

Interpreting the Public Performance Right: A Comparison of American and Canadian Supreme Court Cases

The public performance right has recently come under close scrutiny in both the United States and Canadian Supreme Courts. The Supreme Court of the United States delivered its much anticipated decision in the *American Broadcasting Companies Inc. v Aereo, Inc., F/K/A Bamboom Labs, Inc.*, 134 S. Ct. 2498, 2507 (2014) (*Aereo*) on June 25, 2014. In a 6-3 split of the Court, *Aereo* lost. The public performance right received similar attention at the Canadian Supreme Court in *Rogers Communications Inc., v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 and *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231. In each instance, the Court was tasked with interpreting the scope and implications of the public performance right in the digital environment. Of great concern to the Justices in these cases are the potentially widespread ramifications of their decisions on the digital environment and how their interpretations may impact both the public interest and the very foundations of Copyright law: how to strike a balance between innovation on the one hand and rewarding creators on the other. Lyle Denniston described the oral arguments in *Aereo* as moving “back and forth between killing that novelty by forcing it to pay sizable fees to download copyrighted TV programs, or giving it a fighting legal chance to survive as a cheaper alternative to cable.”¹

Both Canadian and American courts are concerned about the larger issues raised within the digital environment. In *Aereo*, the court was concerned with possible ramifications on cloud computing.² In both *Rogers* and *Aereo*, there was a concern for how the court’s decision might

¹ Lyle Denniston. Argument analysis: Slipping down the digital slope. *SCOTUSBlog*. April 22, 2014. <http://www.scotusblog.com/2014/04/argument-analysis-slipping-down-the-digital-slope/>.

² *Aereo* at 7.3.

impact on the ability to comply with International treaties.³ In *Rogers*, the court distinguished between American and Canadian Copyright regimes.⁴ While the Supreme Court of Canada has been committed to a large and liberal reading of users' rights, even in Justice Scalia's dissent in *Aereo*, the Court clearly sides with owners' rights⁵. Do these differing philosophies really result in radically different outcomes? In the face of changing technology, is there a theory of statutory interpretation that best serves all parties? This paper will compare and contrast the interpretive methods used in *Rogers* and *ESA* with those used in *Aereo* and the outcomes of these cases.

Statutory interpretation is almost never an easy task, yet that is what the Supreme Court – of both Canada and the United States – is most often asked to do in cases involving the Copyright Acts of the respective countries. In his dissent in *Aereo*, Justice Scalia provides a good summary of just exactly what the Supreme Court's task is, and this can easily be applied to the Supreme Court of Canada⁶ (if we substitute Parliament for Congress) as well:

this Court to identify and plug loopholes. It is the role of good lawyers to identify and what we have before us must be considered a “loophole” in the law. It is not the role of exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I might add, in a much more targeted, better informed and less disruptive fashion.⁷

Litman points out the importance of letting Congress plug those holes as the public has a greater respect for laws that are enacted by Congress, and this is an important consideration in combating piracy. If the public sees no legitimacy or common sense to the law, they are more likely to disregard it.⁸ A closer look at the decisions in *Aereo*, *Rogers* and *ESA* provide some insight into how each Court arrived at their decisions. Graham points out that “a judge's

³ *Rogers* at para 37. *Aereo* at 24.8.

⁴ *Rogers* at para 51.

⁵ *Aereo* at 12; see also Jessica Litman, Real Copyright Reform. IOWA LAW REVIEW. 96:1 at 31.

⁶ For both simplicity and clarity, this paper will refer to the Supreme Court of Canada as SCC and the Supreme Court of the United States as SC as per general practice.

⁷ Dissent at 12.

⁸ See *supra* note 5 Litman at 31.

willingness to endorse counterintuitive interpretations of a text varies inversely with the level of precision exhibited by the language of the relevant enactment.” Are there such differences in the preciseness of the language in regards to the public performance right between the *Copyright Acts* of the United States and Canada that can account for the different outcomes of these cases?

Statutory Interpretation

In an article anticipating the decision in *Aereo*, Antonio Del Mastro points to the interpretative possibilities before the Court:

If the Supreme Court gives precedence to the principals of statutory interpretation (as the US District Court for the District of Massachusetts did in *Hearst v. Aereo*⁹) then Aereo's technical argument will likely win the day. But this leaves the annoyance of the functional argument, and the real economic fallout pressing in from the periphery. History has shown that the court is not blind to significant public policy considerations. Even if the Supreme Court finds in Aereo's favor, ABC and other broadcasters have indicated (in the petition and elsewhere) that such a finding will force cable providers to make the economically rational choice of creating their own Aereo-type service to continue offering broadcast programming without the obligation of paying the retransmission fee. As this and related revenue streams dry up, the broadcasters claim, it will no longer be economically viable to even provide broadcast television at all. If these assertions are true, a victory for Aereo might erode the very service it hopes to provide.¹⁰

Is it possible to rely on a purposive or originalist construction in the face of today's technologies? A dynamic or progressive interpretation that construes meaning “with reference to contemporary ideals”¹¹ would seem better suited to tackling the intricacies of technologies not yet dreamed of by the framers. Rebecca Tushnet points out that “It's difficult to regulate properly without being able to define the regulated object.”¹² Graham goes on to point out that

⁹ http://scholar.google.com/scholar_case?case=13801335114793867538

¹⁰ Antonio Del Mastro, *Quagmire of Statutory Interpretation at Center of ABC v. Aereo Copyright Case*, JURIST - Dateline, Mar. 1, 2014, <http://jurist.org/datetime/2014/03/antonio-del-mastro-copyright.php>

¹¹ Randal N. Graham. *Statutory Interpretation: Theory and Practice*. 2001. Toronto: Edmond Montgomery Publications Limited at 31.

¹² Rebecca Tushnet. *Performance Anxiety: Copyright Embodied and Disembodied*. Georgetown Public Law and Legal Theory Research Paper No. 13-040 at 1039. (see also 60 J. Copyright Soc'y U.S.A. 209-248 (2013))

The principal benefit of dynamic interpretation is its ability to respond to the flaws of originalist construction. Where originalism fails to respond to linguistic evolution, dynamic interpretation thrives on it.¹³

The Supreme Court in *Aereo* takes a purposive approach with statements such as “History makes plain that one of Congress’ primary purposes in amending the Copyright Act of 1976...”¹⁴ and “when read in light of its purpose, the Act is unmistakeable.”¹⁵ Furthermore, “In terms of the Act’s purposes, these differences do not distinguish Aereo’s system from cable systems, which do not perform ‘publicly.’”¹⁶ Other statements include “Therefore, in light of the purpose and text of the Clause, we conclude...”¹⁷ and “We also note that courts often apply a statute’s highly general language in light of the statute’s basic purposes.”¹⁸

Likewise, the Supreme Court of Canada relies on a purposive interpretation in *Rogers*. In laying out the appropriate standard of review, the SCC determined that

Because of the unusual statutory scheme under which the [Copyright] Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions.¹⁹

Abella J in his concurring opinion points out that

The Board was not tasked with definitively or even separately defining the terms “communicat[ion]” and “to the public” in its decision.... It is not clear to me that Parliament intended this phrase to be defined categorically at all, as opposed to contextually depending on the facts of each case.²⁰

Abella J goes on to point out that isolating each word is an “unduly interventionist approach.”

The headnotes of *ESA* actually emphasize under the summary for the dissent that the

¹³ *Supra* note 11 at 37.

¹⁴ *Aereo* at 4.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 12.

¹⁷ *Ibid.*, at 14.

¹⁸ *Ibid.*, at 17.

¹⁹ *Rogers* at 15.

²⁰ *Ibid.*, at 86

general rules of statutory interpretations require that the words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

The majority in *ESA* also takes a purposive approach, particularly in regards to the fact that “to communicate” is not defined within the *Act*.²¹ Justices Abella and Moldaver emphasize the need to ground the term “communications” in more than mere dictionary definitions:

In our view, using dictionary definitions in this case has the effect of ignoring a solid line of legislative history connecting the term “communicate” to performance-based activities....

In our view, this interpretation goes far beyond what the term “communicate” was ever intended to capture.²²

In all three of these cases, the Courts use of a purely purposive approach is hindered by a lack of specific language within the statutes to rely upon.

While the language of the decisions points toward a purposive, originalist approach, in each of these three cases, the emphasis in the decision is on the interpretation of the words in the statute, pointing towards a dynamic or progressive interpretation that takes into account that “statutory language must grow and adapt in response to changing social conditions,”²³ or in these instances, changing technology. Graham cautions, however, that “dynamic construction’s highly subjective nature can give judges an almost unfettered discretion to interpret the law in surprising and whimsical ways.”²⁴ In essence, this is Justice Scalia’s criticism of the majority’s decision in *Aereo*.²⁵

²¹ *ESA* at para 4.

²² *Ibid.*, at paras 31-2.

²³ Graham at 32.

²⁴ *Ibid.*, at 41.

²⁵ Justice Scalia is perhaps one of the best known originalists. See for example “Scalia Defends Originalism as Best Methodology for Judging Law” *University of Virginia Law School: News and Events*. April 20, 2010. http://www.law.virginia.edu/html/news/2010_spr/scalia.htm; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

In *Statutory Interpretation: Theory and Practice*, Randal Graham outlines a unified theory of statutory interpretation that is “a tool designed to assist judges faced with difficult problems of statutory construction.”²⁶ When judges are required to interpret ambiguity or subtext within the language of a statute, Graham recommends an originalist approach. In instances of vagueness, however, a dynamic approach is suggested as preferable. When the need to rely upon analogy arises, however, Graham emphasizes that the court should “[r]eject the attempt to extend the statute’s terms.”²⁷ In all three of the cases mentioned herein, the Justices were faced with terms that exhibited both vagueness and ambiguity. Analogy played a large part in all of the decisions, but perhaps, more so in *Aereo*.

Copyright law is uniquely tasked with attempting to balance the rights of creators, who deserve to be rewarded for their creation, with the rights of users, who may need access to previous creations in order to create further from them. As Litman states, “[a] copyright system is designed to produce an ecology that nurtures the creation, dissemination, and enjoyment of works of authorship.”²⁸ Tushnet points out that the

primary economic and cultural significance of copyright today comes from works and rights that weren’t contemplated by the Framers of the Constitution’s Copyright Clause... and new means of distribution have profoundly changed the scope and meaning of copyright.²⁹

Litman draws a more precise picture of the various actors who may be involved in copyright cases in the digital environment. Users, owners, and intermediaries are the three categories generally referred to, but Litman further delineates copyright owners from creators and divides intermediaries into makers and distributors. Rather than creators benefitting from copyright law,

²⁶ *Graham*, at 179.

²⁷ *Ibid.*, at 180. Graham provides a very helpful chart on this page.

²⁸ Jessica Litman, Real Copyright Reform. *Iowa Law Review*. 96:1 at 8 (2010).

²⁹ *Supra* note 12 at 1001.

Litman sees “the bulk of the proceeds they earn are held instead by copyright owners who serve as intermediaries between the authors and their audience [users].”³⁰ According to Litman, “distributors own the copyright; they license reproduction, adaptation, and public distribution, performance, and display”³¹ while makers are “the group of people and businesses who make instruments, devices, and services designed for the enjoyment of copyrighted works.”³² Aereo would seem to fall squarely under the category of maker. Tushnett points out that “at least with respect to large-scale works, we are interested in economic incentives and in the smooth operation of copyright rights and limitations, rather than in rewarding creativity as such.”³³ It is important to bear in mind that the United States copyright system is a largely utilitarian one while the Canadian system has long supported a “large and liberal” view to users’ rights.³⁴

Factors Affecting Interpretation

Economics plays a large role in copyright theory as the assignment of rights and limitations incentive creation. According to William Landes and Richard Posner, “[s]triking the correct balance between access and incentives is the central problem in copyright law.”³⁵ One of the central problems is that in the current market, the cost of creation is high in many instances but the cost of reproduction is very low.³⁶ Furthermore, Landes and Posner point out that “[l]egal rights are costly to enforce – rights of intangibles especially so – and the costs may outweigh the

³⁰ *Supra* note 28 at 10.

³¹ *Ibid.*, at 18.

³² *Ibid.*, at 21.

³³ *Supra* note 12 at 1029.

³⁴ See Laura J Murray and Samuel E Trosow, *Canadian Copyright: A Citizen’s Guide*. 2 ed. Toronto: Between the Lines. (2013). Amendments to the Copyright Act, including a User-Generated Content exception represent Parliament’s support of SCC decisions in support of users’ rights.

³⁵ William Landes and Richard Posner, An Economic Analysis of Copyright Law, 18 J. Leg. Stud. 325 (1989) at 326.

³⁶ See Tushnett note 12 and Litman note 28.

social gains in particular settings.”³⁷ In keeping with the theories brought forward in “Utilitarianism, Economics, and Legal Theory,”³⁸ the authors posit that even in the face of these competing interests, there is an optimal level of copyright protection that can maximize wealth for both interests. To determine what this level might be, Landes and Posner present a number of equations that are supposed to help to take the guess work out of the process: the

various doctrines of copyright law, such as the distinction between the idea and expression and the fair use doctrine, can be understood as attempts to promote economic efficiency by balancing the effect of greater copyright protection – in encouraging the creation of new works by reducing copying – against the effect of less protection – in encouraging the creation of new works by reducing the cost of creating them.³⁹

However, Litman points out that as “technology has enabled individuals to enjoy works in new ways... copyright owners have asked for greatly enhanced control over their works.”⁴⁰ Users want less expensive ways to enjoy television, particularly via their computers as more and more users are “cutting the chord.” Not only do these users not subscribe to cable, they do not even own a television set. The historical reasons to grant those enhanced controls to copyright owners/distributors is no longer valid:

Before digital networks, it was entirely reasonable to assume that only if distributors could rely on collecting the largest share of proceeds from copyrighted works would the business of mass distribution seem likely to reward their investment. Today, of course, there are many ways of disseminating works to everyone in the world without having to spend much money.⁴¹

As competing interests seem to become more firmly entrenched and at odds, the task of striking a balance between these interests becomes more difficult for both legislators and Justices.

The history of copyright legislation, according to Litman, is one

³⁷ *Supra* note 33 at 331.

³⁸ Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Leg. Stud. 103 (1979).

³⁹ *Supra* note 33 at 333.

⁴⁰ *Supra* note 28 at 14.

⁴¹ *Ibid.*, at 12.

in which copyright lobbyists engaged in protracted negotiations with one another to arrive at copyright laws that enriched established copyright industries at the expense of both creators and the general public.⁴²

The copyright owners are the ones with the economic interests and the economic resources to pursue lobbying. Makers, according to Litman, also need to incentive their business. They are often the ones providing the means to low-cost access for users. One reason users turn to piracy or more economically viable alternatives, for them, of content delivery is that they are economically disadvantaged and simply cannot afford mainstream delivery of content. Litman sees this conflict between users and owners and owners and makers as an inherent threat to the legitimacy of copyright itself:

Makers of new devices and services for enjoying copyrighted works, meanwhile, face threats of ruinous litigation. As a result, many members of the public who are being called upon to follow the extant copyright rules in their daily lives have decided that the rules are unfair or unreasonable, or that they don't in fact do what they're claimed to do. The erosion in copyright's legitimacy is itself problematic for the health of the copyright system.⁴³

Both Justices and legislators are affected by the economic tug of war between the participants.

Justices are people too, and therefore, subject to the same forces that affect everyone, though they are often held to a higher standard. Justices are also faced with economics of time and reputation. They only have so much time to devote to a given case for example. Supreme Courts by their very nature are forced to pick and choose which cases they can hear in any given sitting. A case must demonstrate merit and necessity. Graham observes that

Judges interpret legislations through the lens of their own policy predilections and ideological commitments. They manipulate legal texts and interpretive theories, whether consciously or unconsciously, with a view to entrenching their own policy preferences.⁴⁴

⁴² *Ibid.*, at 7.

⁴³ *Ibid.*, at 25.

⁴⁴ Randal N M Graham, "What Judges Want: Judicial Self-interest and Statutory Interpretation" *Statute Law Review* 30(1) (2009) at 47.

It becomes an interesting exercise then, and one which most good lawyers practice, to examine past decisions by judges on current topics. For instance, it makes perfect sense that Justice Denny Chin would write the dissent in *WNET, THIRTEEN v. Aereo, Inc.*, 712 F.3d 676 (2013) (“*Aereo II*”). The case relied heavily on the decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). The *Cablevision* decision actually overturned a decision of Chin while he sat on the District Court. In his dissent in *AereoII*, Chin posited that the court was relying on the wrong precedent and compared Aereo’s service not to Cablevision but to streaming services at issue in *United States v. American Society of Composers, Authors, Publishers* (“ASCAP”) No. 09-0539, 2010 WL 3749292 (2d Cir. 2010) and *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012). It also comes as little surprise to see the Justices on the SCC provide the same support for a large and liberal reading of users’ rights by referencing their own prior decision in *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 (“*CCH*”).⁴⁵

Graham’s article⁴⁶ also focuses on the nature of language and the part self-interest may play in any Justice’s interpretation of a statute. Litman points out that “[t]he copyright law is long, complex, counterintuitive and packed with traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors.”⁴⁷ Graham asserts that “[l]anguage works because we typically have an interest in interpreting language in conventional ways.”⁴⁸ In the end,

achieving predictable outcomes (and maintaining a good reputation) maximizes our utility. As a result, self-interest has the effect of pushing us toward conventional and

⁴⁵ It is interesting to look at the split of the Supreme Court in *Aereo*. Roberts, Kagan, Scalia, Ginsburg, and Thomas are all from the DC Circuit – the court of Justice Collyer who issued an injunction shutting down *FilmOn*. Scalia and Thomas wrote the dissent for *Aereo*, but the other three came to a similar decision as Collyer.

⁴⁶ *Supra* note 44.

⁴⁷ *Supra* note 28 at 33.

⁴⁸ *Supra* note 44 at 71.

intuitive interpretations of language, while leading us away from any counterintuitive meanings that a deconstruction of the relevant language might reveal. ...

vague and open-textured language - such as the language typically found in constitutions... – is inherently vulnerable to conscious or unconscious manipulation by those charged with the task of interpreting and applying it. Specific and detailed language, by contrast – such as that which is commonly found in ... statutes aimed at specific, discrete, and complex social issues – is relatively difficult to manipulate.⁴⁹

In each of the three cases discussed in the next section, Supreme Court Justices were asked to interpret language. What is meant by communicate versus what is meant by transmit? What is the deciding factor in whether the action in questions is public or private? Tushnett points out that “the boundaries of the ‘work’ are unfixed until we start comparing it to other works that might or might not infringe.”⁵⁰ The very questions the Justices ask are value-laden, and the answers provided and interpreted will have consequences not only on the rights of the parties involved but on other technologies as well.

A Closer Look at Three Cases

As already stated, the Supreme Court of the United States delivered its much anticipated decision in *Aereo* on June 25, 2014. While many anticipated *Aereo*’s loss, there are still many questions remaining, including whether this a good decision for copyright owners and users, for television content providers and television viewers, and what the ramifications for new technologies are going forward. It is clearly a win for the big content providers and a loss for television viewers, but the larger ramifications on technology providers and the larger ramifications on data delivery from the cloud remain to be seen. The Court’s split decision was delivered by Justice Breyer and Justice Scalia delivered the dissent. The dissent provides a more persuasive argument.

⁴⁹ *Ibid.*

⁵⁰ *Supra* note 12 at 1005.

The Supreme Court heard the arguments and delivered its decision in near record time. Spurring them on, was the fact that this case was causing a split in the Circuit Courts. The Second Circuit Court denied the application for an injunction against Aereo in *WNET, THIRTEEN v. Aereo, Inc.*, 712 F. 3d 676 (2013), but the Ninth Circuit granted one for the virtually identical FilmOn technology.⁵¹ In fact, Justice Collyer of the District of Columbia Court had granted an injunction against FilmOn in every Circuit except the Second.⁵² Why such a different result in the different Circuit Courts which were using the same Copyright Act to interpret essentially identical technology and use? The major difference between the Circuit Courts was the precedence binding each Court. The Second Circuit was bound by their own precedence, which did not bind the Ninth Circuit. In the Ninth Circuit, the courts were relying on *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991) (“*On Command*”), while the Second Circuit was constrained by the decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). *On Command* only provided a guide for the Ninth Circuit as it is not a Circuit decision, but the Ninth Circuit was not bound by *Cablevision* at all as it is a Second Circuit decision. Meanwhile, the Second Circuit was bound by its own precedential decision in *Cablevision*.

Both *On Command* and *Cablevision* dealt with discrete copies of copyrighted works being transmitted to individual users. Both cases turned on what constituted “the public” and who was doing the performing. Both relied on specific technology that allowed the transmission. However, in *On Command* people in hotel rooms could choose a video to watch while

⁵¹ FilmOn’s rather colorful history is extensive. The technology was variously known as Aereokiller and BarryDriller.com. See Eriq Gardner, Barry Diller Sues Over BarryDriller.com, *The Hollywood Reporter*. August 22, 2012. <http://www.hollywoodreporter.com/thr-esq/barry-diller-sues-barrydrillercom-364748>; Jonathan Handel, ‘Aereokiller’ Hearing May Portend Difficulties for Networks (Analysis), *The Hollywood Reporter*. August 28, 2013. <http://www.hollywoodreporter.com/thr-esq/aereokiller-filmon-hearing-may-portend-616737>

⁵² *Fox Televisions Stations Inc. v. FilmOn X LLC*, No. 13-758 (D.D.C. 2013).

Cablevision was providing remote DVR storage for its customers. The users in *On Command* were determined to be “the public” largely because they were paying hotel guests as a unit. *Aereo* is far more like the *Cablevision* case than *On Command* in terms of drawing an analogy to what should constitute “the public.” Of course, the Supreme Court is not constrained by either of these decisions and is bound first and foremost by the *Copyright Act* itself.

The Supreme Court rejected *Aereo*’s position that it is simply a passive equipment provider. While the Court acknowledged the difference between the *Aereo* system which remains inert until the subscriber activates the equipment and a CATV system which operates continuously, the Court relied on the substantial similarity between the two systems, deciding ultimately that they are more alike than they are different. It is hard to justify the discounting of that one very important distinction, however. It is the user who initiates the copy.

In assessing whether the transmission was public or private, the Court relied heavily on a purposive interpretation of the *Copyright Act*, relying on what the ultimate goals of the Act are rather than the actual context of the case and its particular facts. The transmission of a discrete copy through a discrete antennae to a discrete individual would, at face value, appear to be a private one-on-one communication. However, the Court clearly disagreed, relying on the purpose of the Transmission Clause⁵³: “in light of the purpose and text of the Clause, we conclude that 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.”⁵⁴ The Court also points out that the subscribers are the “public” meant by the Act in contrast to “family and friends.” The Court further rejects any argument that could be made for time shifting – a la Sony – “ ‘the public’ need not be situated together,

⁵³ 17 U.S.C. §101.

⁵⁴ *Aereo* at 14.

spatially or temporally.”⁵⁵ This reasoning seems more in line with that of the On Command, paying hotel customer than a single user in their own home – or at least on their own device (computer, tablet etc).

The majority acknowledged concerns regarding innovative technology in other spheres being hampered by their decision, but stressed that they do not believe this to be an issue as the Transmit Clause was intended to be limited “to cable companies and their equivalents.”⁵⁶ It’s the use of the word “equivalents” that still provides enough ambiguity to be of concern. The decision is geared particularly to concerns over the transmission of data through cloud-based systems, however. The Court stressed that the consumers have no underlying ownership in the performances in the Aereo situation, and the decision in this case “does not extend to those who act as owners or possessors of the relevant product.”⁵⁷ The Court distinguished cloud-based storage systems specifically.

The Court stressed that any decisions regarding other technologies, such as cloud-based data or DVRs should be left to cases that specifically address those technologies. However, that does not necessarily safeguard those technologies from similar analogous findings. Certainly, during the oral arguments all of the Justices were concerned in their questioning in determining what Aereo was most like. However, just because a technology is most like one thing, does not mean that it does not also share similarities with other technologies, and it would be impossible for any court to adequately anticipate future innovations. However, it does behoove the Court, stemming from the very heart of copyright, to encourage such innovation, not kill it in the womb.

Justice Scalia’s strongly argued dissent is compelling. His analogy of Aereo to a copy shop relies on the volitional action necessary to result in direct infringement. As nothing happens

⁵⁵ *Ibid.*, at 15.

⁵⁶ *Ibid.*, at 16.

⁵⁷ *Ibid.*

until the customer acts, this is the much more compelling argument. Scalia then correctly points out that the argument should move to a consideration of secondary infringement. Scalia points out that no determination as to secondary liability has been explored, but that this would be a much better option for limiting what Scalia agrees is Aereo's suspect use of the Petitioners' copyrighted material than distorting the *Copyright Act* to do so. Scalia's issue is not with the Court's decision so much as its analysis and reasoning.

Scalia takes the majority to task for its finding that Aereo is more like a video on demand company or cable provider than it is like a copy shop. In fact, according to Scalia, there are numerous differences that the Court simply chooses to ignore, such as the curation of content, selling commercials, and originating content. At the end of the day, the point is not whether Aereo looks like a cable company – and therefore performs – but whether Aereo actually does perform. In fact, Scalia wonders if “the Court means to adopt (invent, really) a two-tier version of the *Copyright Act*, one part of which applies to ‘cable companies and their equivalents’ while the other governs everyone else.”⁵⁸ Scalia criticizes the Court for using smoke and mirrors rather than actual textual analysis. If the Court insists this only applies to the live version of Aereo, does that mean that Aereo escapes liability with its more DVR-like function by time shifting? Furthermore, the Court specifically carves out DVR-like services from its “limited holding.” Scalia also points out that the Court has to side step the issue of common equipment between subscribers because that would implicate Internet service providers.

A much more compelling argument likens Aereo to an antenna service. What is the difference between a customer buying and using their own antenna and a customer renting Aereo's? The technology really allows consumers to watch broadcast television affordably on devices other than a television.

⁵⁸ *Ibid.*, at 9.

Justice Scalia's assessment that if a finding through the *Copyright Act* cannot be found, one must conclude that Aereo has found a loophole in the law, and it is up to Congress to plug that hole, not the Courts is a fair assessment of how law is intended to be shaped. There are, in fact, numerous bills in front of Congress, or on their way to Congress, seeking to deal with the increasingly muddy waters of technological delivery of content via the Internet. The content providers, as Scalia pointed out, played Chicken Little during the *Sony*⁵⁹ case and yet they continue to thrive.

Justice Scalia points out that the Supreme Court's mandate does not include plugging loopholes in the *Copyright Act*. Consumers will suffer from a lack of access to less expensive alternatives to cable services, especially at a time when so many new users are not only chord cutters but have always been chord free. Technological innovation will no doubt also suffer from a chilling effect due to this decision. Finally, this decision is likely to spark a growing uncertainty due to its ambiguity among alternate technologies such as those involved in cloud computing services.

Two recent cases in the Supreme Court of Canada touch on similar issues but point to somewhat different outcomes. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada* ("Rogers")⁶⁰ resulted in a unanimous holding that on-demand music streams from an online music service provider constituted communications "to the public." The case distinguishes between downloads and streamed content, allowing SOCAN to collect royalties on streamed content but not downloaded content. *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* ("ESA")⁶¹ on the other hand resulted in a 5:4 split decision. The majority held in ESA that SOCAN could not

⁵⁹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁶⁰ 2012 SCC 35, [2012] 2 S.C.R. 283.

⁶¹ 2012 SCC 34, [2012] 2 S.C.R. 231.

collect royalties on music contained within video games when those games were sold over the Internet when the music had already been licensed by the video game publishers.

The Court in *Rogers* determined that “the sole issue in this appeal is the meaning of the phrase “to the public.”⁶² In restricting the discussion to streaming, the Court relied upon the majority decision in *ESA* which “determined that musical works are not “communicated” by telecommunications when they are *downloaded*.”⁶³ The discussion centered on whether a point-to-point communication via telecommunications was a communication to the public “regardless of whether another copy of the same work is transmitted a different customer at a different time”⁶⁴ (para 21). This portion of the argument is very similar to the reasoning in *Aereo*.

The Court then moved on to consider the difference – if any – of “pull” technologies (in which the consumer initiates the action) versus “push” technologies (in which the source initiates the action). In *Rogers*, the Court asserts that the *Copyright Act* “has evolved to ensure its continued relevance in an evolving technological environment.... [and] the Act should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting.”⁶⁵ Furthermore, “the broad definition of ‘telecommunications’ was adopted precisely to provide for a communication right ‘not dependent on the form of technology.’”⁶⁶ The Court specifically rejects the ruling of *Cablevision* and asserts that there are

important differences both in wording and in policy between Canadian and American copyright legislation.... The difference in statutory wording between the relevant provisions of the American legislation and of the Canadian *Copyright Act* is sufficient to render the U.S. decisions of no assistance in the interpretive exercise engaged here.⁶⁷

⁶² *Rogers* at para 2.

⁶³ *ESA* at para 2. Emphasis in original.

⁶⁴ *Ibid* at para 21.

⁶⁵ *Rogers* at paras 38-9.

⁶⁶ *Ibid.*, at para 39.

⁶⁷ *Ibid.*, at para 51.

The Canadian Court does, however, recognize that the Canadian *Act* has adapted in considerations of International treaties such as the WIPO Copyright Treaty⁶⁸ and NAFTA.⁶⁹ Such international considerations are important given the global nature of the Internet and content that flows over it. The American Court, in contrast, does not consider the international ramifications of its decision in *Aereo*, even though it was provided with a lengthy *amici curiae*⁷⁰ on the subject by a group of law professors and scholars.⁷¹

The Court in *Rogers*, concluded that the streaming was a public performance because “the appellants’ business model is premised on the expectation of multiple sales of any given musical work. Achieving the highest possible number of online sales is the very *raison d’etre* of online music services.”⁷² The Court quotes David Vaver: “If the content is intentionally made available to anyone who wants to access it, it is treated as communicated ‘to the public’ even if users access the work at different times and places.”⁷³ However, the Court goes on to distinguish the facts in *Rogers* from those in *CCH* in which “the Great Library had made the works generally available at any lawyer’s request.”⁷⁴ Following Justice Scalia’s copyshop analysis in *Aereo*, it seems likely that *Aereo* might have received a very different conclusion in Canada.

The majority in *ESA* state that “a ‘download’ is merely an additional, more efficient way to deliver copies of the games to customers. The downloaded copy is identical to copies purchased in stores or shipped to customers by mail, and the game publishers already pay

⁶⁸ *Ibid.*, at para 44.

⁶⁹ *Ibid.*, at para 37.

⁷⁰ http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-461_resp_amcu_lp-s.authcheckdam.pdf

⁷¹ The authors are Margot Kaminski, Sean M Fiil-Flynn, Michael Carroll, Peter A. Jaszi, and Meredith W. Jacob. See also Barry Sookman, “Aereo infringes says international associations and copyright scholars to SCOTUS” Barry Sookman: Copyright, Intellectual Property, Computer, Internet, e-Commerce Law. March 3, 2014. <http://www.barrysookman.com/2014/03/03/aereo-infringes-says-international-associations-and-copyright-scholars-to-scotus/>.

⁷² *Rogers* at para 54.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at para 55.

copyright owners reproduction royalties for *all* of these copying activities.”⁷⁵ The majority stressed that “the *Copyright Act* [should] apply equally between traditional and more technologically advanced forms of the same media.”⁷⁶ The majority also clarified that “to ‘communicate’ is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.”⁷⁷

Writing for the dissent in *ESA*, Justice Rothstein argued that the communication and transmission of a work were a single act of communication to the public.⁷⁸ Justice Rothstein also stresses the difference between American law, which “recognizes a right of public performance,”⁷⁹ rather than an exclusive right to communicate a work to the public. In very similar language to that used by the Court in *Rogers*, Rothstein states that “The difference in statutory wording between the provisions of the American legislation and of the Canadian *Copyright Act* is sufficient to render the U.S. decisions of no assistance in the interpretive exercise engaged here.”⁸⁰ Rothstein is also concerned within the dissent about the far reaching ramifications of the decision: “it would be hazardous for the courts to delimit the scope of broadly defined rights in the digital environment without the benefit of a global picture of the implications for all the parties involved.”⁸¹

ESA, unlike *Aereo*, is concerned with downloading material, and as has already been pointed out, *Aereo* is concerned with the streaming of content as is the *Rogers* case. In *Rogers*, the consumer was paying for the content, which again forms an important distinction from *Aereo* customers who were paying for the equipment – not the content.

⁷⁵ *ESA* at para 4.

⁷⁶ *Ibid.*, at para 5.

⁷⁷ *Ibid.*, at para 12.

⁷⁸ *Ibid.*, at para 87.

⁷⁹ *Ibid.*, at para 103.

⁸⁰ *Ibid.*, at para 104.

⁸¹ *Ibid.*, at para 124.

Conclusion

As a generalization, the Canadian Supreme Court has taken a more global view into account when interpreting the *Copyright Act*, yet have not had to perform the contortions to make their decisions consistent with the Canadian *Copyright Act* that the American Court had to do in the *Aereo* decision. While the *Aereo* case was pending, Aereo's CEO Chet Kanojia maintained that he did not have a "plan B" if the Supreme Court ruled against him. Since losing the case, the company has ceased service to its customers. However, Kanojia has sent a letter⁸² to customers urging them to write to their representatives in Congress asking for more "choice to access live over-the-air broadcast television... [and] access to a cloud-based antenna."⁸³ Perhaps, Kanojia's final goal was to push for actual changes to the *Copyright Act* itself. However, Kanojia did not stop there. Kanojia also applied for a compulsory copyright license to be categorized as a Cable system. Unfortunately, the Copyright Office denied the application.⁸⁴ The decision in *Aereo* would suggest that changes to the American *Copyright Act* are long overdue. However, those changes should come from Congress, not the Supreme Court. Had *Aereo* been heard in Canada, the SCC's greater emphasis on users' rights may have found a statutory interpretation that favored a technology that enhanced the use and enjoyment of works.

⁸² <https://www.aereo.com/>

⁸³ Kwame Opam, Aereo turns to Congress to reverse Supreme Court decision, *The Verge*, July 1, 2014. <http://www.theverge.com/2014/7/1/5860888/aereo-turns-to-congress-to-reverse-supreme-court-decision>

⁸⁴ Keach Hagey, Copyright Office Denies Aereo Request to Be Classed as Cable System, *The Wall Street Journal*, July 17, 2014. <http://online.wsj.com/articles/copyright-office-denies-aereos-bid-to-be-classed-as-cable-system-1405616940>