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# ***Aereo* Dynamics: “User Rights” and The Future of Internet Retransmission in Canada**

Pradeepan K. Sarma\*

## **Abstract**

*2014’s U.S. Supreme Court decision Aereo made waves in the entertainment and technology industry when it ruled in favour of a coterie of cable companies against an upstart start-up, Aereo Inc., retransmitting broadcast television over the internet. Little attention, however, has been paid to its ramifications to the Canadian broadcasting regime, with its vastly different regulatory scheme and an underlying objective to promote the dissemination of Canadian content. Complicating matters further is the 2012 Canadian Supreme Court decision Cogeco, where the retransmission of broadcast signals had been re-articulated as a ‘user right’. This paper uses the Aereo decision as a heuristic tool to examine the Canadian retransmission regime with respect to the internet streaming of broadcast television, in which I argue that a firm employing ‘Aereo’-like technology can help fulfill the CRTC’s mandate to advance the objectives of the Broadcasting Act that underpins Canadian communication law, and indeed, can and should be legal under Canada’s current copyright and telecommunications regime. I further contend that the retransmission of broadcast television is a ‘user right’ in Canada and consequently does not constitute a copyright violation. The paper ends by examining the contours of the new ‘user right’ to retransmission and how it relates to the existing ‘user rights’ discourse introduced by the Supreme Court in CCH Canadian Ltd. v. Law Society of Upper Canada.*

[T]he Internet will replace cable systems as the single method of distribution of television, radio and other content, becoming the sole medium for the distribution of digital works.

— Submission of JumpTV in response to *Call for comments concerning Internet Retransmission (Order in Council P.C. 20021043)*<sup>1</sup>

## **INTRODUCTION**

Imagine Montrealers viewing an over-the-air (OTA) feed of a heated mayoral debate on CTV while on their metro commute home, college students in Hamilton streaming a feed of a local music festival from an independent television station to their TV-less dorm, or residents of rural Nunavut watching

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<sup>1</sup> See Canadian Radio-television and Telecommunications Commission, Broadcasting Public Notice CRTC 2003-2, 17 January 2003 at para. 22 [Public Notice CRTC 2003-2].

Aboriginal Peoples Television Network on their laptops without an expensive-but-otherwise-necessary satellite subscription.

Reading the *Broadcasting Act*, one would likely conclude that a company providing the services described above would well support the objectives of the *Act*.<sup>2</sup> Indeed, reading a recent Canadian Radio-television and Telecommunications Commission (CRTC) report about its struggles in ensuring the vitality of OTA television,<sup>3</sup> one would assume that such a service, increasing as it does the distributive range of OTA television, is precisely what is needed to rejuvenate the relevance of Canadian broadcast television in the twenty-first century.

Yet the means to provide such a service is, under Canada's *Copyright Act* (*CCA*), ostensibly precluded from functioning without being encumbered by onerous copyright restrictions. The *CCA*'s television retransmission regime was specifically intended for retransmissions of broadcast television to take place without infringement or authorization.<sup>4</sup> However, amendments in 2002 have been interpreted as excluding "new media retransmitters" internet retransmitters—from its ambit, "effectively impos[ing] a gratuitous cost for the use of more efficient, Internet-based technologies."<sup>5</sup>

The *American Broadcasting Cos. v. Aereo, Inc.* (*Aereo*) decision in 2014 by the Supreme Court of the United States<sup>6</sup> effectively closed the door to internet-based television retransmitters after Aereo Inc.'s nascent service was ruled liable for copyright infringement. The Canadian context is different. Given an updated legislative scheme,<sup>7</sup> a public that is more cognizant of its own interests than in the past, and a judiciary that has reintroduced the centrality of the public domain<sup>8</sup>—allowing in a bevy of new interpretive principles in conceptualizing its provisions—it is an opportune moment to examine Canada's own broadcast retransmission regime.

<sup>2</sup> *Broadcasting Act*, S.C. 1991, c. 11, s. 3 [*Broadcasting Act* or *BA*].

<sup>3</sup> See Canadian Radio-television and Telecommunications Commission, Broadcasting Public Notice CRTC 2007-53, 13 May 2007 at para. 11-12; CRTC Broadcasting Public Notice 2008-100, 30 October 2008 at paras. 17, 18, 41, 42 [Public Notice 2008-100]; Broadcasting Notice of Consultation CRTC 2014-190, 8 September 2014 at paras. 66, 70-76, 81-82.

<sup>4</sup> *Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 SCC 68, 2012 CarswellNat 4810, 2012 CarswellNat 4811 (S.C.C.) at para. 72 [*Cogeco*].

<sup>5</sup> *Copyright Act*, R.S.C. 1985, c. 42, ss. 21, 31(1) [*Copyright Act*]; *Public Performance of Musical Works, Re*, 2012 SCC 34, 2012 CarswellNat 2376, 2012 CarswellNat 2377 (S.C.C.) at para. 9 [*Entertainment Software Assn. or ESA*].

<sup>6</sup> See *American Broadcasting Cos. v. Aereo, Inc.*, 134 S.Ct. 2498 (U.S. Sup. Ct., 2014) [*Aereo*].

<sup>7</sup> See *Copyright Modernization Act*, S.C. 2012, c. 20 [*Copyright Modernization Act*].

<sup>8</sup> Abraham Drassinower, "Taking Rights Seriously" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462 at 463.

This paper will proceed as follows: after a brief introduction into Canada's retransmission regime, I will detail the facts of the *Aereo* Supreme Court decision and the events leading up to it: the nature of the service, Aereo Inc.'s journey through various U.S. courts, and the legal principles behind the U.S. Supreme Court's eventual ruling against it. I will then continue with an examination of the Canadian retransmission regime of section 31, the right to "retransmit" having recently been identified as a "user right" in a recent Canadian Supreme Court decision,<sup>9</sup> before making my argument: Under Canadian law, Aereo can qualify under the retransmission regime. First, I will argue that an Aereo-like service could benefit from the retransmission regime, and contrary to popular belief, would not be pre-emptively barred from being licensed by the CRTC, provided it obtained the requisite broadcasting distribution undertaking (BDU) licence that other BDUs need to qualify. Second, I will discuss the factors that weigh in favour of Aereo being eligible for a licence as a BDU under section 9 of Part II of the *Act*. Following this analysis, I will offer a preliminary mapping of the contours of "retransmission" as a user right, arguing that understanding retransmission as a user right requires a conceptual shift from previous appraisals of the right in Canadian law which is otherwise anchored in fair dealing.

## I. THE CANADIAN COPYRIGHT AND BROADCASTING REGIME

### (a) The U.S. Context

The complexity of U.S. copyright law when it comes to the regulation of digital-era technologies reflects the largely court-driven process of interpreting the use of new technologies, as its copyright statute has yet to be significantly modified since 1998, with its last major reform in 1976.<sup>10</sup> Strongly vested interests (and parties created to offset those interests) have stymied legislative attempts at reform,<sup>11</sup> forcing courts into the unenviable role of interpreting provisions that have seen little change in decades and reflect the preoccupations of previous eras. There is a silver lining in the status quo, however. While legislative gridlock in the U.S. may produce uncertainty with respect to the legality of new technologies, the lack of legislation sometimes had the benefit of leaving open avenues of potential legality, at least until the technology had time to proliferate enough that efforts by incumbent businesses threatened by a particular new technology could be counterbalanced by public response.<sup>12</sup>

<sup>9</sup> See *Cogeco*, *supra* note 4.

<sup>10</sup> *Copyright Act of 1976*, 17 U.S.C. §§ 101 - 810 (1976) [U.S. *Copyright Act*]; *Digital Millennium Copyright Act*, 17 U.S.C. §§ 512, 1201-1205, 1301-1332; 28 (1998).

<sup>11</sup> See generally, Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001); see also John Tehranian, "Infringement Nation: Copyright Reform and the Law/Norm Gap" (2007) 2007:3 Utah L Rev 537 at 543 [Tehranian].

<sup>12</sup> Tehranian, *ibid.* "In recent years, mainstream publications have regularly featured large

### (b) The Canadian Context

In contrast, up until the last few years,<sup>13</sup> many of the *CCA*'s amendments have been reflective of the needs of vested interests<sup>14</sup> concerned more about protecting existing business models from potential risks wrought by new technologies than in legislation that would better allow Canadians to harness these technologies. Perhaps that has to do with, at least until the exceptional days of “balanced copyright,”<sup>15</sup> a public which saw digital-age copyright reform as the obscure concern of techies and corporate suits<sup>16</sup> (which, to be fair, it was), and that until the latter half of the 2000s internet technologies had yet to play the prevailing role to the public that they do today.

Canada has more recently been proactive in attempting to tackle the challenges of applying digital-era technologies to the venerable strictures of its copyright law, resulting in the passage of Bill C-11, the *Copyright Modernization Act*, which came into effect in 2012.<sup>17</sup> While no less complicated, this has resulted in considerable legislative divergences between the two regimes.

### (c) Canadian Broadcasting Regime: Overview of its Copyright-Related Aspects

Historically, television broadcasts and their retransmissions have been regulated by the *Broadcasting Act (BA)*. Its mandate is more than simply the management of an effective and efficient broadcasting system—access to the public radio spectrum and the means of transmitting the results of such access are regulated in order to promote, protect, and disseminate particular cultural aims. Its primary focus has been the “cultural enrichment of Canada through the broadcasting of programs which involve a significant amount of Canadian artistic creativity”<sup>18</sup> and to that end the *Act* authorizes the CRTC to “regulate and supervise the Canadian broadcasting system.”<sup>19</sup>

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spreads on copyright issues that would have previously appeared arcane and esoteric. Groups such as the Electronic Frontier Foundation the Creative Commons, and the Future of Music Coalition have emerged as powerful forces to offset the lobbying interests of the entertainment and publishing industries, and programs such as Stanford Center for Internet and Society's Fair Use Project have begun public interest litigation to vindicate fair use rights against overly aggressive copyright holders. Indeed, copyright activism has become commonplace” *ibid* at 542.

<sup>13</sup> See *Copyright Modernization Act*, *supra* note 7.

<sup>14</sup> See Sam Banks & Monique Hebert, Parliamentary Research Branch, Legislative Summary LS-437E, Bill C-11: An Act to Amend the Copyright Act (10 October 2002), at 1-2, 6, 10 [Legislative Summary LS-437E].

<sup>15</sup> See generally Michael Geist, *From “Radical Extremism” to “Balanced Copyright”* (Toronto: Irwin Law, 2010).

<sup>16</sup> Tehranian *supra* note 11 at 539.

<sup>17</sup> Bill C-11: *An Act to amend the Copyright Act*, 1st Sess, 44th Parl, 2012.

<sup>18</sup> *Reference re Federal Courts Act (Canada)*, 2010 FCA 178, 2010 CarswellNat 2092, 2010

Cable television started out in the 1940s as "community antenna television" (CATV)—a means by which broadcast signals could be distributed to remote areas that could otherwise not be reached. Essentially, this meant that large antennas were assembled in certain well-placed locations that received, amplified, and distributed these signals through coaxial cable systems directly to homes.<sup>20</sup> In Canada, given the nationalistic aims of its broadcasting policy, this was a significant means to supplement the existing broadcasting industry to further its cultural policy goals.

While broadcasts had been previously allowed to be retransmitted without any copyright infringements,<sup>21</sup> amendments to section 3(1)(f) gave broadcasters a right to their signals, and a retransmission regime was created in 1988 to reflect Canada's free trade obligations<sup>22</sup> under which cable companies could continue to retransmit provided they were licensed by the CRTC. In order to be licensed as a BDU, the prospective BDU licensee is required by the CRTC to carry out various requirements to fulfil aims essential to the vitality of the Canadian broadcasting system as set out in the *BA*.<sup>23</sup> Broadcast television is the primary means by which the CRTC ensures that Canadians have access to Canadian content by imposing upon these television stations rigorous content regulations.<sup>24</sup> To that end, one of the BDU license's most significant requirements is the mandatory carriage of local broadcast stations, ensuring (or at least helping) their maximal dissemination.<sup>25</sup> The retransmission regime in the *CCA* facilitates these aims by precluding these retransmissions of local broadcast signals from any copyright infringement, preventing the need for onerous negotiations with content-holders that may otherwise be "not only a process of questionable efficiency and even possibility but, among other things, could permit a single holdout to force a conventional BDU to choose between compliance with its broadcasting regulatory obligations and copyright infringement."<sup>26</sup> Thus, the retransmission regime is viewed as instrumental to fulfilling basic public policy objectives.

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CarswellNat 3295 (F.C.A.) at para. 49, affirmed 2012 CarswellNat 214, 2012 CarswellNat 215 (S.C.C.) [*Reference*].

<sup>19</sup> *Cogeco*, *supra* note 4 at para. 1.

<sup>20</sup> John P. Cole, "Community Antenna Television, The Broadcaster Establishment, and the Federal Regulator" 1965 14 Am U L Rev 124 at 126-127.

<sup>21</sup> *Canadian Admiral Corp. v. Rediffusion Inc.*, 1954 CarswellNat 5, [1954] Ex. C.R. 382 (Can. Ex. Ct.) [*Rediffusion*].

<sup>22</sup> *Cogeco*, *supra* note 4 at 75; *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65 s. 62.

<sup>23</sup> *Broadcasting Act*, *supra* note 2, ss. 9-11.

<sup>24</sup> See Canadian Radio-television and Telecommunications Commission, *Broadcasting Public Notice CRTC 1999-84/ Telecom Public Notice CRTC 99-14, Report on New Media*, 17 May 1999 [hereinafter *Report*].

<sup>25</sup> Public Notice 2008-100 at paras 41-42; *Broadcasting Distribution Regulations*, SOR/97-555, s. 17.

<sup>26</sup> Intellectual Property Policy Directorate (Industry Canada) & Copyright Policy Branch

In 1999, the CRTC created an “*Exemption Order for New Media Broadcasting Undertakings*” [“*Order*”]<sup>27</sup> exempting broadcasting undertakings that provide “broadcasting services delivered or accessed over the internet” from the licensing regimes otherwise required to be lawful under the *BA*. Shortly after, two Canadian start-ups, iCraveTV and JumpTV, saw the internet’s disintermediary<sup>28</sup> promise (and threat) by streaming television over it.<sup>29</sup> However, their operations were forced against established media players determined to cauterize their existing business models from outside threats, a legislature with little interest in upsetting the status quo, and a CRTC which saw the promise of new technologies to its mandate, but favoured the control its carefully-managed and labyrinthine regulatory schemes granted it. The result was Bill C-11: *An Act to Amend the Copyright Act* in 2002. The Bill attempted to seal the breach in the oligopolistic hull the CRTC had opened with its *Order*<sup>30</sup> three years earlier and upon which the aforementioned start-ups had tried to capitalize, by, on first glance, preventing internet retransmitters from benefitting from the exemption from copyright infringement retransmitters of broadcast television that they had effectively possessed since *Canadian Admiral Corp. v. Rediffusion Inc.* in 1954.<sup>31</sup>

Whereas government ministries had identified the stakes at hand in a 2001 consultation paper,<sup>32</sup> the resultant amendments to the *CCA* encapsulated in Bill C-11 did not reflect the concern demonstrated in the report.<sup>33</sup> The report noted that the ramifications of unduly singling out one particular means of transmission from benefiting from the retransmission users right would violate the principle of technological neutrality through which the regime should be approached.<sup>34</sup> However, the Bill went against these prescriptions by appearing to

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(Canadian Heritage), *Consultation Paper on the Application of the Copyright Act’s Compulsory Retransmission Licence to the Internet*, (Ottawa: Industry Canada & Department of Canadian Heritage, 22 June 2001) at 4 [*Consultation Paper*].

<sup>27</sup> See Canadian Radio-television and Telecommunications Commission, *Public Notice CRTC 1999197, Exemption order for new media broadcasting undertakings*, 17 December 1999 [*CRTC Order*].

<sup>28</sup> Disintermediary: “Anything that removes the ‘middleman’ (intermediary) in a supply chain. A disintermediary often allows the consumer to interact directly with the producing company. This cuts service costs from purchases made at a retailer and increases market transparency with regards to manufacturers’ prices.” *Investopedia*, “Disintermediary”, online: <<http://www.investopedia.com/terms/d/disintermediary.asp>> .

<sup>29</sup> See generally Sunny Handa, “Retransmissions of Television Broadcasts on the Internet” (2001) 8 Sw J & Trade Am 39 at 41; Public Notice CRTC 2003-2, *supra* note 1 at para 23.

<sup>30</sup> See *CRTC Order*, *supra* note 27.

<sup>31</sup> *Canadian Admiral Corp. v. Rediffusion, Inc.*, 1954 CarswellNat 5, [1954] Ex. C.R. 382 (Can. Ex. Ct.) [*Rediffusion*].

<sup>32</sup> See *Consultation Paper*, *supra* note 26.

<sup>33</sup> *An Act to amend the Copyright Act*, S.C. 2002, c. 26.

ban retransmitters from using the internet—the technology JumpTV had ominously foretold might “eventually replace cable, DTH satellite and multipoint wireless distribution systems as the sole means of distribution.”<sup>35</sup> In one fell swoop the CRTC’s much-lauded Order was handicapped and instead used as a means by which the user rights regime necessary for the new media exemption to be of use for retransmitters was denied. This has been the status quo until the present era. While new media undertakings have flourished in the past thirteen years,<sup>36</sup> they have largely done so outside the *BA*’s regulatory parameters.

## II. THE AEREO DECISION

### (a) Background

Founded in 2012 by Chet Kanojia, Aereo Inc. began as a technology company based out of New York City that created a service (also called Aereo) that allowed customers to stream OTA television broadcasts to their ipads, iphones, or web browsers, for a small fee. Serving the New York City area first, the service eventually expanded to other U.S. metropolitan areas, including the Boston, Atlanta, and Dallas areas. By the end of 2013, Aereo had about 80,000 subscribers.<sup>37</sup> Aereo marketed itself as merely providing a rental service for a powerful antenna and associated DVR system to be used at the subscriber’s discretion. Given that it is legal for users to receive free and open television signals captured over broadcast frequencies through the use of equipment (traditionally dipole or “rabbit ears” antennas), Aereo purported its service as providing for viewers a merely updated means to partake in a long-established activity as old as television itself, and what was already well within their legal rights.

In its technical operation, however, the service betrayed an awareness and proficiency of the most up-to-date American copyright jurisprudence.<sup>38</sup> Aereo used dime-sized antennas contained in close-spaced arrays housed in its data centers to capture OTA television broadcasts. Each antenna was assigned to a particular subscriber. When the subscriber wished to watch a program, her antenna was “activated,” the signal was picked up by the antenna, digitally converted, and stored into the subscriber’s assigned cloud account from which

<sup>34</sup> *Consultation Paper*, *supra* note 26 at 3-4.

<sup>35</sup> *Ibid* at 7.

<sup>36</sup> See Canadian Radio-television and Telecommunications Commission, *Broadcasting and Telecom Notice of Consultation CRTC 2011-344*, 25 May 2011 at paras 15; *Broadcasting Regulatory Policy CRTC 2009-329*, 4 June 2009 at para 11.

<sup>37</sup> Peter Kafka, “Here’s How Many Subscribers Aereo Had Last Year” *ReCode* (21 July 2014), online: Recode <<http://recode.net/>> .

<sup>38</sup> Roger Parloff, “Aereo is leaving the courts dazed and confused” *Fortune* (21 May 2012), online: Fortune <<https://fortune.com/>> .



the data is streamed to the customer's platform of choice. The service used geolocation technology, GPS and wifi to ensure that subscribers are limited to receiving broadcasts from the maximum ambit a rooftop antenna from their "designated market area" (DMA) would ordinarily pick up.<sup>39</sup> In this way it attempts to mimic the technological constraints of OTA broadcasts in accordance to which laws regulating conventional BDUs have been designed. The elaborate method by which the service operates was designed in such a way as to fall under the letter of the law as set out in a recent U.S. Court of Appeals ruling pertaining to the legality of digital video recording services which make use of the "cloud," *Cartoon Network, LP v. CSC Holdings, Inc.* [*Cablevision*].<sup>40</sup>

**(b) The *Cablevision* Decision**

*Cablevision* concerned a DVR subscription service that, like Aereo, allowed subscribers a personal online storage account into which programs were stored and from which these programs were streamed to the subscriber's device.<sup>41</sup> Initially ruled in favour of the plaintiffs, the decision was overturned on appeal and the court's reasoning for why the service did not infringe copyright formed the basis for the business models of several internet-streaming services that appeared on the market shortly after the decision, including Aereo itself.<sup>42</sup> Essentially, the emphasis placed on the *subscriber*, rather than the service provider, as the subject of "volitional conduct" —in this case, the copying of the program onto the personal storage account—meant that no *direct* copying was committed by the service provider, *Cablevision*,<sup>43</sup> according to the reasoning of the court. On whether the viewing of a program constituted a "performance to the public" under the terms of the transmit clause, the court interpreted "performance to the public" to mean "the performance created by the act of transmission". Consequently, the playback by a subscriber of a program at her own behest, from her own personal online account, constituted a transmission that was private, rather than public, and thus not a "performance to the public" for the purposes of the transmit clause.<sup>44</sup>

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<sup>39</sup> *Ibid.* "Basically, Aereo uses FCC maps to determine the maximum perimeter around the New York City metropolitan area from which someone with a typical residential TV antenna on her roof would be able to pick up over-the-air signals from New York City. If the customer ventures outside that range, her phone's GPS or wi-fi systems will eventually detect that fact, and Aereo will dutifully cut off reception. (So, for instance, some parts of the Hamptons get reception, some don't.) Since it's ordinarily not possible to receive New York's over-the-air signals with an antenna beyond a certain distance, Aereo imposes analogous, if artificial, limitations on its users."

<sup>40</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d121 (U.S. C.A. 2nd Cir., 2008) [*Cablevision*].

<sup>41</sup> *Ibid* at 125.

<sup>42</sup> James Grimmelmann, "Why Johnny can't stream: How video copyright went insane" *ArsTechnica* (30 August 2012), online: *ArsTechnica* <<http://arstechnica.com/>> at 2, 3.

<sup>43</sup> *Cablevision*, *supra* note 39 at 21, 23-25.

This reasoning formed the bedrock on which Aereo's technology was crafted. By individualizing every aspect of the workflow—from the reception of broadcast signals to their storage in a personalized account to their conveyance to the individual subscriber—Aereo hoped that its service would pass legal scrutiny in the same manner as Cablevision Inc.'s operations. The fact that each transmission "is made to a single subscriber using a single unique copy produced by that subscriber" was key to the court's finding in *Cablevision* that no infringement occurred.<sup>45</sup> Like a VCR supplier or copyshop, Aereo could thus claim that it merely provided the technology through which subscribers could copy to their personal accounts and view—transmissions that were for all intensive purposes "private". Had subscribers streamed the broadcasts to their devices simply through a conventional server, this might not have been the case. As such, Aereo designed its service so that subscribers would stream broadcasts using the *exact same method* as Cablevision Inc.'s service, regardless of its practicality or efficiency, in order to be, in Aereo's eyes, in accord with American copyright legislation.

### (c) Aereo's Legal Travails

Broadcasters did not agree. In March 2012 a number of them filed an action against Aereo Inc. for infringement of the *Copyright Act of 1976* [U.S. *Copyright Act*] in the District Court for the Southern District of New York, and sought a preliminary injunction against Aereo.<sup>46</sup> In July, the preliminary injunction was denied, the judge stating that, amongst the other factors needing to be proven, the plaintiffs had not established that Aereo's service was materially indistinguishable from the system upheld in *Cablevision*, and thus had not demonstrated a *prima facie* case of a public performance copyright infringement claim.<sup>47</sup> While the court did not decide on whether there had been infringement or not, it agreed with Aereo Inc.'s characterization of its system, stating that "the copies Aereo's system creates are not materially distinguishable from those in *Cablevision*."<sup>48</sup>

Unsatisfied with this decision, the broadcasters appealed to the 2nd Circuit Court of Appeal and launched actions against Aereo in almost every market it operated, most notably Massachusetts and Utah.

In April 2013, the Court of Appeal affirmed the decision of the lower court, stating that the district court had made no legal error in its characterization of Aereo's transmissions as not being public performances.<sup>49</sup> Importantly, it also

<sup>44</sup> *Ibid* at 36.

<sup>45</sup> *Ibid* at 43.

<sup>46</sup> See *American Broadcasting Companies v. Aereo, Inc.*, 874 F.Supp. 2d 373 (S.D. New York, 2012).

<sup>47</sup> *Ibid* at 381, 404.

<sup>48</sup> *Ibid* at 385.

<sup>49</sup> *Wnet, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2nd Cir., 2013) at pp. 682, 696.

reaffirmed *Cablevision*, holding that “technical architecture matters.”<sup>50</sup> This decision was appealed to the Supreme Court.

In the meantime, the preliminary injunction succeeded in Utah where the 2nd Circuit Court’s *Cablevision* decision had no authority. Judge Kimble determined that Aereo’s system was indistinguishable from that of a cable company retransmitting to the public, falling squarely within the ambit of the U.S. *Copyright Act*’s transmit clause designed expressly to encompass such retransmissions of copyrighted content.<sup>51</sup>

This reasoning proved prescient. In June 2014 the U.S. Supreme Court’s decision was finally released. Writing for the majority, Justice Breyer ruled that Aereo’s service constituted a performance to the public under the transmit clause.<sup>52</sup> He did so through a “purposive interpretation” of the clause in light of regulatory objectives, wherein Congress would have intended to regulate any system functionally similar to cable retransmission systems.<sup>53</sup> The fact that broadcasts were recorded onto a personal copy for each user to view rather than viewed from a single source did not make it functionally different.<sup>54</sup> Thus, Aereo “performed publicly”, and as such was subject to §111’s licensing regime in order to retransmit OTA television lawfully.<sup>55</sup>

### III. AEREO IN CANADA

#### (a) Ramifications of the *Aereo* decision to Canadian Copyright Law

The U.S. regulatory scheme for retransmissions differs substantially from that of Canada. According to the majority in *Aereo*, Congress amended §101 to overturn 1974’s *Teleprompter v. CBS* and added a complicated technology-specific licensing regime with compulsory fees under §111.<sup>56</sup> Along with the statutory license and royalty fees, consent by OTA stations to retransmit their broadcasts is required by the Federal Communications Commission (FCC)<sup>57</sup> and

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<sup>50</sup> *Ibid* at 693.

<sup>51</sup> *Community Television of Utah, LLC v. Aereo, Inc.*, 997 F.Supp.2d 1191 (C.D. Utah, 2014) at p. 1205.

<sup>52</sup> *Aereo*, *supra* note 6 at 21.

<sup>53</sup> *Ibid* at 17.

<sup>54</sup> *Ibid* at 14.

<sup>55</sup> *Ibid* at 8.

<sup>56</sup> *Aereo*, *supra* note 6 at 8; U.S. *Copyright Act*, *supra* note 10, §111; *contra Aereo*, *supra* note 6 at 23, Scalia J. dissenting (who disputes how the majority adduces congressional intent).

<sup>57</sup> See “Cable Carriage of Broadcast Stations”, online: Federal Communications Commission <<https://www.fcc.gov/media/cable-carriage-broadcast-stations>>; *Turner Broadcasting System, Inc v. FCC*, 117 S.Ct. 1174 (U.S. S.C., 1997) (affirming the legality of “must carry” regulations).

is generally subject to additional compensation by the BDU (a "value for signal" regime).<sup>58</sup>

In contrast, in Canada "must carry" is the rule: licensed BDUs are *required* to retransmit local broadcasts and in turn are granted a statutory user right to retransmit those signals. Not only is compensation or royalties not needed, *consent* is not required at all. A "value for signal regime", as exists in the U.S., does not exist in Canada, and indeed the last attempt to set one up by the CRTC was ruled *ultravires* by the Supreme Court in 2012.<sup>59</sup> Finally, the 2012 amendments to the CCA<sup>60</sup> have updated its language, creating express references to the legality of particular types of uses digital undertakings employ. Thus, any answer to the question of how the *Aereo* scenario would have played out in Canada requires a detailed analysis of the relevant Canadian regulatory scheme.

#### (b) Relevant Statutory Rights under the CCA

The contemporaneous retransmission of broadcasts, the subject matter of the *Aereo* decision, potentially infringes upon two rights under the CCA: first, the section 3(1)(f) right possessed by the owners of the works broadcast in the transmission;<sup>61</sup> second, the limited section 21 right possessed by the broadcaster in the transmission *itself*. The fact that the retransmission is "streamed" to the subscriber is no bar.<sup>62</sup> The Supreme Court has recently ruled that the broadcasters' section 21 right "does not apply against BDUs".<sup>63</sup> Consequently, while *Aereo Inc.* may not infringe the broadcaster's limited section 21 right if it

<sup>58</sup> "Retransmission Consent", online: Federal Communications Commission <<https://www.fcc.gov/media/policy/retransmission-consent>>; *Cable Television Consumer Protection and Competition Act of 1992*, 106 Stat 1460 (1992).

<sup>59</sup> *Cogeco*, *supra* note 4 at para. 61.

<sup>60</sup> See *Copyright Modernization Act*, *supra* note 7.

<sup>61</sup> *Cogeco*, *supra* note 4 at para. 56; *Entertainment Software Assn.*, *supra* note 5: "CUFTA, however, required Canada to compensate copyright owners for the retransmission of television signals that were sent over cable lines. The amendments were therefore designed to ensure that cable companies, and not just radio broadcasters, would also be captured under s. 3(1)(f)" at para 24 [citations omitted]; "the replacement of the words 'radio communication' with 'telecommunication' should be understood as merely expanding the *means of communicating* a work — that is, from radio waves ('by radio communication') to cable and other future technologies ('to the public by telecommunication')" at para 25.

<sup>62</sup> *Public Performance of Musical Works, Re*, 2012 SCC 35, 2012 CarswellNat 2378, 2012 CarswellNat 2379 (S.C.C.) at paras. 1-2, Rothstein J. [Rogers].

<sup>63</sup> *Cogeco*, *supra* note 4 at para. 50: "BDUs are not a 'broadcaster' within the meaning of the *Copyright Act* because their primary activity in relation to communication signals is their retransmission. Thus, the broadcaster's s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster's exclusive right does not include a right to authorize or prohibit a *BDU* from retransmitting its communication signals."

constitutes a BDU, outside of the retransmission regime of section 31(2), Aereo Inc. is unlikely to defend its infringement of the rights owners' section 3(1)(f) right in any of the other "safe harbour" provisions in the *CCA* (though they may help with its "timeshifting" function).

**(c) "User Right" of Retransmission: Section 31(2)**

The retransmission exception of section 31(2) of the *CCA* was first characterized as a "user right" in a Federal Court of Appeals decision by Judge Sharlow,<sup>64</sup> which was, on appeal, affirmed and expanded upon by Judge Rothstein in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* ["Cogeco"], who, writing for the majority, states that, "[t]he exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (a) through (e) are met."<sup>65</sup> The section 31(2) user right allows for the simultaneous retransmission of broadcasts without infringing any copyright, whether the section 3(1)(f) right or any other right the content-owner or broadcaster might hold.<sup>66</sup> Given the large number of copyright owners involved in any broadcast signal, this user right is essential to the viability of any retransmission service.<sup>67</sup>

**(d) Does Aereo Qualify for the Retransmission Regime of Section 31?**

The 2002 amendment to the retransmission regime of section 31 of the *CCA* appeared to exclude internet retransmitters from benefitting from the user right.<sup>68</sup> In truth, it not so much banned internet retransmitters from the regime but rather prevented any service operating under the Order from qualifying.<sup>69</sup> This is a subtle yet salient distinction that will be elaborated upon below.

Operating under the Order is generally not conducive to the failure of any digital media undertaking. Indeed, many popular online services that provide digital media in Canada, like Netflix, ostensibly do so under this order.<sup>70</sup>

<sup>64</sup> *Reference re Broadcasting Act (Canada)*, 2011 FCA 64, 2011 CarswellNat 398, 2011 CarswellNat 6332 (F.C.A.) Sharlow J.A., reversed *Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 CarswellNat 4810, 2012 CarswellNat 4811 (S.C.C.).

<sup>65</sup> *Cogeco*, *supra* note 4 at para. 56.

<sup>66</sup> *Ibid* at paras. 53-58.

<sup>67</sup> Legislative Summary LS-437E, *supra* note 14 at 4.

<sup>68</sup> See Consultation Paper, *supra* note 26.

<sup>69</sup> See *Copyright Act*, *supra* note 5, s. 31(1); *CRTC Order*, *supra* note 27.

<sup>70</sup> See Michael Geist, "Does the CRTC Have the Power Regulate Online Video?: Internet Companies Set to Challenge Its Authority" *Michael Geist* (23 September 2014), online: Michael Geist <<http://www.michaelgeist.ca/2014/09/crtc-power-regulate-online-video-internet-companies-set-challenge-authority/>>; Canadian Radio-television and Telecommunications Commission, Communications Monitoring Report: October 2014, ch. 5.0 (Ottawa: CRTC, October 2014) [Communications Monitoring Report 2014].

However, given that Aereo's business model depended on retransmitting the radio signals transmitted by the station without fees or authorization, its viability or the viability of an analogous service hinges on its qualification under section 31's retransmission regime. In the following section I will demonstrate that an Aereo-like service could benefit from the retransmission regime, and thus operate legitimately, provided it obtained the requisite BDU licence that other BDUs need to qualify. Second, I will discuss the factors that weigh in favour of Aereo being eligible for a licence as a BDU under section 9 of Part II of the *Act*.

### (e) Interpreting the User Rights Regime

If an entity is a retransmitter and fulfils the conditions of section 31(2)(a)-(e), it is entitled to the user rights regime of section 31. In the case of Aereo, only the first right is relevant. The regime is described in *Cogeco* as follows:

the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. *The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal.* The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d)). *Both user rights are, subject to s. 31(2), beyond the owner's control.*<sup>71</sup>

Section 31(1) is the interpretive provision for the retransmission regime. Its definitions thus apply to the terms used in section 31(2):<sup>72</sup>

"new media retransmitter" means a person whose retransmission is lawful under the Act only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time; . . .

"retransmitter" means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

### (i) Statutory Interpretation

The modern approach to statutory interpretation is noted by Judge McLachlin in *Canada Trustco Mortgage Co. v. R.* as follows:

"the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The interpretation of a statutory provision must be made according to a

<sup>71</sup> *Cogeco*, *supra* note 4 at para. 58 [emphasis added].

<sup>72</sup> *Copyright Act*, *supra* note 5, s. 31(1).

textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole.<sup>73</sup>

However, as Ruth Sullivan notes: “When a term is defined in a statute or regulation, interpreters are bound to apply the definition stipulated by the law-maker, which may depart from the ordinary meaning of the defined term. Legislative definitions may be exhaustive or non-exhaustive.”<sup>74</sup>

First, the terms in question here are technical terms with meanings defined in the regime’s interpretive provision. Given that the terms are exhaustive, they “declare the complete meaning of the defined term and completely displace any other meaning that the term might otherwise bear.”<sup>75</sup> Thus, it is here and not outside the statute—certainly not to any policy documents published by regulatory agencies authorized under other statutes—that one should turn. Second, the only previous user right identified by the Canadian courts until *Cogeco* had been the CCA’s fair dealing provision. It was because of the user rights paradigm introduced by *CCH Canadian Ltd. v. Law Society of Upper Canada* (*CCH*) that the principles of statutory interpretation applied to the fair dealing provisions in question changed substantially.<sup>76</sup>

In *Cogeco*, the principles from which an expansive interpretation of fair dealing provisions as user rights were drawn in *CCH* were applied to the retransmission regime by Judge Rothstein.<sup>77</sup> Given that the reasons underlying the characterization of the retransmission regime as user rights in *Cogeco* were

<sup>73</sup> *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, [2005] 2 S.C.R. 601 (S.C.C.) at para. 10, citing 65302 *British Columbia Ltd. v. R.*, 1999 CarswellNat 2222, 1999 CarswellNat 2223, [1999] 3 S.C.R. 804 (SCC) at para. 50 [citations omitted].

<sup>74</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008) at 61-62.

<sup>75</sup> Halsbury’s Laws of Canada, Legislation, (Markham, Ont: Lexis Nexis Canada, 2013) at HCU-183 “Changes” at HLG-66 “Legislative definition prevails over ordinary meaning”. See also *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, 1988 CarswellOnt 921, 1988 CarswellOnt 965, [1988] 2 S.C.R. 175 (S.C.C.) at 194 [S.C.R.]; *Yellow Cab Ltd. v. Alberta (Industrial Relations Board)*, 1980 CarswellAlta 319, 1980 CarswellAlta 98, [1980] 2 S.C.R. 761 (S.C.C.) at 762 [S.C.R.]; *Canadian Assn. of Broadcasters v. Society of Composers, Authors & Music Publishers of Canada*, 1994 CarswellNat 1846, [1994] F.C.J. No. 1540 (F.C.A.); *R. v. Moore*, 1985 CarswellNS 285, 67 N.S.R. (2d) 241 (N.S. C.A.) at 243-244 [N.S.R.]; *R. v. Verma*, 1996 CarswellOnt 4743, 31 O.R. (3d) 622 (Ont. C.A.).

<sup>76</sup> 2004 SCC 13, 2004 CarswellNat 2004, 2004 CarswellNat 447 (S.C.C.) at paras. 48, 51 [*CCH*]. *Contra Cie générale des établissements Michelin - Michelin & Cie v. CAW—Canada*, 1996 CarswellNat 2297, 1996 CarswellNat 2711, 71 C.P.R. (3d) 348 (F.C.) (“exceptions to copyright infringement should be strictly interpreted” at para. 68).

<sup>77</sup> *Galerie d’art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307 (S.C.C.) at paras. 11, 12, 30, as cited in *Cogeco*, *supra* note 4 at paras. 64, 67; also cited in *CCH*, *supra* note 76 at para. 10; *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, 2004 CarswellNat 1919, 2004 CarswellNat 1920 (S.C.C.) at para. 88 as cited in *Cogeco*, *supra* note 4 at para. 65, 66.

drawn from those principles introduced in *CCH*, as well as *Théberge* and *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, and it was these same reasons that justified the application of expansive interpretative principles in fair dealing, it is evident that the liberal interpretive principles seen in *CCH* and in consequent fair dealing cases were the result of the new "user rights" paradigm.

Thus, interpretative principles regarding such provisions would not only prove helpful but could be determinative in the interpretation of the retransmission regime: the Supreme Court in *CCH* noted that the fair dealing provisions are to "be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."<sup>78</sup> Further, user rights should "not be interpreted restrictively" as they are not mere defences, but an integral part of copyright legislation.<sup>79</sup>

The retransmission regime as reflected by section 21(1) and section 31, "represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals."<sup>80</sup> The user right itself was expressly adopted *against* the wishes of broadcasters who wished to retain an unrestricted right to their broadcasts.<sup>81</sup> As the Supreme Court states in *Cogeco*, this retransmission regime ultimately serves the *Copyright Act's* underlying purpose to "balance the entitlements of copyright holders and the public interest in the dissemination of works."<sup>82</sup>

It is the need that the "traditional balance between authors and users should be preserved in the digital environment"<sup>83</sup> that grounds the Supreme Court's principle of technological neutrality through which Canadian copyright law should be interpreted.<sup>84</sup> Thus, in interpreting the statutory provisions at hand, the principle of technological neutrality states that "absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user."<sup>85</sup> Since the user right reflected in section 31(2) that retransmitters retain against copyright

<sup>78</sup> *CCH*, *supra* note 76 at para. 51.

<sup>79</sup> *Ibid* at 48.

<sup>80</sup> *Cogeco*, *supra* note 4 at para. 67.

<sup>81</sup> *Ibid* at para. 72.

<sup>82</sup> *Ibid* at para. 70.

<sup>83</sup> *ESA*, *supra* note 5 at para. 49.

<sup>84</sup> But see Michael Birnhack, "Reverse Engineering Informational Privacy Law" (2013) 15 Yale J L & Tech 24, which argues that technological neutrality is an impossibility.

<sup>85</sup> *ESA*, *supra* note 5 at para. 9; *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, 2004 CarswellNat 1919, 2004 CarswellNat 1920 (S.C.C.) at 181; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2014 FCA 84, 2014 CarswellNat 808, 2014 CarswellNat 809 (F.C.A.) at para. 39, reversed 2015 CarswellNat 6092, 2015 CarswellNat 6093 (S.C.C.).



infringement reflects the importance that Canadian copyright law places on the dissemination of content to the public, its statutory provisions should not be construed as to render outside of its scope (and thus impose an additional layer of fees onto) internet-based disseminators solely by virtue of the *method of delivery* they employ.

Given the interpretive rules of copyright legislation thus stated, the expansive interpretation of user rights regimes in recent years, the underlying purposes served by the user rights regime of section 31(2) in particular, and the principle of technological neutrality grounded in these underlying purposes through which the regime should be interpreted, exceptions to the regime should be construed narrowly. Applying the interpretative principles above to the statutory definition of “retransmitter” in section 31(1) thus yields two conditions to qualify as a retransmitter:

- a. not constituting a new media transmitter;
- b. performing a function comparable to that of a cable retransmission system.

Each of the above conditions with respect to Aereo will be evaluated in turn.

### **(e.1) Does Aereo Fit the Statutory Definition of “New Media Transmitter”?**

“New media transmitter” has a statutory definition:

“new media retransmitter” means a person whose retransmission is lawful under the Act only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;<sup>86</sup>

According to this definition, if a retransmission is lawful under the *BA only by reason* of the Order, the person whose retransmission it is constitutes a new media retransmitter. In other words, a new media retransmitter is someone whose retransmission, *but for* the Order, would be unlawful under the *BA*. Thus, it is necessary to assess the grounds on which a retransmission of Aereo would be lawful.

#### **(i) Is Aereo a “broadcasting undertaking” under the Broadcasting Act?**

The *Broadcasting Act* defines “distribution undertaking” as:

an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking.<sup>87</sup>

<sup>86</sup> *Copyright Act*, *supra* note 5, s. 31(1).

<sup>87</sup> *Broadcasting Act*, *supra* note 2, s. 2(1).

If Aereo is a distribution undertaking then it constitutes a broadcasting undertaking under the *BA*. This definition was written to be technologically neutral, as opposed to its predecessor,<sup>88</sup> and does not indicate that the retransmission of OTA signals using a particular means of transmission would bar an undertaking from being a BDU. In its Report, the CRTC notes that "transmission" over the internet is explicitly contemplated under the *BA*'s definition of broadcasting.<sup>89</sup> While CRTC's broad understanding of its jurisdiction, especially with respect to the internet, has often been called into question, when the "transmission" in question is that of OTA broadcast television, the reasoning is less controversial. In the words of Sunny Handa, "an Internet retransmitter would be a BDU as defined in the *Broadcasting Act* and hence subject to regulation under that Act."<sup>90</sup>

Further, in *Reference Re Broadcasting Act*, in deciding whether internet service providers were "broadcasting undertakings" under the *BA*, the unanimous court stated that, "the term 'broadcasting undertaking' does not contemplate an entity with no role to play in contributing to the Act's policy objectives."<sup>91</sup> As per section 3(1)(t), two of its relevant policy objectives with respect to distribution undertakings are as follows:<sup>92</sup>

- (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
- (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

Aereo directly engages in these policy objectives through its services. As stated earlier, it retransmits local OTA broadcast television to a local area. It does so at a lower cost than most conventional competitors and uses the most effective technologies to do so. With regard to the scheme, purpose, and wording of the *BA*, Aereo is likely to constitute a broadcast distribution undertaking, which under section 2(1) is a kind of broadcasting undertaking. Note that if Aereo were not a kind of broadcasting undertaking, then it would be outside the scope of the *BA* and thus outside of the CRTC's ability to regulate altogether.

**(ii) Would Aereo qualify as a "new media broadcasting" under the Order?**

The *Order* is defined as follows:

... the Commission exempts persons who carry on, in whole or in part in Canada, broadcasting undertakings of the class consisting of new

<sup>88</sup> See *Broadcasting Act*, R.S.C. 1967-68, c. 25.

<sup>89</sup> *Report*, *supra* note 24 at para. 39.

<sup>90</sup> Handa, *supra* note 29 at 46.

<sup>91</sup> *Reference re Federal Courts Act (Canada)*, 2012 SCC 4, 2012 CarswellNat 214, 2012 CarswellNat 215, [2012] 1 S.C.R. 142 (S.C.C.) at para. 5.

<sup>92</sup> *Broadcasting Act*, *supra* note 2, s. 3(1)(t).

media broadcasting undertakings, from any or all of the requirements of Part II of the Act or of a regulation thereunder.

New media broadcasting undertakings provide broadcasting services delivered and accessed over the internet, in accordance with the interpretation of “broadcasting” set out in the Broadcasting Public Notice CRTC 199984/Telecom Public Notice CRTC 9914, Report on New Media, 19 May 1999.<sup>93</sup> The Order was made pursuant to section 9(4) of the *BA*, which permits the CRTC to exempt certain classes of broadcasting undertakings from having to abide by the regulations of Part II of the *BA* broadcasting undertakings are otherwise expected to follow. As a distribution undertaking is a kind of broadcasting undertaking under section 2(1), it is thus possible for Aereo to qualify under the Order. Further, Aereo clearly qualifies under the stated definition of “new media broadcasting undertaking.”

Given that the retransmission of an undertaking that qualifies for the Order is lawful under the *BA*, if Aereo makes a retransmission *without first having applied for a licence*, it will be lawful and thus would clearly fit the statutory definition of “new media retransmitter” under section 31(1) of the *CCA*. However, this is not the *only* avenue of legality. Nothing prevents Aereo from applying for a licence and thus being lawful under the *BA* for a reason *other* than qualifying under the Order.

### (iii) *Interpretive Context*

This reading of the provision is supported by the legislative history of the retransmission regime. The legislative summary of the bill underlying the 2002 amendment states:

The “Internet carve-out” that is currently proposed in the bill, however, does not shut the door entirely. Internet retransmissions might yet qualify for the compulsory licence if, having regard to the definition of “new media retransmitter” in clause 2(2) of the bill, such retransmissions become lawful under the *Broadcasting Act* by means *other than* the CRTC’s 1999 Exemption Order.<sup>94</sup>

Michael Geist puts it as follows:

In plain language, the post-iCraveTV framework means that services can’t both rely on the Copyright Act retransmitter provision and the CRTC Order. *If the retransmitter relies on the Copyright Act, it will be subject to regulation under the Broadcasting Act.* Alternatively, if the service is excluded from Broadcasting Act regulation by qualifying under the new media exemption, it cannot rely on the Copyright Act provision and must obtain licenses to avoid copyright infringement claims.<sup>95</sup>

<sup>93</sup> *CRTC Order*, *supra* note 27.

<sup>94</sup> Legislative Summary LS-437E, *supra* note 14.

<sup>95</sup> Michael Geist, “The Ghost of iCraveTV?: The CRTC Asks Bell For Answers About Its

Thus, this wording was intended to give some flexibility. It was made with the intention of denying those retransmitters that make use of the exemption clause from benefitting from the user right to retransmit, while allowing for those that successfully qualify for a license—the ordinary requirement for a BDU to be lawful under the *BA*—to benefit from the regime like other licensed retransmitters. By hinging their exception from the user right on the use of the Order, Parliament put the ball in the CRTC's court.

**(iv) *Can Aereo make a retransmission that is lawful under the BA without relying on the Order?***

It has already been established that Aereo can qualify as a BDU. Aereo is thus not precluded from applying for a license. In the absence of the Order, an internet-based retransmitter would be lawful in the same manner that another retransmitter would be lawful—that is, it would be lawful *subject to the licensing requirements imposed on retransmitters laid out in the BA*. The Order merely exempts undertakings that qualify for it from having to fulfill the licensing requirements imposed on other retransmitters. However, not requiring a license to be lawful under the *BA* does not deny retransmitters the ability to qualify for licensing. Given that Aereo would qualify as a BDU under the *BA*, *there is no reason it cannot apply for, and ultimately attain, a licence*.

Of course, the CRTC may reject an application for a license, but there is a possibility that the CRTC can reject the application of any prospective BDU, not just that of Aereo—all licenses are pursuant to CRTC approval. The fact that this discretion exists, however, does not make an internet-based retransmitter like Aereo pre-emptively barred from applying for a licence. Thus, the definitional amendments to section 31(1) suggests two options:

1) If the internet-based retransmitter goes ahead and starts retransmitting without obtaining a license as is required of a BDU, it will be lawful under the *BA* only because of the Order. As such, it will count as a “new media transmitter” according to the *CCA*'s statutory definition and would not qualify as a retransmission as set out in section 31(1), and thus inapplicable to the user right regime in section 31(2).

2) The internet-based retransmitter can apply for a license like any other BDU. In this case, as a retransmitter operating pursuant to the conditions of its license, it would be lawful under the *BA* in the same way that any BDU operating pursuant to its licence would be lawful. Since its lawfulness does not *depend* on the Order it no longer fits the statutory definition of ‘new media retransmitter’ and could fit the definition of “retransmitter” as long as it “performs a function comparable to that of a cable retransmission system”. Retransmission

would become its user right (pursuant to fulfilling the other requirements of section 31(2)).

**(e.2) Does Aereo Perform a “Function Comparable to that of a Cable Retransmission System”?**

If, as established earlier, Aereo does not necessarily fall under the statutory definition of “new media retransmitter” but falls under the definition of retransmitter in section 31(1), then it can qualify for the retransmission user right. The definition of retransmitter is as follows:

“retransmitter” means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;<sup>96</sup>

As stated earlier, the United States Supreme Court reasoned that the Aereo system was analogous to that of a cable retransmission system.<sup>97</sup> Indeed, its decision that Aereo was in violation of the plaintiffs’ copyright hinged on this comparison. Justice Breyer noted that “[i]nsofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service.”<sup>98</sup> While there remain formidable distinctions between Canadian copyright law and that of the United States, Canadian courts often look at how American courts have dealt with particular issues in order to shed new light on the case at hand. This is especially the case when the factual situation is the same.<sup>99</sup>

In *Aereo*, Justice Breyer’s factual characterization of the functioning of the Aereo service in terms of a cable retransmission system is helpful because it does not rest on particular features of U.S. copyright law but rather on a broad characterization of the functioning of Aereo’s service as compared to conventional cable retransmission systems, operations of which are not functionally different from those of Canada. His focus on the “nature of the service” rather than the “technological manner in which it provides the service” echoes the principle of technological neutrality under Canadian copyright law and particularly the Supreme Court’s statement in *Rogers* to consider the “broader context” to ensure that “form does not prevail over substance” when examining internet transmissions.<sup>100</sup> Given this precedent, if Aereo was to be decided in Canada there is little reason why this finding by the U.S. Supreme

<sup>96</sup> *Copyright Act*, *supra* note 5, s. 31(1).

<sup>97</sup> *Aereo*, *supra* note 6 at 12-17.

<sup>98</sup> *Ibid* at 17.

<sup>99</sup> *Robertson v. Thomson Corp.*, 2006 SCC 43, 2006 CarswellOnt 6182, 2006 CarswellOnt 6183, (S.C.C.) at para. 42; see also *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, 1997 CarswellNat 2752, 1997 CarswellNat 2111, [1998] 2 F.C. 22 (F.C.A.), leave to appeal refused 1998 CarswellNat 3212 (S.C.C.).

<sup>100</sup> *Rogers*, *supra* note 62 at para. 30.

Court would not prove persuasive, if not determinative, in any assessment on whether Aereo “performs a function comparable to that of a cable retransmission system.”

Thus, there is little preventing Aereo from fulfilling the definitional requirements of a retransmitter if it falls outside of the definition of “new media retransmitter” and provided it fulfills the conditions set out in section 31(2)(a)-(e), it would qualify under the retransmission regime. This is even more likely in light of the addition of section 31(3) to the retransmission regime in the 2002 amendment. Section 31(3) gives legislative flexibility in adapting the regime to the needs of particular classes of retransmitters, allowing “local” and “distance” signals a modified definition.<sup>101</sup> This is particularly suited to Aereo or an Aereo-like service, which mimics the boundaries of OTA broadcasters not as a constraint but as a choice.<sup>102</sup> The ability to tailor the retransmission regime under section 31 to the particular realities of Aereo’s mode of retransmission gives even less of a reason to deny it recourse under the regime simply on the basis of its mode of retransmission.

#### **(f) Would Aereo’s Time-Shifting Feature be Legal in Canada?**

In addition to simultaneous viewing of broadcast television, Aereo also allowed users to record the broadcast for viewing later. The broadcast would be recorded on the user’s personal cloud account for later viewing. A single copy was recorded onto the user’s personal cloud account, which only the user could access.<sup>103</sup> While the plaintiff’s lawsuit against Aereo was against all aspects of its service, the injunction was with respect to “only the aspects of Aereo’s service that allow subscribers to view plaintiffs’ copyrighted television programs contemporaneously with the over-the-air broadcast of these programs”<sup>104</sup> and thus it was only with respect to this aspect of the Aereo service that the U.S. Supreme Court ruled against the company.<sup>105</sup> If an Aereo-like service were to operate in Canada, then the time-shifting aspect of the service must also be evaluated.

This function of Aereo’s service likely falls squarely within section 29.23(1) of the CCA, an exception to copyright infringement (or possible user right) for fixing a broadcast for later viewing introduced in 2012’s *Copyright Modernization Act*.<sup>106</sup> Given that only a single copy is made (section 29.23(1)(c)) and only the individual can access this copy (section 29.23(1)(f)), Aereo falls within the statutory requirements of the ‘right’ as long as the broadcast itself was viewed

<sup>101</sup> *Copyright Act*, *supra* note 5, s. 31(3).

<sup>102</sup> *Parloff*, *supra* note 38 and accompanying text.

<sup>103</sup> *Supra* note 46 at 377.

<sup>104</sup> *Ibid* at 376.

<sup>105</sup> *Aereo*, *supra* note 6 at 2: “The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo’s service is not before us”.

<sup>106</sup> *Copyright Act*, *supra* note 5, s. 29.23(1); *Copyright Modernization Act*, *supra* note 7.

legally (section 29.23(1)(a)). Thus, its applicability is conditional on Aereo falling under the retransmission regime of section 31(2) (and thus the broadcast being legal) or having independently sought the right to retransmit from the broadcaster and relevant content-holders.

Regarding the limitation in section 29.23(2) against on-demand services, and whether it would apply to Aereo, it is important to note that the mere act of deciding to copy the transmission does not make it “on demand” as this is precisely what is meant to be a defence against infringement. The service the user can decide to record is a live transmission and thus not freely available “on-demand”, being subject to the schedule of the broadcast station. Thus, this acceptable use mimics that of a VCR, which is indisputably legal, whereas the copying of an on-demand program would mimic that of copying a rental video, and would not fall under the section 29.23(1) exception.

While it is unclear if the “safe harbour” provision of section 31.1(4) would apply to Aereo, given the permissibility of time-shifting granted in the above provision, it is not likely to be necessary. Thus, as long as the section 31(2) user right is applicable to the broadcast itself the time-shifting aspect of Aereo’s service is not likely to fall afoul of any Canadian copyright law.

#### **(g) Could (Should?) Aereo Receive A License?**

While one may argue that a retransmitter would not be expected to apply for a BDU licence under the *BA* if not obliged in order to retransmit lawfully under the *BA*, a BDU is required to have a licence in order to benefit from the *CCA*’s retransmission user right. Lawfulness under the *CCA* is as essential to lawfulness under the *BA* to the effective functioning of this user right.

Further, to the contention that the existence of the Order suggests that even if a retransmitter were to apply for a license like any other BDU, the CRTC would certainly deny the application, this is not necessarily the case. Note that, for example, following the release of the Order the CRTC then granted a license to an internet protocol-based cable retransmitter.<sup>107</sup> The CRTC had, as is in its jurisdiction, required the BDU to address particular concerns in order to be granted the licence, which the BDU met to the CRTC’s satisfaction.<sup>108</sup>

In a recent federal court decision involving the Order, the court writes, “the *CRTC Order* was rendered necessary by the new media context and especially by the arrival of the Internet. The CRTC could not regulate all the broadcasting content aimed at Canadian listeners: this task would be simply insurmountable.”<sup>109</sup> It was easier to avoid having to regulate altogether than risk months of backlogged applications for licenses from an array of different

<sup>107</sup> See Canadian Radio-television and Telecommunications Commission, *Decision CRTC 2000-754*, 18 September 2000.

<sup>108</sup> *Ibid.* (“[t]he applicant plans to use Internet Protocol (IP) digital technology to deliver programming services to persons residing in these properties”).

<sup>109</sup> *Unicast S.A. v. South Asian Broadcasting Corp.*, 2014 FC 295, 2014 CarswellNat 873, 2014 CarswellNat 874 (F.C.) at para. 59.

technological services operating in vastly different areas of content creation or distribution. Retransmission of broadcast signals, however, conforms much more closely to the broadcasting distribution undertakings ordinarily regulated by the CRTC.

In its last report on internet-based retransmitters released in 2003, the CRTC laid out several concerns, identified both by concerned parties and the Commission itself, which needed to be addressed before it could consider internet-based retransmitters under the licensing regime.<sup>110</sup> These concerns will be addressed below.

**(i) *The internet's architecture has changed***

The primary concern of the Commission and of interested parties was the geographical reach of internet retransmissions.<sup>111</sup> The regulability of the internet has changed<sup>112</sup> since the report was published back in 2003, when it noted that, "there is currently no completely workable means of preventing unauthorized use of Internet retransmissions, whether it be program decoding, sharing and recording, rerouting to other users or signal modification to insert or remove advertising."<sup>113</sup> Geographical restrictions to the access of websites are common today, as demonstrated by Quebec's demand a few years ago that online retailers that did not operate in French block access to their websites from Quebec.<sup>114</sup> Aereo uses geolocation technology, which "assigns geographic borders to Internet users and their conduct."<sup>115</sup> Geolocation has advanced to such a point that Aereo can set precise limits to the extent of its operating service, not simply jurisdictional but metropolitan. As stated earlier, Aereo limits its ambit to the DMA determined by the FCC for a particular region. As the CRTC sets similar boundaries for licence holders, combined with its subscriber-model, Aereo would have little trouble adapting such requirements as needed.

**(ii) *Other concerns***

The other concerns largely amount to the following: 1. Internet transmission opens up the ability to time-shift; 2. The signal can be altered; 3. Canadians do not have enough bandwidth for the retransmission of video signals; 4. Possibility of advertisements in display screen; and 5. The internet transmission system does not have the capacity to provide audio-visual works of acceptable quality.

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<sup>110</sup> See Public Notice CRTC 2003-2, *supra* note 1 at Appendix D.

<sup>111</sup> *Ibid.*

<sup>112</sup> See Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006) at 25, 45, 57-59.

<sup>113</sup> Public Notice CRTC 2003-2, *supra* note 1 at Appendix D.

<sup>114</sup> Eva Friede, "Retailers forced to block English-only websites in Quebec — or face sanctions from language police" *National Post* (13 November 2014), online: National Post <<http://news.nationalpost.com/>>.

<sup>115</sup> Tracie Wendells, "Geolocation and Jurisdiction: From Purposeful Availment to Avoidance and Targeting on the Internet" (2011) 16 J Tech L Poly 275 at 276.



Time-shifting, as stated earlier, was added as a statutory user right in 2012's *Copyright Modernization Act* and is a well-established use amongst television viewers.<sup>116</sup> Note that broadcast television has been able to be recorded since the creation of VCRs. The potential that signals can be altered is present in any retransmission technology. In the preceding eleven years technological advances and usage patterns have made the other concerns moot, as has been conceded by the CRTC itself.<sup>117</sup>

*(iii) Broadcasting Distribution Regulations*

Further, an assessment of the requirements it imposes on holders of the “terrestrial distribution undertakings” licence pursuant to sections 16-17(5) of the *Broadcasting Distribution Regulations* reveals that Aereo is capable of fulfilling the retransmission requirements of the licensee’s “basic service”.<sup>118</sup> In fact, these requirements are the primary means by which the CRTC fulfills the objectives of the *BA*. It also has the ability to regulate the rates of “basic service” to ensure that it is affordable to consumers. Given that Aereo’s business model is built around the retransmission of local signals—something the CRTC has to *compel* other retransmitters to do as a matter of policy—and has performed this service at a competitive price in the United States, surely merits at least an evaluation of its viability as a licence holder given its potential to further several of the objectives of the *BA*.<sup>119</sup>

#### IV. THE USER RIGHT TO RETRANSMIT: SIMPLY A STATUTORY ENTITLEMENT?

On the adoption of user rights in Canada, David Vaver commented that their “full implications have not yet fully been worked out.”<sup>120</sup> With the right to retransmit as only the second provision from the *CCA* to be explicitly referred to as a “user right” by Canadian courts, this is no less true. Because most discussion of user rights in Canadian copyright law has almost exclusively focused on fair dealing, the constitutive aspects of user rights as distinct from fair dealing is not clear. For instance, some statements in past jurisprudence suggests that fair dealing is more important than other exemptions because they, unlike the others, are user rights.<sup>121</sup> In other cases, exemptions are *synonymous* to user rights.<sup>122</sup>

<sup>116</sup> See Dara Lithwich & Maxime-Olivier Thibodeau, Legal and Legislative Affairs Division, Publication No. 41-1-C11-E, Bill C-11: An Act to Amend the Copyright Act (14 October 2012), at 13; *Copyright Modernization Act*, *supra* note 7.

<sup>117</sup> See Communications Monitoring Report 2014, *supra* note 70.

<sup>118</sup> *Broadcasting Distribution Regulations*, C.R.C.

<sup>119</sup> *Supra* note 70, s. 5(a).

<sup>120</sup> David Vaver, “Copyright Defences as User Rights” (2013) 60:4 J Copyright Soc’y 661 at 672.

<sup>121</sup> Bastarache J., in his concurring opinion, writes that “*unlike other exceptions*, fair dealing is an essential part of copyright protection,” [emphasis added] in *Kraft Canada Inc. v.*

Thus, an examination of the retransmission user right is an excellent means to determine the contours of a user rights paradigm normally obscured by fair dealing's overbearing shadow.

In "Taking Rights Seriously", Drassinower posits that the legitimacy of fair dealing as a user right rests on the assertion of an "authorial right" while at the same time not placing oneself in the "authorial locus" of the original creator.<sup>123</sup> The user right to retransmit, as identified in *Cogeco*, however, does not seem to fit such a model. It is hard to argue that the right of a BDU to reproduce a signal is built upon the BDU's "authorial" use of the signal, given that the right in question rests upon the signal remaining unaltered.<sup>124</sup> And the historical origins of the legality of retransmission in Canada rest on the act of retransmission being deemed by the courts as not being significant enough to infringe the owner's copyright.<sup>125</sup>

Thus, if retransmission is a user right, it must be one of the non-authorial user rights Drassinower identifies in "a more general category of user rights."<sup>126</sup> On the rationale of such a right, he notes "[t]he point is that no wrong arises where the reproduction in question is but incidental to viewing a publicly accessible work."<sup>127</sup> This is more in accord with the retransmission user right of section 31(2). Applying this rationale, the user right to retransmit is a non-authorial right justified under the explicit objective of promoting the public interest that underlies the *CCA*, along with the cultural objectives of the *BA*, together forming a larger statutory scheme under which this right operates.<sup>128</sup> Like fair dealing above, however, under this framework the "use" in question is a "user right" because, being a purely non-authorial right ("the signal is retransmitted. . . without alteration")<sup>129</sup> it does not usurp the creator/owner's authorial locus, whereas fair dealing is a user right because the user in that case asserts *her own* authorial right.<sup>130</sup>

The retransmission user right can also be explained by reference to David Lange's concern that new intellectual property claims "tends to blur, and then

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*Euro Excellence Inc.*, 2007 SCC 37, 2007 CarswellNat 2087, 2007 CarswellNat 2088 (S.C.C.) at para. 79, Bastarache J.

<sup>122</sup> *CCH*, *supra* note 76, McLachlin C.J.: "[t]he fair dealing exception, like other exceptions in the Copyright Act, is a user's right" [emphasis added] at para. 48.

<sup>123</sup> *Drassinower*, *supra* note 8 at 475-476.

<sup>124</sup> *Copyright Act*, *supra* note 5, s. 31(2)(c).

<sup>125</sup> See *Rediffusion*, *supra* note 29.

<sup>126</sup> *Drassinower*, *supra* note 8 at 476.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Cogeco*, *supra* note 4: "[h]owever, these powers must be exercised within the statutory framework of the *Broadcasting Act*, and also the larger framework including interrelated statutes. This scheme includes the *Copyright Act*" [citations omitted] at para 2.

<sup>129</sup> *Copyright Act*, *supra* note 5, s. 31(2)(c).

<sup>130</sup> *Drassinower*, *supra* note 8 at 477.

displace, important individual and collective rights in the public domain”<sup>131</sup> and thus the “recognition of new intellectual property interests should be offset today by equally deliberate recognition of individual rights in the public domain.”<sup>132</sup> Given that the new section 21 right granted to broadcasters was the result of the interests of U.S. broadcasters as reflected in Canada’s free trade negotiations with the U.S.,<sup>133</sup> the granting of the new corollary user right in section 31(2) could be interpreted as a recognition by Parliament that “[e]mphasis on the protected domain leads to neglect of the public domain.”<sup>134</sup> In order to protect the public interest served by the retransmission of broadcast television, the encroachment into the public domain represented by the broadcaster’s right to retransmissions that had heretofore been part of the public domain was accompanied by the creation of a corresponding user right, therefore maintaining the balance between Canadian copyright law’s dual objectives.

Both of these understandings help see the retransmission user rights regime as both conceptually distinct and closely linked to fair dealing. They represent very different “uses” that are nonetheless both user rights because neither of them abrogate the authorial claim of the creator.<sup>135</sup> However, the user right to retransmission is also an explicit statutory counterbalance, similar to fair dealing, to the owners’ transmission rights to ensure not only that the public interest in the dissemination of works is not unduly restricted, one of the dual objectives of the *CCA*, but in also fulfilling the objectives of the *BA* in disseminating works that enhance the “cultural, political, social and economic fabric of Canada.”<sup>136</sup>

## V. CONCLUSION

Given the level of vertical integration with respect to Canada’s conventional BDUs and television stations, the current users of the right to retransmit are becoming increasingly indistinguishable from those with the opposing broadcasters’ right. This fact only makes it more imperative that those who operate solely as retransmitters are not prematurely precluded from their user right simply on the basis of a stagnant conception of the milieu in which the retransmission of public spectrum radio signals occurs. As public consumption habits change so too should our conception of the environment in which retransmission, and the complementary sets of owners’ and users’ rights with respect to retransmission, exist.

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<sup>131</sup> David Lange, “Recognizing the Public Domain” (1981) 44:4 Law & Contemp Probs 147 at 171.

<sup>132</sup> *Ibid* at 147.

<sup>133</sup> *Cogeco*, *supra* note 4 at para. 75.

<sup>134</sup> R.S. Brown, “Unification: A Cheerful Requiem for Common Law Copyright” (1977) 24 UCLA L Rev 1070 at 1093.

<sup>135</sup> *Drassinower*, *supra* note 8 at 476.

<sup>136</sup> *Broadcasting Act*, *supra* note 2 at s. 3(1)(d)(ii).

Using a recent U.S. Supreme Court decision, this paper offers one possible method by which an internet-retransmitter may lawfully operate in Canada. It is not the only possible method—merely one that requires the least legislative impetus. Another more proactive solution may be for the CRTC to create a new exemption order specifically for internet retransmitters. If it is clear that the retransmitter is operating under the new exemption rather than the one referenced in section 31(1) (by amending the old exemption Order to exclude internet retransmitters, for instance) then Aereo may lawfully function under the retransmission regime. Such a solution is not likely to be considered viable, however, if it is made subject to a determination from a public hearing, a forum where, to paraphrase an old critique of the process,<sup>137</sup> oligopolist BDUs simply relate the preservation and promotion of their own economic welfare directly to the CRTC's protection of the public interest while depicting potential outside competitors as a decided threat to Canadian culture.

As Aereo Inc. begins the Chapter 11 process, the U.S. Bankruptcy Court recently consented to its streaming technology to be sold off.<sup>138</sup> If the successor to the technology sets its eyes on Canada, the CRTC could do better than to reflexively accommodate the loudest existing licensees. With prudence the government might even consider purchasing the technology itself, in a bid at cultivating the culture-disseminating potential of the public spectrum on its own terms. Either option is more sensible than the status quo, however, which cultivates nothing so much as an increasing disregard toward Canada's broadcasting regulator by the public-at-large it was ostensibly created to serve.<sup>139</sup>

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<sup>137</sup> Cole, *supra* note 20 at 125. See generally Public Notice CRTC 2003-2, *supra* note 1.

<sup>138</sup> Nathan Matisse, "Aereo can sell off its TV stream tech—with some caveats" *ArsTechnica* (28 December 2014), online: ArsTechnica <<http://arstechnica.com/>>.

<sup>139</sup> Peter Nowak, "Why the CRTC's showdown with Netflix was all for show" *Canadian Business* (22 September 2014), online: Canadian Business <<http://www.canadianbusiness.com/>> "[f]rom another, it appeared like the last gasp of an increasingly irrelevant regulator trying to flex its dwindling muscle."