

2015

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### Repository Citation

Stern, James Y., "ABC v. Aereo and the Humble Judge" (2015). *Faculty Publications*. 1737.  
<https://scholarship.law.wm.edu/facpubs/1737>



## **ABC V. AEREO AND THE HUMBLE JUDGE**

**James Y. Stern**

*American Broadcasting Cos., Inc. v. Aereo, Inc.*<sup>1</sup> was a lawyer's case if ever there was one. Aereo, a New York-based tech startup, offered a service that allowed subscribers to watch local broadcast television through an internet connection, thus bypassing the need for cable service to receive ordinary network programming. The trouble is that copyright law forbids retransmitting television programs to the public without the copyright-holder's consent, which doesn't come cheap.<sup>2</sup> Aereo, however, thought it could avoid any copyright problems through an unusual set-up. It devised a system in which it maintained thousands of tiny television antennas, each about the size of a dime. A subscriber watching a program through Aereo's service would be assigned a unique antenna. The signal from the antenna would then be converted into a digital file on

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<sup>1</sup> 134 S. Ct. 2498 (2014).

<sup>2</sup> For cable companies, the cost of copyright is diminished by the statutory licensing regime established by the Copyright Act. See 17 U.S.C. § 111. The cost of re-broadcasting network programming is nevertheless substantial by virtue of the "re-transmission consent" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which separately require permission from broadcasters to retransmit their broadcasts. See 47 U.S.C. § 325(b).

Aereo's computers, again assigned only to the subscriber, which the subscriber could then watch through a streaming interface virtually simultaneous with the broadcast over the airwaves. The system was intended to capitalize on previously recognized limits on the scope of copyright law.

Despite this peculiar arrangement, Aereo was immediately sued by various broadcast television interests holding copyrights in material Aereo subscribers received. Broadcast television is given to viewers for free, of course, and broadcasters have traditionally derived the bulk of their revenues from advertising. One might think broadcasters would be enthusiastic about the prospect of distributing their material more widely and easily. But the broadcast networks have become increasingly dependent on royalties paid by cable companies, which themselves enjoy considerable market power. By repelling Aereo, broadcasters preserved the ability to base their business model on recouping a portion of the subscription fees cable providers receive from their customers, rather than on advertising alone.

The essential legal issue in *Aereo* concerned the scope of control over broadcasts of copyrighted material conferred by copyright law. Confusingly, however, the statutory question turned on the meaning of a copyright-holder's exclusive right "to perform the copyrighted work publicly."<sup>3</sup> The Copyright Act does not refer to an exclusive right to broadcast a copyrighted work; rather, it classifies transmitting to the public as a type of public performance, like reciting, dancing, and acting.<sup>4</sup>

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<sup>3</sup> 17 U.S.C. § 106(4).

<sup>4</sup> The definitional section of the Copyright Act, Section 101, provides that:

To "perform" a work means ... 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.

To perform ... a work "publicly" means... to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of re-

Much attention in the case centered on whether Aereo was performing “publicly,” given the use of individual antennae and individual files. All sides evidently assumed that a transmission to only one person is not “to the public.” The question was how to count transmissions. Should each sending of a broadcast signal be treated as a separate transmission—in which case no transmission ever reached more than a single subscriber? Or should the separate sending of signals to different subscribers but relaying the same underlying content be treated as a single, aggregate transmission—in which case transmissions through the Aereo service were undoubtedly public?

In constructing its system, Aereo relied on the Second Circuit’s earlier *Cartoon Networks* decision.<sup>5</sup> *Cartoon Networks* dealt with remote DVR technology supplied by a cable company, which essentially replicates the ability to record television programs at home but by means of equipment owned and maintained by the cable company, rather than the viewer. The *Cartoon Networks* court concluded that transmissions of each user’s file containing a given recorded program to the user were private transmissions for copyright purposes. Aereo’s peculiar model with the thousands of micro-antennae followed the path laid out in *Cartoon Networks*, and, Aereo argued, was clearly permissible under that decision. The District Court in the Aereo litigation agreed, denying a request for a prelim-

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ceiving the performance ... receive it in the same place or in separate places and at the same time or at different times.

To “transmit” a performance ... is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

17 U.S.C. § 101.

<sup>5</sup> See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

inary injunction to shut the service down.<sup>6</sup> The Second Circuit affirmed and rejected calls to reconsider *Cartoon Networks*.<sup>7</sup>

But the story was different at the Supreme Court. Joined by five of his colleagues, Justice Breyer saw Aereo's system as a clear attempt to evade copyright law by means of the most technical of technicalities, and declared that Aereo was very much engaged in transmitting to the public. The conclusion was partly grounded in the text, but more generally in a congressional purpose to ensure that copyright law covered rebroadcasts by cable companies. Shortly before enactment of the 1976 Copyright Act, the Supreme Court decided a pair of cases involving early forms of cable, holding that the cable providers did not violate copyright holders' exclusive performance rights.<sup>8</sup> According to Justice Breyer, Congress added the transmission language in the 1976 Act to overturn the results of those decisions. Aereo's use of individual antennae and distinct computer files for each subscriber was therefore irrelevant, for one simple reason: "In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems."<sup>9</sup>

In dissent, Justice Scalia sidestepped the public-versus-private question, arguing instead that Aereo did not "perform" at all for purposes of the Copyright Act—not because there wasn't a performance but because Aereo wasn't the performer.<sup>10</sup> On his reading, it was the Aereo subscriber alone who actually transmits the copyrighted work, not Aereo. Aereo merely supplied the equipment necessary to transmit a broadcast to the subscriber's computer. Just

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<sup>6</sup> See *Am. Broad. Cos., Inc. v. AEREO, Inc.*, 874 F. Supp. 2d 373, 376 (S.D.N.Y. 2012).

<sup>7</sup> See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013). See also *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013) (denying rehearing en banc).

<sup>8</sup> See *Teleprompter Corp. v. Columbia Broad. System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists TV, Inc.*, 392 U.S. 390 (1968).

<sup>9</sup> *Aereo*, 134 S. Ct. at 2498.

<sup>10</sup> The district court had declined to reach the issue given its conclusion that the case was controlled by *Cartoon Networks*.

as a copyshop does not itself engage in the act of copying when a customer uses one of its photocopiers, *Aereo* did not perform a work when a subscribers logged in and obtained content via its system. Copyright, he argued, requires a “volitional act,” and because the *Aereo* subscriber, not *Aereo*, decided when and what to transmit, the subscriber alone was the performing party for purposes of copyright law.

The *Aereo* decision appears to defy a number of ready assumptions. Although intellectual property law is not as ideologically charged as constitutional law, it has its political valences, with a somewhat greater enthusiasm for the defense and expansion of IP protection on the right than on the left.<sup>11</sup> In *Aereo*, however, it was the three justices conventionally identified as the most politically conservative—Scalia, Thomas, and Alito—who were unwilling to find infringement. By contrast, the majority’s opinion was authored by Stephen Breyer, author of an early academic critique of copyright law.<sup>12</sup> One need not believe justices simply vote their preferences to think that in complex and textually ambiguous cases like *Aereo*, those preferences will exert some pull on the way interpretive questions are approached. *Aereo*, however, seems to come out backwards as a matter of predilection.

Then there is methodology. Copyright is governed by a bulky and elaborate statute, and *Aereo* was expected to turn on a fine parsing of the statutory language, the definition of “publicly” in particular. Yet while Justice Scalia is surely the foremost judicial advocate of textualism, his challenge to Justice Breyer lay not in an analysis of either the verb “perform” or the adverb “publicly” but the seeming-

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<sup>11</sup> See Matthew Sag, Tonja Jacobi, Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 803 (2009) (concluding political ideology “is a significant determinant of IP cases.”). See also DEBORA J. HALBERT, *INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS* (1999).

<sup>12</sup> See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

ly existential, theoretical question of who the performer is when a performance occurs. This is not a “textual” question in the ordinary sense; a dictionary definition of “perform” will not reveal whether A’s provision of the means by which B accomplishes some task should be treated as a situation in which A performs the same act as B. Neither, however, is it at odds with a textual approach to copyright. Legal construction and legal systems inevitably depend on a vocabulary of assumed concepts. To acknowledge that the action may be taking place off the textual stage is not to depart from a commitment to a text-centric mode of interpretation, although the frequency with which such problems occur may weaken the case for such a method.

Meanwhile, although Justice Breyer’s opinion ultimately centered on congressional purpose, rather than textual niceties, he dwelt on the text at considerable length. Moreover, his seemingly more pragmatic analysis itself rested upon some formal, if unarticulated, premises. Aereo argued that it was supplying technology that would have been perfectly lawful for viewers to use themselves, by watching with rabbit ears on their own television sets. If Aereo’s business had been to rent television antennas, delivering them by physical possession, it is hard to imagine Breyer would have decided that Aereo was “substantially similar” to a cable provider.<sup>13</sup> Breyer’s conclusion seems to give decisive weight to the location of the antenna—whether it is on Aereo’s property or the Aereo subscriber’s. Put differently, if Aereo had sent antennas to its subscribers, rather signals from antennas, it would not have been “performing publicly.” The point is not that this distinction is necessarily unjustifiable but that no justifications were provided. Breyer’s analysis, no less than Scalia’s, relies on an assumed conceptual framework to cabin the field of inquiry.

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<sup>13</sup> See *Aereo*, 134 S. Ct., at 2506 (“In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users’ homes.”).

Recognizing the role played by assumed concepts is important because those concepts themselves embed practical judgments and offer strategies for dealing with problems that may otherwise exhaust interpretive resources. Justice Scalia's emphasis on the need for a "voluntary act" is a good example. The great shadow hanging over the *Aereo* case is the vast technological infrastructure that the Court by its own admission does not really understand. In particular, the fear raised in advance of *Aereo* was that a decision against the company would jeopardize practices like cloud computing and remote data storage, in which firms enable users to perform tasks through an internet connection on the companies' own hardware in ways that replicate functions that might otherwise be performed using the user's own equipment.

Technological developments are blurring the lines used to separate actions and objects into the categories used to structure legal systems. Tasks that were once performed entirely in-house now involve a more intensive contribution by outsiders. Obtaining, receiving, transmitting, organizing, analyzing, and storing data are less likely to be carried out on a discrete "PC" in ways entirely within the control of the user. And tasks that were performed by outsiders now involve more substantial end-user participation. Under the old model, television broadcast networks and cable television providers choose what will be available to watch and when. Today, services like Netflix supply content but enable users to make those choices. Remote connections make it possible for users to share common resources—hardware, software, and data—and enable greater flexibility in being able to use those capabilities than when users have to supply equivalent goods to themselves. All of this is to the good, but it strains legal rules that were not designed with such complex interrelationships in mind.<sup>14</sup>

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<sup>14</sup> See Jonah M. Knobler, *Performance Anxiety: The Internet and Copyright's Vanishing Performance/distribution Distinction*, 25 CARDOZO ARTS & ENT. L.J. 531, 533 (2007)

Justice Scalia's stress on legal principles of agency and responsibility—in this case, through the “volitional act doctrine”—is a sensible response to such issues. The question he put his finger on is essentially a variant on the problem of proximate cause to which law students are introduced almost as soon as their legal education begins; the context may be novel, but the problem is one the law has worked over many times. The doctrine Scalia would have used to decide the case offers one analytical tool to draw lines more precisely, now that processes are becoming more integrated. Whether Scalia provided the best or most persuasive answer to the responsibility question, he asked the right question.

At the same time, however, it may well be that the “volitional act” concept is not up to the task in the long run. The distinction between an on-demand video service, which selects its library of programs, and a service like Aereo, which seemingly takes its programming as it comes, is hardly airtight. If Netflix buys its titles in bulk from a particular studio, does it really “curate” its collection? While there is a definite risk of overreacting to technological developments and underestimating the adaptability of existing legal constructs, it is nevertheless true that “digital technology produces a breakdown and conflation of legal categories that were meaningful in the analog era.”<sup>15</sup> But again, the need for new conceptual frameworks is less likely to be recognized unless the role played by existing frameworks is appreciated.

In the final analysis, *Aereo* may be less useful as a window into the path copyright law is likely to follow in the realm of media and communications technology than as an illustration of two alternative attitudes to the problem of technological change. “A man's got to know his limitations,” said a famous San Franciscan. It wasn't

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(questioning whether the “traditional categories and distinctions in copyright law—such as the once obvious distinction among ‘performances,’ ‘reproductions,’ and ‘distributions’—remain meaningful and applicable in the Internet context at all.”).

<sup>15</sup> 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §8.024 (2008).

Stephen Breyer, but it might as well have been. Breyer is altogether aware of his shortcomings as an analyst of things high-tech—as indeed is the Court more generally.<sup>16</sup> Breyer’s *Aereo* opinion was designed to be minimal. Its “limited holding,” he wrote, should not have the effect either “to discourage or to control the emergence or use of different kinds of technologies” in ways Congress did not intend.<sup>17</sup> The lynchpin of the Court’s decision was its conclusion that *Aereo*’s service was “highly similar” to the kinds of cable retransmission Congress intended to reach in the Copyright Act.<sup>18</sup> This was meant as reassurance. Developers of new technology need not fret, so long as they can avoid offering something that looks like, or almost like, cable television. The message, in other words, was “We know ‘em when we see ‘em—and so do you. So don’t worry. We’ll get this right.”

The problem with this approach is two-fold. First, it rests on an exaggerated self-confidence. It assumes judicial judgments as to what are and are not cable equivalents will be so obviously correct that reasonable minds will have no real difficulty figuring out what activities fall within the danger zone. Having reached a conclusion, it is natural to think its logic is self-evident. But there will always be close cases, and a standard based on similarity to cable television

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<sup>16</sup> See, e.g., *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 759 (2010) (“The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”). One may say of the Court’s modesty that it has much to be modest about. At oral argument in a recent Fourth Amendment case, for example, Justice Breyer admitted he did not know what kind of phone he has “because I can never get into it because of the password.” Transcript of Oral Argument at 7, *United States v. Wurie*, 134 S. Ct. 2473 (No. 13-212), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-212\\_g2il.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-212_g2il.pdf). “The justices are not necessarily the most technologically sophisticated people,” according to Justice Elena Kagan, who explains that “the court hasn’t really ‘gotten to’ email.” Kagan: Justices Not Tech Savvy, Send Paper Memos, Associated Press, August 20, 2013.

<sup>17</sup> *Aereo*, 134 S. Ct., at 2510.

<sup>18</sup> *Id.* at 2511.

seems likely to produce more than its fair share of them. After all, even Aereo is not functionally identical to cable, not only because it also offers recording capabilities but also because it delivers data directly to computers, tablets, and similar devices.<sup>19</sup>

The second problem is that the cable similarity test bears no relation to the language of the statute or the *Aereo* Court's various statements interpreting that language. Consider the example of remote DVR services. Time-shifting—the practice of recording a program for later playback—certainly seems quite different from the early forms of cable transmission to which Congress was responding when it enacted the relevant provisions of the Copyright Act in 1976. The statute itself, however, speaks only of performing “publicly.” The *Aereo* majority's central argument in response to the Second Circuit was that multiple separate acts of communication to separate recipients counts as a transmission “to the public” so long as the same content is relayed to each, and that concept is not limited to cable television equivalents. It plainly implicates services like remote DVR services, not to mention remote data storage more generally, cloud computing, internet service provision, and so on. Perhaps the Court did not intend its discussion to be taken seriously, but investors, entrepreneurs, and litigants ignore the Court's stated reasoning at their peril.

The irony of *Aereo*, then is that the Court's minimalist instinct is grounded in a fear of disrupting high-tech fields and squelching innovation, but the Court's very reticence and unwillingness to seek consistency may encourage those results. The Court should not be faulted for self-conscious prudence, restraint, and humility. But the question is what to do when one knows that one knows so little. It

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<sup>19</sup> There are other differences, such as the non-broadcast content cable companies supply. In addition, Aereo has no particular advantage in the market over competitors, while cable companies have long enjoyed market power. See Glynn S. Lunney, Jr., *Aereo and Copyright's Private-Public Performance Line*, 162 U. PA. L. REV. ONLINE 205, 215–217 (2014).

may generally be better in the fast-changing world of technological innovation to have clear rules and adhere to the standard tools of legal reasoning than to pull back and retreat into vagueness when the consequences seem uncertain. The nervous driver may be inclined to slow down in trying to pull onto a crowded and fast-moving highway, but the safer course is often to speed up. *Aereo* might seem like a quirky case with funny facts, but the problem of relating transmissions of data to copyright law is one that will only grow in importance in the years ahead. At some point, real guidance will have to be provided, whether the Court likes it or not.