological struggles that came with it. These technological struggles led to the innovation of community antenna television which was beneficial to programme copyright owners at first but later became detrimental. Part B will explain that Congress provided relief to the programme copyright owners by enacting a compulsory licence for cable retransmissions as part of the 1976 revision of the Copyright Act. Part C will provide a background of the firm Ivi, which was likely the first firm to use the Internet as a medium for cable retransmissions, but was denied a

[6] Dan Garon, 'Poison ivi: Compulsory Licensing and the Future of Internet Television' (2013) 39 Iowa J Corporate L 173, 175.

[7] See *ABC, Inc v Aereo, Inc*, 134 S Ct 2498 (2014); *WPIX, Inc v ivi, Inc*, 691 F 3d 275 (2d Cir 2012); *Fox TV Stations v BarryDriller Content Sys*, 915 F Supp 2d 1138 (CD Cal 2012).

[8] Garon (n 6).

[9] *See ivi* (n 7) [282]; Copyright Act 1976, s 111.

[10] ibid [282].

[11] *See Aereo* (n 7) [2511]; *Fox TV Stations* (n 7) [1146].

[12] ibid.

[13] ibid.

[14] *Aereo* (n 7) [2507].

[15] Keach Hagey, 'Copyright Office Denies Aereo Request to Be Classed as Cable System' *Wall Street Journal* (New York City, 17 July 2014).

compulsory licence. Part D will describe a similar firm, Aereo, which also made secondary retransmissions of cable content on the Internet but did so on the assumption that it did not publicly perform. Part D will also describe Aereo's quest for a compulsory licence.

Finally, Section 3 will analyse Aereo's argument that it was entitled to a section 111 compulsory licence and propose an FCC regulatory framework that would bring Internet retransmissions within the realm of section 111. Part A will analyse the specific merits of Aereo's claims and ultimately reject them. Aereo was not compliant with section 111 because the FCC does not regulate it and because Internet retransmissions are not localised. Part B will then argue that a new FCC regulation could kill two birds with one stone: the FCC could choose to regulate Internet retransmissions and, in doing so, require that those retransmissions be localised utilising geolocation software, solving both of the compatibility issues between Internet retransmissions and section 111.

2. A History of Cable Television, Compulsory Licences, and Streaming Cable Content

Copyright law does not require secondary cable transmitters to negotiate with each copyright holder in the content they transmit.[16] For a statutory fee, the Copyright Office grants them a compulsory licence instead.[17] The concept of secondary transmissions dates back almost as far as cable television itself and an understanding of this history,[18] along with the history of compulsory licences and streaming cable content via the Internet, is necessary to understand why Internet retransmissions are not eligible for a compulsory licence in their current form, and what it would take to make them eligible. Part A will discuss the history of cable television and the technological inadequacies that came with it. Those inadequacies ultimately led to Congress' enactment of section 111, which will be discussed in Part B. Parts C and D will discuss two important pieces of litigation relating to Internet retransmissions of cable content.

A. The History of Broadcast Television and Cable Systems

Cable television first gained commercial success in the 1950s.[19] However, cable signals were originally weak, and many homes received poor reception or no reception at all.[20] Cable owners solved this problem by inventing the community

[16] Copyright Act (n 9) s 111.
[17] ibid.
[18] Garon (n 6).
[19] Fred H Cate, 'Cable Television and the Compulsory License' (1990) 42 Federal Communications LJ 191, 193.
[20] ibid.

antenna television (CATV).[21] Under CATV, a community shared one large antenna, which picked up signals more clearly from local television broadcast stations, and individual users would connect to this large antenna with a coaxial cable.[22] Initially, both television broadcasters and copyright owners encouraged this practice; an increased viewer base meant higher advertising prices and royalty fees.[23] However, technology eventually improved, and with it, the distances the signals could travel increased. As a result, broadcast networks lost their local market monopolies.[24]

The advent of colour television worsened matters. Signal interference resulting from tall buildings in urban areas hardly affected black and white television, but the effect was noticeable with colour television.[25] In addition, cable operators began broadcasting their own programmes which were not available on broadcast television.[26] Consequently, as viewers began making the switch to cable television copyright owners began losing compensation because the cable operators did not pay them a royalty or licence fee.[27] As a result, copyright owners and the broadcast industry began suing cable systems for copyright infringement, alleging that the retransmissions were 'performances' for purposes of the Copyright Act 1909.[28] The Supreme Court disagreed with this contention in *Fortnightly Corp v United Artists Television, Inc* in 1968, ruling in favour of the cable systems.[29] Six years later, the Supreme Court again held that broadcast retransmissions did not infringe copyrights in *Teleprompter Corp v Columbia Broad Sys, Inc*.[30] The copyright owners and the broadcast industry had to seek relief elsewhere.

[21] ibid.
[22] ibid.
[23] Garon (n 6) 180.
[24] ibid.
[25] Cate (n 20) 195.
[26] ibid.
[27] ibid.
[28] See generally *Fortnightly Corp v United Artists Television, Inc*, 392 US 390, 400–402 (1968); *Teleprompter Corp v Columbia Broad Sys, Inc* 415 US 394, 409 (1974). The right to publicly perform is an exclusive right granted to copyright owners. If the CATVs 'performed' the copyrighted cable content, they were committing copyright infringement. See Copyright Act (n 9) s 106(4), 501(a).
[29] *Fortnightly* (n 28) [400]–[402].
[30] *Teleprompter* (n 28) [409].

B. Congress Enacts a Compulsory Licence

Congress responded swiftly to *Fortnightly* and *Teleprompter* in its 1976 revision of the Copyright Act.[31] While the statute already defined 'public performance', Congress added to it as follows:

> To perform or display a work 'publicly' means…to *transmit* or otherwise communicate a performance or display of the work... 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.[32]

These changes directly brought cable retransmissions within the definition of a 'public performance', thus effectively overruling *Fortnightly* and *Teleprompter*. But Congress did not stop there: the 1976 revision to the Copyright Act also created a compulsory licence for the same cable retransmissions they brought into the realm of 'public performances'.[33] A compulsory licence requires cable operators to pay a statutory royalty to the Copyright Office, as opposed to negotiating a royalty with each copyright holder.[34] The Copyright Office then disburses the royalties to the copyright holders.[35] This compulsory licence applies exclusively to retransmissions that meet the definition of a 'cable system'. The Copyright Act defines a 'cable system' as a facility that 'receives signals transmitted or programmes broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.'[36]

The Act also specifies requirements with which each cable system must comply. Cable systems must make an annual 'Statement of Account' setting out the number of rebroadcasts they make.[37] They also may not modify the transmissions in any way.[38] Finally, the cable systems must adhere to all FCC regulations.[39] To date, the Copyright Act has added two additional compulsory licences, both of which are for satellite carriers.[40] The two additional licences were a response to

[31] Copyright Act (n 9) s 101.
[32] ibid (emphasis added).
[33] ibid.
[34] Copyright Act (n 9) s 111.
[35] ibid.
[36] ibid.
[37] ibid.
[38] ibid.
[39] ibid.
[40] Copyright Act (n 9) ss 119, 122.

the development of a new medium, satellite, for viewing cable content. However, Congress has yet to respond to a more recent development of a cable viewing medium: the Internet. As the Internet grew in popularity, so too did the demand for viewing cable content via the Internet. One of the first firms to stream live cable content over the Internet was called Ivi.

C. WPIX, Inc v IVI, Inc

On September 13, 2010, a firm called Ivi released its 'revolutionary live television application', which it claimed 'enable[s] anyone with an Internet connection' to 'watch live television anywhere in the world, anytime.'[41] The launch was the first of its kind.[42] By downloading an app on Ivi's website, users could start with a free 30 day trial and stream the broadcasts of major networks such as ABC, NBC, CBS, and Fox.[43] Essentially, Ivi's premise was that it brought television to the Internet while other firms focused on bringing the Internet to television.[44] Ivi also allowed its users to 'cut the cord'.[45] Indeed, Ivi brought users a significant advantage over traditional television: users could watch anything a network's affiliates in New York, Los Angeles, Chicago, or Seattle were currently streaming.[46] Traditional television limits viewers to watching only broadcasts from local stations.[47] Ivi did not obtain the consent of any of the broadcasters it streamed.[48]

The broadcasters' response was swift. They sent several cease and desist letters to Ivi, to which Ivi was not responsive.[49] About two weeks after Ivi's launch, the broadcasters brought suit in federal court in the Southern District of New York seeking, among other things, a preliminary injunction.[50] Distributors of non-commercial education programmes, Major League Baseball, top motion picture studios and individual broadcast television stations joined the broadcasters as plaintiffs.[51] The plaintiffs contended that Ivi's streaming service was an unsanctioned 'public performance' of their copyrighted works.[52] Section 106 of the Copyright Act gives a copyright owner several exclusive rights, including

[41] Hal Bringman, 'ivi, Inc. Launches Highly Disruptive Software Delivering Live TV to the Internet' (*PRWeb*, 13 September 2010) <http://www.prweb.com/releases/2010/09/prweb4487284.htm> accessed 10 December 2015.

[42] ibid.

[43] ibid.

[44] ibid.

[45] 'Cutting the cord' refers to the concept of ceasing one's cable subscription in favour of using the Internet to view cable content.

[46] *WPIX, Inc v ivi, Inc*, 765 F Supp 2d 594, 599 (SDNY 2011) affd 691 F 3d 275 (2d Cir 2012).

[47] ibid.

[48] ibid.

[49] ibid.

[50] ibid.

[51] ibid.

[52] ibid.

the right to publicly perform their work.[53] The violation of any of the section 106 exclusive rights constitutes copyright infringement.[54] Ivi argued that it fit within the statutory definition of 'cable system' as provided by section 111 of the Copyright Act.[55] It made this argument by pointing out that its facility was located in the United States and received signals transmitted by broadcast stations for a secondary transmission.[56] While conceding that they did not comply with the 'rules, regulations, or authorizations of the Federal Communications Commission' as required by section 111 of the Copyright Act,[57] Ivi contended that its transmissions were permissible because the FCC does not, in fact, regulate the Internet.[58]

The District Court disagreed, noting that no technology had ever been allowed to take advantage of section 111's compulsory licence without complying with the rules and regulations of the FCC.[59] The Court buttressed its conclusion by looking to the legislative history of section 111 and taking into account practical considerations. Specifically, the Court found it significant that Congress understood the cable system to be a 'highly localized medium', which the Internet is not, and that Ivi refused to comply with the rules and regulations of the FCC.[60] In addition, the Court granted Skidmore deference to the Copyright Office's interpretation of section 111[61] and reviewed several pieces of evidence that suggested that the Copyright Office disapproved of granting compulsory licences for Internet retransmissions.[62] Under Skidmore deference, a Court gives weight to an agency's determinations to the extent that the agency's judgment is persuasive.[63] The Copyright Office, like the Court, found the reach of an Internet retransmission to be too broad, and not 'localized' in the sense that Congress intended.[64] Ivi made one final argument: they should be included as a 'cable system' under section 111 due to the broadness of the statute's definition of a 'cable system'.[65] Once

[53] Copyright Act (n 9) s 106.

[54] ibid (n 9) s 501(a).

[55] *ivi* (lower court) (n 46) [599].

[56] Memorandum in Support of Motion to Stay Preliminary Injunction Pending Appeal, *WPIX, Inc v ivi, Inc*, 765 F Supp 2d 594 (SDNY 2011) (Docket No 10 Civ 7415 (NRB)).

[57] Copyright Act (n 9) s 111(b)(2); *ivi* (lower court) (n 46) [599].

[58] *ivi* (lower court) (n 46) [599].

[59] ibid [602]. This held that Ivi is not a cable system under section 111 of the Copyright Act.

[60] ibid [604].

[61] ibid [605].

[62] ibid [609]–[610] (quoting US Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 97 (1997)).

[63] *Skidmore v Swift & Co*, 323 US 134, 137 (1944).

[64] *ivi* (lower court) (n 46) [609]–[610] (quoting US Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 97 (1997)).

[65] ibid [616]. Ivi relied solely on the first part of the definition, which states that a cable system is a 'facility, located in any state…that in whole or in part receives signals transmitted or programs broadcast...and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications for channels to subscribing members of the public who pay for such service' (quoting Copyright Act (n 8) s 111(f)(3)).

again, the Court was not persuaded. It noted that Ivi's interpretation neglected the second sentence of section 111(f)(3), which refers to 'headends' and 'contiguous communities', two concepts not present in Ivi's technology.[66] Accordingly, the Court held that Ivi was not likely to succeed on the merits of its case and ultimately granted the plaintiffs a preliminary injunction.[67]

Shortly thereafter, Ivi appealed to the Court of Appeals for the Second Circuit.[68] In deciding the issue of a preliminary injunction and the plaintiffs' likelihood of success on the merits of their case, the Court of Appeals focused solely on the Copyright Office's interpretation of section 111.[69] Unlike the District Court, the Court of Appeals gave the Copyright Office Chevron deference, which is stronger than the Skidmore deference the District Court granted.[70] At Chevron step one, the Court inquires whether Congress directly spoke to the issue at hand.[71] If Congress did not directly speak to the issue, the Court proceeds to step two, asking whether an agency's interpretation is 'permissible'.[72] At Chevron step one, the Court determined that the statutory text of section 111 was ambiguous as to whether an Internet retransmission is eligible for a compulsory licence and accordingly proceeded to step two.[73] The 'thoroughness' and 'validity' of the Copyright Office's reasoning in interpreting section 111 was sufficient for the Court.[74] The Court also held that the legislative history of section 111 revealed that Congress did not intend for Internet retransmissions to be eligible for a compulsory licence.[75] For those reasons, the Court deemed the Copyright Office's interpretation that section 111's definition of 'cable system' did not encompass internet providers to be permissible.[76] Ivi lost its legal battle, but it was not the last Internet company to fight for the right to retransmit live streaming cable online.

[66] ibid [616]. A headend is the point at which cable signals are monitored and processed before being distributed. Contiguous communities are neighboring areas controlled by one headend.

[67] ibid [617]–[622].

[68] *Ivi* (n 7) [278].

[69] *See generally* ibid.

[70] ibid (n 7) [279].

[71] *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984).

[72] ibid.

[73] *ivi* (n 7) [280]. The Court of Appeals thought 'facility' was ambiguous and doubted that the Internet qualified as such.

[74] The weight a court gives to an agency's interpretation of a statute 'depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.' *United States v Mead Corp*, 533 US 218, 228 (quoting *Skidmore v Swift & Co*, 323 US 134, 140 (1944)).

[75] *ivi* (n 7) [280].

[76] ibid [284]–[285] (citing *Chevron* [837]; Copyright Act (n 9) s 111).

D. ABC, Inc v Aereo, Inc

Like Ivi, a firm called Aereo, Inc ('Aereo') also tried its hand at streaming the live broadcasts of copyrighted television programmes.[77] Aereo operated differently: for each of its users, it allocated one antenna the size of a dime and one transcoder that in turn transmitted copyrighted content at the user's request.[78] When a viewer chose content to stream, an antenna server operated by Aereo sent a 'tune request' directing the viewer's antenna to tune into a specified broadband frequency correlated with the desired broadcast.[79] In addition, Aereo gave its viewers the option to watch *or record* the content they streamed.[80] When a viewer watched content, they also had the option to pause or rewind the content.[81] In this respect, Aereo was similar to the digital video recorders (DVR) that cable providers offered, except that it operated via computers, laptops and mobile devices.[82] When a viewer chose to record the content, Aereo saved the stream to a permanent hard disk the viewer could later access, which it did not do when the viewer only chose to watch the content.[83]

On March 1, 2012, a similar group of copyright holders as those in *Ivi* brought a claim against Aereo in the District Court for the Southern District of New York and moved for an injunction to prevent Aereo from allowing its users to stream live broadcasts.[84] Relying on a Second Circuit case, *Cartoon Network, LP v CSC Holdings, Inc* (*Cablevision*), Aereo contended that it was not in violation of copyright law.[85] *Cablevision* involved a dispute over an RS-DVR system that allowed users to record cable programming on a hard drive system that Cablevision operated at a remote location, much as Aereo operated its recording mechanism at a remote location.[86] In *Cablevision*, the Second Circuit held that the video streams of DVRs were not 'public performances' for purposes of the Copyright Act's Transmit Clause because only one person received each transmission.[87] The District Court in the Aereo litigation concluded that the two cases were indistinguishable, and thus denied the injunction.[88]

[77] *ABC v Aereo, Inc*, 874 F Supp 2d 373, 377 (SDNY 2012); revd *ABC, Inc v Aereo, Inc*, 134 S Ct 2498 (2014).

[78] ibid [379]. Unlike the CATV system, which led to the creation of statutory licenses, Aereo users did not share a satellite; one was allocated to each user.

[79] ibid [378].

[80] ibid [377].

[81] ibid.

[82] ibid.

[83] ibid.

[84] ibid [376]; Garon (n 6) 192.

[85] *Aereo* (n 77) [373].

[86] ibid (citing *Cablevision* [124]).

[87] *Cablevision* [137].

[88] *Aereo* (n 77) [405].

The plaintiffs appealed to the Court of Appeals for the Second Circuit on November 30, 2012, which reviewed the District Court's denial of a preliminary injunction for abuse of discretion.[89] The Second Circuit affirmed the lower court's holding. The Court first interpreted *Cablevision* and identified four guideposts relevant to Aereo.[90] First, if the public is capable of receiving a transmission, that transmission is a public performance.[91] However, if only one person is capable of receiving a transmission, it is not a public performance.[92] The second guidepost was a corollary of the first: courts cannot aggregate private transmissions and call them public performances, except as provided for in the third guidepost.[93] According to the third guidepost, courts should aggregate private transmissions when private transmissions all result from the same copy of the work.[94] If the aggregated transmissions from that single copy enable public viewing, that transmission is a *public* performance.[95] Finally, courts should give weight to factors that limit a potential audience for the purposes of the Transmit Clause. With these guideposts in place, the Second Circuit applied *Cablevision* to the facts before them.[96] It found the two cases to be indistinguishable: the RS-DVR system in *Cablevision* created unique copies of the programme a user wished to record, and the transmission was also generated from that unique copy.[97] Aereo's transmissions were unique copies transmitted at the user's request while the programmes were still on broadcast television.[98] The Second Circuit held Aereo's streaming did not constitute a public performance and upheld the District Court's denial of a preliminary injunction.[99]

The Supreme Court granted certiorari in the case to address two questions: whether Aereo 'performed' at all and, if so, whether Aereo performed publicly.[100] The Court answered the first question in the affirmative, reasoning that both Aereo and the viewer of a television programme 'performed' when they used Aereo's streaming service.[101] The Court next turned to the issue of whether Aereo's performance was public.[102] Aereo argued that the performance was not public, since each antenna was allocated to just one subscriber and thus only one subscriber had the ability to view each transmission.[103] The Supreme Court was

[89] *WNET v Aereo, Inc*, 712 F 3d 676 (2d Cir 2012); revd *ABC, Inc v Aereo, Inc*, 134 S Ct 2498 (2014).
[90] ibid.
[91] ibid [689].
[92] ibid.
[93] ibid.
[94] ibid.
[95] ibid.
[96] ibid [689]–[694].
[97] ibid (citing *Cablevision* [124]).
[98] ibid [696].
[99] ibid (citing *Cablevision* [124]).
[100] *ABC, Inc v Aereo, Inc* (n 89) [2504].
[101] ibid [2506]–[2508].
[102] ibid [2509].
[103] ibid [2508].

not convinced. In terms of Congress' regulatory objectives, the technological differences between Aereo and a cable provider were irrelevant.[104] These 'behind-the-scenes' mechanics did not change Aereo's commercial objective.[105] The Court concluded that Aereo did indeed perform publicly.[106] Justice Stephen Breyer's opinion analogised Aereo to a cable system and he considered Aereo's practice highly similar to the CATV systems in *Fortnightly* and *Teleprompter*.[107] Accordingly, the Supreme Court reversed the Second Circuit's decision and ruled that Aereo was infringing numerous copyrights.[108]

Aereo may not have gotten the ruling it wanted from the Supreme Court, but it was pleased with the Supreme Court's analogy of its service to a cable system.[109] Since cable systems are generally entitled to a compulsory licence,[110] Aereo sent a cheque for $5,310.74 to the Copyright Office in hopes of obtaining a compulsory licence which would make the Supreme Court's ruling that it 'publicly perform[ed]' irrelevant.[111] The Copyright Office, however, did not accept Aereo's money.[112] They cited *Ivi* and refused to grant Aereo a compulsory licence.[113] Dissatisfied with the Copyright Office's ruling, Aereo decided to attempt litigation one more time and brought suit in the District Court for the Southern District of New York, contending that the plaintiffs from its recent Supreme Court case were not entitled to a preliminary injunction despite their victory.[114] This contention was based on the new affirmative defence that Aereo was entitled to a compulsory licence because Justice Breyer's opinion essentially overruled the *Fortnightly* and *Teleprompter* decisions.[115] The Court disagreed, reasoning that Aereo's similarity to a cable system did not necessarily entitle it to the compulsory licence granted to genuine cable systems under section 111.[116] In addition, the Supreme Court never addressed the issue of compulsory licences when deciding *Aereo*, a void which *Ivi* seemingly filled.[117] For those reasons, the Court granted the plaintiffs an injunction.[118]

[104] ibid.
[105] ibid [2509].
[106] ibid [2511].
[107] ibid.
[108] ibid.
[109] Hagey (n 15).
[110] Copyright Act (n 9) s 111.
[111] ibid; Hagey (n 15).
[112] ibid.
[113] Letter from Jacqueline C Charlesworth, General Counsel and Associate Register of Copyrights, to Matthew Calabro, Aereo, Inc (July 16, 2014).
[114] *ABC v Aereo, Inc,* 2014 US Dist LEXIS 150555 (SDNY Oct 23, 2014).
[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid.

Aereo's fight was seemingly still not over after losing in the District Court on remand. On October 28, 2014, FCC Chairman Tom Wheeler posted to the Official FCC Blog that the FCC would consider enacting rules to regulate Internet retransmissions such as Aereo.[119] According to Wheeler's post, the FCC wants to open access to cable programmes for Internet video services.[120] Wheeler compared the up-and-coming technology to that of satellites when satellites first transmitted television content.[121] He felt that new rules could spur competition and that the Internet as a medium could allow consumers to purchase smaller cable packages.[122] Judging from Wheeler's post, the FCC appears enthusiastic about enacting new rules, and their creation may be imminent.

Ultimately, Aereo was unable to overcome its legal issues. It filed for bankruptcy on November 20, 2014.[123] Its Chapter 11 filing marked the end of the legal and financial troubles that had defined the company for the past year.[124] New FCC rules may be too late for Aereo, but they could potentially pave the way for similar firms to gain access to a section 111 compulsory licence. It is therefore essential to examine whether future Internet retransmissions of cable content could ever be eligible for a section 111 compulsory licence.

3. Aereo's Claims Under Section 111 and the Future for Internet Retransmissions

Although Aereo is now bankrupt, it is worth analysing the merits of their section 111 claims since those claims were decided by a District Court and the FCC is interested in enacting rules to cater to similar services. In addition, it is likely that Aereo will not be the last firm to experiment with Internet retransmissions of cable content. For example, FilmOn continues to operate and it provides a similar service to that of Aereo.[125] Part A of this Section will analyse the merits of Aereo's claims under section 111 and conclude that the District Court rightfully disposed of those claims. Aereo did not comply with section 111 because it did not take certain steps *before* commencing its retransmitting service. Part B will examine whether

[119] Tom Wheeler, 'Tech Transitions, Video, and the Future' (*Official FCC Blog*, 28 October 2014), <http://www.fcc.gov/blog/tech-transitions-video-and-future> accessed 10 December 2014.

[120] ibid.

[121] ibid.

[122] ibid.

[123] Tanya Agrawal and Jonathan Stempel, 'Video streaming service Aereo files for bankruptcy' (*Reuters*, 21 November 2014) <http://www.reuters.com/article/2014/11/21/us-aereo-bankruptcy-idUSKCN0J513K20141121> accessed 10 December 2014.

[124] Emily Steel, 'Aereo Concedes Defeat and Files for Bankruptcy' *The New York Times* (New York City, 21 November 2014).

[125] Lisa Shuchman, 'FilmOn Fights On After Aereo Bankruptcy' (*The AM Law Litigation Daily*, 24 November 2014) <http://www.litigationdaily.com/home/id=1202677363695?mcode=1202617031029&curindex=0&slreturn=20150009090918> accessed 10 December 2014.

an Internet service similar to Aereo could be eligible for a section 111 licence if it were to take those steps before commencing operations. Because the Internet is not localised or regulated by the FCC, Part B will conclude that other Internet retransmissions are also ineligible. Part C will suggest a regulatory framework for the FCC to adopt that would bring Internet retransmissions within the realm of section 111.

A. Analysing the Merits of Aereo's defence on Remand from the Supreme Court's Decision

On remand from the Supreme Court decision, the District Court properly disposed of Aereo's claim that it was entitled to a compulsory licence because the FCC did not regulate Aereo and Aereo was not compliant with the plain requirements of section 111. At first blush, it may appear that Aereo was a 'cable system' as contemplated by Congress when it passed the Copyright Act of 1976. The corresponding Senate Report states that cable systems 'are commercial subscription services that pick up broadcasts of programmes originated by others and retransmit them to paying subscribers'.[126] Aereo seemingly matched this description; it used antennas to retransmit the broadcasts of others and relayed them to paying subscribers.[127]

However, a closer look at the wording of section 111 reveals that Aereo did not comply with the plain requirements for obtaining a compulsory licence. Aereo did not apply for a compulsory licence until Justice Breyer analogised them to a 'cable system' in his *Aereo* opinion.[128] Under section 111, cable systems must take specific steps one month before commencing operations to be eligible for a compulsory licence.[129] Specifically, Aereo needed to record a notice in the Copyright Office including its identity and address along with the name and location of the primary transmitter whose signals it regularly carries.[130] There is no indication that Aereo took these steps, likely because it designed its business model to take advantage of the Second Circuit *Cablevision* decision, which concerned the public performance right.[131] Aereo created its service in hopes that it did not infringe copyrights at all, and therefore did not need a compulsory licence in the first place.

Even without the clarity of section 111, courts grant the Copyright Office Chevron deference in their interpretations of the Copyright Act.[132] Although Congress may not have directly spoken to the issue of Internet retransmissions,

[126] S Rep 94-473 (1975).

[127] *ABC v Aereo, Inc*, 874 F Supp 2d 373, 378 (SDNY 2012); revd *ABC, Inc v Aereo, Inc*, 134 S Ct 2498 (2014).

[128] *See* n 109–111.

[129] Copyright Act (n 9) s 111(d).

[130] HR Rep No 1476, 94th Cong, 2d Sess 95 (1976).

[131] Timothy B Lee, 'With Aereo appeal, broadcasters threaten the foundation of locker services' (*Ars Technica*, 17 April 2013) <http://arstechnica.com/tech-policy/2013/04/with-aereo-appeal-broadcasters-threaten-the-foundation-of-locker-services/> accessed 10 December 2014.

[132] *See ivi* (n 7) [280].

Courts still uphold an agency's interpretation in such situations as long as the interpretation is 'permissible'.[133] The Copyright Office's interpretation easily meets this relatively low standard. It denied Aereo's application because Aereo's service was not localised and the FCC did not regulate it.[134] The wording and legislative history of section 111 so clearly beg this determination that, arguably, an *opposite* finding would not be 'permissible'. Therefore, the District Court for the Southern District of New York properly disposed of Aereo's affirmative defence that it was entitled to a compulsory licence on remand from the Supreme Court's decision. But does this mean that the future of Internet retransmissions of cable content is doomed?

B. Are Other Internet Retransmissions of Cable Content Necessarily Ineligible for a Section 111 Compulsory Licence?

Other Internet retransmissions, besides Aereo, face similar difficulties in their applicability to section 111. Internet retransmissions can hardly be classified as 'localized' because the Internet's reach is extremely vast. Content on the Internet is not just available across the nation, but internationally as well.[135] As the Courts in *Ivi* and *Aereo* correctly held, Congress intended section 111 of the Copyright Act to apply to *localised* retransmissions only.[136] This much is plainly clear from the legislative history of section 111.[137] Congress' entire purpose in enacting section 111 was to provide copyright holders relief while maintaining the conveniences and benefits of the local secondary cable transmissions already in place.[138] Specifically, Congress was concerned with preserving the then-current economic state of cable retransmissions.[139] The Committee on the Judiciary in the House of Representatives believed that the retransmission of 'local' broadcast signals posed no threat to the existing market for copyright holders in cable content.[140] The Committee also found it significant that networks compensated those copyright holders based on the local markets the networks served.[141] As a corollary, it believed that transmission of distant programming would 'adversely affect the ability of

[133] *Chevron* (n 71) [843].

[134] Letter from Jacqueline C Charlesworth, General Counsel and Associate Register of Copyrights, to Matthew Calabro, Aereo, Inc (16 July 2014).

[135] Dan Jerker B Svantesson, 'Geo-Location Technologies and Other Means of Placing Borders on the "Borderless" Internet' (2004) 23 John Marshall J Computer & Information L 101.

[136] *Ivi* (n 7) [280]; *Aereo* (n 114); '…the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of *distant* nonnetwork programming', HR Rep No 1476, 94th Cong, 2d Sess 99 (1976) (emphasis added).

[137] 57 Fed Reg 3284 (29 January 1992).

[138] HR Rep No 1476, 94th Cong, 2d Sess 99 (1976) (noting that 'distant' signals are not to be subject to payment under the section 111 licence); Cate (n 19) 195.

[139] HR Rep No 1476, 94th Cong, 2d Sess 90 (1976).

[140] ibid.

[141] ibid.

the copyright owner to exploit the work in the distant market.'[142] Since Congress intended to preserve the then-current economic state of secondary retransmissions, any interpretation of section 111 that disrupted that economic state would be contrary to Congress' will. Because of Congress' stated intention, it is proper to consider the economic ramifications of permitting Internet retransmissions to obtain a compulsory licence under section 111.

1. The Economics of Allowing Section 111 in its Current Form to Cover Internet Retransmissions

If the phenomenon of independent firms retransmitting cable signals nationwide becomes widespread, which it would if anyone was able to do so by simply applying for a compulsory licence, the business models of many cable providers would collapse. The cable industry depends on the long-standing practice of marketing television programmes on a geographic basis.[143] Specifically, advertising is made specially for localised transmissions.[144] Although television series are made for a national, or even international, audience, the series and other cable content are subject to numerous retransmissions throughout the United States.[145] Accordingly, the market is segmented.[146] The localised nature of a traditional cable retransmission adds value to the cable content because it allows advertisers to target local audiences and provides opportunities for local businesses to narrowly advertise within their locales. But the segmented market resulting from local retransmissions is not the only economic concern.

The large quantity of local cable retransmissions has also created a reliance interest in the cable industry. Because traditional cable retransmission systems only reach a limited distance, there must be many of them to cover the vast number of regions in the United States. This fact highlights the need for a compulsory licence in the first place: the retransmissions are so numerous that it would be financially prohibitive to require each retransmitter to negotiate with the holder of each copyright they 'perform'.[147] The Copyright Royalty Board sets the statutory fee for the compulsory licence based on the large quantity of licences they will grant and their market value, as determined in part by advertising revenue.[148] Clearly, the cable industry has a legitimate reliance interest in the cable retransmission system in its current form because of the advertising business model

[142] ibid.
[143] Matt Jackson, 'The Technological Revolution Will Not Be Televised: Canadian Copyright and Internet Retransmissions' (2006) Michigan State L Rev 133.
[144] ibid.
[145] ibid.
[146] ibid.
[147] *Ivi* (n 7) [278].
[148] Copyright Act (n 9) s 111(d)(A).

that has been in place for years. The 'borderless' nature of the Internet would upset this balance already in place and wreak havoc on the cable industry.[149]

Accordingly, economic considerations, in addition to the legal considerations addressed above, suggest that secondary retransmissions over the unrestricted Internet are ineligible for a section 111 compulsory licence. But this is not to say that the Internet itself can never be a suitable medium for viewing cable content. If the FCC adopted a framework for regulating Internet retransmissions that required those retransmissions to be localised, Internet retransmissions could potentially be eligible for a section 111 compulsory licence.

C. Killing Two Birds with One Stone: A Proposed Regulatory Framework for the FCC to Apply to Internet Retransmissions of Cable Content

On October 28, 2014, after Aereo lost both its Supreme Court challenge and its challenge to obtain a compulsory licence, the Chairman of the FCC announced that the FCC would begin the process of changing its rules to accommodate Aereo and thus allow Aereo to operate as a cable system.[150] Although Aereo is now bankrupt, new FCC rules could apply to future firms launching a similar service. In fact, FilmOn, a firm that competed with Aereo and also streams live cable content, is still in business, and such a rule change would pave the way for FilmOn and similar firms to obtain compulsory licences.[151]

The FCC would not be overstepping its bounds by enacting such rules. Congress clearly reserved a role for the FCC in the compulsory licence scheme by requiring cable systems to comply with FCC rules and regulations.[152] In addition, the legislative history of section 111 reveals that Congress did not intend for section 111 to affect communications policy, which they desired to be the FCC's prerogative.[153] In other words, Congress recognised the interplay between communications policy and copyright law and intended to affect only the latter when it enacted section 111. With a properly crafted regulatory framework, the FCC could do its part in the interplay between communications policy and

[149] Jackson (n 143).

[150] Joshua Brustein, 'The FCC Wants to Let Aereo Become a Cable Service' (*Bloomberg Businessweek*, 28 October 2014) <http://www.businessweek.com/articles/2014-10-28/the-fcc-wants-to-let-aereo-become-a-cable-network> accessed 10 December 2014.

[151] Shuchman (n 125); Shalini Ramachandran, 'Aereo Investors See a "Plan B" After FCC's Latest Move' (*CMOToday*, 31 October 2014) <http://blogs.wsj.com/cmo/2014/10/31/aereo-investors-see-a-plan-b-after-fccs-latest-move/> accessed 10 December 2014.

[152] Copyright Act (n 9) s 111(a)(1).

[153] 'While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterised as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.' HR Rep No 1476, 94th Cong, 2d Sess 89 (1976).

copyright law and bring Internet retransmissions within the realm of section 111, enabling the previously elusive marriage of live cable and the Internet.

First, an FCC rule change recognizing Internet retransmissions as cable systems would itself solve one of the compliance issues with the text of section 111. The statutory text was previously a roadblock because Aereo was not compliant with FCC rules and regulations as required by section 111(a)(1).[154] As it turns out, there were no rules and regulations to follow because the FCC does not regulate Internet retransmissions of cable content at all. The FCC now desires to treat Internet retransmissions as cable systems and thus could bring them under its rules. New FCC rules, regardless of their content, would bring Internet retransmissions into compliance with FCC regulations, as required by section 111.[155] Second, the FCC could kill two birds with one stone by mandating that Internet retransmissions be localised, requiring retransmission services to adopt specific technology to address the problem of the Internet's global nature.[156] Such technology already exists and is known as geolocation software.[157] Geolocation software identifies the location of an Internet user and can report the location to a website that retransmits cable content.[158] The FCC could require websites to authenticate the location of a user using geolocation software to ensure that the viewer is truly local. As a result, Internet retransmissions would serve localised markets in the same manner as traditional cable secondary retransmissions, thereby bringing Internet retransmissions within the scope of section 111 and benefitting society through the expanded interchange of information and ideas—all without upending the well-established local balance of the cable industry.

4. Conclusion

Secondary retransmission of cable television content is almost as old as cable television itself. Retransmission was originally a solution to the poor signal quality that consumers experienced when cable television first became commercially successful. The retransmission process segmented the market for cable television as smaller communities received their own transmissions. This market segmentation allowed advertisers to focus on different locales, giving rise to the economic reality of cable television as it exists today. When Congress enacted the compulsory licence provision in section 111 of the Copyright Act, it intended to preserve this status quo, enabling 'cable systems' to receive compulsory licences only if they were

[154] Copyright Act (n 9) s 111(a)(1).

[155] ibid.

[156] Congress enacted section 111 to provide compulsory licences only for *localised* secondary retransmissions of cable. *See* n 138–142 and accompanying text.

[157] Daniel Ionescu, 'Geolocation 101: How It Works, the Apps, and Your Privacy' (TechHive, 29 March 2010) <http://www.techhive.com/article/192803/geolo.html> accessed 10 December 2014.

[158] ibid.

regulated by the FCC and their retransmissions were localised. Because Congress passed this licensing scheme in 1976, it likely did not consider the possibility of Internet retransmissions.

Ivi was the first firm to retransmit cable content over the Internet, but the Second Circuit put an end to this venture, ruling that Internet retransmissions of cable content were ineligible for a compulsory licence. Aereo came on the scene shortly thereafter, offering a service highly similar to that of Ivi, but purporting not to infringe copyrights because it did not 'publicly perform'. Its fate, however, was similar to Ivi's, leaving the future of Internet retransmissions of cable content uncertain. Aereo was not entitled to a compulsory licence because it was not regulated by the FCC and because its retransmissions were not localised. The FCC, however, could kill both birds with one stone by stepping in to regulate Internet retransmissions. Regardless of the content of its regulations, by adopting a regulatory scheme for Internet retransmissions, the FCC would remove the first barrier to compulsory licenses for services like Aereo. The FCC could remove the second barrier—the localization problem—by requiring Internet retransmissions to utilise geolocation software, thereby ensuring that users are truly 'local'. This requirement would satisfy Congress' intent that only localised transmissions be protected under section 111. It would also maintain the segmented nature of the cable television market that Congress sought to preserve. In sum, an FCC rulemaking on Internet retransmissions could bring cable content into the twenty-first century.