Journal of Legal Aspects of Sport, 2017, 27, 3-18
https://doi.org/10.1123/jlas.2016-0014

Human Kinetics
ORIGINAL RESEARCH

Privilege Over Innovation: Sports Broadcasting, Mobile Television, and the Case of *Aereo*

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Despite the advent of digital and mobile technologies, major leagues and television networks continue to enjoy significant control over the distribution of popular sports content. Leagues have long enjoyed an antitrust exemption via the Sports Broadcasting Act when it comes to negotiating pooled coverage rights with broadcasters. This paper argues that leagues leverage this competitive advantage to thwart technological innovation. Our case is demonstrated by an examination of how Aereo—a startup technology company sued by broadcast networks in 2013 for copyright infringement—was framed in legal debates and news media coverage. Reinforced by statements circulated in the media, the leagues filed an amicus brief supporting their broadcast partners that expressed concerns about how Aereo-style innovation would impact their business models. Drawing in related international cases, the present study shows that the control of intellectual property and enforcement of copyright are crucial sources of power in the global sports media market.

Keywords: media rights; copyright protection; Sports Broadcasting Act; emerging technology

Seemingly since it became law, the Sports Broadcasting Act of 1961 (SBA) has been characterized as "special interest legislation" (Anderson, 1995, p. 947; Boliek, 2014, p. 543). Critics have suggested the SBA does little more than enable professional sports leagues the privilege of selling increasingly expensive pooled television rights to broadcast networks without fear of antitrust scrutiny (Boliek, 2014).

In its more than 50 years of existence, the SBA has evolved from "essential" legislation necessary to protect professional sports to a safe haven for the National Football League's (NFL) tax-exempt status (Schmied, 2014). (It should be acknowledged, however, that the NFL decided to forego its tax-exempt status effective for the 2015 fiscal year [Clegg, 2015].) Indeed, scholars have long called for either a complete abolition of the law (Boliek, 2014; Horowitz, 1978), or, at the very least, an update to include today's media business models, which focus on cable

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and satellite distributors, subscriber fees, and retransmission fees for free-to-air terrestrial networks (e.g., Kaiser, 2005; Palachuk, 2014). Goodman (1995, p. 506) called the SBA a "vestige of an era gone by" just 35 years after its passage, and Boliek (2014, p. 507) noted that while technological advances have created greater variety of content and increased consumer choice, "many regulatory policies and rules—especially those that support preferred content and technologies—have not been revised in decades."

Technology company Aereo was founded in February 2012 as a means to offer consumers increased choice. Aereo's business model involved leasing miniature digital antennas to consumers for a monthly fee. Consumers could watch or time-shift any program delivered through a free-to-air terrestrial signal and then view it on a computer or tablet. Broadcast networks argued Aereo was retransmitting their signals without compensation in violation of the 1992 Cable Act. Aereo countered the service provided to consumers was a private performance, similar to an old VHS recording, and not a retransmission of the broadcast signal.

Aereo prevailed twice in court, first at the district court level and then on appeal to the circuit court of appeals. The plaintiffs took their pleas to the Supreme Court of the United States, which agreed to hear the case in spring 2014. The Court ruled 6–3 in favor of the broadcasters, effectively ending Aereo's operation in June 2014.

Leaning on the privileges afforded them in the Sports Broadcasting Act, the NFL and Major League Baseball (MLB) inserted themselves into the case when they filed a joint "friend of the court" amicus brief in November 2013 supporting the petitioners, led by American Broadcasting Companies, Inc. (ABC). In the brief, the professional sports leagues threatened to move all of their games to pay television if Aereo was deemed legal (Johnson, 2013). The leagues argued allowing Aereo-like technology would harm copyright owners such as the NFL and MLB and "undermine the 'important federal interest' in protecting over-the-air broadcasting" (*Brief of National Football League and Major League Baseball,* 2013, p. 14).

This paper examines how the professional sports leagues, leveraging their congressionally awarded antitrust exemption from the Sports Broadcasting Act, influenced the court of public opinion during the *Aereo III* case. It is argued that professional sports leagues thwarted technological innovation in favor of privilege and profit maximization. In making this argument, the present study shows how the case highlights two important features of the contemporary sports coverage rights market. First, the control of intellectual property and enforcement of copyright are vital sources of market power and corporate wealth for sports leagues and television networks, particularly when faced by potentially disruptive technological innovations and competitors (Evens, Iosifidis, & Smith, 2013). Second, Aereo is symptomatic of the legal and regulatory complications presented by new cloud-based mobile television services and storage systems, which is a phenomenon that can be observed internationally (Flew, Suzor, & Liu, 2013; Hutchins, 2016). These factors coalesce to ensure that market-dominant leagues and television networks deploy significant resources to maintain control over the distribution of popular sports content and influence the parameters of news coverage and public opinion.

Part I of this paper presents an overview of the passage of the Sports Broadcasting Act of 1961. Part II summarizes the decisions of the courts in the *Aereo I, II*, and *III* cases. Part III focuses on a content analysis of the amicus brief filed by

the leagues, as well as how those messages were framed in print, broadcast, and online news media, to see how the leagues leveraged their market power. Part IV outlines how Aereo is indicative of wider developments in sports coverage and digital media, and mirrors regulatory issues and legal conflicts in other national jurisdictions such as Australia and the United Kingdom. Finally, part V provides a conclusion of how the leagues used their privilege and provides perspective on the future of the Sports Broadcasting Act.

Part I: Sports Broadcasting Act of 1961

After watching its rival, the American Football League (AFL), ink a five-year contract for pooled media rights with ABC worth about $8.5 million in June 1960, the National Football League (NFL) signed a two-year contract with CBS for a record $9.3 million one year later, in summer 1961 (Deninger, 2012). In so doing, the NFL caught the attention of Federal District Judge Alan Grim, who in 1953 ruled in favor of the NFL with respect to territory rights. This time Grim invalidated the record NFL contract with CBS, saying it went too far in eliminating competition between individual teams and violated antitrust laws (Lowe, 1995).

NFL Commissioner Pete Rozelle told a Congressional subcommittee on August 28, 1961, pooled rights were necessary to prevent teams in wealthier television markets from realizing more revenue for their rights than teams in smaller media markets. Rozelle suggested the league would see an increase in the number of "sick" clubs as the "rich get richer and the poor get poorer" (Lowe, 1995, p. 93).

Almost immediately, Congressman Emanuel Celler in the House and his colleague, Estes Kefauver in the Senate, proposed bills friendly to professional sports leagues. Despite public opposition from the Department of Justice, which "feared the legislation would grant professional sports leagues an exemption that might be used to cover more than simply package-broadcasting deals" (Lowe, 1995, p. 93), the legislation, known as the Sports Broadcasting Act (SBA) or Public Law 87–331, was signed into law by President John F. Kennedy on September 30, 1961.

Interpretations of the impact of the SBA have varied from its impact on consumers to its ability to create a new economic reality of professional sports. Ross's (1990, p. 469) view of the SBA was that "Congress acted to promote, not restrict, viewership of games—especially the games fans care about most, those of their local teams." Anderson (1995, p. 958) took a contrarian view when he characterized the SBA as "special-interest legislation" suggesting "the SBA is meant primarily to protect the sports leagues." He criticized the lack of benefit to the fan, or consumer of sports programming, noting "fan interest appears as an ancillary benefit to the primary goal of keeping the league financially viable" (p. 957).

From an economic perspective, the law "permitted professional sports franchises to negotiate as a single economic unit the sale of national broadcast rights" (Rader, 1984, p. 90) and "opened the door to skyrocketing television contracts" (Rader, 1984, p. 91). Critics of this congressionally created monopoly suggested rights pooling eliminates competition between televised games and creates the right to televise "the only game in town" in each community (Horowitz, 1978, p. 415). Horowitz (1978, p. 428) concluded nearly 40 years ago that "this law is at variance with the 'maintaining competition' spirit of national economic policy and our antitrust laws."

Indeed, the economic impact of the SBA is just as Rozelle and the NFL had hoped. It is a primary source of revenue and financial viability of the league. Reflecting on the impact of the Sports Broadcasting Act in the late 1980s, Klatell and Marcus (1988, p. 80) noted: "The 1961 Act created the modern television package which now subsidizes the professional leagues." However, as an analysis of the leagues' role in defeating Aereo will suggest, the Department of Justice's fear in 1961 has been realized. The leagues have used the market power granted them through the congressionally supported antitrust exemption for more than just packaging broadcast deals.

Part II: The Aereo Case

As noted earlier, Aereo was a technology company offering consumers a cloud-based method for watching broadcast television. Aereo's business model involved leasing miniature digital antennas to consumers for a monthly fee. Consumers could watch live or record any program delivered through a terrestrial signal and then view it on a computer, tablet, or smartphone. Recorded programs were stored on Aereo's cloud-based servers. Broadcast networks argued Aereo was retransmitting their signals without compensation in violation of the 1992 Cable Act. Aereo countered the service provided to consumers was a private performance, similar to an in-residence Digital Video Recorder (DVR), and not a retransmission of the broadcast signal. The case was initially heard at the district court level, then appealed to the circuit court of appeals, and finally heard by the Supreme Court of the United States, which made its ruling in 2014.

Copyright Act of 1976

The Copyright Act, last amended in its entirety, is designed to provide protection against unauthorized reproduction of "original works of authorship fixed in any tangible medium of expression" (Copyright Act of 1976, 17 U.S.C. § 101, 2013). Section 106 grants copyright owners the exclusive right to perform or license the performance of copyrighted works publicly. Of importance to the Aereo case are clauses in the Copyright Act that define what constitutes "perform," "public," and "transmit" in said copyrighted material (Reyes, 2015).

Aereo I. A class of plaintiffs, including broadcast networks and basic cable providers, filed two separate complaints against Aereo on March 1, 2012, in the United States District Court for the Southern District of New York (*American Broadcast Companies, Inc. v. Aereo,* 2012). This case has become known colloquially as "ABC v. Aereo," as the American Broadcast Companies, Inc. was the lead plaintiff, or "Aereo I" (Palachuk, 2014; Reyes, 2015). The plaintiffs alleged Aereo violated their rights of public performance and reproduction under section 106 of the Copyright Act of 1976 (Palachuk, 2014).

The Public Place Cause defines public as "a place open to the public" or "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" (Copyright Act of 1976, 17 U.S.C. § 101, 2013). The Transmit Clause defines transmit as a communication "by any device or process whereby images or sounds are received beyond the place from where they are sent" (Copyright Act of 1976, 17 U.S.C. § 101, 2013).

In reaching its decision, the court relied on interpretations of the Public Place and Transmit Clauses in the Copyright Act, along with reasoning from an earlier case regarding a Remote-Storage Digital Video Recorder (RS-DVR) system (Reyes, 2015). In *Cartoon Network v. CSC Holdings* (2008), referred to colloquially as "Cablevision," the Second Circuit Court had to determine whether Cablevision's RS-DVR technology, which stored a recording on a server until the customer began to play the recording, constituted a public performance under the Transmit Clause (Gatti & Jonelis, 2013; Reyes, 2015). Because each transmission of the recorded content was made to a single customer, the court ruled that the transmission was not a public performance (Gatti & Jonelis, 2013; Reyes, 2015).

Drawing on the precedent contained in that decision, the district court ruled in favor of Aereo, suggesting the plaintiffs failed to adequately establish that Aereo's technology constitutes a public performance (Reyes, 2015).

Aereo II. The plaintiffs in *Aereo I* appealed to the Second Circuit Court of Appeals, the same venue that decided the *Cablevision* case. This time the lead plaintiff was WNET, a public television station licensed in Newark, NJ. Again, the relevant portion of the Copyright Act under dispute was what constitutes a public performance. As with *Cablevision,* the Second Circuit found "the potential audience of an individual transmission was a single Aereo subscriber" (Reyes, 2015, p. 231). Palachuk (2014, p. 123) further interpreted the court's ruling in *Aereo II,* saying that Aereo's retransmission did not constitute a public performance "because each Aereo subscriber received an individualized transmission streamed from an individual subscriber-associated digital copy of the broadcast transmission."

Judge Denny Chin authored a strongly worded dissenting opinion for *Aereo II,* suggesting Aereo's technology was a "sham" (*WNET, Thirteen v. Aereo, Inc.,* 2013). As Reyes (2015, p. 233) emphasized, Judge Chin's dissent "found that given the dictionary definition of public, 'a transmission to anyone other than oneself or an intimate relation' is not private." Judge Chin used the NFL's Super Bowl to illustrate his point that someone watching a recording of a live event that is still being recorded is "both a stream and a download." He writes: "If 50,000 Aereo subscribers choose to 'watch' the Super Bowl live, each subscriber receives a 'performance or display' of the exact same broadcast on a seven-second delay" (*WNET, Thirteen v. Aereo, Inc.,* 2013). This live retransmission of copyrighted television programming, Judge Chin argues, would threaten to destabilize the industry.

Aereo III. After losing in both the district court and the Second Circuit, the broadcasters turned their attention to the Supreme Court of the United States in 2014, where they fared better. The Court ruled 6–3 in favor of the broadcasters, with Justice Stephen Breyer writing the majority opinion, and Justice Antonin Scalia composing the dissenting opinion. The Court leaned heavily on decisions in *Fortnightly Corp. v. United Artists Television, Inc.* (1968), which established that a cable company was more like a viewer than a broadcaster because the cable system did not enhance viewing any more than a standard antenna, and in *Teleprompter Corp. v. Columbia Broadcasting* (1974), which reached a similar conclusion, "irrespective of the distance between the broadcasting station and the ultimate viewer."

Congress amended the Copyright Act in 1976 to reject the holdings from Fortnightly and Teleprompter and clarify that both the broadcaster and the viewer

"perform." Congress also added the Transmit Clause to the Copyright Act, which emphasizes that an entity performs when it transmits a performance to the public (Copyright Act of 1976, 17 U.S.C. § 101, 2013).

The majority opinion written by Breyer looked at whether Aereo and its technology both performed and transmitted the copyrighted works. "The many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo 'perform[s]'" (*American Broadcast Companies, Inc. v. Aereo,* 2014, p. 10).

With respect to the Transmit Clause, the majority opinion focused on whether Aereo performed copyrighted works publicly. The Court rejected Aereo's argument that it transmits personal copies to subscribers, noting that "the subscribers to whom Aereo transmits television programs constitute 'the public'" (*American Broadcast Companies, Inc. v. Aereo,* 2014, p. 14). In addition, the Court concluded that "when an entity communicates contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes" (p. 14).

Part III: Professional Sports Leagues Arguments

Eight organizations submitted amicus briefs to the Court in November 2013, all supporting the broadcasters. Influential organizations such as the American Society of Composers, Authors, and Publishers (ASCAP), the National Association of Broadcasters, and several nonprofit research institutes submitted briefs; however, none of their briefs appeared to garner the amount of media coverage the professional sports leagues brief received. In fact, the majority of the reporting on the briefs was conducted by journalists whose primary beats were media and technology, not sports reporters.

In addition to a thorough reading of the leagues' brief, the researchers obtained and analyzed 39 mainstream media and trade media articles published during the period immediately after submission of the leagues' brief (November 12, 2013) up to, and including, the Supreme Court decision on June 25, 2014. Additional source materials included 16 law review articles focused on the Aereo case, and published between 2013 and 2015, which helped inform the findings. Two primary themes used by the professional sports leagues in their amicus brief dominated media coverage of the brief—the need to protect existing business models and the threat to migrate sports programming to pay television. Fundamental to understanding both themes is knowledge of how retransmission fees work. The leagues were also successful in having news media portray these themes in somewhat sensationalistic language.

What Are Retransmission Fees?

The Cable Television Consumer Protection and Competition Act of 1992, known as the 1992 Cable Act, required multichannel video programming distributors (MVPDs) to seek permission from broadcasters before carrying their programming. Alternatively, MVPDs could include networks in their service under "Must Carry" rules, in which MVPDs with more than 12 channels must set aside one-third of their channel capacity for local, free-to-air broadcasters. At that time, some 40%

of U.S. households relied on free-to-air broadcasters for their television programming (Teeter & Loving, 2008).

Permission to retransmit a broadcast networks signal on an MVPD became known as "retransmission consent" or "carriage fees." Should an MVPD and a broadcast network not reach agreement on an appropriate carriage fee, the MVPD may remove, or "black out," the network from its system (or vice versa), thereby depriving consumers the ability to see certain programming. Often, live sports content is at the center of these debates. For example, Sunbeam Television Corporation operates WHDH, the NBC affiliate in Boston. On January 14, 2012, Sunbeam denied DirecTV access to its signal after DirecTV refused to pay a 300% increase in retransmission fees. The timing of the blackout occurred before popular NFL divisional playoff games. The dispute was settled on January 27, one week before the New England Patriots played in Super Bowl 46, a game for which NBC had broadcast rights (Thestreet.com, 2012).

Aereo's technology received broadcast network terrestrial signals legally, but, the plaintiffs argued, retransmitted that signal without their consent, denying the networks the fees entitled to them by the 1992 Cable Act. In addition, the plaintiffs argued, the broadcasts were protected under the 1976 Copyright Act.

Protection of Existing Business Models

Under existing business models, broadcast networks bid on rights for exclusive content, including popular sports programming (Evens et al., 2013). The amount a network bid is related to how much revenue the network can expect to receive from advertising monies as well as retransmission fees. If Aereo-like technologies allowed consumers to receive retransmitted signals less expensively than what traditional MVPDs charge, it is possible consumers would engage in accelerated "cord-cutting," resulting in fewer subscribers. Any reduction in subscriber numbers would mean a reduction in the revenue section of a network financial statement without a corresponding reduction in the expense section. Sport leagues feared future rights deals might not be as lucrative if networks are losing money.

Indeed, the leagues stressed this theme in their amicus brief, articulating their interest in the case thus:

> The Leagues have developed successful businesses licensing rights to televise their games and to retransmit those copyrighted telecasts over various media, both domestically and internationally. Their business models rely on a well-established, statutorily-created legal regime that requires commercial services to obtain copyright licenses in order to retransmit programming on broadcast television stations. The decision below significantly alters that legal regime and unsettles the marketplace for licensing rights to broadcast television programming. (*Brief of National Football League and Major League Baseball,* 2013, p. 1)

The doom and gloom language expressed by the leagues prompted technology reporter Cecelia Kang (2014) to write in the *Washington Post* that if Aereo prevailed in the Supreme Court, "the foundation of the NFL's television business could crumble."

Writing in the week before the Supreme Court decision was delivered and in response to the *Washington Post'*s piece, Chris Morran (2014) provided a view that an Aereo victory would not damage the NFL's business model in his piece for the *Consumerist,* a nonprofit subsidiary of *Consumer Reports*. Morran argued the NFL still needs broadcasters such as CBS to produce games: "The presence of Aereo as a way of transmitting those games to local-end users does nothing to remove the broadcasters from the equation and the networks still pay huge piles of money to get the ratings." Morran further suggests broadcasters should work with Aereo to get ratings information to count those viewers in the numbers provided to advertisers.

In summarizing their arguments to the Court, the leagues first addressed the need to preserve the existing business model, which is held together by retransmission fees:

> A prime consideration in licensing telecasting rights to over-the-air broadcast stations has been the ability of the Leagues to derive important revenue from the retransmission of those telecasts by various media, both domestically and internationally. The decision below, however, unravels the foundation of this business model by giving broadcast retransmission rights to unlicensed commercial strangers that inefficiently engineer distribution systems to avoid copyright liability. (*Brief of National Football League and Major League Baseball,* 2013, p. 7)

> If copyright holders lose their exclusive retransmission licensing rights and the substantial benefits derived from those rights when they place programming on broadcast stations, those stations will become less attractive mediums for distributing copyrighted content. (*Brief of National Football League and Major League Baseball,* 2013, p. 14)

That last paragraph was printed verbatim in a piece posted by John Eggerton (2014), a journalist for trade publication *Broadcasting & Cable,* under the headline "Leagues to Supremes: Aereo 'Package' Is a Game Breaker." Should Aereo prevail in the case, Eggerton suggested "the leagues will likely take their ball and go home, 'home' being pay channels where they can be sure to get compensated, and where their own packages of games can't be trumped by a service that doesn't pay." Similarly, journalist Ted Johnson (2013), writing the day the brief was filed for *Variety.com,* an entertainment trade publication, emphasized the fiscal interest the leagues have "in the multi-billion dollar retransmission fees because networks use the money to purchase sports rights and other content."

Writing for *Businessweek.com,* journalist Joshua Brustein (2013) pinpointed a different business concern the leagues expressed in the amicus brief, noting that "the sports leagues lay out a clever way that Aereo could wreak way more havoc" should Aereo offer a service similar to the NFL's lucrative Sunday Ticket deal with DirecTV. Indeed, the leagues wrote:

> The mere specter of such offerings, sanctioned by an influential court of appeals, causes considerable uncertainty in the industry. And that uncertainty affects the ongoing negotiations and renegotiations between the Leagues and their telecast partners, such as those involving the NFL Sunday Ticket agreement with DirecTV that expires at the end of next season. (*Brief of National Football League and Major League Baseball,* 2013, p. 11)

In the early 1960s, the professional sports leagues lobbied Congress saying the Sports Broadcasting Act (SBA) was necessary in order for the leagues to stay financially solvent amid technological innovation that permitted teams in larger media markets to realize more broadcasting revenue than teams in small media markets (Lowe, 1995). As Klatell and Marcus (1988) suggested, the SBA created the current subsidization of professional sports leagues.

More than 50 years later, the professional sports leagues lobbied the Supreme Court to suggest that the business model that the SBA created aided "the ability of the Leagues to derive important revenue from the retransmission of those telecasts" (*Brief of National Football League and Major League Baseball,* 2013, p. 7). The inference in the leagues' argument was that protection from the Aereo-like technology was necessary to remain financially solvent—the same theme presented in the early 1960s.

Migration to Pay Television

One theme the leagues could not use in the 1960s was the threat to move their rights away from traditional broadcast networks to cable, or pay, television networks as cable did not yet exist. The leagues stated explicitly in their amicus brief that, should Aereo prevail, the "option for copyright holders will be to move that content to paid cable networks [such as ESPN and TNT] where Aereo-like services cannot hijack and exploit their programming without authorization" (*Brief of National Football League and Major League Baseball,* 2013, p. 14).

Such incendiary language was picked up in numerous news media and trade outlets, particularly by Eggerton. "If Aereo wins its court case, the floodgates will open and the World Series, Super Bowl and probably the regular seasons of pro baseball and football will be moving to ESPN, TNT and other pay outlets" (Eggerton, 2013). Writing again in March 2014, before the Supreme Court hearings, Eggerton (2014) stated, "[P]lenty of football and baseball have already moved to national and regional cable sports nets, but the leagues argued that flight could become a stampede if the court rules in Aereo's favor." Suggesting that an Aereo win could result in the floodgates opening or a "stampede" of sports programming to pay television ignored the fact that most consumers already pay retransmission fees for free-to-air television networks, rendering mute the idea of separate free-to-air and pay television networks.

Business, technology, and public policy reporter Sam Gustin (2013) offered some context to the league's alarmist tone while writing for *Time.com* under the headline "NFL, MLB Warn of the End of Free Sports on Television." The article placed the leagues' involvement in context, by quoting media and technology analyst Rich Greenfield: "The fact that the broadcasters are asking their most powerful allies, including the NFL and Major League Baseball, to support them in front of the Supreme Court, shows just how disruptive Aereo could be if the service is found legal" (Greenfield as quoted in Gustin, 2013).

CNN picked up on the "end of sports on free TV" theme on multiple occasions. It was the focus of a piece in November 2013, when the brief was filed, under the headline "NFL and MLB: Aereo May Kill Sports on Free TV" (Pepitone, 2013). Despite a legalized monopoly to broadcast their content on free-to-air networks, the leagues' claim that they would be "forced" to air content on cable channels dominated the article.

It was a theme reiterated in January 2014, when CNN reported that the Supreme Court would hear the case: "Several content creators have joined the fray. In November, the NFL and MLB filed a legal brief to the Supreme Court in support of the broadcasters' case, saying Aereo could cause them to stop airing games on free TV" (Pepitone & Stelter, 2014).

Part IV: International Parallels

While professional sports leagues may have rejoiced in the Supreme Court's decision that ultimately shut down Aereo, it is apparent technological innovation will continue to reshape the landscape of sports media rights. The significance of the Aereo case in this regard is emphasized by similar issues in other national contexts, including the United Kingdom and Australia. Common features of these different national jurisdictions are the unpredictable challenges presented by cloud-based services in consumer media markets and the threats posed by emergent mobile and digital operators to existing business models and relationships.

Cloud computing encompasses a range of infrastructures, platforms, and software services. This ensemble of services presents a series of complications in the operation of media markets and their attendant content rights and licensing arrangements. For example, the United Kingdom government commissioned a national policy review of intellectual property frameworks in November 2010. Referred to as the Hargreaves Report, this review states that cloud computing is part of the "next wave" of technologies and services that are "likely to create opportunities and disruptions in a very broad range of industries" (Hargreaves, 2011, p. 14). The breadth of this impact is borne of the fact that "the cloud" combines previously distinct elements of communications infrastructure, computing and mobile devices, service provision, and media content in one product (cf. Mosco, 2014). The Australian national communications and media regulator, ACMA, also acknowledges that cloud-based services produce a series of "pressure points on regulation" and the obligations applying to those companies that operate them (ACMA, 2013, p. 12). New players are entering the marketplace with services and technologies that fail to "align with existing legislative definitions" (p. 14). In the case of sports coverage rights, the legal system and news media are pivotal sites where these definitions are then debated by market incumbents and challengers seeking to contest their dominance.

In a case with striking parallels to Aereo, a dispute over coverage rights and copyright triggered high-profile legal proceedings between two major sports leagues in Australia and the country's second-largest telecommunications carrier, Optus. Australia's most popular football competitions, the National Rugby League (NRL) and Australian Football League (AFL), claimed that a new cloud-based mobile television service, Optus' "TV Now," infringed their copyright and diminished the value of their digital and mobile coverage rights. While there are differences between media systems and rights regimes in Australia and the United States, the similarities between Aereo and TV Now are such that legal scholars have compared them directly (Foong, 2015), while others have written about both cases at length in separate articles (Giblin, 2012a, 2012b; Giblin & Ginsburg, 2014, 2015). For those interested in the details of the Australian case that ran over the course of almost a year in 2011 and 2012, we recommend consultation with these

sources and media studies commentaries that critically assess the implications of the court decisions and their news coverage for "mobile media sport" (Hutchins, 2014, 2016).

For the purposes of our analysis, it is necessary to note two key features of the TV Now case. As with Aereo, this new mobile television service is labeled a direct threat to the existing business models of the sports leagues in the news media, and is ultimately shut down following contending court decisions. After having lost the initial court case, the then head of the NRL, David Gallop, complained that the financial value purportedly manifest in copyright was damaged by TV Now:

> We are dealing with a situation where an asset on our balance sheet, being copyright of our content, has been transferred to another company's balance sheet without our consent. That cannot be right and needs to be fixed quickly. (Quoted in Harrison & Willingham, 2012)

Second, TV Now undermined the established and mutually beneficial commercial relationship between the football codes and their digital and mobile coverage rights partner, Telstra. Telstra is a major sponsor of both leagues and the country's dominant telecommunications carrier. A Telstra spokesperson stated that a first ruling in favor of Optus was "out of step with the reality of the market" and may force a revision of their "content sourcing strategy" because the TV Now service diminished the value of Telstra's rights package (Battersby, 2012). The numerous claims made publicly by the leagues and their rights holder contain uneven levels of merit. Nonetheless, TV Now ceased operation after Optus was refused special leave to appeal to the High Court of Australia in September 2012.

Part V: Conclusion

This paper has shown that U.S. professional sports leagues were largely successful in framing news media and trade publication discourse throughout the *Aereo III* case. The leagues' primary message threatening to stop airing games on free TV was repeatedly picked up by news media outlets and technology-related websites. So successful were the leagues in influencing coverage, reports immediately after the Supreme Court's final ruling suggested the leagues had received "good news" (Ourand, 2014) and were "breathing a sigh of relief" (CNBC.com) and "celebrating" (Boren, 2014).

However, flaws existed in the leagues' arguments to the Supreme Court, despite these failing to garner attention in the public discourse. First, 95.2% of 116.4 million American TV households (Nielsen.com, 2015) subscribe to cable, satellite, or broadband services. These households pay retransmission fees to the same free-to-air broadcast networks from which the professional leagues threatened to pull programming. As Stirparo (2016, p. 149) succinctly stated, "[B]broadcasters are paid retransmission consent fees for cable and satellite companies to show broadcasters' programming, which includes sports events." So, in essence, sports programming is already shown on pay television. By threatening to pull programming off free television networks while simultaneously acknowledging the importance of retransmission fees, the leagues present contradictory statements regarding the current state of "free" television.

Second, the leagues' threat to move sports to pay television may be a hollow threat in the current climate of technological innovations, as consumers are frequently "cutting the cord" to their traditional cable bundle. Nielsen Media reported the percentage of TV households in the United States that subscribe to cable, satellite, or broadband video services declined nearly 1% from the 2014–2015 TV season to the 2015–2016 season (Nielsen.com, 2015). Travis (2016) reported ESPN lost an average of 10,400 subscribers a day between February 2016 and May 2016. Each subscriber lost reduces the network's revenue, which could eventually translate into less money available to spend on rights for sports content.

Moreover, to guard against a potential future revenue shortfall, many sports organizations are turning to alternative ways of reaching consumers. The NBA's Los Angeles Clippers are reportedly exploring ways to broadcast games in "non-traditional means," including the possibility of an over-the-top (OTT) service that would stream games directly to fans through an app (Woike, 2016). The World Wrestling Entertainment has experienced success with its OTT delivery service, having almost turned a profit only two months after launch and recently exporting its operations to the Indian subcontinent (Graser, 2014; *Sport Business,* 2015). Indeed, the market for sports OTT channels appears strong, with 63% of all sports fans interested in paying for one (Katz, 2016). Sports are also entering into rights deals with social networking service Twitter, which has acquired live streaming rights packages for a handful of MLB and National Hockey League games (Wagner, 2016), as well as Thursday night NFL games, the Wimbledon tennis tournament, and the Pac-12 conference college sports (Perez, 2016).

Emerging mobile technologies and evolving content distribution systems would also suggest the relevance of the SBA is waning. U.S. courts have determined the Sports Broadcasting Act only applies to free commercial television, and not pooled rights contracts with pay television (*Chicago Professional Sports Ltd. Partnership v. NBA,* 1996; *Shaw v. Dallas Cowboys Football Club, Ltd.,* 1999), which may explain the leagues' interest in the Aereo case. Should the professional leagues be "forced" to move their content to pay cable distributors as they threatened in their amicus brief, the leagues would no longer enjoy the exemption from antitrust law ensured by the SBA. This could open the leagues up to future antitrust challenges to their pooled rights, such as the class action lawsuit MLB settled on the January 2016 day a trial was to begin (Gardner, 2016). (This lawsuit is another case that deserves its own in-depth examination and analysis.)

Klatell and Marcus (1988, p. 90) were extremely prescient when they concluded, in 1988, that "the proliferation of new communications technologies, including distribution systems, and satellite dishes will produce a new round of legal complications." Indeed, sports media and the law have collided on a number of technology related fronts since then. Mobile, cloud-based technologies such as Aereo and Optus TV Now appear to be the latest battlefront, with Aereo in particular signaling a significant shift in the interaction between media technologies, content distribution, and legal and regulatory systems.

Innovative approaches to streaming sports content suggest that the discussion over what constitutes a public performance of copyrighted material may remain relevant for a while. In the last half of 2016 alone, the NFL began streaming games on Twitter (Wagner, 2016), Real Madrid announced it would begin delivering content from its club television channel to Facebook Live (Connelly, 2016), and

Washington, DC–based Monumental Sports Network launched an OTT service offering a mix of live sports and prepackaged content for area professional sports teams, including the NBA's Wizards and NHL's Capitals (Ourand, 2016). Future research should explore how these technologies might be exploited to circumvent copyright laws.

While Reyes (2015, p. 243) noted the *Aereo III* decision offered a "small win against technology," she implied professional sports leagues may still need to rethink their approach: "If professional sports leagues want to continue to have exclusive rights to each broadcast market . . . to maximize their live-sports broadcasting revenues, the leagues must embrace Aereo-like technology, as the Internet seems to be the future of television for consumers." That the professional sports leagues believed it important to weigh in on a legal case that they felt threatened their current business models suggests the leagues value their privileged status above innovation.

Acknowledgments

Brett Hutchins's research contribution to this article was supported by a fellowship from the Australian Research Council Future (FT130100506; http://artsonline.monash.edu.au/mobilemediasport).

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