Aereo's Errors

Ira Steven Nathenson, St. Thomas University School of Law
AEREO'S ERRORS

Ira Steven Nathenson*

Abstract: This article scrutinizes the many troubling errors made by the United States Supreme Court in its decision in American Broadcasting Companies Inc v Aereo Inc. Aereo’s streaming television service allowed subscribers to watch broadcast television on a computer, tablet, or smartphone without requiring them to be directly connected to cable, satellite, or a local antenna. Aereo’s system was designed to comply with existing copyright law by using thousands of antennas, each of which was designated for only one subscriber at a time. Aereo was sued for copyright infringement by a number of leading television broadcasters. The United States Supreme Court, over a heated Scalia dissent, concluded that Aereo was “highly similar” to a cable company, and that it therefore made “public performances” falling within the plaintiffs’ exclusive rights. Because the Aereo decision was unnecessary, unsound, and unwise, this article proposes steps that should be taken in order to avoid frustrating the development of beneficial “cloud” computing services.

Keywords: Copyright; intellectual property; infringement; public performance; transmission; technology; cloud computing; television; broadcast; streaming; internet; certiorari; United States Supreme Court.

I. Introduction

For more than 300 years, copyright and technology have engaged in a fencing match, a never-ending “thrust and parry”, each challenging and changing the other.1 The Statute of Anne, passed in 1710,2 was the delayed result of the 15th-century printing press.3 Throughout copyright’s history, technological innovations such as photography, player pianos, and sound recordings have prompted changes to copyright at an ever-increasing pace.4 More recently, law has quickened its reaction

* Professor of Law, St Thomas University School of Law. The author thanks Professors Anton Cooray and Siegfried Wiessner for their assistance and support, and Alejandro Fernandez-Lovo for generously sharing thoughts regarding Aereo and cloud computing.


2 Act for the Encouragement of Learning (Statute of Anne) 1710 (8 Ann c 19).

3 “To deal with the monk-copyist, we need no intellectual property right because physical control of the manuscript is enough. To deal with the Gutenberg press, we need the Statute of Anne”. James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66 Law and Contemporary Problems 33, 42.

to technology. In the 1970s, the United States Supreme Court tried to address fair use and photocopying, but split 4-4. In the 1980s, the Court again broached technology after Sony’s “Betamax” videocassette recorder (VCR) triggered suit. More recently, the Court held that Grokster’s peer-to-peer file-sharing technology may be unlawful “inducement” of infringement. It would seem that as the pace of new technology quickens, so do legal responses.

A contemporary example of a quick response to new technology may be found in the Supreme Court’s decision in American Broadcasting Companies Inc v Aereo Inc. Aereo allowed subscribers to watch over-the-air television broadcasts on devices such as smartphones, tablets, or computers. To comply with existing appellate case law, Aereo designed its service so that each subscriber’s television feed was tied to a separate dime-sized antenna and separately allocated hard drive storage space. Aereo designed its service in this rather strange way in order to provide individual, user-initiated transmissions in order to avoid liability under applicable copyright law. Unsurprisingly, major broadcasters and copyright owners filed several copyright suits against Aereo on the same day in federal court in New York. Aereo later countered that “designing technologies to comply with the copyright laws is precisely what companies should do”.

5 Williams & Wilkins Co v United States 420 US 376 (1975), affirming 487 F 2d 1345 (Ct Cl 1973).
9 134 S Ct 2498 (2014).
10 Complaint in American Broadcasting Companies Inc v Aereo Inc, No 12 Civ 1540 (SDNY filed 1 Mar 2012) (suit by ABC, CBS, NBC, Disney, and others); Complaint in WNET v Aereo Inc, No 12 Civ 1543 (SDNY filed 1 Mar 2012) (suit by Twentieth Century Fox Film Corp, Univision, PBS, and others). The two suits were heard together by the lower courts and by the Supreme Court.
12 The image was used by Aereo in its counterclaims to the lawsuits filed against it in this case. Counterclaim in WNET v Aereo Inc, No 12 Civ 1543, [19] (SDNY filed 9 April 2012); Counterclaim to Amended Complaint in American Broadcasting Companies Inc v Aereo Inc, No 12 Civ 1540 [20] (SDNY filed 31 October 2013).
Thus, was Aereo’s service a lawful loophole or an unlawful infringement? The United States Supreme Court ruled against Aereo, finding its near real-time “watch” feature to be “highly similar to” early cable television systems.\textsuperscript{13} According to Justice Breyer’s majority opinion, Congress had amended the law to bring early cable systems within copyright, and Aereo’s internet retransmissions were sufficiently similar to such cable systems that Aereo had engaged in public performances of the plaintiffs’ copyrighted works.\textsuperscript{14} A spirited Scalia dissent chided the majority for a decision that lacked “criteria for determining when its cable-TV-lookalike rule applies”.\textsuperscript{15}

The “public performance” issue in Aereo is important. If Aereo’s internet streaming of free broadcast television constitutes a potentially infringing public performance, what about other internet-based technologies used for streaming audiovisual works or for displaying internet content? More pertinently, what about cloud computing services such as DropBox, Google Drive, and other yet-to-be-invented technologies? The uncertainty generated by the Court’s \textit{ad hoc} decision may lead to a significant increase in copyright lawsuits and chill the development of beneficial technologies.

Section II of this article provides background on relevant technologies, discussing the explosion of ways for viewers to watch television, including Aereo’s internet streaming. It also briefly discusses cloud-based technology. Section III provides background on the public performance right that was at dispute in Aereo, looking to early cases that led to changes included in the 1976 Copyright Act, as well as subsequent cases leading up to Aereo. Section IV turns to the Aereo lawsuit in detail, looking at the complaints and lower-court decisions. It pays particular attention to the Supreme Court oral arguments, Justice Breyer’s opinion, and Justice Scalia’s dissent. Section V casts a critical eye towards Aereo, concluding that the decision was unnecessary, unsound, and unwise. The article closes by suggesting some modest ways to reverse or limit Aereo’s impact on the future development of important technologies.

\section*{II. Internet Television and Cloud Technology}

This section provides background on the technology relevant to Aereo. It first discusses the development of recent television technologies, and then turns to Aereo’s service. It also provides some basic explanation of cloud technology.

\subsection*{A. A new era for television}

We live in a “New Golden Age” of television, and shows like \textit{Breaking Bad}, \textit{Game of Thrones}, \textit{Orange is the New Black}, \textit{Mad Men}, and \textit{House of Cards} set

\begin{thebibliography}{9}
\bibitem{Aereo} Aereo (n.9), 2511.
\bibitem{Ibid} Ibid.\textsuperscript{14}
\bibitem{Ibid} Ibid., 2516 (Scalia J, dissenting).\textsuperscript{15}
\end{thebibliography}
new high marks for quality.\textsuperscript{16} Also changing is the technology used by viewers to watch their favorite shows. For decades, viewers were tethered to their televisions and to network schedules, forced to watch their favorite shows at home and only while the shows aired. The mass-market introduction of the VCR in the 1970s and 1980s changed that, permitting time-shifting.\textsuperscript{17} Similar time-shifting technologies emerged later, such as TiVo and digital video recorders (DVRs), permitting the recording of programming for later viewing. Modern devices use digital media such as hard drives rather than videotape.

Content providers are also innovating. For example, major owners of programming provide access to copyrighted content through broadcast network websites (such as CBS.COM), streaming-video services (such as Hulu), television-connected devices (such as Roku), apps for smartphones and tablets (such as those for CBS and Hulu), and downloads (such as the iTunes store). Some networks, such as CBS and Comedy Central, also maintain channels on video sites such as YouTube.\textsuperscript{18}

Even unauthorized video uploads may be of interest to television networks. One source reports that “more than one-third of the two billion views of YouTube videos with ads each week are ... uploaded without the copyright owner’s permission but left up by the owner’s choice”.\textsuperscript{19} Owners of television shows and movies also pay attention to illegal downloads, with Time Warner CEO Jeff Bewkes “stating that piracy resulted in more subscriptions for his company and that receiving the title of ‘most-pirated’ was ‘better than an Emmy’”.\textsuperscript{20}

Such innovations — authorized, tolerated, or illegal\textsuperscript{21} — are leading to an explosion in the ways viewers can access television programming and other video content. What cannot be doubted is that viewers increasingly want to watch television using internet-connected devices. Although services such as Hulu and Netflix permit time-, space-, and device-shifted offerings of selected movies and television shows, they usually do not offer live television. Consumers, however,


\textsuperscript{17} Justice Stevens defined time-shifting as “the practice of recording a program to view it once at a later time, and thereafter erasing it”. \textit{Sony} (n.6), 423.

\textsuperscript{18} CBS, YouTube channel, available at <http://www.youtube.com/user/cbs> (accessed 31 September 2014); Comedy Central, YouTube channel, available at <http://www.youtube.com/user/comedycentral> (accessed 31 September 2014).


want to be able to watch live television without being tethered to a sofa or easy chair. Thus, Aereo’s service filled a significant void in the television-viewing market.

B. Aereo’s service

For those wanting to “watch live broadcast television at home or on the go”, Aereo offered subscribers the ability to watch television broadcasts without using cable, satellite, or even a television.22 With Aereo, subscribers could use internet-connected devices such as PCs or Macs, tablets and smartphones running iOS or Android, and TV-connected devices such as Apple TV, Roku, or Google Chromecast.23 Aereo also offered users a “remote, cloud-based DVR to set and watch recordings”.24 The services cost $8 per month for the ability to pause and rewind live television and to store up to 20 hours of video on the cloud-based DVR.25

How did the technology work? Aereo used a small antenna, “[s]o small it can fit on the tip of your finger”.26 Through the service, subscribers could “watch and record local broadcast TV channels that are available in the approved market area, including all the major networks and a number of local stations that broadcast live 24 hours a day”.27 This distinguishes Aereo from services such as HBO Go, which permit subscribers to watch a particular network; Aereo, in contrast, retransmitted television that was broadcast live and freely over public airwaves. For example, channels covered in the New York City area included local affiliates of CBS, NBC, Fox, ABC, CW, PBS, and more.28

Aereo’s service included both “watch” and “record” features.29 To “watch” live broadcast programming, a subscriber would use the Aereo Guide to instruct an “assigned antenna housed at the Aereo data center to tune to the channel the show is on and pass the digital broadcast stream to [the subscriber’s] remote DVR”.30 In turn, the DVR “records the program as you watch it, giving you the ability

---

29 Aereo (n.9), 2515 (Scalia J, dissenting).
to pause or rewind the live stream”. Once a subscriber finishes watching live television, the recorded files are removed from the DVR.

The Supreme Court divvied up the “watch” function into four steps:

1. a subscriber instructs Aereo the show she wants to see;
2. an Aereo server selects an individual antenna, one of thousands in a warehouse, and a transcoder translates the broadcast into digital data for the internet;
3. a server saves the data to space in a “subscriber-specific folder” on Aereo’s hard-drive storage; and
4. after “several seconds of programming have been saved”, Aereo streams the saved data over the internet to the subscriber.

In Aereo, only the “watch” feature was at issue. Not at issue was Aereo’s DVR-like “record” feature, which allowed subscribers to record from the channel guide or while watching a show. With the “record” feature, subscribers could record a program once, or schedule all episodes of a series.

C. Cloud computing

Aereo’s service is an example of “cloud computing”. One source defines cloud computing as “the ability to run applications and store data on a service provider’s computers over the Internet, rather than on a person’s desktop computer”. In contrast to running software stored on one’s own computer such as a local installation of Microsoft Word, the cloud permits one to run software or to access files hosted elsewhere, such as Google Documents. With cloud computing, one runs remote software, or stores, accesses, or synchronizes remote data over the internet, and “an individual user ... may never have any idea what kind of massive data-processing is happening on the other end”. Cloud computing has become ubiquitous, and many people use cloud technology daily without realizing it.

31 Ibid.
32 Ibid.
33 Aereo (n.9), 2503.
35 Ibid.
37 Ibid., 1199–1200.
Examples of cloud storage would be Google Drive and DropBox; cloud services include running online versions of Microsoft Office 365.\textsuperscript{39}

Cloud computing has its critics. Some devices, such as the Google Chromebook, may not have complete functionality unless they are connected to the live internet to access cloud storage and services.\textsuperscript{40} Cloud storage may not be as cheap or as fast as local storage.\textsuperscript{41} Crashes and service outages in the cloud may have greater potential for harm than a localized outage because disruption to a cloud service such as Gmail may affect millions of people.

Aereo is an example of cloud computing. Subscribers access its services using a computer or internet-connected device. Interacting with Aereo’s servers, subscribers view television feeds displaying data that is stored on Aereo’s hard drives. Thus, Aereo is an example of cloud storage as well as cloud services. Because Aereo operates through the cloud, a court decision deeming it unlawful may have broader implications for a new and important technology.

### III. The “Public Performance” Right

Section III first examines significant cases under the 1909 Copyright Act, and then notes how those cases led to major changes in the 1976 Act. Finally, it considers a number of post-1976, pre-Aereo cases construing the “public performance” right.

#### A. Before 1976

Ironically, much of Justice Breyer’s reasoning in \textit{Aereo} ties directly into two older cases that construed the performance right under the 1909 Copyright Act. In \textit{Fortnightly Corp v United Artists Television Inc},\textsuperscript{42} United Artists sued a community antenna television (CATV) system for copyright infringement.\textsuperscript{43} The relevant areas in West Virginia did not have local broadcasting stations until 1957.\textsuperscript{44} Defendant Fortnightly provided what we would today think of as rudimentary cable service that carries only local broadcast television, by erecting antennas, boosting signals, and carrying signals to subscribers.\textsuperscript{45} United Artists sued Fortnightly under the Copyright Act of 1909.\textsuperscript{46} The Supreme Court rejected the claim, concluding that the defendant did not “perform” the plaintiff’s copyrighted works.\textsuperscript{47} The Court took a

\textsuperscript{39} Ibid. Of course, the statement in the text is a bit oversimplified. Cloud storage is itself a service, and cloud services may also use storage (which may be local or cloud-based).

\textsuperscript{40} Ibid.

\textsuperscript{41} Ibid.

\textsuperscript{42} 392 US 390 (1968), superseded by statute, Copyright Act of 1976, Pub L No 94-553, Title I, §101, 90 Stat. 2541.

\textsuperscript{43} Ibid., 393.

\textsuperscript{44} Ibid., 391.

\textsuperscript{45} Ibid., 392.

\textsuperscript{46} Ibid., 393–394.

\textsuperscript{47} Ibid., 402.
functional approach, noting that a CATV broadcast required the combined activity of broadcasters and viewers. Although CATV companies provided an “active” role in making reception possible[,] so do ordinary television sets and antennas. Concluding that the defendant’s function was more akin to a viewer than a broadcaster, the Court held: “Broadcasters perform. Viewers do not perform”.

Another case reached the same outcome on similar facts. In Teleprompter Corp v Columbia Broadcasting System Inc, the CATV system was more advanced, adding original programming, inserting commercials, and providing interconnection with other CATV systems. The Court held that the “reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer”. The Court further noted that broadcast stations benefitted from having a “different and larger viewer market”. Accordingly, the Court rejected fears that the Court’s decision would disrupt established markets, concluding that the dispute “cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived”. Such matters were “best ‘left to Congress’”.

B. 1976 Copyright Act

In the Copyright Act of 1976, Congress overruled Fortnightly and Teleprompter. The House Report accompanying the 1976 Act rejected a “narrow construction” of the performance right in favor of a “broad definition”. Although Congress expanded the scope of the performance right, it also gave cable companies a compulsory license authorizing their activities, so long as cable companies complied with detailed requirements. Amendments in later years addressed business models such as satellite and microwave transmissions. However, no language currently exists in the Copyright Act that would explicitly authorize internet retransmissions of broadcast television.

The core question presented in Aereo was whether Aereo had engaged in direct infringement. A defendant directly infringes copyright when it engages in conduct falling under one or more of the copyright owner’s exclusive rights. Specifically

48 Ibid., 397.
49 Ibid., 399.
50 Ibid., 398, 400–401.
52 Ibid., 403–404.
53 Ibid., 408.
54 Ibid., 412.
55 Ibid., 414.
56 Ibid.
at issue was the s.106(4) right of "public performance". Notably, the public performance right does not extend to every possible kind of work of authorship; instead, the right extends only to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works". This would include a public reading of a book (literary work), a concert performance of a song (musical), a public play (dramatic), and so on. More pertinently for Aereo, it would also include a public showing of a copyrighted television show or movie (motion pictures and audiovisual works). A public performance of any of the protected categories of works will be infringing, unless licensed or falling within a relevant exception such as fair use.

Because television programming is protected by the public performance right, we next turn to the definition of "public performance". First, one must "perform" the work:

"To 'perform' a work 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".

A viewer who watches a television show on an iPad "performs" the work. The viewer renders the audiovisual work (the television show) by using a device (the iPad) to watch moving images and to listen to sound. In Aereo, one of the key questions was whether Aereo also performed the work. However, mere performance of a television show is not enough for direct liability. Instead, the defendant must also perform the programming "publicly". The Copyright Act indicates, "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

61 Ibid., §106(4). The other rights are reproduction, derivation, public distribution, public display, and public performance of sound recordings by way of digital audio transmission. Ibid., §106.
62 Ibid., §106(4). Closely related to the public performance right is the public display right, which protects "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work". Ibid., §106(5). Some types of works are protected under both the performance and display rights, namely literary, musical, dramatic, choreographic, and pantomime works. An example of public performance of a musical work: singing a Beatles song at a concert. An example of public display of the same work: posting the sheet music to the internet.
63 Ibid., §101.

"Audiovisual works’ are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied".
64 Ibid., §§106–107.
65 Ibid., §101.
(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.\textsuperscript{66}

The first clause, the “Public Place” clause, looks to places, requiring the performance to be at a place open to either the public or to a substantial group beyond normal family and friends. Such a place could include a movie theatre, a restaurant, or a stadium. The clause thus looks to a \textit{particular} place and was not at issue in \textit{Aereo}. Performances made using Aereo’s service would be in many \textit{different} places, through many different devices, and to people who would be unaware of one another. From the perspective of the typical Aereo subscriber, the broadcast would typically be private. Most viewers would be alone, or with friends, or with family.\textsuperscript{67}

The definition of performance at issue in \textit{Aereo} was the second clause, the “Transmit Clause”. Although the clause is by no means a model of clarity, it was without a doubt pertinent to resolution of the \textit{Aereo} dispute. Many subscribers used Aereo’s services in different places, whether at home, work, or elsewhere. Due to the “watch” feature’s ability to pause or rewind internet broadcasts, subscribers would also often view near-live streaming at different times.

Additionally, one should note that the Transmit Clause requires that the performance be transmitted or otherwise communicated. The Act says: “[t]o ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent”.\textsuperscript{68} An example of transmitting a performance to the public would be a disc jockey who plays songs over the radio.

Thus, the language of the Copyright Act and the facts of \textit{Aereo} give rise to a number of crucial questions:

1. Were performances made through Aereo’s services?
2. If there were performances, who made them?
3. If Aereo made performances, were they private or public?

With these questions in mind, subsection III.C will address how lower courts interpreted the public performance right prior to \textit{Aereo}. Section IV will turn directly to the \textit{Aereo} decision. Finally, Section V will address \textit{Aereo}’s errors.

\textsuperscript{66} \textit{Ibid}.

\textsuperscript{67} Nonetheless, it is possible that Aereo’s services might have been used to feed television to a stadium or bar. Such a possibility was not relevant to the Court’s decision in \textit{Aereo}.

\textsuperscript{68} 17 USC §101 (2012).
C. After 1976

1. Early Cases

The scope of the public performance right has been litigated in a number of interesting cases. Two classic lawsuits filed by movie studios illustrate some of the key issues. In the first, the Third Circuit held that the public performance right was violated by a video store that permitted customers to view videos in private booths. The Court concluded that the videos had been performed: (1) in a place open to the public because “[a]ny member of the public” could pay a fee to watch a video; and (2) the defendant transmitted performances to booths in the back from video players located at the front of the store. Here, the buttons had been pushed by the defendant, not the viewers.

In another case, the Ninth Circuit found that a hotel did not violate the right when the hotel had rented videodiscs to patrons in its lobby to be watched in the patrons’ rooms. The Public Place clause was not violated: even though the hotel was open to the public, the rooms were privately occupied. The Transmit Clause was not violated either, because the hotel did not “communicate” performances “at all.” As the court held, mere facilitation of an in-room performance was not “otherwise communicat[ing]” a performance.

Although the Supreme Court was bound by neither decision, interesting observations can be drawn from these two cases regarding the Transmit Clause at issue in Aereo. Repeatedly inserting a particular videocassette into a machine and transmitting the signal was enough to constitute a public performance. But renting out a video that someone else would perform in a hotel room was not a public performance. With Aereo’s service, each subscriber had an individual antenna, copy, and transmission. It would appear that the facts of Aereo fall somewhere in the cracks between the two cases.

2. The Volition Requirement

Additional guidance regarding technology providers comes from the Fourth Circuit. In CoStar Group Inc v LoopNet Inc, the Fourth Circuit held that even though copyright is normally a strict liability violation, such “principles were ill-suited

70 Ibid., 156–159.
71 Columbia Pictures Industries Inc v Professional Real Estate Investors Inc 866 F 2d 278, 282 (9th Cir 1989).
72 Ibid., 281.
73 Ibid.
74 Ibid., 282. But see Video Views Inc v Studio 21 Ltd 925 F 2d 1010, 1019–1020 (7th Cir 1991) (rejecting Professional Real Estate Investors Inc, and holding that what matters in video-booth cases is whether the public is “openly invited”).
75 373 F 3d 544 (4th Cir 2004).
Thus, although it is not necessary that a defendant “know that he is infringing”, direct infringement still requires the defendant to have engaged in volitional conduct, i.e., “conduct by a person who causes in some meaningful way an infringement”. But such “volition or causation ... is lacking where a defendant’s system is merely used to use a copy by a third party”. Thus, showing that the defendant owned a machine used by others to copy did not constitute direct infringement. The volition issue is squarely relevant to Aereo as well, since each transmission was instituted at the direction of a subscriber and not Aereo itself.

3. **Cablevision**

In *Cartoon Network LP, LLLP v CSC Holdings Inc (Cablevision)*, the Second Circuit adopted the Fourth Circuit’s volition requirement. In that case, the defendant Cablevision was a cable company that offered a remote DVR service called RS-DVR. Subscribers used it like any DVR: select an item to record and watch it later. But the service was also somewhat like a video on demand (VOD) service in that recorded signals were sent from the cable provider. However, “unlike a VOD service, RS-DVR users can only play content that they previously requested to be recorded”. Thus, subscribers could not backdate a request, so if a recording was started after a show began, those parts would not be recorded. Cablevision placed each separate recording request in hard drive space used only for a specific subscriber.

The plaintiffs alleged direct infringement of the reproduction and public performance rights. Regarding reproduction, the Second Circuit adopted the CoStar volition requirement and noted that only two possible acts could constitute volitional copying: (1) Cablevision providing a system that “exists only to produce a copy”; and (2) a customer ordering the “system to produce a copy of a specific

---

76 Ibid., 557–558 (following Religious Technology Center v Netcom On-Line Communication Services Inc 907 F Supp 1361, 1369–1373 (ND Cal 1995)).
77 Ibid., 549 (emphasis in original).
78 Ibid., 548 (quoting Netcom (n.76), 1370).
79 Ibid., 550. In contrast, Professor Nimmer plausibly argues that the Netcom volitional-conduct rule was superseded by s.512 of the copyright statute, which provide limited immunity from monetary copyright liability under a set of safe harbors; if Nimmer is correct, then the volition requirement would not be a “free-standing feature of copyright law”. 4 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* (2014) §12B.06[B][2][c][i]; see also 17 USC §512 (2012).
80 536 F 3d 121 (2d Cir 2008).
82 Cablevision (n.80), 125.
83 Ibid.
84 Ibid.
85 Ibid., 124.
86 Ibid., 123.
program”.87 Likening the copying to that done by a VCR, only the customer’s activities qualified as volitional conduct.88 Accordingly, Cablevision could not be liable for direct infringement of the reproduction right.89

Regarding public performances, the court turned to the Transmit Clause. Even assuming that Cablevision was making a transmission, held the court, the transmission was not to the public.90 Only one subscriber was able to receive “any given RS-DVR transmission”.91 The lower District Court, in contrast to the Second Circuit, had looked not to the particular transmissions made by Cablevision, but instead, to the programming that had been sent to Cablevision’s subscribers in separate, individually requested transmissions (such as an HBO show).92 The Second Circuit refused to focus on the original performance, concluding that instead, “we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is ‘to the public’”.93 Because the RS-DVR “makes transmissions to one subscriber using a copy made by that subscriber”, the only person able to receive that transmission is that subscriber only.94 Because “the potential audience of a given transmission” was “a single subscriber using a single unique copy produced by that subscriber”, Cablevision did not infringe the right to public performance.95

4. Internet Television Cases

It would appear that the Second Circuit’s 2008 Cablevision decision spurred the creation of new business models that used the internet to transmit programming, leading to further litigation between traditional broadcasters and disruptive innovators.96 Although the Second Circuit’s subsequent 2013 decision in Aereo — i.e., the decision appealed to the Supreme Court — appears to be the only appellate-level decision regarding the performance right and internet retransmitters, a number of District Court opinions have also involved Aereo and Aereo-like companies. One decision from a federal District Court in California expressly rejected the analysis of Cablevision, holding that the statute “does not by its express terms require that two members of the public receive the performance from the same transmission”.97 The case was appealed to the Ninth Circuit, but voluntarily dismissed after the

87 Ibid., 131.
88 Ibid.
89 Ibid., 133.
90 Ibid., 139.
91 Ibid., 135.
92 Ibid., 135–136.
93 Ibid., 136–137 (emphasis added).
94 Ibid., 137.
95 Ibid., 139.
96 In one case, the Second Circuit upheld a preliminary injunction that held an internet retransmitter is not a “cable system” eligible for a compulsory broadcast license. WPIX (n.59), 277.
97 Fox Television Stations Inc v Barrydiller Content Systems Plc 915 F Supp 2d 1138, 1144 (CD Cal 2012), appeal dismissed, sub nom Fox Television Stations Inc v FilmOn X LLC, No 13-55226 (9th Cir 2014).
Supreme Court decision in *Aereo*.98 In another case from a different federal district, the defendant admitted it was like *Aereo* in material ways, even once using the name “Aereokiller”.99 The court granted a preliminary injunction, focusing on the “original over-the-air broadcast”: “[b]y making available Plaintiffs’ copyrighted performances to any member of the public ... [defendant] performs the copyrighted work publicly”.100

Several cases have directly addressed the liability of *Aereo*. In Massachusetts, the District Court denied a preliminary injunction.101 Siding with the Second Circuit, the court concluded that *Aereo*’s reading of the statute was a “better reading”.102 Again, the case was appealed, here to the First Circuit, and again, was voluntarily dismissed after the Supreme Court’s *Aereo* decision.103 But in another case in Utah, *Aereo* lost.104 Accusing the Second Circuit of spinning the Transmit Clause “into a complicated web”, the court held that the clause “clearly ... applies to any performance made available to the public”.105 An appeal was filed in the Tenth Circuit.106 In sum, at the time *Aereo* was heard by the Supreme Court, cases involving internet retransmissions of broadcast television had been brewing within the First, Ninth, and Tenth Circuits.

**IV. The *Aereo* Lawsuit**

This section discusses the specific lawsuits that led directly to *Aereo* by the Supreme Court. It addresses the complaints, lower-court decisions, oral arguments, and the opinions by Justice Breyer for the Court and Justice Scalia in dissent.

**A. The suits**

The case involved two lawsuits that were litigated together. The first of the two suits was filed in March 2012 in the United States District Court for the Southern District of New York by a number of entities including television station WNET, Fox Television Stations, Inc, Twentieth Century Fox Film Corporation, and the Public Broadcasting Service (WNET plaintiffs).107 The WNET complaint asserted three counts: (1) direct copyright infringement in violation of the right of public

---

98 *Fox Television Stations Inc v FilmOn X LLC* No 13-55226 (9th Cir 2014) (docket entry 127).
103 *Hearst Stations Inc v Aereo Inc*, No 13-2282 (1st Cir 2014) (docket entry 58).
104 *Community Television of Utah LLC v Aereo Inc* 997 F Supp 2d 1191 (D Utah 2014).
106 *KSTU LLC v Aereo Inc*, No 14-4020, 2014 WL 1687749 (10th Cir 2014) (denying stay).
107 Complaint in *WNET v Aereo Inc*, No 12 Civ 1543 (SDNY filed 1 March 2012).
Aereo’s Errors

The performance,108 (2) direct and secondary liability for violation of the reproduction right,109 and (3) unfair competition.110 The WNET plaintiffs sought a permanent injunction, statutory or actual damages, attorneys’ fees, costs, and other monetary relief.111

The second suit was filed on the same day in the same District Court by ABC, Disney, CBS, NBC, and others (ABC plaintiffs).112 The complaint asserted an omnibus count for copyright infringement, asserting the rights of reproduction, public distribution, public performance, public display, and preparation of derivative works.113 An amended complaint filed in October 2013 alleged that Aereo was directly liable for violating the reproduction and public performance rights, and secondarily liable for violating the reproduction right.114 The ABC plaintiffs sought preliminary and permanent injunctive relief, actual or statutory damages, costs and reasonable attorneys’ fees, and other appropriate relief.115

B. Lower-court decisions

The District Court issued a lengthy opinion denying preliminary injunctive relief.116 The sole merits issue before the court was whether Aereo was directly liable for publicly performing the plaintiffs’ works.117 The court found in Aereo’s favor, but only because it was “constrained” by Cablevision’s express holding regarding the Transmit Clause.118

On appeal, a split panel of the Second Circuit affirmed.119 The majority concluded that users of Aereo’s service exercise “the same control over their playback” as did the users of Cablevision’s RS-DVR.120 Moreover, each transmission was to “the single user to whom each antenna was assigned”.121 Finally, the court rejected the plaintiffs’ argument that Aereo was “functionally equivalent to a cable television provider” because such an argument had been foreclosed by Cablevision.122 Judge

108 Ibid., [42]–[48].
109 Ibid., [49]–[58].
110 Ibid., [59]–[63]. The unfair competition count was later dismissed by the District Court as being preempted by the Copyright Act. WNET v Aereo Inc 871 F Supp 2d 281, 292 (SDNY 2012).
111 Complaint in WNET (n.107) 16.
112 Complaint in American Broadcasting Companies Inc v Aereo Inc, No 12 Civ 1540 (SDNY filed 1 March 2012).
113 Ibid., [28]–[38].
115 Ibid., 13.
116 American Broadcasting Companies Inc v Aereo Inc 874 F Supp 2d 373 (SDNY 2012), aff’d sub nom WNET, Thirteen v Aereo Inc 712 F 3d 676 (2d Cir 2013), rev’d & remanded sub nom Aereo (n.9).
117 Ibid., 376.
118 Ibid., 375, 385.
119 WNET, Thirteen (n.116), 680, rev’d & remanded sub nom Aereo (n.9).
120 Ibid., 692.
121 Ibid., 693.
122 Ibid., 693–694.
Chin issued a blistering dissent, calling Aereo’s technology a “sham” and a “Rube Goldberg-like contrivance” attempting “to take advantage of a perceived loophole in the law”. The majority responded by pointing out that “Aereo is not the first to design systems to avoid copyright liability”, noting that “cloud computing services, such as internet music lockers”, had done the same. The plaintiffs sought rehearing en banc, which was denied over another dissent by Judge Chin.

C. United States Supreme Court

1. Certiorari and Oral Arguments

The plaintiffs filed a petition for a Writ of Certiorari before the United States Supreme Court. That losing plaintiffs would seek Supreme Court review is common. Most uncommon, however, is that Aereo agreed with the plaintiffs that the petition should be granted. A review of the oral argument in Aereo is revealing regarding issues important to the Court. First, the comments of Justice Breyer — later the author of the majority opinion — strongly suggest that he had reached a decision before oral argument and that he was primarily interested in finding a way to justify that decision. As he stated “for argument’s sake”, “if there were ever anything that should be held to fall within the public performance, this should be”. Indeed, several of Justice Breyer’s questions suggest that he was troubled by Aereo’s business model on a moral level, suggesting to Aereo’s attorney that “it looks as if somehow you are escaping a constraint that’s imposed upon [cable companies]”, and “[t]hat’s what disturbs everyone”.

Second, the Justices were concerned about the impact of the Court’s decision on cloud technologies. Justice Breyer noted, “we have to write words” and asked “are we somehow catching other things that really will change life and shouldn’t, such as the cloud”? Justices Sotomayor and Kagan also asked cloud-related questions. Similarly, Justices Alito and Kennedy asked whether the Court could

---

123 Ibid., 697 (Chin, dissenting). It should be noted that Judge Chin wrote the District Court opinion that was overruled in Cablevision. Twentieth Century Fox Film Corp v Cablevision Systems Corp 478 F Supp 2d 607 (SDNY 2007), rev’d in part, vacated in part sub nom Cablevision (n.80). Patry’s treatise criticizes Judge Chin’s dissent as “vitriolic” and “petulant”, making one wonder whether he was resentful about being reversed in Cablevision. 4 William F. Patry, Patry on Copyright (2014) §14:28.

124 WNET, Thirteen (n.116), 694, rev’d & remanded sub nom Aereo (n.9).

125 WNET, Thirteen v Aereo Inc 722 F 3d 500 (2d Cir 2013).


127 Transcript of Oral Argument, 17, Aereo (n.9) (No 13-461).

128 Ibid., 38.

129 Ibid., 17.

130 Ibid., 8, 12, 18, 20.
reverse the Second Circuit’s decision in Aereo without overruling the *Cablevision* decision regarding the RS-DVR.\(^{131}\)

Finally and interestingly, Justice Sotomayor was curious as to whether *existing* statutory law already justified Aereo’s conduct. She asked whether Aereo should be considered a “cable company”, which might qualify it for the s.111 compulsory transmission license.\(^{132}\) In response, Aereo’s attorney emphatically stated that Aereo is “not a cable service”.\(^{133}\)

2. Justice Breyer’s 6-3 Majority Decision

Writing for a six-Justice majority, Justice Breyer held that Aereo’s “watch” service was “highly similar” to the CATV services in *Fortnightly* and *Teleprompter*; accordingly, Aereo publicly performed the plaintiffs’ copyrighted works.\(^{134}\) His opinion addressed two main issues: did Aereo perform, and if so, did it perform publicly?

A. Perform

Regarding “performance”, Breyer did not focus on the *language* of the statute, but instead on what he found to be its *history* and *purpose*. As he stated: “History makes plain that one of Congress’ primary purposes” in the 1976 Act was to overturn *Fortnightly* and *Teleprompter*.\(^{135}\) As noted previously, in those two cases the Court had held that cable companies were more like viewers than broadcasters, and therefore had not made a “performance”.\(^{136}\) But in 1976, Congress did three things regarding cable companies. First, it provided a new and broad definition of “perform”: “[u]nder this new language, both the broadcaster and the viewer of a television program ‘perform’”, because both show the sounds and images of television programming.\(^{137}\) Second, Congress enacted the Transmit Clause. Through this clause, “[c]able system activities ... lie at the heart of the activities” Congress wanted to reach.\(^{138}\) Thus, held Breyer, “an entity that acts like a CATV system itself performs”.\(^{139}\) Third, and finally, Congress created a “complex, highly detailed compulsory licensing scheme ... under which cable systems may retransmit broadcasts”.\(^{140}\) Breyer concluded that Congress’ purpose, its “end”, was to “bring the activities of cable systems within the scope of” copyright law.\(^{141}\)


\(^{133}\) *Ibid.*, 28 (statement of attorney for Aereo).

\(^{134}\) *Aereo* (n.9), 2511.

\(^{135}\) *Ibid.*, 2504.

\(^{136}\) Section III.A.

\(^{137}\) *Aereo* (n.9), 2505–2506 (emphasis in original).


\(^{139}\) *Ibid.* (emphasis added).

\(^{140}\) *Ibid.*

\(^{141}\) *Ibid.*
The next part of the opinion applied this history and purpose to Aereo. Breyer held that “history makes clear that Aereo” is “substantially similar” to the CATV companies covered by the 1976 Act.\textsuperscript{142} Aereo had argued that television shows were not transmitted by Aereo, but rather, by its subscribers.\textsuperscript{143} Breyer rejected this argument due to Aereo’s “overwhelming likeness” to cable television systems, which also permit subscribers to decide what to watch.\textsuperscript{144} Breyer admitted that there were some differences. With cable, the programming “lurked behind the screen, ready to emerge when the subscriber turned the knob”.\textsuperscript{145} With Aereo, users must “click on a website” to “activate[] machinery”.\textsuperscript{146} However, any difference in technology “means nothing to the subscriber”.\textsuperscript{147} Put differently, differences in technology, such as who initiated a particular transmission, were irrelevant: “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” what the dissent had argued was “a copy shop that provides its patrons with a library card”.\textsuperscript{148} Accordingly, Aereo performed the plaintiffs’ works.\textsuperscript{149}

\section{Publicly}

The next question was whether Aereo’s performances were “public”. Aereo made two arguments. First, if it performed, then the relevant performance was not the original performance (such as an ABC show), but rather the subsequent performance Aereo created by its own act of transmitting.\textsuperscript{150} The Court accepted this first proposition as correct for the purposes of argument.\textsuperscript{151}

Second, Aereo argued that “because each of these performances is capable of being received by one and only one subscriber, Aereo transmits privately, not publicly”.\textsuperscript{152} Aereo’s technology was rooted in this argument. Each Aereo subscriber viewed a separate stream, based on an individual copy, based on a subscriber-specific antenna. Aereo’s entire architecture was built on this single-antenna technology, which was no doubt based on the \textit{Cablevision} decision.

The Court rejected Aereo’s argument. Rather than initially focusing on the intricate language of the Transmit Clause, the Court instead turned to the 1976 Act’s “purpose”.\textsuperscript{153} The Court concluded that technological differences between Aereo and older cable systems did not matter, because “[t]hey concern the

\begin{thebibliography}{153}
\bibitem{142} Ibid.
\bibitem{143} Ibid., 2507.
\bibitem{144} Ibid.
\bibitem{145} Ibid.
\bibitem{146} Ibid.
\bibitem{147} Ibid.
\bibitem{148} Ibid.
\bibitem{149} Ibid.
\bibitem{150} Ibid., 2508.
\bibitem{151} Ibid.
\bibitem{152} Ibid.
\bibitem{153} Ibid.
\end{thebibliography}
behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens”. Posing the question rhetorically, the Court asked: why would an Aereo subscriber care whether television shows were “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?”

Only then did the Court turn to the actual text of the Transmit Clause, which states in relevant part that one performs a work publicly if one “transmit[s] or otherwise communicat[e] a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times”. The Court admitted that the Clause speaks in “singular” terms, but nonetheless held that “the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions”. Indeed, the Clause speaks of “a performance” that can be received “at the same time or at different times”. Breyer noted that if “the words ‘to transmit ... a performance’ [were] limited to a single act of communication, members of the public could not receive the performance communicated ‘at different times’”. Accordingly, “when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes”. Moreover, Aereo’s separate antenna, separate copy, separate stream, separate subscriber technology did not help because the Copyright Act applied to transmissions “by means of any device or process”. Aereo used that “process” to transmit a performance to multiple subscribers. And those subscribers were members of the public. Accordingly, Aereo performed the plaintiffs’ works publicly.

C. Other Technologies

In light of the similarities between the functions of Aereo and of cable companies, Justice Breyer did not find it necessary to consider the differences in technology. But he admitted that other types of technology may need to be examined more closely: “In other cases involving different kinds of service or technology providers, a user’s involvement in the operation of the provider’s equipment and selection of the content

154 Ibid.
155 Ibid., 2508–2509.
157 Aereo (n.9), 2509.
158 Ibid.
159 Ibid.
160 Ibid.
161 Ibid.
162 Ibid.
163 Ibid.
164 Ibid., 2511.
transmitted may well bear on whether the provider performs within the meaning of the Act”. 165 Breyer further admitted that Congress “did not intend to discourage or to control the emergence or use of different kinds of technologies”. 166 He suggested that his opinion provided a “limited holding” unlikely to have that effect. 167

First, he said, although “the history” of cable and the Transmit Clause “inform[ed] our conclusion” regarding Aereo, that history “does not determine whether different kinds of providers in different contexts also ‘perform’”. 168 Second, a defendant would be liable for a public performance only when “it communicates contemporaneously perceptible images and sounds of a work”. 169 Third, the decision did not apply to “those who act as owners or possessors of the relevant product”, but applied instead where “ordinary members of the public ... pay primarily to watch broadcast television programs”. 170 Moreover, a “public” performance still required a performance to “a substantial number of people outside of a family and its social circle”. 171 Thus, an entity transmitting a video to a person authorized by the copyright owner to view that video apparently would not be public, even if she watched the video with her family or a small group of friends. 172

Finally and perhaps most importantly for cloud-storage services such as DropBox, the Court held that “we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content”. 173 Thus, questions regarding cloud computing, remote-storage DVRs, and other “novel issues not before the Court” would await another day. 174

3. Justice Scalia’s Dissent

Justice Scalia, joined by Justices Thomas and Alito, wrote a spirited dissent in which he focused on issues of volition and “guilt by resemblance”, concluding that existing law meant that any performance was not by Aereo, but by its subscribers. Because Scalia thought that there was no “performance”, he did not analyze whether any such performance was “public”.

A. The Volition Requirement

Noting that most suits against service providers and equipment manufacturers involve secondary liability, Justice Scalia noted that the Aereo appeal was solely

---

165 Ibid., 2507.
166 Ibid., 2510.
167 Ibid.
168 Ibid.
169 Ibid. (emphasis added).
170 Ibid.
171 Ibid., 2511.
172 Ibid., 2510.
173 Ibid., 2511 (emphasis added). The Court also noted that the fair use doctrine might provide a safety valve, and that Congress always had the power to overturn a decision construing the Copyright Act. Ibid.
174 Ibid. (internal quotation removed).
Aereo’s Errors 191

about direct liability of the public performance right.\textsuperscript{175} Scalia agreed that the copyrighted shows had been performed, but the question was: by whom?\textsuperscript{176} If the plaintiffs could only show that Aereo’s subscribers performed the works, then their direct infringement claim must fail.\textsuperscript{177} The failure of a direct infringement claim would not necessarily free a defendant from liability, but would instead “channel” the analysis into secondary liability claims.\textsuperscript{178}

Scalia expressed concern that “the distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether the defendant committed the infringing act”.\textsuperscript{179} Direct liability, said Scalia, therefore required volitional conduct: “A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act”.\textsuperscript{180} The requirement of volitional conduct was “firmly grounded” in the text of the performance right, “which define[d] ‘perform’ in active, affirmative terms”.\textsuperscript{181} Indeed, the definition of “perform” “means to recite, render, play, dance, or act it”, or for works such as a television show, “to show its images”.\textsuperscript{182} Scalia further noted that every federal appellate court considering direct liability claims against automated service providers had adopted a volitional-conduct rule, and argued that Supreme Court cases were consistent with such a rule.\textsuperscript{183}

Scalia pointed out that in garden-variety direct infringement cases, volition is obvious, but volition issues “come[] right to the fore” in cases against defendants “who [do] nothing more than operate an automated, user-controlled system”.\textsuperscript{184} Because automated systems are “indifferent”, the defendant can be directly liable only when the defendant “itself ‘trespassed’” on the copyright.\textsuperscript{185} Scalia posited two extremes. At one end was a copy shop that “rents out photocopiers on a per-use basis” with no role in selecting content to copy or in initiating the copy; instead, the shop supplies equipment, and that equipment responds to customer commands.\textsuperscript{186} Such a shop could not be directly liable for the customer’s copies.\textsuperscript{187} At the other end was a VOD service: like copy shops, VOD services respond to user input, but unlike copy shops, VOD services “choose the content”.\textsuperscript{188} Accordingly, curation, the “selection and arrangement by the service provider constitutes a volitional

---

\textsuperscript{175} Ibid., 2512 (Scalia J, dissenting).
\textsuperscript{176} Ibid.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid., 2514 (citing Brief for 36 Intellectual Property & Copyright Law Professors as Amici Curiae, 7).
\textsuperscript{179} Ibid. (emphasis in original).
\textsuperscript{180} Ibid., 2512 (citing 3 Patry (n.123) §9:5.50 (2013)).
\textsuperscript{181} Ibid.
\textsuperscript{182} 17 USC §101 (2012); Aereo (n.9), 2512 (Scalia J, dissenting).
\textsuperscript{183} Aereo (n.9), 2512 and n.1 (Scalia J, dissenting) (noting decisions of the Second, Third, Fourth, and Ninth Circuits).
\textsuperscript{184} Ibid., 2513.
\textsuperscript{185} Ibid. (quoting CoStar (n.75), 550–551).
\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid.
\textsuperscript{188} Ibid. (emphasis in original).
act directed to specific copyrighted works and thus serves as a basis for direct liability.”

B. Aereo Lacked Volition

Scalia concluded that Aereo was neither a traditional copy shop nor a VOD service. Instead, it was “akin to a copy shop that provides its patrons with a library card.” The display of television programming on an Aereo customer’s device “fits the statutory definition of a performance to a tee”, but such displays are not the result of Aereo’s volitional conduct. Instead, Aereo “assigns each subscriber an antenna that — like a library card — can be used to obtain whatever broadcasts are freely available”. But it is the subscribers who “call all the shots”. Scalia admitted that Aereo did engage in a volitional act, namely, being the “but-for cause of the resulting performances”, but just like a copy shop, this would be insufficient for direct liability. Such a holding would not necessarily leave Aereo free from liability because other bases for direct and secondary liability remained for disposition by the lower courts.

C. No Guilt by Resemblance

Scalia had particularly harsh words for the majority’s looks-like-cable standard, calling it a “Guilt By Resemblance” syllogism. Put simply, the majority had concluded: (1) Congress amended copyright law in 1976 to overrule decisions “holding that cable systems do not perform when they retransmit over-the-air broadcasts”; (2) “Aereo looks a lot like a cable system”; and (3) Aereo therefore performs.

This syllogism suffered from three defects. First, wrote Scalia, the majority relied on “a few isolated snippets of legislative history”, “even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress”. Second, the majority failed to consider “material differences” in technology between Aereo and cable. Third and “most importantly”, Scalia attacked the majority’s focus on purpose over text, arguing that what Congress “meant to do and how they did it are two different questions — and it is the latter that governs the case before us here”.

189 Ibid.
190 Ibid., 2514.
191 Ibid.
192 Ibid.
193 Ibid.
194 Ibid.
195 Ibid., 2514–2515.
196 Ibid., 2515.
197 Ibid.
198 Ibid.
199 Ibid.
200 Ibid., 2516.
Aereo’s Errors

Scalia wondered whether the majority’s “looks like cable” test had invented a two-tier system of copyright: one applying to “cable companies and their equivalents” and the other governing “everyone else.” He also argued that the majority failed to provide “criteria for determining when its cable-TV-lookalike rule applies.” Additionally, he expressed concern that the majority’s analysis had disrupted what he viewed as “settled jurisprudence” regarding the “bright-line test of volitional conduct.”

He further criticized the majority’s discussion of the meaning of “public” in the Transmit Clause, arguing that this portion of the majority opinion was “superfluous.” He said, “[i]f Aereo’s similarity to a cable company means that it performs, then by necessity that same characteristic means that it does so publicly.” If so, then the portion of the majority’s opinion addressing the text of the Transmit Clause “discuss[ed] an issue that is no longer relevant — though discussing it certainly gives the opinion the ‘feel’ of real textual analysis.”

Scalia argued with some force that the majority’s “cable-TV-resemblance [test was] nothing but th’ol’ [sic] totality-of-the-circumstances test”, which was not a test but instead an “assertion of an intent to perform test-free, ad hoc, case-by-case evaluation”. He noted that it might take years or longer to determine which cases would be analyzed under a volitional-conduct test and which under the Aereo “treatment.” Cloud or automated systems, existing or contemplated, “will have to take their chances.”

Scalia closed out his dissent by noting that moral questions may have driven the majority’s thinking. He stated, “I share the Court’s evident feeling that what Aereo is doing (or enabling to be done) to the Networks’ copyrighted programming ought not to be allowed”. However, he noted, Aereo might still be liable on other bases, and if not, then the law would contain a loophole. But loopholes are for “good lawyers to identify and exploit”, and for “Congress to eliminate”, if it so wishes.

V. Aereo’s Errors

This section addresses three major errors of the Aereo decision: the decision was unnecessary, unsound, and unwise.

201 Ibid. (quoting and citing majority opinion 2506–2507, 2510).
202 Ibid.
203 Ibid.
204 Ibid.
205 Ibid.
206 Ibid.
207 Ibid., 2517.
208 Ibid.
209 Ibid.
210 Ibid.
211 Ibid.
212 Ibid.
A. Unnecessary

The grant of review by the Supreme Court at this early juncture of internet television litigation was unnecessary. Normally, resolving splits between the federal Courts of Appeals is “[o]ne of the principal functions of the Supreme Court”.213 As correctly noted by Aereo in its brief, several lower-level District Courts in other parts of the country had ruled contrary to the Second Circuit.214 But “no court of appeals [had] ruled to the contrary” of the Second Circuit’s opinion.215 Thus, a circuit split appears to have been absent, and Justice Breyer’s opinion gives no indication that a split in authority prompted the grant of review.216

This is odd. Often, the Supreme Court will not take on a case until there is an appellate-level split.217 One reason is that any putative conflict arising from District Court opinions may be eviscerated by later Court of Appeals decisions that bring national case law into harmony. This avoids squandering the Supreme Court’s limited judicial resources on cases where a lower-court conflict may be resolved at the level of the regional Courts of Appeals. In this case, however, it appears that any split was only between the Second Circuit and lower-level District Courts.

Additionally, if the Supreme Court had allowed the case to percolate through the mid-level appellate courts, that would have permitted the issues to be sharpened through the collective minds of multiple judges and advocates. Such refinement can make for better decisions by the Supreme Court, because the issues would have been litigated extensively by multiple litigants in multiple regional appellate courts. And in fact, such percolation would have happened if the Supreme Court had not granted review so quickly. At the time certiorari was granted in the Second Circuit case, other cases involving internet retransmission services had already been brewing within the First, Ninth, and Tenth Circuits. Had the Supreme Court denied review of the Second Circuit’s decision, the Court would have had additional opportunities, with the benefit of percolation and refinement.

Adding to the oddities of this case, the defendant Aereo joined the plaintiffs in asking the court to review the Second Circuit’s decision.218 Aereo’s likely motivations, however, do make some sense. Aereo faced actual litigation and conflicting lower-court decisions in other parts of the country that were not bound by the Second Circuit’s decisions in Cablevision and Aereo. As a company expanding its streaming television business around the country, Aereo stood to benefit significantly from a potential Supreme Court victory regarding the legality of its business model. But

214 Certiorari brief for Respondent, Aereo (n.126) 20.
215 Ibid., 18.
216 Justice Breyer’s opinion notes that several Second Circuit judges had disagreed with that court’s panel decision but does not identify a split between the Second Circuit and other Courts of Appeals. Instead, he says without elaboration, “We granted certiorari”. Aereo (n.9), 2504.
218 Certiorari brief for Respondent, Aereo (n.126) 18.
such a bet-the-business gamble was risky. First, even if Aereo prevailed on the issue of direct infringement through public performance, other bases for liability existed, such as secondary liability. Second and more fundamentally, Aereo’s “bet-the-business” gambit backfired when the Supreme Court ruled against it.

Most likely, the Supreme Court granted certiorari based on another justification for review: “an important question of federal law that has not been, but should be, settled by this Court.”219 But one can attack this basis as well. As noted, the legality of internet television did not hinge solely on the public performance/direct liability issue. Other bases existed to either establish or excuse liability, such as secondary infringement, the s.111 compulsory license for cable systems, the s.512 safe harbor for service providers, and the possibility of a Sony VCR-like fair use defense.

In light of such concerns, one must wonder what else might have motivated the Justices to take on the case. One might be a sense that Aereo was behaving immorally by designing its technology in order to take advantage of an unfair loophole. Yet as Justice Scalia correctly pointed out in dissent, exploiting loopholes is what good lawyers do. A more cynical observer might wonder whether the “coolness” factor prompted Supreme Court clerks — themselves likely consumers of internet-based video — to urge their bosses to take on the case.220

B. Unsound

The opinions in Aereo are unsound. Here are just eight reasons why. First, the majority’s looks-like-cable test is deeply flawed. As Justice Scalia suggests, it is based on a syllogism:

- **Major premise:** Under the 1976 Act, cable systems “publicly perform”.
- **Minor premise:** Aereo’s “watch” service is highly similar to a cable system.
- **Conclusion:** Aereo’s “watch” service publicly performs.

This simplistic syllogism bypasses any need for genuine statutory construction of the definition of performance or the meaning of the Transmit Clause. Considering the complexity of these provisions, the majority’s syllogism is breathtaking, and not in a good way. Being highly similar to something is not identical to being the same for all purposes. Humans and chimpanzees may share 99 per cent of their DNA,221 but small differences can have significant biological, cognitive, and

---

219 US Sup Ct R 10(c) (2013).
220 An empirical study on Supreme Court law clerks observed that matters such as certiorari “are likely more susceptible to the influence of law clerks than voting on the merits of a case”. Todd C Peppers and Christopher Zorn, “Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment” (2008) 58 DePaul Law Review 51, 76.
behavioral consequences. Small differences in technology may lead to similarly significant consequences for legal decision-making. The Court’s opinion, however, obviates any need to look at any differences in technology.

Second, by treating Aereo as if it were a cable system, the Court has replaced loophole with absurdity. Because Aereo is “similar” to a cable system, the Court holds that it has engaged in conduct that may render it directly liable. But under binding law of the Second Circuit, Aereo likely cannot be considered a cable system for purposes of the s.111 statutory license. Moreover, the Copyright Office has consistently taken the position that internet retransmitters of broadcast television are not cable systems, and reiterated that position upon inquiry by Aereo after the Supreme Court issued its opinion. In other words, Aereo is like a cable system for purposes of the s.101 definition of “public performance”, but not a cable system for purposes of the s.111 statutory license. It is both a cable system and not a cable system, an absurdity that only an attorney could enunciate with a straight face.

Third, the majority’s looks-like-cable standard is simplistic and unworkable. Justice Scalia accuses the majority of creating a special rule for services that look like cable television. He is right to point out that it is difficult, perhaps impossible, to draw any guiding principles from this vague, ad hoc standard. Ironically, in Fortnightly, Justice Fortas’ dissent—a dissent from a finding of no liability—decried the majority’s “disarmingly simple” approach, suggesting that “[t]his case calls not for the judgment of Solomon but for the dexterity of Houdini.” In Teleprompter, Justice Blackmun similarly dissented from the “simplicistic basis” of the majority’s no-liability holding. The same complaints remain, but the complainants have switched teams.

Fourth, the majority has stirred up a hornet’s nest by refusing to look “under the hood” at Aereo’s technology, while at the same time leaving open the possibility of scrutinizing technology in other cases. For Breyer, all that mattered was that Aereo’s “watch” service was similar to traditional cable. From a viewer’s perspective, he said, it did not matter whether the technology relied on one antenna or separate antennas. Yet in the same breath, Breyer admitted that in other cases it may be necessary to look more closely at the user’s involvement in the technology. Breyer’s “look or don’t look” approach to technology provides a textbook example of how outcomes can hinge upon the perspective taken by the court. Professor Kerr describes the “problem of perspective in Internet law”: in internet cases, the outcome may hinge on whether the court takes an “internal perspective”, looking at the virtual reality of how one experiences the internet, or whether it instead takes

---

222 *WPIX* (n.59), 277.
224 Letter from Jacqueline C Charlesworth, General Counsel and Associate Register of Copyrights, to Matthew Calabro, Aereo, Inc (16 July 2014). In the letter, Ms Charlesworth said there was nothing in the Aereo opinion “that would alter” the Copyright Office’s conclusion. *Ibid.*, 1.
225 *Fortnightly* (n.42), 402, 405 (Fortas J, dissenting).
226 *Teleprompter* (n.51), 415 (Blackmun J, dissenting).
an “external perspective” of the physical reality, ie, how the technology actually operates. Breyer’s opinion is an example of a court taking an internal perspective of the user’s experience of watching television, and this perspective influenced the Court’s decision tremendously. In fact, using the internal perspective likely determined the outcome. However, the Court seems to leave open the door for taking an external perspective in other cases. Going forward, how are innovators, attorneys, or lower courts supposed to know which perspective to take? Considering that the perspective can determine the outcome, one can expect future litigants to battle extensively over whether to take an internal “look at the experience” perspective or an external “look at the technology” perspective.

Fifth, much of the difference between Scalia’s and Breyer’s opinions can be traced directly to their differing approaches to statutory construction. Under Scalia’s “textualist” approach, what matters is “the objective indication of the words” rather than legislative intent; accordingly, “legislative history should not be used as an authoritative indication of a statute’s meaning”. In that light, Scalia’s refusal to consider the House Report for the 1976 Act is unshocking. In contrast, Justice Breyer cautions that “overemphasis on text can lead courts astray, divorcing law from life”. He believes that courts should primarily focus on “statutory purpose, ruling out neither legislative history nor any other form of help in order to locate the role that Congress intended the statutory words in question to play”. If necessary, the court should hypothesize a “reasonable legislator” who, “even if at times … a fiction — helps statutes match their means to their overall public policy objectives”. Therefore, it is equally unshocking that Justice Breyer’s opinion de-emphasizes the difficult and confusing statutory text of the Copyright Act in favor of an unabashed look at the Act’s purported “history” and “purpose”, or at least Breyer’s view of the Act’s history and purpose.

Sixth, the legislative history of the 1976 Act does not create the clear legislative purpose that Breyer relies upon so heavily. While cherry-picking language that supports his position, Breyer ignores language in the House Report that “caution[s] … others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue”. This admonition counsels strongly against relying on that legislative history for the creation of a broad looks-like-cable standard to classify new technologies, ones that did not exist nearly 40 years ago when the Copyright Act of

---

230 Ibid., 98.
231 Ibid., 101.
232 HR Rep No 94-1476 (n.57), 1976 USCCAN 5703–5704.
1976 was drafted. In fact, the cable issue was so difficult that it was a major reason why copyright reform was delayed for three consecutive sessions of Congress.233 As the House Report correctly notes, the provisions regarding cable television systems were “detailed and complex”, lacked a “simple answer”, and required “extensive consideration” through “voluminous hearings”.234 In light of Congress’ admonition regarding new technologies, and the difficulty of coming up with complex rules, Breyer’s vague ad hoc standard is unjustified and unsatisfying.

Seventh, the statutory construction issues in this case are far more difficult than Breyer lets on. For example, Breyer tries mightily to make sense of the Transmit Clause, which states, “transmit[s] or otherwise communicate[s] a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times”.235 He admits that the Transmit Clause speaks of a singular transmission and not multiple transmissions, yet the clause also refers to reception “at different times”, which one should note is in the plural. This language makes little sense, and Breyer resolves it by holding that “the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions”.236 In essence, Breyer rewrites the statute to change the singular to include the plural: “transmit[s] or otherwise communicate[s] a performance or performances ... of the work”, and to “receive it or them ... at the same time or at different times”. One wonders why Breyer did not consider citing to the Dictionary Act, which states: “words importing the singular include and apply to several persons, parties, or things”.237 That might have bolstered his argument for essentially rewriting the wording.

Finally, Justice Scalia’s dissent deserves criticisms as well. One wonders why he does not analyze the meaning of “public” within the Transmit Clause. Scalia argued that Breyer’s discussion of that issue was unnecessary in light of the majority’s conclusion that Aereo was like a cable system. But Scalia could have offered an alternative statutory analysis. Might that mean that Scalia agreed with Breyer’s construction of the Transmit Clause? One cannot be certain. Also, Justice Scalia’s “copy shop with a library card” analogy is deeply unsatisfying. It is true that companies such as Netflix may engage in more intensive content cultivation than did Aereo, but Aereo still chose the markets to enter, and knowingly decided which local stations it would stream over its service. Such lesser cultivation might still qualify as a lesser form of “volition”. Indeed, even Scalia admits that Aereo acted volitionally in acting as a but-for cause of the performances. One has to wonder whether the line Justice Scalia draws between but-for causation (not legally

233 ibid., 5661.
234 ibid., 5703.
236 Aereo (n.9), 2509.
237 1 USC §1 (2012).
Aereo’s Errors

The importance of the volition issue to internet intermediaries, as compared to the lack of guidance obtained, provide additional reasons why certiorari should have been denied.

C. Unwise

The Aereo decision was also unwise. First, as noted above, the grant of certiorari was premature and unnecessary. As a result, the Supreme Court prevented the issue from percolating, something that would have provided additional opportunities and time for scholars, attorneys, and judges to add their voices to the mix. Had the Court waited to hear the public performance issue, the end result might have been a more sound opinion: one achieving a better result, or at the very least, providing clearer guidance.

Second, the Court may have silently overruled the Sony Court’s presumption that copyright should not be expanded at the expense of new technology without guidance from Congress. As Sony held:

“The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology”.

Ironically, in the quote above, Justice Stevens cited Fortnightly and Teleprompter for support of the proposition that new technologies should be addressed primarily by Congress. Adding further irony, in Sony, Justice Stevens found that the Sony VCR did not constitute contributory infringement, noting that it was up to Congress to “fashion[] the new rules that new technology made necessary”.

Aereo turns this approach on its head. Justice Breyer dismissively holds that if interested persons have concerns about the relationship between technology and

---

238 One must also wonder whether the volitional-conduct rule of Cablevision and other cases remains good law in light of the safe harbors of 17 USC §512, which was created in response to the Netcom decision that first enunciated the volition rule. This complex issue is well beyond the scope of this article; however, this author believes that the volitional-conduct rule ought to be used in direct infringement cases regardless of whether s.512 also applies. Professor Nimmer disagrees. Nimmer §12B.06[B][2][c][i] (n.79).

239 Sony (n.6), 431 (citations removed). Unfortunately, this presumption has been under attack for a while, considering the Supreme Court’s enunciation of the “inducement” theory of secondary liability in Grokster. Grokster (n.7), 965 (Breyer J, concurring) (quoting Sony in case where Court expanded copyright liability).

240 Sony (n.6), 430–431.
copyright, “they are of course free to seek action from Congress”. 241 But unlike Sony, which denied copyright liability, Aereo expands the scope of copyright, essentially telling aggrieved innovators “if you don’t like it, go bug Congress”. Indeed, one cannot read Aereo without concluding that the majority was bothered by an amorphous sense of indignation at Aereo’s use of a potential loophole in copyright law. Scalia rightly notes that loopholes are for smart lawyers to use, and for Congress to close.242 According to Sony, courts should be reluctant to expand copyright, leaving the job to Congress. According to Aereo, courts can throw that reluctance out the window if they divine sufficient “purpose” from the legislative history to justify outcomes that better comport with their sense of moral indignation. And if the Court errs, let Congress fix it.

Third and finally, one should worry about whether Aereo will have adverse effects on cloud technologies, those current and those yet to arrive. Some forms of cloud storage are perhaps safe under Aereo, such as a person who has lawful possession of a copyrighted work, and who uploads that work to a cloud service to device-shift it to herself elsewhere. But what about other cloud technologies? Although the opinion strives mightily to avoid outlawing unlicensed remote DVR systems such as the one in Cablevision, future litigation is likely. Other forms of cloud computing also fall into an uncertain area. For example, what if a law professor uploads a copyrighted video file to a cloud-storage folder and shares the file with the general public? Barring safe harbor under s.512, would the cloud-storage provider be directly liable for infringement of the public performance right when the general public plays the video? Numerous other scenarios will no doubt emerge in attorney-client discussions, demand letters, and litigation, leading to alterations or cessations of existing technology, or beneficial technology that never comes to light.

VI. Conclusion

Aereo erred in three ways. First, the Court’s opinion in Aereo was unnecessary because a circuit split does not appear to have existed. Although the internet retransmission issue was important, the Court’s reasoning would have benefitted from allowing the issue to percolate in the lower courts. Second, the opinion is hopelessly unsound. Justice Breyer erred by assuming that any service similar to cable television also falls within the scope of the public performance right. In so doing, the opinion fails to provide meaningful guidance. Third, Aereo errs by being

241 Aereo (n.9), 2511.
Aereo’s Errors

unwise. Despite the Court’s seeming willingness to limit Aereo to its near-live internet-retransmission-of-broadcast-television context, it seems inevitable that the opinion will trigger a flood of litigation over cloud services.

How might things be fixed? For one thing, Congress should consider an amendment to provide internet television retransmitters with a compulsory license such as that in s.111, and better yet, get to work on a broader revision of copyright to address exemptions for the digital age, including cloud computing and other issues such as orphan works and digital preservation. For another, courts should take Justice Breyer at his word when he called Aereo a “limited holding” that is unlikely to discourage new technologies. The “smells-like-cable-so-it-publicly-performs approach” should be used only when a technology engages in live or near-live internet retransmissions of broadcast television. But when the technology differs from that in Aereo, courts should look “under the hood” at the technology and consider how the technology operates and not focus solely on the user experience. Courts should also consider carefully who is engaging in the volitional conduct constituting any direct infringement. In other words, much of Justice Scalia’s approach should be used by lower courts, unless a dispute falls cleanly into the Aereo “cable box”. The best way to avoid perpetuating Aereo’s errors is to stop “airing” them. In the lingo of television broadcasting — where failing programming invites the falling axe of cancellation — Aereo deserves to be “cancelled”.
