

American Broadcasting Cos. v. Aereo, Inc.

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Few things are as central to Americans' lives as their television. But the medium that has for decades been defined by the device on which it has traditionally been viewed is now undergoing a transformation to computers, tablets, and smartphones. Americans want their television programming to be available no matter where, no matter when, and no matter on what device.

Creative industries have responded by addressing that demand with a multitude of licensed services; at least 100 unique platforms for viewing television and full-length films are available in the United States alone.¹ Still, when a service appears that offers another attractive alternative, it will draw viewers—even if its legality is questionable.

Aereo,² and its competitor Aereokiller/FilmOn,³ fit that description. Like iCraveTV and other previous services, Aereo and FilmOn burst onto the scene, offering customers an opportunity to view television programming remotely across the Internet. And like iCraveTV,⁴ Aereo did not have permission from either the broadcaster or the copyright owner, and litigation ensued.

Part I of this comment will briefly summarize the legal background against which the Aereo service was engineered. Part II will describe the pertinent design and functions of the Aereo service. Part III will review and analyze the recent decision of the U.S. Supreme Court in *American Broadcasting Cos. v. Aereo, Inc.*,⁵ as well as the dissent.⁶ The issues presented in this litigation have implications beyond the specific facts of the case, and those issues remain controversial. This comment is intended to provide an even-handed account of the Court's opinions and, while it will note unanswered questions, it does not seek to offer answers to them.

1. See *Technology and Innovation*, MPAA.ORG, <http://www.mpaa.org/technology-and-innovation/> (last visited Dec. 1, 2014).

2. See *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014) (describing Aereo's business model and functionality).

3. Aereokiller was a competitor to Aereo that adopted the same technological construct and used similar names to provide essentially the same service. Aereo's proprietor, Barry Diller, sued Aereokiller's owner, Barry Driller Content Systems, alleging, among other claims, trademark infringement and "[s]eeking to unfairly capitalize on the success [of Diller's business]... ." *Diller v. Barry Driller, Inc.*, No. CV 12-7200 ABC EX, 2012 WL 4044732, at *2 (C.D. Cal. Sept. 10, 2012). The court issued a preliminary injunction against Aereokiller, finding that it had "intended to capitalize on Plaintiff's name and involvement with Defendants' competitor Aereo." *Id.* at *7. Aereokiller subsequently changed its name to "FilmOnX." *Id.* at *2. For the balance of this comment, I will refer primarily to "Aereo," although the operation of each system, and therefore presumably the legal liability, are essentially identical.

4. *Aereo*, 134 S. Ct. at 2503.

5. *Id.*

6. *Id.* at 2511 (Scalia, J., dissenting).

I. BACKGROUND

The Golden Age of Television of the 1950s must surely seem like the Dark Ages to modern television audiences. Back then, there existed a scant three broadcast networks,⁷ supplemented by a handful of low-power local stations, if at all: no ability to record or rewind live broadcasts; no ‘on demand’ content; no ability to purchase television episodes or movies on videotape, DVD, or download; and reception that depended on each home’s location, antenna positioning, weather, and other factors.

Some towns, isolated from broadcast stations by distance from a broadcast market and/or local topography, found broadcast television signals difficult or impossible to receive.⁸ To rectify that shortcoming, in many communities, a single large tower was erected to receive broadcast television signals and transmit them over cables to nearby residences.⁹ This “community access television” or “CATV” was the early forerunner of modern cable systems.¹⁰

A. Fortnightly *and* Teleprompter

These CATV systems posed an interesting copyright question: did they publicly perform the television shows they enabled people to view, thus implicating the Copyright Act—which secures to copyright owners the exclusive right to publicly perform their original creative works? In 1968, the Supreme Court addressed this question when it decided *Fortnightly Corp. v. United Artists Television, Inc.*¹¹ The defendant/appellant, Fortnightly Corporation, operated a CATV system that made available copyrighted works to subscribers without licenses from the copyright holders.¹² The plaintiff/appellee, United Artists Television, Inc., was the copyright holder of several of the works that Fortnightly transmitted.

United Artists’ perspective was straightforward: the CATV operator, it argued, was performing its programming—embodied in broadcast signals—without permission. But Fortnightly’s perspective was equally straightforward: it claimed it did not “perform” anything, but merely passed along signals of television performances to its subscribers.

To determine whether Fortnightly “performed” the works it broadcasted, the Court turned to the Copyright Act in force at that time—the

7. See JOSEPH STRAUBHAAR, ROBERT LAROSE & LUCINDA DAVENPORT, *MEDIA NOW: UNDERSTANDING MEDIA, CULTURE, AND TECHNOLOGY* 248 (8th ed. 2013).

8. *United States v. Sw. Cable Co.*, 392 U.S. 157, 163–64 (1968).

9. *Id.*

10. See Daniel J. Smith, *Stay the Course: A History of the FCC’s Response to Change in the Cable Industry*, 13 J.L. & POL. 715, 725 (1997).

11. 392 U.S. 390 (1968).

12. *Id.* at 392.

1909 Act, as amended¹³—which provided two relevant exclusive rights: “to play or perform [a nondramatic literary work] . . . in public for profit”¹⁴ and “to perform . . . publicly if it be a drama”¹⁵ The Court considered that broadcasters make active choices in selecting and procuring programming and that, as such, broadcasters “perform” works within the meaning of the Act.¹⁶ Viewers, however, are more like the members of a live audience who receive the performance and thus do not “perform” it themselves, the Court reasoned.¹⁷

Having established that dividing line, the Court had to determine the side on which CATV fell. Because the Court considered CATV to be a passive retransmitter, compared to the affirmative programming selections made by broadcasters, it rejected the plaintiff’s views, essentially finding CATV services amounted to no more than long cables:

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be ‘performing’ the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.¹⁸

A similar case made its way to the Supreme Court a few years later. In *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,¹⁹ the Court considered whether the public performance analysis under the 1909 Act was any different with regard to a CATV system that facilitated the viewing of television signals so distant that they were not viewable through other antennae in the community.²⁰ The broadcasters and copyright owners argued that because of new developments in CATV, such as the production by CATV systems of their own original programming and their sale of commercial advertising, cable television had crossed the line over to the broadcaster side of the Court’s performance analysis in *Fortnightly*.²¹ Again, the Court was unpersuaded:

13. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, *amended by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at scattered sections of 17 U.S.C.) [hereinafter 1976 Act].

14. Copyright Act of 1909 § 1(c) (repealed 1976).

15. Copyright Act of 1909 § 1(d) (repealed 1976).

16. *Fortnightly*, 392 U.S. at 397-98.

17. *Id.*

18. *Id.* at 400.

19. 415 U.S. 394 (1974).

20. *Id.* at 401.

21. *Id.* at 403-04.

The copyright significance of each of these functions—program origination, sale of commercials, and interconnection—suffers from the same logical flaw: in none of these operations is there any nexus with the defendants’ reception and rechanneling of the broadcasters’ copyrighted materials. As the Court of Appeals observed with respect to program origination, “[e]ven though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a ‘performer’ of the broadcast programming when it offers both origination and reception services, but remains a nonperformer when it offers only the latter.” Similarly, none of the programs accompanying advertisements sold by CATV or carried via an interconnection arrangement among CATV systems involved material copyrighted by the petitioners.²²

While its copyright analysis had driven it to a result contrary to the desires and views of the broadcasters and copyright owners, the Court was not ignorant to the commercial effect of its rulings. However, it was unwilling to impose its own policy judgments on such questions: “Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.”²³

B. 1976 Act

Congress did indeed take heed of these cases, and it did not like what it saw. As fate would have it, the long process of comprehensively revising the Copyright Act was at hand, providing an opportune vehicle to address these issues.

The Copyright Act of 1976, which remains in force as amended, carried forward the exclusive right of public performance “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly”²⁴

But unlike the 1909 Act, the new law provided a statutory definition of the pivotal terms. To “perform” a works means “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”²⁵

22. *Id.* at 405 (alteration in original) (citation omitted).

23. *Id.* at 414.

24. 17 U.S.C. § 106(4) (2012).

25. 17 U.S.C. § 101 (2012).

This is a broad definition, encompassing even the viewers of television shows. The legislative history confirms this intent, as well as a limiting element:

[A]ny individual is performing whenever he or she . . . communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to occur would itself not be actionable as an infringement unless it were done “publicly”²⁶

And to perform or display a work “publicly” means:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁷

The second clause of the definition of “publicly,” known as the “Transmit Clause,” makes clear that not only broadcasters, but also CATV systems’ activities implicate the public performance right. Motivated by *Fortnightly* and *Teleprompter*, and a subsequent Supreme Court decision extending the reasoning in these decisions to the public performance of music in a fast-food restaurant,²⁸ Congress wrote specifically that “[t]his basis for the decision is completely overturned by the present bill”²⁹

And so the law stood for decades. Indeed, the above recitation is so well accepted that it essentially mirrors the review the Supreme Court provided in the *Aereo* decision.³⁰ But unlike this comment, the Court’s

26. H.R. REP. NO. 94-1476, at 63 (1976).

27. 17 U.S.C. § 101 (2012).

28. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162–63 (1975).

29. H.R. REP. NO. 94-1476, at 34. It is worth noting that at the same time Congress made clear that cable systems are engaged in public performances, it also provided a statutory license for the retransmission, under certain circumstances, of broadcast signals. *See* 17 U.S.C. § 111 (2012).

30. *See* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2502–06 (2014).

recitation stops short of mentioning the case that provides the bridge between the 1976 Act and the engineering of the Aereo service: *Cablevision*.³¹

C. Cablevision

Cablevision is a traditional cable service that conceived of a new, cloud-style approach to digital video recorders.³² Instead of customers recording chosen programming on a set-top digital storage device, the programming would be stored on and replayed from Cablevision's servers at a Cablevision facility.³³ This "remote DVR" service would appear to the customer to function the same way as a set-top DVR, allowing them to record chosen programs and watch that recording at a later time. Of course, the overwhelming majority of television programming is copyrighted, but Cablevision did not obtain any licenses for this service.³⁴

While technological efficiency might have dictated that Cablevision store a single copy of all programs on its servers from which viewers could choose to watch, they constructed the system differently. Instead, Cablevision's service recorded programming multiple times, as specifically indicated by its various customers. And those customers would then later view the particular copy they had indicated (by pressing remote control buttons) they wanted to record.³⁵

The litigation against Cablevision arising from this service involved several copyright issues, but the one relevant here is the claim that Cablevision's playback of the recorded programming infringed the public performance right. The plaintiff copyright owners relied on the Transmit Clause to argue that the playback of the copies housed on Cablevision's remote servers constituted a transmission of a performance to the public.

It was undisputed that Cablevision transmitted the performance. But Cablevision argued that the transmission, and thus the performance, was not available "to the public" because each particular copy, and the playback of that copy, was available only to the customer who had it recorded. Thus, each transmission was unique to the corresponding customer; the public was not "capable of receiving" it.³⁶

The Second Circuit agreed with Cablevision, based on a statutory analysis of the transmit clause that focused on whether the performance of the *copy* was available to the public, rejecting the plaintiffs' arguments that

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

32. *Id.* at 125.

33. *Id.*

34. *Id.* at 124.

35. *Id.* at 125.

36. *Cablevision*, 536 F.3d at 135.

the proper reading of the statute turns on whether the performance of the *work* is available to the public.³⁷

II. AEREO

Thus the scene was set for the emergence of the Aereo service. Aereo is an Internet-based service that allows subscribers to view broadcast television over the Internet. It has no licenses for these transmissions.

A. *Operational facts*

Aereo's service obtains broadcast television signals through the use of thousands of antennae, which are notable for their small size (comparable to a dime).³⁸ When a subscriber logs on and selects programming in one of the cities in which Aereo operates, a particular antenna is dedicated to that subscriber.³⁹ The programming is received by means of the antenna, buffered in a dedicated copy on Aereo's server, and transmitted to that subscriber moments later.⁴⁰

Aereo's decision to engineer its system this way—and, it hoped, avoid implicating the public performance right by relying on individual, dedicated copies like the RS-DVR at issue in *Cablevision*—was not lost on the Court. Chief Justice Roberts, in particular, pursued this in his questioning of Aereo's counsel at oral argument:

CHIEF JUSTICE ROBERTS: Just to make sure I've got it – there's no reason it's a user-specific copy, is it? They're making 10,000 copies. It'd be much easier for you if you'd just have to make one copy and everybody could get a copy.

MR. FREDERICK: Well, that's where the issue about replicating what happens in the home matters, Mr. Chief Justice, because if I'm in my home and I start the program two minutes in, using Aereo's technology, I missed the first two minutes, I never get to watch it. It happens to be when I push the button to initiate the copy, just like if I'm at home watching on a DVR, the same principle. And so that copy will always be different because I have control over it versus –

CHIEF JUSTICE ROBERTS: Surely, you can make a program where you have just one copy and starting [sic] it at different times. You don't need every viewer to have his own copy.

37. *Id.* at 135–39.

38. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

39. *Id.*

40. *Id.*

MR. FREDERICK: But that is – that is the key distinction between video on demand and the service that Aereo provides, the kinds of equipment and technology that Aereo provides. We don't have a brief to defend the master copy because in the master copy situation, that is indisputably public because there is no right to exclude anyone else. With Aereo's technology, if I'm making a copy using Aereo's system, no one else can look at it. Even if you happen to have watched the same program, you can't watch my copy, I can't download it –

CHIEF JUSTICE ROBERTS: That's just saying your copy is different from my copy.

MR. FREDERICK: Correct.

CHIEF JUSTICE ROBERTS: But that's the reason we call them copies, because they're the same.

CHIEF JUSTICE ROBERTS: All I'm trying to get at, and I'm not saying its outcome determinative or necessarily bad, I'm just saying your technological model is based solely on circumventing legal prohibitions that you don't want to comply with, which is fine. I mean, that's – you know, lawyers do that. But I'm just wondering why –

CHIEF JUSTICE ROBERTS: -- whether you can give me any technological reason, apart from compliance with a particular legal issue, for your technological mind.⁴¹

Counsel for Aereo avoided an admission that the service's inefficient construction was solely for legal reasons.⁴² Indeed, several lower courts did not seem troubled by that possibility.⁴³ But, as discussed below, the Supreme Court seemed to reach that conclusion nonetheless.⁴⁴

B. Lower Court Litigation

The litigation battle over Aereo ranged far and wide. Over the course of less than two years, numerous copyright infringement lawsuits were filed

41. Transcript of Oral Argument at 40–42, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-461_o7jp.pdf.

42. *Id.*

43. See discussion *infra* Part II.B.

44. See discussion *infra* Part III.A.

against Aereo and its competitor FilmOn, resulting in decisions across five federal judicial circuits.⁴⁵

The first case was filed on March 1, 2012 in the Southern District of New York.⁴⁶ The decision was issued on July 11, 2012, applying the *Cablevision* precedent and ruling in favor of Aereo.⁴⁷ The plaintiffs appealed to the Second Circuit, but fared no better—this was, after all, the same circuit that had decided *Cablevision*.⁴⁸

On August 12, 2012, suit was filed against FilmOn in the Central District of California. The Central District rejected the *Cablevision* court's focus on the transmission and performance of a *copy* in favor of an analysis that considers the transmission and performance of a *work*.⁴⁹ Analyzing the facts as applied to that reading of the law, the District Court found a likelihood of success on the merits and ordered an injunction against FilmOn applicable throughout the Ninth Circuit.⁵⁰

The third case was filed on May 23, 2013, against FilmOn in the District of Columbia. The District Court was presented with a choice between following the reasoning of the Second or of the California District Court. It chose the latter, ruling that FilmOn infringed the public performance right and granting an injunction that applied nationwide, except for the Second Circuit.⁵¹

On July 9, 2013, suit was filed against Aereo in Massachusetts. That court followed the *Cablevision* precedent of its neighboring circuit and denied the plaintiff's motion for a preliminary injunction.⁵²

The fifth case was filed against Aereo on October 7, 2013 in Utah. That court followed the precedent of its neighboring circuit, agreeing with the California court—along with the D.C. court and the dissent in the Southern District of New York—and enjoining the service throughout the Tenth Circuit.⁵³

Against the backdrop of this dizzying array of litigation and split decisions, and given the importance of the issues at stake, it is not surprising

45. See *infra* notes 46–53 and accompanying text (discussing cases from the Second, Ninth, District of Columbia, First, and Tenth Circuits).

46. See Complaint at 1, *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12 Civ. 1540).

47. *Aereo*, 874 F. Supp. 2d at 382–96 (denying plaintiffs' Motion for a Preliminary Injunction) *rev'd and remanded*, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

48. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013), *rev'd and remanded sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

49. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1143–46 (C.D. Cal. 2012).

50. *Id.* at 1148.

51. *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013).

52. *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32 (D. Mass. 2013).

53. *Cmty. Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1199 (D. Utah 2014).

that the Supreme Court took an interest. Certiorari was granted in the New York case on January 10, 2014.⁵⁴

III. SUPREME COURT DECISION

On June 25, 2014, the Supreme Court ruled six-to-three that Aereo's service infringes the public performance right and remanded the case back to the Second Circuit.⁵⁵ The majority opinion was written by Justice Breyer, which took some by surprise as his votes on the Court have tended towards narrower protection of copyright.⁵⁶ Justice Scalia wrote the dissenting opinion, joined by Justices Thomas and Alito.

A. Majority opinion

In each of the lower court decisions, the courts explicitly grappled with the competing interpretations of the Transmit Clause: the *Cablevision* case from the Second Circuit that the district court in Massachusetts also followed, and the view of the broadcasters and copyright owner plaintiffs that federal courts accepted in California, Washington, D.C., and Utah. While the same question was presented to the Supreme Court, it is noteworthy that Justice Breyer's majority opinion never mentions the *Cablevision* case by name.⁵⁷

This is, perhaps, further evidence that interest in the *Aereo* case, like many Supreme Court decisions, is as much about the potentially broad implications of the ruling as it is about the facts before the Court. Indeed, numerous amici briefs addressed the implications of the case for the legality of cloud computing models.⁵⁸ The majority opinion refers explicitly to this issue as well, as discussed below.

1. If it walks like a duck and quacks like a duck...

In the tradition of *Fortnightly* and *Teleprompter*,⁵⁹ the Court's ruling relied as much on analogy as it did on legal analysis. Starting from the

54. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) (granting petition for certiorari) [hereinafter *Aereo petition for certiorari*].

55. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014).

56. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 949 (2005) (Breyer, J., concurring); *Golan v. Holder*, 132 S. Ct. 873, 899 (2012) (Breyer, J., dissenting).

57. The *Aereo* majority cites the *Cablevision* opinion only once, indirectly, while reviewing the procedural history of the *Aereo* litigation. *See Aereo*, 134 S. Ct. at 2504.

58. *See, e.g.*, Brief for BSA | The Software Alliance as Amicus Curiae in Support of Neither Party, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2014 WL 844499.

59. *See supra* notes 11–23 and accompanying text.

undisputed fact that Congress in the 1976 Act intended to bring CATV and cable systems within the public performance right, the Court considered whether Aereo's service is sufficiently similar to those services that it must also implicate the public performance right.

a. *Does Aereo "perform"?*

The Court noted the similar functions of CATV and Aereo to use technology outside of the home to provide television broadcast signals to additional viewers, concluding that "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach."⁶⁰ It was not persuaded of the significance of the distinction that while CATV services transmitted constantly,⁶¹ Aereo only transmits on demand, an attribute that Aereo (and the dissent) likened to a copy shop that allows customers to copy only what they select:

But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."⁶²

Having determined that Aereo performs the works it provides its subscribers, the Court turned to whether those performances are "public."

b. *Is Aereo's performance "public"?*

Aereo argued to the Court, as it did in the various lower courts, that because each of its performances is dedicated to a particular subscriber, no performance its service provides is available to the public.⁶³ Again, the Court analogized Aereo to CATV and cable systems in light of the congressional intent underlying the 1976 Act:

In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform "publicly." Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They

60. *Aereo*, 134 S. Ct. at 2506.

61. *Id.* at 2507.

62. *Id.* at 2507. The Court did acknowledge that, in other cases, the particulars of equipment and selection of material could bear on copyright liability. *Id.*

63. *Id.* at 2507-08.

do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.⁶⁴

Regardless of what the proper interpretation of the Transmit Clause is, the Court scarcely could be clearer that it is unwilling to allow clever collaboration between lawyers and engineers to defeat the unambiguous legislative intent of the Copyright Act.

2. Clouded *Cablevision*

What remains of the public performance aspect of the *Cablevision* decision? The Court never even mentions that case by name,⁶⁵ much less explicitly overrules any aspect of it. But the Court dismisses as irrelevant the operational technology that drove the Second Circuit's analysis and conclusion.

The closest the Supreme Court comes to saying the Second Circuit's interpretation of the statute is wrong is a passage concerning the interpretive question of whether the Transmit Clause looks to performances of *copies* or performances of *works*:

[W]hether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.⁶⁶

It is difficult to see what is left of the Second Circuit's interpretation of the Transmit Clause in *Cablevision* in light of this holding by the Supreme Court. But, as noted below, the Court did not assert it would have reached a different result in that case.

64. *Id.* at 2508–09.

65. *See supra* note 57.

66. *Id.* at 2509.

The Court was clearly mindful of the implications beyond the facts of this case; almost immediately after making this clear statement, it hemmed it in. First, the Court noted that its decision is rooted in the history of CATV and cable systems and the adoption of the Transmit Clause, and may not determine whether other types of providers in other contexts publicly perform works.⁶⁷ The Court mentioned whether the user is paying for “something other than the transmission of copyrighted works, such as the remote storage of content” as a potentially distinguishing factor.⁶⁸ The Court also left open the application of fair use,⁶⁹ noting that “[w]e have said that [our holding in this case] does not extend to those who act as owners or possessors of the relevant product.”⁷⁰

In sum, the Court articulated the limits of its holding (and disclaimed reversing the result in *Cablevision*) with reference and deference to Congress:

We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that “[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.”⁷¹

There is much room for further consideration and interpretation in this area.

B. Dissent

The dissent concludes that Aereo does not perform works and is dismissive of the majority’s analysis-by-analogy approach.⁷²

Justice Scalia wrote that, in order to directly infringe a copyright, the defendant must have engaged in some volitional act that implicates the rights of copyright owners, beyond an automated function initiated by a customer.⁷³ Applying this rule to the facts at bar, the dissent concludes that because Aereo does not transmit anything unless and until a subscriber selects a particular program, it is the customer that has engaged in the volitional act,

67. *Id.* at 2510.

68. *Id.* at 2511 (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 31, *Aereo*, 134 S. Ct. 2498 (No. 13-461) 2014 WL 828079 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984))).

69. *Id.* at 2511.

70. *Id.* at 2510.

71. *Id.* at 2511 (alterations in original) (citing Brief for the United States, *supra* note 68, at 34).

72. *Id.* at 2512 (Scalia, J., dissenting).

73. *Id.* at 2513–17 (Scalia, J., dissenting).

not Aereo.⁷⁴ “In sum,” the dissent explains, “Aereo does not ‘perform’ for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, it cannot be held directly liable”⁷⁵

The dissent dismisses the majority’s analogy likening Aereo to CATV and cable systems, finding it built on what it describes as “the shakiest of foundations” of legislative history.⁷⁶ Instead, the dissent sees importance in the technological distinctions that cable and CATV are constantly transmitting programming—unlike Aereo—and that Aereo, unlike the CATV system in *Teleprompter*, does not import distant signals, create its own programming, or sell advertising.⁷⁷

Nonetheless, Aereo did not seem to generate much more sympathy with the dissent than it did with the majority. As Justice Scalia wrote in his dissent, “I share the Court’s evident feeling that what Aereo is doing (or enabling to be done) to the Network’s copyrighted programming ought not to be allowed.”⁷⁸ Accordingly, the dissent offers the possibility that Aereo could be infringing by virtue of secondary liability related to a public performance, or directly or secondarily liable for the reproductions created on its system.⁷⁹

But these alternative bases of potential liability are likely of cold comfort to copyright owners. It is well established that secondary liability may arise only where there is underlying direct infringement.⁸⁰ And if the dissent believes that it is Aereo’s subscribers who perform the works, it is difficult to see how that could result in a public performance from which Aereo’s secondary liability could arise.⁸¹ With regard to the reproduction of televised works on Aereo’s remote servers, the same approach to volition from which the dissent concluded that Aereo does not perform seems likely to lead those Justices to conclude it does not make the copy, either.⁸² And unless the dissent believes that the Supreme Court’s *Sony* decision, which established that home recording of television programming for purposes of timeshifting constitutes fair use, would not apply here,⁸³ there is again an

74. *Id.* at 2514 (Scalia, J., dissenting).

75. *Id.* (Scalia, J., dissenting).

76. *Id.* at 2515 (Scalia, J., dissenting).

77. *Id.* at 2515–16 (Scalia, J., dissenting).

78. *Id.* at 2517 (Scalia, J., dissenting).

79. *Id.* (Scalia, J., dissenting).

80. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

81. One could certainly imagine that an Aereo subscriber might allow a wide enough group to view the programming he received through the Aereo service that the performance would be public. But tying that back to Aereo through any of the doctrines of secondary liability is far less plausible.

82. *See Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130–33 (2d Cir. 2008).

83. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447–55 (1984).

apparent absence of underlying direct infringement to support a finding of secondary liability.

Perhaps recognizing the weaknesses of its own proposed alternatives, the dissent notes that despite its willingness to allow Aereo to prevail through a “‘loophole’ in the law,” it is Congress’ responsibility to close it.⁸⁴

IV. CONCLUSION

The Supreme Court’s decision in *American Broadcasting Cos. v. Aereo, Inc.* decided one dispute with absolute clarity: Aereo publicly performs copyrighted works. The consequences for Aereo have been dire. With no apparent exception in the Copyright Act to excuse the infringement, and with the Copyright Office having rejected Aereo’s claim of eligibility for the section 111 statutory license for cable systems,⁸⁵ Aereo has filed for Chapter 11 bankruptcy protection and expects to pay millions of dollars in damages to copyright owners.⁸⁶ Proceedings in the lower courts are ongoing at the time of this publication.⁸⁷

As for the ongoing questions implicated by the Court and the dissent, such as the application of the public performance right to cloud computing and other contexts and the relevance of volitional conduct, there is something for everyone to cite to as the consideration of those matters continues.

84. *Aereo*, 134 S. Ct. at 2517 (Scalia, J., dissenting).

85. 17 U.S.C. § 111 (2012); see also *US Copyright Office Says Aereo Not a Cable Company Under Terms of Copyright Act*, CNBC (July 17, 2014, 9:51 AM), <http://www.cnbc.com/id/101838646#>.

86. See Joshua Brustein, *Aereo Files for Bankruptcy and (Almost) Declares Defeat*, BUSINESSWEEK (Nov. 21, 2014), <http://www.businessweek.com/articles/2014-11-21/aereos-files-for-bankruptcy-and-almost-declares-defeat>.

87. *Id.*