ESSAY

TEXTUALISM AND THE EQUITY OF THE COPYRIGHT ACT: REFLECTIONS INSPIRED BY *AMERICAN BROADCASTING COMPANIES, INC. V. AEREO, INC.*

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Still steeped in an important tradition of unwritten law—where statutes were either "declaratory of the common law, or remedial of some defects therein"[1]—English judges in the time of Coke and later Blackstone often invoked the equity of the statute. Departing from the text, they "extended statutes beyond their plain terms in order to make them more coherent expressions of purpose and cut back others to avoid inequitable results that did not serve the statutory purpose."[2] Whatever one's views about textualism, equity of the statute is almost

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1 1 WILLIAM BLACKSTONE, COMMENTARIES *86; *see also, e.g.*, Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260, 261–62, 272–73 (1904) (explaining that the Magna Carta was not a charter of liberty, that a fair construction of most of its terms shows that it was primarily concerned with cementing class privilege among a narrow elite, and that Lord Coke's creative rewriting of the document in later judicial decisions made him its "real author"); Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1061 (1947) ("[T]he Charter was merely an ancient statute not much in people's minds. It was Coke . . . who gave Magna Carta its sacrosanctity."); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 388, 392 (1942) (explaining that "[i]t has taken the common law a little over three centuries to come to the full realization that it has to deal with something called statutes," and that part of this reticence, at least in England, came from the fact that "there was less reason [than there was in Continental Europe] to deal with statutes as supremely authoritative, since there had never been among English theorists an unqualified admission that legislation was the highest of governmental functions").

2 John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001); *see also id*. at 29–36 (discussing the English practice of equitable statutory interpretation in the 16th through 18th centuries).

surely inconsistent with it.[3] Now, some two centuries after Blackstone and four centuries after Coke, a case involving technologies both jurists would have surely found "indistinguishable from magic"[4] brings us face-to-face once more with this fundamental tension between words and aims, equity and text.

On April 22, 2014, the Supreme Court will hear argument in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, a case involving such technological boondogglery, such Rube Goldbergian skullduggery, such naked and unapologetic circumvention of the perceived purposes and aims of the Copyright Act, that it will strike textualism at its very core. In doing so, however, *Aereo* offers an occasion for deeper reflection on how we should understand the Copyright Act. Who, between Congress and the courts, should its master arborist be? How much space is there for equity in the Copyright Act?

This Essay sets out to answer those questions. First, it explains the disjunction between the Copyright Act as it is popularly conceived and the codish copyright statute we actually have. Second, it explains the *Aereo* case and, in particular, how Aereo's effort to exploit an apparent loophole in the Copyright Act places these twin conceptions on a collision course. Third, it concludes by arguing that the Copyright Act offers a rare union: The best way to interpret the Copyright Act is textually, because that is what it means to read the Copyright Act equitably.

I

THE COPYRIGHT ACT: MORE INSTRUCTION MANUAL THAN STATUTE

People like to talk about the Copyright Act as if the statute has purposes and aims or enacts a set of values.[5] Implicitly it does. But

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[3] *See* Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 309 (2014) (explaining that the only thing that it seems can be said about every self-described textualist is that they "actually read—and take[] seriously—statutory text"); *see also* Manning, *supra* note 2, 125–27 (discussing the tension between equitable statutory interpretation and textualism).

[4] ARTHUR C. CLARKE, PROFILES OF THE FUTURE: AN INQUIRY INTO THE LIMITS OF THE POSSIBLE 36 (1962).

[5] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) ("The purpose of copyright is to create incentives for creative effort."); James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005, 2006, 2035 (2009) (arguing that copyright law expresses ethical values of reciprocity and mutual respect); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1117 (1990) ("[T]he purpose of copyright [is] the stimulation of creative endeavor for the public edification."); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990) ("The purpose of copyright law is to encourage authorship."); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 324 (1996) ("[T]he traditional idea [is] that copyright serves to further the public interest in expressive

whether the claim is that it promotes expression, imagination, authorship, or creation, claims about what the Copyright Act "does" are fast and frequent enough that one might mistakenly come to believe that the statute itself is broad, sweeping, or purposive. But it isn't. The Copyright Act is incredibly mechanistic and rulish, not at all vague or open-ended.

The Copyright Act takes a two-step approach. First, it defines how a copyright comes to be. The criteria are formal. As explained in 17 U.S.C. § 102(a):

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[6]

Literally speaking, copyright, like energy, can never be created or destroyed. Copyright "subsists." You could not deny it if you tried. Like a soul, copyright lives in original works of authorship, fixed in tangible media, perceivable or reproducible. And it subsists in all such works, no matter how marginal. Everything you or anyone has ever made that was fixed, even for a moment, had or has a copyright—every jot and tittle.

The Copyright Act's second step is to give exclusive control over that copyrighted thing to its owner by defining—via a numbered list—those things that only the owner can do with it. This is 17 U.S.C. § 106, which reads:

> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce [it];
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> (2) to prepare derivative works [from it];
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> (3) to distribute copies [of it];
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> (4) . . . to perform [certain kinds of copyrighted works] publicly;
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> (5) . . . to display . . . [certain kinds of copyrighted works] publicly; and
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> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[7]

In addition to the detailed structure within the provisions themselves, the Act is riddled with exceptions and exclusions. One section is entitled, "Scope of exclusive rights in architectural works," another, "Limitations on exclusive rights: Reproduction for blind or other

diversity and public education.").

6 17 U.S.C. § 102(a) (2012).

7 *Id.* § 106.

people with disabilities," and another, "Limitations on exclusive rights: Secondary transmissions of local television programming by satellite." And these only reflect the titles of §§ 120–22.

Thus, for everything that has been said about the Copyright Act and the values it reflects or enacts, it reads far more like a careful manual than a so-called "common law statute"—a statute that "has essentially left the courts free to mold the contours of . . . policy . . . in essentially a common law process of creating specific rules, and of rescinding those rules that over time prove unworkable or inconsistent with general policy."[8]

II
AEREO'S CONDUCT AND THE COPYRIGHT ACT

The fact that the Copyright Act is so specific—so tinkered and architectured—is incredibly important when the discussion turns to *Aereo*, because the case turns on a loophole in the copyright statute.[9] Aereo built thousands of tiny antennas and rented each of them to an individual subscriber, who could then stream live television broadcasts to her home computer over the Internet.[10]

The question in the case is whether Aereo is "publicly performing" these television broadcasts, which is one of the exclusive rights held by a copyright owner under 17 U.S.C. § 106.[11]

You might wonder why Aereo is using so many antennas—one per person. The answer is that back when cable companies were first starting out, they did use just one antenna, and simply carried broadcast television over their cables like conduits. The Supreme Court endorsed this and held that it did not constitute a "public performance" of the retransmitted work. The Court wrote:

> If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would

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[8] William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377 (1988); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1516–17, 1516 n.150 (1987) (arguing for dynamic interpretation of statutes for which Congress chose open-ended language). *But see* Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1168 (2009) (reviewing NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008)) ("The Copyright Act is . . . structured largely as a common law enactment.").

[9] *See* Brian Fung, *Aereo: Yes, We're a Rube Goldberg Device. And We're Proud of It.*, WASH. POST (Mar. 27, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/03/27/aereo-yes-were-a-rube-goldberg-device-and-were-proud-of-it/ ("Exploiting loopholes is the whole point, the company says.").

[10] WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680–83 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 896 (2014).

[11] 17 U.S.C. § 106(4).

> not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose.[12]

Congress promptly revisited the Copyright Act, and in 1976 amended it to overrule the Supreme Court, explaining in the definitions section, 17 U.S.C. § 101:

> To perform or display a work "publicly" means . . .
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> (2) to transmit or otherwise communicate a performance or display of the work . . . 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*.[13]

To de-gibberish the above, the Copyright Act now makes the "public performance" of a work turn on how many individuals can perceive the same copy at any given point. But if everyone has their own antenna then everyone has their own personal copy. Aereo argues that this means it has not violated the Copyright Act. It is really that simple. ("Pause to note what a silly distinction this is."[14])

Aereo is hardly the first to attempt to circumvent the Copyright Act. An act so narrow, rulish, and mechanistic invites charlatanry and chicanery. But other circumventers have not been as careful as Aereo in their attention to the "one person, one copy" rule. A textbook case involved a video rental store in the 1980s that did not want to pay to license expensive rental copies of its movies. Instead, the store rented rooms where customers could privately view any movie of their choice from the store's video library. This constituted a public performance because the store was using the same videos over and over just "in separate places . . . at different times."[15] When Zediva, a startup company in California, attempted to stream individual DVDs from personally-rented DVD players over the internet, it ran into the same one person, one copy problem: Different people could rent the same DVD. Thus, Zediva was enjoined out of existence.[16]

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12 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400 (1968); *see also* Teleprompter Corp. v. Columbia Broad. Sys., 415 U.S. 394 (1974) (upholding *Fortnightly*).

13 Act of Oct. 19, 1976, Pub. L. 94-553, 90 Stat. 2541 (emphasis added).

14 James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane: Deploying 10,000 Tiny Antennas Makes No Technical Sense—But the Law Demands It*, ARS TECHNICA (Aug. 30, 2012), http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane/2.

15 Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984) (quoting 17 U.S.C. § 101 (1982), which defines "public performance").

16 Warner Bros. Entm't v. WTV Sys., Inc., 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011).

But Aereo has solved the one person, one copy problem by engineering a device that gives to each her own tiny antenna, and with it, an individual copy of the broadcast she wants to see. In that way, as the Second Circuit explained in finding two to one that Aereo does not commit copyright infringement, "Aereo . . . is an antenna, a DVR, and a Slingbox rolled into one."[17]

Literally, that is what it is.

III
IS THE COPYRIGHT ACT REALLY JUST ANOTHER STATUTE?

Aereo puts the question plain: What does textualism require in a case like this one? The question has two dimensions. First, in what ways does textualism limit or constrain the ways we should distill the meaning of the Copyright Act? Second, is the Copyright Act special, and if so, why and how is it special?

First, textualism. Beginning with the text, the most important words in this case are "a" and "the." To perform or display a work publicly means "to transmit or otherwise communicate *a* performance or display of *the* work . . . to the public."[18] But Aereo is not displaying one copy to many people: Aereo is allowing individuals to make and view their own copies.[19]

But does textual analysis really end there? Or does it only begin there? Or should it even begin there? After all, doesn't the *Aereo* case really begin with precedent, with *Fortnightly*,[20] the case Congress overruled in the 1976 Copyright Act? Or does it begin with history, in particular, the history surrounding the Copyright Act and the emergence of new technologies in the twentieth century?[21] Or is it even earlier with the 1909 Copyright Act, or the enactment of the Patent and Copyright Clause in the Constitution, or even the Act for

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17 WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 703 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 896 (2014).

18 17 U.S.C. § 101 (2012) (emphasis added).

19 Brief for Respondents at 14, Am. Broad. Cos. v. Aereo, Inc., No. 13-461 (U.S. Dec. 12, 2013), 2013 WL 6513765 ("Under the correct construction of the statute, the undisputed facts concerning the design and operation of Aereo's system [show that Aero does not engage in 'public performance' of the petitoner's copyrighed works]. A unique copy of a performance of a work, created at the direction of the user, is transmitted only by and to that user. That transmission – the relevant performance – can be received by no one else.").

20 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

21 *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (departing markedly from the clear text of the Food, Drug, and Cosmetic Act in part because of tobacco's "unique place in American history and society").

the Encouragement of Learning[22]—the ancient English copyright statute popularly known as the "Statute of Anne"—from which American copyright is a "legal transplant"?[23] Should the Court consider whether allowing Aereo to exist will endanger the broadcast networks' ability to recoup their substantial investments in producing television content, even if the statute says not one word about profits or incentives?

These are all variants of the same set of questions textualists confront in every case before they even reach the text. This is the zeroth step of interpretation—the preinterpretive confrontation with the unique institutional, historical, and prudential concerns that surround a law and dictate how one reads it.[24]

Notice that none of these considerations goes to what Congress "wanted" or "intended" to do in the Copyright Act. The enactors of the Copyright Act certainly would have thought that the "over-engineered[,]" "Rube Goldberg-like contrivance"[25] should be sacrificed to the copyright gods. But reading the statute as its enactors wanted or intended seems somehow deeply inconsistent with the values it is meant to serve. Inconsistent, that is, with the purposes of copyright. This is the fundamental tension between actual and imputable purposes—the tension captured by the equity of the statute.

Which brings us to the second question—really the critical question—this Essay set out to frame: Is there a special place for "equity" in the Copyright Act? And if there is a place for equity, what does it look like?

The plaintiffs in *Aereo*, referring to the enactor's actual purposes, suggest that the case is an easy one: The court should just aggregate all the individual copies and treat them as if Aereo is just capturing television broadcasts with one giant antenna.[26] But should judges really do that? Even if that reading is contrary to the text (hyperfocused as it is on formalities, on individual copies, performances, and transmissions)?

When it comes to the Copyright Act, there are three strong equitable reasons to hew extremely close to its literal text, but one

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22 8 Ann., c. 19 (1710) (Gr. Brit.).

23 *See generally* Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427 (2010) (describing the statute's role in the history of copyright law).

24 *See generally* Andrew Tutt, Comment, *Interpretation Step Zero: A Limit on Methodology as "Law,"* 122 YALE L.J. 2055, 2058 (2013) (discussing the step-zero decision of whether to apply an interpretive framework at all).

25 *Aereo*, 712 F.3d at 697 (Chin, J., dissenting).

26 Brief for Petitioners at 23–25, Am. Broad. Cos. v. Aereo, Inc., No. 13-461 (U.S. Feb. 24, 2014), 2014 WL 768315.

will scarcely find those reasons in the *Aereo* briefing or the published decision that follows.

First, Congress has amended the Copyright Act countless times, and has shown an enormous penchant for tinkering with it.[27] This is because the Copyright Act is a rent-seeking statute, and Congress has strong incentives to move the Act's protections in the direction of those who stand to gain the most from them.[28] Unlike so many statutes, where a failure of judicial imagination often means a failure of justice, if the courts read the Copyright Act to mean what it says, and Congress dislikes what it says, Congress will make the necessary fix.

Second, there can be no doubt that reading the Copyright Act literally has always been—and will always be—innovation forcing. Aereo's service may be over-engineered and designed to circumvent intellectual property protections, but it is a *transformative use* of the copyrighted content at issue, one for which the market has shown incredible demand but there exists no supply. CBS has already said that if Aereo wins its court case, CBS will stream its television over the Internet in a bid to destroy Aereo.[29] But if Aereo is destroyed by CBS streaming live TV over the Internet, consumers win—transformative technology was forced into existence.

Third, and finally, copyright is an ancient social institution, not just the subject of a run-of-the-mill statute. It is enumerated in the Constitution and long predates it. Judges are institutionally ill suited to strike the pluralistic balance necessary to grapple with the destabilizing effects of new technologies on that institution. Reading the Copyright Act literally reflects that wisdom and humility, and allows rent-seeking bargains to be struck where they should be struck—in Congress and not the courts.

Ironically, then, when asked whether there is room for equity in the Copyright Act, the answer is an emphatic yes. But when asked

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27 *See* CONG. COPYRIGHT OFFICE, BULL. NO. 3, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT (1973) (reprinting relevant copyright statutes).

28 *See, e.g.*, Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CALIF. L. REV. 2187, 2190 (2000) ("Much more money is at stake in IP legislation than in the past. . . . A solid economic logic therefore underlies the very active legislative scene in the contemporary IP world."); Andrew Tutt, *Unique Copyrights*, 95 J. PAT. & TRADEMARK OFF. SOC'Y 390, 390 (2013) ("The received wisdom of the last copyright extension act is that it was purchased by a narrow class of intensely interested copyright holders at the expense of the public domain.").

29 Todd Spangler, *CBS Chief Moonves: We Can Go Over-the-Top if Aereo Wins at Supreme Court*, VARIETY (Mar. 11, 2014, 10:55 AM), http://variety.com/2014/digital/news/cbs-chief-moonves-we-can-go-over-the-top-if-Aereo-wins-at-supreme-court-1201129362.

where that equity is found, the answer is not in judicially-fashioned equities, spun from abstract incantations of purposes or values. The answer is in the text.