CASE COMMENT

WALKING THE SEMANTICS TIGHT-ROPE: DEFINING "PUBLIC PERFORMANCE" IN WNET, THIRTEEN v. AEREO, INC.

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INTRODUCTION

For every new technological advance in the field of multimedia, another new wrinkle arises in the struggle between copyright holders and the entrepreneurs of multimedia services. The streaming of "live" television broadcasts via the internet is one of the newer ways technology has put stress on what the true meaning of "public performances" is within the Copyright Act of 1976 and how it has transformed the extent of the rights of a copyright holder.

Defendant-appellee Aereo, Inc. (Aereo) allows for its subscribers to watch broadcast television programs over the internet for a monthly fee.[1] Aereo uses a system of antennas and remote hard drives to create individual copies of programs that Aereo users select to watch either during the actual broadcast of the program or at some later time.[2] In this system, no two Aereo users share the same antenna at the same time and the signal received by each antenna is used to create an individual copy of the program that is only accessible to that particular user.[3] Two groups of plaintiffs filed separate copyright infringement actions against Aereo in the Southern District of New York and both groups moved for preliminary injunctions barring Aereo from transmitting programs to its subscribers.[4] The district court denied the preliminary injunction by relying on *Cablevision*, 536 F.3d 121,[5] and concluded that Aereo's system was not materially distinguishable from the system in

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1. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013).

2. *Id.*

3. *Id.* at 683. In order to be able to sustain this process for every Aereo user, Aereo's facilities contains thousands of antennas to process each user's request. *Id.* at 682.

4. *Id.*

5. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008) (holding that there was no infringement on the exclusive right of public performance in DVR playback transmissions because each transmission was made to a single subscriber using a single unique copy, causing these transmissions to not be performances "to the public.").

Cablevision.[6] The Court of Appeals for the Second Circuit affirmed the decision of the district court.[7] HELD, that Aereo's transmissions of unique copies of broadcast television programs created at its users' requests and transmitted while the programs are still airing on broadcast television are not "public performances" of the plaintiffs' copyrighted works under *Cablevision*.[8]

The court's interpretation of the Transmit Clause is inadequate. The Second Circuit failed to address the question of how one might rationalize the district court's decision to allow the segmentation of the "public" under the Transmit Clause of the Copyright Act of 1976. Properly addressing this question may simplify the dilemma surrounding the interpretation of this outdated statute.

I. BACKGROUND

The 1976 Copyright Act gives copyright owners several exclusive rights that are subject to a number of exceptions.[9] One of these enumerated rights is the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly."[10] The two pertinent words in this clause are the words "perform" and "publicly." "Perform" 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."[11] The definition of "publicly" includes:

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

6. Am. Broad. Cos., Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 385 (S.D.N.Y. 2012) ("the copies Aereo's system creates are not materially distinguishable from those in *Cablevision* . . . .").

7. *WNET, Thirteen*, 712 F.3d at 696.

8. *Id.*

9. *Id.* at 684.

10. 17 U.S.C. § 106(4) (2002).

11. 17 U.S.C. § 101 (2010).

different times.[12]

This definition is important primarily because of the second clause, commonly called the Transmit Clause, which is what the Aereo case hinges upon.[13]

A proper analysis of the Transmit Clause must begin with a look at the history of the Copyright Act of 1976, which is the copyright statute in effect today. Its predecessor, the Copyright Act of 1909, lacked language resembling the Transmit Clause.[14] Two Supreme Court cases, *Fortnightly Corp v. United Artists Television, Inc.*, 392 U.S. 390,[15] and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394,[16] held that cable television systems that received broadcast television signals via antenna and retransmitted these signals to its subscribers via coaxial cable did not "perform" the copyrighted works and therefore did not infringe the copyright holders' public performance right.[17] However, in forming the Copyright Act of 1976, Congress intended to divert from *Fortnightly* and *Teleprompter* to bring a cable television system's retransmission of broadcast television programming within the scope of the public performance right.[18] Congress coupled this diversion from case precedent with the caveat that private performances are exempted from copyright liability.[19]

The technological environment of 1976 made the public-private performance determination feasible because distinguishing between

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12. *Id.*

13. *WNET, Thirteen*, 712 F.3d at 685.

14. *Id.*

15. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400–01 (1968) (holding that the community antenna television systems (CATV) that only received programs that have been released to the public and carried them by private channels to additional viewers were unlike broadcasters and did not perform the programs they received and carried).

16. Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 409 (1974).

> Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public . . . a CATV system does not lose its status as a nonbroadcaster, and thus a "nonperformer" for copyright purposes, when the signals it carries are from distant rather than local sources.

Id.

17. *WNET, Thirteen*, 712 F.3d at 685 (citing *Fortnightly* and *Teleprompter*).

18. *Id.* (citing H.R. Rep. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, at 63). The House Report rejected *Fortnightly* and *Teleprompter* because "a cable television system is performing when it retransmits the broadcast to its subscribers . . . ." *See* H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, at 63 (1976).

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

private and public was simpler than it is today.[20] However, unanticipated technological developments created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and Congress's intent that some transmissions be classified as private.[21]

Some of these unanticipated technological developments, such as a "Remote Storage DVR System" (RS-DVR), have been held to be "private" performances.[22] In *Cablevision*, the RS-DVR system split transmission data from network broadcasts to a remote server, which would record programs requested by the user to a hard disk associated to that user.[23] Copyright holders of numerous movies and television programs sued Cablevision for declaratory and injunctive relief.[24] The district court found that the RS-DVR system transmitted to the public because the system still transmitted the same program to members of the public, albeit at different times.[25] The Second Circuit reversed and held that the RS-DVR system did not perform a transmission "to the public."[26] In coming to this decision, the Second Circuit considered not the potential audience of the work, but the potential audience of the transmission in applying the Transmit Clause.[27] Further, the Second Circuit found that because each transmission was made using a unique copy of the broadcast, use of such a unique copy may limit the potential audience of a transmission.[28] Thus, the Second Circuit concluded that each RS-DVR playback transmission was not "to the public."[29]

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20. *WNET, Thirteen*, 712 F.3d at 694.

21. *Id.* at 695.

22. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008).

23. *Id.* at 124.

24. *Id*.

25. *Id.* at 126 (citing Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478 F. Supp. 2d 607, 622–23 (S.D.N.Y. 2007)).

> Under the plain language of this clause, a transmission "to the public" is a public performance, even if members of the public receive the transmission at separate places at different times. Such is the case here. Cablevision would transmit the same program to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS–DVR playback.

Id.

26. *Id.* at 139.

27. *Id.* at 135–36.

28. *Id.* at 138.

29. *See id.* ("Given that each RS–DVR transmission is made to a given subscriber using a copy made by that subscriber, we conclude that such a transmission is not 'to the public,' without analyzing the contours of that phrase in great detail.").

II. THE INSTANT CASE: WNET, THIRTEEN V. AEREO, INC.

The Second Circuit had a second chance of resolving the public performance question in WNET, Thirteen v. Aereo, Inc.[30] The court once again held that Aereo's system was not a public performance as the Aereo System was similar to the RS-DVR system in *Cablevision* in two respects: (1) the Aereo System created copies of each program that were unique to each customer, and (2) the Aereo System would transmit to the customer only through that unique copy.[31]

The Second Circuit rejected a series of arguments advanced by the Plaintiff aimed at distinguishing *Cablevision* from the instant case.[32] Firstly, the court rejected the argument that Aereo did not have a retransmission license as irrelevant to whether a transmission was public.[33] Secondly, the court rejected an aggregation theory on the grounds that the aggregation was based on the potential audience of the work, rather than that of the transmission.[34] Thirdly, the court rejected the argument that *Cablevision*'s analysis was based on an analogy to the VCR as irrelevant.[35] Fourthly, the Second Circuit rejected the notion that the RS-DVR System in *Cablevision* broke the continuous chain of transmission to the public unlike the Aereo system.[36] The court rejected this argument because Aereo users exercised the same control over playbacks as their Cablevision counterparts.[37] Additionally, the court rejected the argument because Aereo used individual antennas that created unique copies which limited the potential audience during the chain of transmission to only one Aereo user, breaking up the chain of transmission.[38] Lastly, the court rejected a "form over substance" argument because the fact that Aereo designed its system around the holding in *Cablevision* is subordinate to the importance of technical

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30. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013).
31. *Id.* at 689.
32. *Id.* at 690.
33. *Id.*
34. *Id.* at 690–91.
35. *Id.* at 691.
36. *Id.* at 692.
37. *See id.*

> [T]he Aereo user selects what program he wishes a copy to be made of and then controls when and how that copy is played. This second layer of control, exercised *after* the copy has been created, means that Aereo's transmissions from the recorded copies cannot be regarded as simply one link in a chain of transmission, giving Aereo's copies the same legal significance as the RS–DVR copies in *Cablevision*.

Id.

38. *Id.* at 693.

architecture.[39]

Judge Chin, in his dissenting opinion, pointed out various flaws in the majority's decision.[40] Of note, he argued that the majority incorrectly labeled Aereo's System as "private"[41] and because Aereo was transmitting television signals to paying strangers, all of the transmissions are "to the public," regardless of the fact that devices limit the potential audience.[42] Additionally, Cablevision had a license to broadcast while Aereo did not, and as such Aereo was essentially streaming broadcasts over the internet in real-time, and no record function can legitimize the unauthorized transmission of copyrighted content.[43]

III. ANALYSIS

It is first important to note the Second Circuit's reluctance to properly resolve this matter by announcing a sound rule of law that makes sense given recent advances in communication technology.[44] This not only shows the court's failure to address the ultimate issue, but also illustrates the unnecessary complexity of the "public performance" issue. Had the court decided to re-work its *Cablevision* decision, the court may have avoided convoluting the problem altogether.

A transmission "to the public" is self explanatory. Based on the statutory definition of publicly, "to the public" can be interpreted as the negative of "a normal circle of a family and its social acquaintances."[45] This is done by using the word "or" within the first clause as a mechanism for substitution. While this first clause is not the Transmit Clause, the two clauses are consecutive.[46] "To the public" most likely carries the same meaning in both clauses. Even by rejecting this

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39. *Id.* at 693–94.

40. *Id.* at 697 (Chin, J., dissenting) ("Its decision, in my view, conflicts with the text of the Copyright Act, its legislative history, and our case law.").

41. *See id.* at 698. Using the ordinary meaning of "the public," a transmission to anyone other than oneself or an intimate relation is a communication to a "member of the public." *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); Webster's II: New Riverside University Dictionary 951 (1994) (defining "public" as "[t]he community or the people as a group").

42. *Id.* at 699.

43. *Id.* at 702.

44. *See supra* note 28 ("*without analyzing the contours of that phrase in great detail*.") (emphasis added).

45. 17 U.S.C. § 101 (2010) ("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.") (emphasis added).

46. *Id.*

proposition, the ordinary plain meaning of "to the public" is "[t]he community or the people as a group."[47] Based on either the plain meaning or the proposed meaning asserted by this author, Judge Chin is correct in asserting that paying strangers are part of the public.[48] The plain meaning rule of statutory interpretation is in place for a reason and manipulating a definition in order to maintain *stare decisis*, as the Second Circuit did, was improper in this case.

The segmentation theory proposed by the Second Circuit in *Cablevision* and the altered theory advanced by the instant case contradict the Congressional intent behind the Copyright Act of 1976.[49] Congress, cognizant of the fact that the law should cover unforeseen technological developments,[50] clarified its position:

> [A] performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place . . . *[t]he same principles apply whenever the potential recipients of the transmission represent a limited segment of the public*, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "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."[51]

While the Second Circuit acknowledged that its decision in *Cablevision* did not weigh the fact that the transmissions were segmented geographically or spatially,[52] the court placed importance on the segmentation of the audience of the transmissions, refusing to aggregate them and instead using the segmented audience as a factor in favor of a private performance.[53] However, the fact that the recipients are segmented should cut both ways: not only should it prevent a transmission from being deemed a public performance but it should not be a determining factor in deeming a transmission a private performance. Essentially, segmentation should not be determinative either way.

Over-analyzing the definition of "to the public" has produced a

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47. *See supra* note 39.
48. *WNET, Thirteen*, 712 F.3d at 699 (Chin, J., dissenting).
49. *Id.*
50. *Id.* at 700.
51. H.R. REP. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 64–65 (emphasis added).
52. *WNET, Thirteen*, 712 F.3d at 687 (citing *Cartoon Network*, 536 F.3d 121 at 134).
53. *Id.* at 691.

result that is contrary to the public good. In essence, the Second Circuit has allowed an unlicensed company to substitute itself as a broadcaster.[54] Despite courts rejecting *Cablevision* and holding that retransmitting copyrighted television programming over the internet were "public performances,"[55] the Second Circuit allowed Aereo to stream copyrighted works over the internet without permission of the copyright holders.[56] This does not make sense; either companies such as Aereo transmit broadcasts publicly or they do not. In this respect, it is important to consider the ends rather than the means.[57] Whether a broadcast is public or private should depend solely on the audience, not the method of broadcast. For example, a broadcaster retransmitting a program without a license to its customers is a public performance, regardless of the technical methods used.[58] In this respect, the customers are an unaffiliated collection of members of the public, therefore making the transmission "to the public." The intricacies of whether a licensed broadcaster can transmit individual copies to its customers is an issue to be resolved in the scope of the license itself rather than continuously reshaping the definition of a public performance because of the emergence of new technologies. This prevents unlicensed broadcasters from exploiting the current loopholes that exist within the realm of public performance.

This view, which pins the determination of whether a broadcast is public or private on the end audience, merely shifts the problem rather than resolves it, but it helps settle the issue of what constitutes a public performance. While the Second Circuit expressed concern over this thought process entailing all broadcasts,[59] the rights of the copyright holder should be considered as superior to those of unlicensed broadcasters. Generalizing the distinction between public or private performances solely on the target audience of the broadcasts would

54. *Id.* at 697 (Chin, J., dissenting).

55. *See e.g.*, Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (declining to follow *Cablevision* and enjoining an Aereo-like system based on plain meaning of § 101); WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 278, 286, 287 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013) (holding that a retransmission of copyrighted television programming by streaming it live over the internet constituted a "public performance."); Fox Television Stations, Inc. v. FilmOn X LLC, CIV.A. 13-758 RMC, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), *reconsideration denied*, CIV.A. 13-758 RMC, 2013 WL 4852300 (D.D.C. Sept. 12, 2013) (equating a commercial service retransmitting plaintiffs' television performances as in no meaningful way different from cable television companies).

56. *WNET, Thirteen*, 712 F.3d at 705 (Chin, J., dissenting).

57. *See id.* at 697.

58. *See* Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc., 772 F. Supp. 614, 651 (D.D.C. 1991) (holding that "transmission by cable programmers of programming containing copyrighted music constitutes public performance of that music, and that they are therefore liable for infringement for performing those works without authorization.").

59. *WNET, Thirteen*, 712 F.3d at 687–88.

restrict which methods of broadcasts are allowable, but these restrictions would also protect the rights of copyright holders.[60] Without protection a copyright is worthless. The goal of copyright protection should be to protect the rights of copyright holders and to prevent unlicensed groups from exploiting loopholes and undermining the whole system of copyright protection. The instant case goes against this bedrock principle of copyright law.

All is not lost, however. The Supreme Court has granted the certiorari petition filed by the plaintiffs in the instant case.[61] Maybe the Court can re-configure the lower court's decision and reverse the injustices tolerated by the current decision. However, the ultimate power lies with Congress in redrafting the public performance statute. By retooling the statute to focus on the general audience of the broadcast rather than whether the method of transmission segmented the audience sufficiently, the emphasis shifts to whether the transmission resulted in the infringement of the rights of a copyright holder. This emphasis coincides with the ultimate goal of copyright, protection of the creation of ideas.

IV. CONCLUSION

The concept of what is a "public performance" is an ever-shaping topic that results from an outdated law that only vaguely anticipated the effect of future technology on the law. The law is currently ambiguous and produces ambiguous results. Clarity is required and there are two main options: (1) re-write the law behind public performances to more fully and accurately incorporate the previous three and a half decades of technological advancements, or (2) treat public performance on a broad scale, solely looking at the intended audience of the broadcast, and leaving the technical methods used to transmit those broadcasts to the realm of copyright licensing.

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60. *See* David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1988).

> Congress intended the definitions of "public" and "performance" to encompass each step in the process by which a protected work wends its way to its audience . . . it would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public.

Id.

61. *WNET, Thirteen*, 712 F.3d at 680, *cert. granted*, 134 S. Ct. 896 (2014).