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Annual Update

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Freedom of Speech in the United States seventh edition

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This update summarizes the free speech decisions of the U.S. Supreme Court for the 2013–2014 term, as well as two significant developments. The complete text of this update and a library of landmark free speech decisions can be found on the book's web site:

<http://www.tedford-herbeck-free-speech.com>

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Chapter 3: Political Heresy: Sedition in the United States since 1917

U.S. Supreme Court

Case: *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2014 U.S. LEXIS 4169 (July 16, 2014); the appellate court decision is *Susan B. Anthony List v. Driehaus*, 2013 U.S. App. LEXIS 9780 (6th Cir. 2013).

Subject: A nonprofit organization has legal standing to challenge an Ohio law prohibiting false political speech.

Summary of Decision: Representative Steven Driehaus, a Democratic Congressman who represented Cincinnati and its suburbs, sought reelection in 2010. The Susan B. Anthony (SBA) List, an advocacy group opposed to abortion, announced plans to sponsor a billboard denouncing Driehaus. According to the SBA, Driehaus had supported “taxpayer-funded abortions” when he voted for the Affordable Care Act earlier that year. The proposed billboard did not explain the connection to health care law. Instead, it simply proclaimed: “Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortions.”

Driehaus (who claimed to be pro-life) believed the SBA’s ad misrepresented his record because the Affordable Care Act prohibited federal abortion funding, except in the case of rape, incest, or maternal health. In an effort to block the billboard, Driehaus filed a criminal complaint with the Ohio Elections Commission (OEC) on October 4, 2010. Under Ohio’s False Statement Law, it is illegal to make a “false statement concerning the voting record of a candidate or public official” during “any campaign for nomination or election to public office or office of a political party.” Under this provision, a false statement can be prosecuted if the source knew the statement was false or didn’t care whether it was true or false.

The complaint had the desired result: the advertising company that owned the billboard refused to display SBA’s message. Because the election was scheduled to occur within a month, the OEC conducted an expedited hearing on the complaint. On October 14, 2000, a three-person panel found probable cause to believe a violation had been committed, on a 2 to 1 vote along party lines. Before the full Commission could take up the matter, the SBA challenged the Ohio law in federal court, arguing the measure violated the First and Fourteenth Amendments of the United States Constitution. The election occurred before the court ruled on the constitutional issues, and Republican Steve Chabot defeated Driehaus. Shortly thereafter, Driehaus accepted an assignment with the Peace Corps in Swaziland (Africa). He withdrew his complaint and the OEC dismissed the matter.

The SBA chose to pursue the matter, however, and the organization amended its original complaint. The revised action claimed that the SBA “intend[ed] to engage in substantially similar activity in the future” and “face[d] the prospect of its speech and associational rights again being chilled and burdened.” Any time a targeted politician complained, the SBA protested, it would be forced to expend time and financial resources defending itself. The threat of prosecution alone, the SBA continued, had a chilling effect on its freedom of expression.

A federal district court dismissed the case on procedural grounds. Because Driehaus had withdrawn his complaint, the SBA no longer faced a risk of criminal prosecution and therefore lacked standing to challenge the Ohio law. The SBA appealed, but the Sixth Circuit Court of Appeals affirmed the lower court. The SBA had not demonstrated “an imminent threat of *future* prosecution,” the Sixth Circuit explained, as the complaint had

never gone beyond the probable cause stage. The election had occurred before the full OEC issued a decision; now that Driehaus had withdrawn the complaint and left the country, the Sixth Circuit concluded, there was no reason why the court needed to hear the case.

The SBA appealed to the Supreme Court. In a rare unanimous ruling, the justices held that the SBA had legal standing and that the case should be heard. This decision does not mean that the Ohio False Statement Law is unconstitutional: the justices simply held that the SBA was entitled to its day in court and remanded the case back to the federal district court.

Writing for the Court, Justice Clarence Thomas noted, “The threat of future enforcement of the false statement statute is substantial.” In fact, he continued, “the specter of enforcement is so substantial that the owner of the billboard refused to display SBA’s message after receiving a letter threatening Commission proceedings. On these facts, the prospect of future enforcement is far from ‘imaginary or speculative.’”

Because the appeal dealt with a procedural issue, Justice Thomas did not consider the larger constitutional question of whether the First Amendment protects false political speech, but the justices were aware of the free speech implications of the Ohio law. In framing the case, Justice Thomas took care to note, “The burdens that Election Commission proceedings can impose on electoral speech are of particular concern.” The decision itself, however, broke no new ground. The case was remanded back to the federal district court for a trial on the merits of the SBA’s challenge to the Ohio False Statement Law.

Chapter 4: Defamation

U.S. Supreme Court

Case: *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 2014 U.S. LEXIS 798 (January 27, 2014); the lower court decision is *Air Wisconsin Airlines Corp. v. Hoeper*, 2012 Colo. LEXIS 163 (Col. 2012).

Subject: The immunity provisions contained in the Aviation Transportation Safety Act (ATSA) applies to materially true statements.

Summary of Decision: William Hoeper began flying planes for Air Wisconsin Airlines in 1998. In late 2004, the airline began to fly a different type of aircraft from Hoeper’s Denver base. To continue working for Air Wisconsin, Hoeper needed to be certified in a new aircraft, a type that he had not previously flown. After failing his first three attempts, Hoeper was given a fourth and final opportunity in a flight simulator in Northern Virginia. When he failed the test, a frustrated Hoeper raised his voice, used profane language, and accused the instructor of trying to “railroad” him.

Air Wisconsin booked Hoeper on a flight back to his home in Denver. While discussing the incident among themselves, Air Wisconsin officials grew concerned about Hoeper’s outburst, especially given the history of violent assaults by disgruntled airline employees. Adding to their concern, Hoeper was a Federal Flight Deck Officer (FFDO), authorized “to carry a firearm while engaged in providing air transportation.” Fearful that Hoeper might have brought his gun to the training session, airline officials decided to alert the Transportation Security Administration (TSA). During the phone call, an Air Wisconsin official told the TSA that Hoeper might be armed and that the airline was “concerned about his mental stability and the whereabouts of his firearm.” This was of

special concern, the Air Wisconsin official warned, because the “unstable pilot” would soon be terminated.

Acting on this information, the TSA officers called Hoeper’s plane back from the runway, removed the disgruntled pilot, searched him and his luggage, and questioned him about the location of his gun. (FFDO pilots are not allowed to carry guns on planes when traveling as passengers.) After determining that Hoeper’s firearm was in Colorado, they allowed Hoeper to return to Denver on a later flight. The next day, Air Wisconsin terminated Hoeper.

Hoeper subsequently brought a lawsuit against Air Wisconsin in a Colorado state court. Air Wisconsin moved for summary judgment, arguing that the Aviation and Transportation Security Act (ATSA) immunized airlines against civil liability for reporting suspicious behavior. The Colorado court refused to dismiss the case and allowed the jury to decide the immunity question. When framing the issue, the court instructed the jury that Air Wisconsin was not immune from a civil suit if the airline had “made the disclosure [to the TSA] with actual knowledge that the disclosure was false, inaccurate, or misleading” or “with reckless disregard as to its truth or falsity.” (The jury was not told that ATSA protects materially true statements.)

After hearing the evidence, the jurors found that Air Wisconsin’s statements to the TSA were false and that one of the statements had been made with a reckless disregard for the truth. Finding the airline was not entitled to immunity under the ATSA, the jury awarded the disgruntled pilot \$849,625 in compensatory damages and another \$391,875 in punitive damages. The judge reduced the punitive damages, resulting in a total judgment of slightly less than \$1.2 million.

Air Wisconsin appealed and the Supreme Court unanimously reversed the judgment. Writing for the majority, Justice Sonia Sotomayor explained, “Congress patterned that exception to ATSA immunity after the actual malice standard of *New York Times v. Sullivan*,” noting that Congress had incorporated language from the *Sullivan* decision into the text of the ATSA. As a result, Air Wisconsin was immune from prosecution unless Hoeper could prove the airline’s statements were materially false and had been made with actual malice or a reckless disregard for the truth.

Such an interpretation, Justice Sotomayor continued, was consistent with Congressional intent. Under the ATSA, the responsibility for assessing and investigating threats to transportation safety was shifted from the airlines to the TSA. To help the TSA do its job, Congress encouraged airlines and their employees to share any security concerns. According to Justice Sotomayor, Congress included the immunity provisions in the ATSA “to ensure that air carriers and their employees would not hesitate to provide the TSA with the information it needed.” Absent these provisions, she concluded, “no airline would contact the TSA (or permit its employees to do so) without running by its lawyers the text of its proposed disclosure—exactly the kind of hesitation that Congress aimed to avoid.”

Although the Supreme Court’s decision to overturn the jury verdict was unanimous, Justices Antonin Scalia, Clarence Thomas, and Elena Kagan would have remanded the case to the lower court to allow the jury to determine whether the statements were materially false. The majority thought this step was unnecessary, as Hoeper’s defamation claim failed as a matter of law.

Chapter 10: Special Problems of a Free Press

Reporter's Privilege (James Risen)

James Risen is a Pulitzer Prize winning journalist who has reported for the *New York Times* and the *Los Angeles Times*. He has written on many topics, but is best known for his work on the activities of the US government, particularly the Central Intelligence Agency (CIA).

Risen's third book, *The State of War: The Secret History of the CIA and the Bush Administration*, was published in early 2006. In this volume, Risen described a series of illegal or potentially illegal actions undertaken by the George W. Bush Administration. The book also detailed Operation Merlin, a covert initiative started during the Clinton Administration that was designed to delay Iran's nuclear weapon by providing "disinformation" such as faulty nuclear blueprints. Instead of delaying Iran's nuclear program, the book argued, the covert operation actually provided the Iranian government with some useful information.

Immediately after *State of War* was released, then-Attorney General Alberto Gonzales announced the Department of Justice was actively investigating disclosures in the book and other security leaks. During its investigation, the government came to suspect that Jeffrey Sterling, a former CIA operations officer who had been assigned to Operation Merlin from November 1998 through May 2000, had leaked classified information to Risen.

In 2008, the Department of Justice subpoenaed Risen so that federal investigators could question him about his sources. Risen successfully fought the subpoena, which expired in 2009, but on December 22, 2010, Sterling was indicted under the Espionage Act of 1917. In an effort to prove the case against Sterling, the Obama administration renewed the subpoena for Risen's testimony.

Risen again challenged the subpoena and a federal judge quashed it. In July 2013, the Fourth Circuit Court of Appeals reinstated the subpoena on a 2 to 1 decision and held that Risen could be compelled to testify at Sterling's trial. "So long as the subpoena is issued in good faith and is based on a legitimate need of law enforcement," the court concluded, "the government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding." Risen sought relief from the Supreme Court, but in a one-line order issued on June 2, 2014, the justices denied certiorari and declined to hear Risen's case.

Now that Risen has exhausted his appeals, the Department of Justice must make a difficult decision. In the past, the Obama administration has aggressively pursued leakers. To help build the case against Sterling, federal prosecutors may decide to call Risen as a witness. If he refuses to divulge his sources then, the government could ask a judge to hold him in contempt of court. As in the past, Risen has proclaimed that he will not "give up everything I believe in" and he has vowed to go to jail rather than testify.

On several occasions, Eric Holder has promised that so long as he is the attorney general, "no reporter who is doing his job is going to go to jail." If Holder honors this pledge, federal prosecutors will need to proceed against Sterling without Risen's testimony. This may not be difficult, as the government has ample physical evidence, including telephone records, e-mail exchanges, and bank statements linking Risen to Sterling. (Ironically enough, Risen and his colleague, Eric Lichtblau, originally broke the story that the Bush administration was engaging in warrantless domestic wiretapping in 2004.)

Anyone interested in freedom of the press will want to follow this case. If federal prosecutors try to compel Risen to testify, they will trigger a serious confrontation between a respected *New York Times* reporter and the federal government. Twenty Pulitzer Prize winners and numerous press organizations have already come out in support of Risen. If federal prosecutors can convict Sterling without Risen's testimony, it will likely be due to the extraordinary amount of intelligence produced by mass surveillance. Either outcome—holding a reporter in contempt or using evidence obtained by domestic spying—raises profound questions for the freedom of the press.

Federal Shield Law (passed by the Senate Judiciary Committee)

Following the Supreme Court's 1972 decision in *Branzburg v. Hayes* (text, pp. 244–245), many media professionals urged Congress to pass a federal journalists' privilege law—often described as a “shield law”—to protect reporters. Although their efforts failed, a series of high profile cases reinvigorated the debate (text, pp. 270–272). The House of Representatives passed a shield law bill by a wide margin in October 2007, but a Republican filibuster effectively killed the measure in the Senate. Then—Attorney General Michael Mukasey had warned that President Bush would likely veto the bill if it did pass.

The election of Barack Obama energized supporters of a federal shield law, as Obama had publicly stated that he supports such legislation. New shield law bills were introduced in both the House of Representatives and the Senate. In September 2013, the Senate Judiciary Committee passed the Free Flow of Information Act by a 13–5 vote. It is unclear, however, when (or whether) the full Senate will take up the legislation.

The Free Flow of Information Act is not without its critics. One area of concern is defining just exactly whom the law covers. Previous versions of the bill focused on the status of the journalist. For example, protection would have been limited to paid employees of recognized media outlets. This definition would have excluded bloggers, concerned citizens, and other interested parties who occasionally post content on the Internet. To address this concern, the current version of the Act focuses on those who practice journalism, regardless of whether the journalist is paid.

Another area of concern is the exception for national security. As currently written, the law allows a federal judge to order disclosure if it would “materially assist the Federal Government in preventing or mitigating an act of terrorism or other acts that are reasonably likely to cause significant and articulable harm to national security.” Because most reporters' privilege cases do not involve national security, the proposed shield law would provide protection to many journalists.

Chapter 11: Constraints of Time, Place, and Manner

U.S. Supreme Court

Case: *McCullen v. Coakley*, 134 S. Ct. 2518, 2014 U.S. LEXIS 4499 (June 26, 2014); the appellate court decision is *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013).

Subject: A Massachusetts law, making it a crime to “enter or remain on a public way or sidewalk” near a reproductive health care facility, violates the First or Fourteenth Amendments.

Summary of Decision: In response to a 1994 shooting at an abortion clinic in Brookline, Massachusetts, the state legislature enacted an abortion clinic buffer law that banned protests outside the entrances or driveways of a “reproductive health care facility” (RHCF). Four categories of persons were exempted from the Massachusetts law: (1) persons entering or leaving such a facility; (2) employees or agents of such a facility acting within the scope of their employment; (3) law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to such a facility solely for the purpose of reaching another destination.

The original Massachusetts law withstood numerous legal challenges. When the Supreme Court denied certiorari in 2005, it appeared that opponents to the law had exhausted all their legal options. In 2007, however, the state legislature extended the buffer zone from 18 to 35 feet. After Governor Deval Patrick signed the bill into law, Eleanor McCullen and six anti-abortion activists brought a new legal challenge, claiming the law, which limits “sidewalk counseling” outside of abortion clinics in Massachusetts, prevents anti-abortion activists from engaging in close personal contact with their intended audiences and impedes their ability to communicate effectively.

In a unanimous decision, the Supreme Court held that Massachusetts’s ban on all protests within 35 feet of abortion clinics infringed upon the First Amendment rights of abortion activists. All nine justices agreed that the Massachusetts law was unconstitutional, but disagreed sharply on the underlying reasoning.

Chief Justice John Roberts’ majority opinion was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan (the four liberals). According to Justice Roberts, the RHCF blocked too much speech because, although it was adopted to stop harassment and violence at abortion clinics, it also applied to people who sought to have quiet conversations with women entering clinics. “Here the commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers,” wrote the chief justice. “It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes.”

Although the majority opinion held that the Massachusetts law was overbroad, it did not hold that all restrictions on abortion protests would be invalid. According to Chief Justice Roberts, Massachusetts “has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.” For example, Massachusetts could protect the rights of women entering clinics by adopting and enforcing laws against harassment, intimidation, and obstruction.

Although they also thought the law was unconstitutional, the four conservative justices would have gone even farther. In his concurring opinion, Justice Antonin Scalia boldly proclaimed, “The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to ‘protect’ prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks.”

Unlike the majority, however, Justice Scalia held any restriction on abortion protest was “unconstitutional root and branch,” because “protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.” To his way of thinking, the restrictions acceptable to the majority would violate the protestors’ freedom of expression.

The Supreme Court's decision in *McCullen v. Coakley* will likely lead to more litigation in the years to come. Although the majority tried to offer some guidance to policymakers, more lawsuits will be needed to determine which approaches to regulating abortion protest can withstand constitutional scrutiny.

Buffer zones are not the only instance in which abortion bumps into the First Amendment. Cases have already been filed challenging abortion-related informed consent laws, laws denying women abortions until they receive counseling, and disclosure laws aimed at anti-abortion crisis centers. The decisions in these cases will tell us a great deal about both abortion and freedom of speech.

Chapter 13: Copyright

U.S. Supreme Court

Case: *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 188 L. Ed. 2d 979; 2014 U.S. LEXIS 3311 (May 19, 2014); the appellate court decision is *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946 (9th Cir. 2012).

Subject: The doctrine of laches (unreasonable delay) cannot be invoked to bar a claim for damages brought within the three-year window for infringement lawsuits created by the Copyright Act.

Summary of Decision: When he retired from boxing, Jack LaMotta collaborated with Frank Peter Petrella to create a book and two screenplays based on LaMotta's career. To protect their intellectual property, LaMotta and Petrella registered their works with the U.S. Copyright Office in 1963, 1970, and 1973. In 1976, LaMotta and Petrella sold exclusive rights to the books and screenplays to Chartoff-Winker Productions, who subsequently assigned those rights to Metro-Goldwyn-Mayer (MGM) Studios. In 1980, MGM released "Raging Bull," an Oscar-winning movie directed by Martin Scorsese that featured actor Robert DeNiro as the legendary LaMotta.

When he died in 1981, all Petrella's copyrights reverted to his heirs. Because his works were created before 1978, his heirs were eligible to renew the copyright "unburdened by any assignment made by the author." Petrella's daughter, Paula, renewed the copyright on her father's 1963 screenplay in 1991. In 1998, her attorney notified MGM that Petrella had obtained the legal rights to the screenplay and that MGM was infringing on those rights. In 2009, when MGM released a DVD commemorating the twenty-fifth anniversary of "Raging Bull," Paula Petrella sued MGM for copyright infringement.

A federal district judge granted summary judgment and dismissed Petrella's lawsuit on the grounds she had waited too long to file her case. To support this ruling, the judge invoked the doctrine of laches (a French word meaning "slackness"), which requires anyone who sues for damages to do so within a reasonable length of time. Because Petrella was aware of the alleged infringement as early as 1981, the judge said it was unfair to allow her to wait to sue MGM until 2009. Petrella appealed the dismissal, but the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court decision.

Petrella then sought relief from the Supreme Court. On a surprising 6-3 decision, the justices reinstated the lawsuit, holding the doctrine of laches could not be used to bar a copyright infringement suit that had occurred within the three-year time frame created by the Copyright Act. Petrella's claim fell within this window, the majority reasoned,

because MGM continued to release the film on DVD and other formats. Under the law, each of these new releases effectively reset the copyright clock. This also meant, however, that Petrella could only sue for damages that had occurred within the three-year window.

Writing for the majority, Justice Ruth Bader Ginsburg noted that “federal copyright law did not include a statute of limitations for civil suits” until 1957. Absent any time limit, federal courts relied on state statutes of limitations or the doctrine of laches to determine the timeliness of copyright infringement claims. That changed, however, when Congress adopted a “three-year look-back limitation” in the Copyright Act. Because Congress had filled the “legislative hole,” Ginsburg concluded, the lower courts “erred in treating laches as a complete bar to Petrella’s copyright infringement suit.”

Justice Ginsburg was not sympathetic to MGM’s argument that it was unfair to allow Petrella to sue after the studio had invested millions promoting the anniversary edition of the movie. Justice Ginsburg noted that there “is nothing untoward about waiting to see whether an infringer is making money, so that litigation is worth the candle.” Nor was Justice Ginsburg dissuaded by the potential consequences of allowing the lawsuit. “Allowing Petrella’s suit to go forward,” Justice Ginsburg reasoned, “will put at risk only a fraction of the income MGM has earned . . . and will work no unjust hardship on innocent third parties, such as consumers who have purchased copies of *Raging Bull*.” Having dispensed with MGM’s arguments, Justice Ginsburg’s opinion remanded the case back to the lower courts for a trial on the merits of Petrella’s infringement claim.

Justice Stephen Breyer filed a lengthy dissenting opinion. To his way of thinking, Petrella had simply waited too long to file her lawsuit. Allowing Petrella to sue at this late date was problematic, Breyer argued, offering several examples to illustrate the potential for “delay-related inequity” For example, copyright holders might bring suits decades after the alleged infringement, long after the memories of witnesses had faded, documents had been destroyed, and profits spent. “In those few and unusual cases where a plaintiff unreasonably delays in bringing suit and consequently causes inequitable harm to the defendant,” Breyer reasoned, the doctrine of laches allows the court to “bring about a fair result. I see no reason,” Breyer concluded, “to erase the doctrine from copyright’s lexicon, not even in respect to limitation periods applicable to damages actions.”

Commentators have come to different conclusions about the significance of the *Petrella* decision. Some believe *Petrella* is a narrow holding that will have limited impact on copyright law. After all, the Supreme Court only allowed Petrella to sue; it did not rule on the merits of her case. The Court also made it clear that Petrella could only seek damages from 2006 (three years before she filed the lawsuit), and that the lower courts could consider Petrella’s delay in seeking redress when awarding damages.

Others, however, have suggested that the *Petrella* decision has the potential to trigger an explosion of lawsuits, especially against the entertainment industry. Using the opportunity created by *Petrella*, distant relatives or estates could file infringement lawsuits against classic films, television shows, or songs. These commentators note that lower courts used the doctrine of laches to bar infringement suits involving James Bond movies and pop classics such as Three Dog Night’s “Joy to the World.” Absent the laches defense, it will be considerably easier for aggrieved copyright holders to get their cases heard in court.

U.S. Supreme Court

Case: *American Broadcasting Co. v. Aereo, Inc.*, 134 S. Ct. 2498, 2014 U.S. LEXIS 4496 (June 25, 2014); the appellate court decision is *WNET v. Aereo, Inc.*, 712 F.3d 676 (2nd Cir. 2013).

Subject: A company publicly performs copyright-protected television content when it transmits the program to paid subscribers over the Internet.

Summary of Decision: Aereo was a service available in the New York City area that allowed subscribers to watch television programs that were being broadcast over the public airwaves. To collect this content, the company erected arrays of thumb-sized antennas that it used to capture signals. Aereo then transmitted the programming over the Internet to subscribers, who could either watch the shows live or access the shows at a later time at their convenience.

ABC and the other plaintiffs sued Aereo for copyright infringement, arguing that use of their programming by streaming services violated the plaintiffs' rights, as provided by the Copyright Act of 1976. Under the Cable Television Consumer Protection and Competition Act of 1992, cable companies are required to negotiate for "retransmission consent" from broadcasters before they can disseminate copyrighted material. The fees paid for permission are a significant source of revenue for broadcasters, who claimed Aereo was a real threat to their business model. If a significant number of viewers subscribed to this service, the plaintiffs claimed, it would undermine the economic viability of commercial broadcasting.

Aereo won the first two rounds of litigation. Federal Judge Alison Nathan refused the broadcasters' request for a preliminary injunction that would have prevented Aereo from operating while the copyright infringement case was pending. On appeal, the Second Circuit Court of Appeals upheld the lower court. Aereo was not broadcasting content over the public airwaves, the Second Circuit argued; rather, it was sending a "private transmission" that was only available to a particular subscriber. Because it was offering shows that were freely available, Aereo was not legally obligated to pay copyright holders for the use of the content.

The third round, however, went to the broadcasters: the US Supreme Court ruled in their favor on a 6-3 decision. Writing for the majority, Justice Stephen Breyer focused on what it means to "perform" a copyright work. Aereo claimed it was "simply an equipment provider," but Justice Breyer held the service was more than a digital video recorder that enabled customers to access programming. To the majority, Aereo bore an "overwhelming likeness to cable companies" that rebroadcast programming to subscribers. When Aereo transmitted the copyrighted programs to subscribers, the service was performing the same work. Because it did not have the legal right to "perform" the content, Aereo was guilty of copyright infringement.

Many commentators feared that a Supreme Court decision in favor of the broadcasters would limit distribution of content over the Internet or lead to broader restrictions on "cloud computing." To allay this concern, Justice Breyer took care to stress that this was a narrow decision confined to the service that Aereo provided. When it was necessary, he explained, the Supreme Court could assess new technology on a case-by-case basis.

Justices Scalia, Thomas, and Alito dissented. Writing for the dissenters, Justice Scalia likened Aereo to a rooftop antenna connected to a digital video player in the living room. "The key point," Justice Scalia opined, "is that subscribers call all the shots: Aereo's

automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it.” When described in this way, Justice Scalia concluded, Aereo was not guilty of active copyright infringement.

Curiously enough, Justice Scalia professed to share the majority’s concern “that what Aereo is doing (or enabling to be done) to the Network’s copyrighted programming ought not be allowed.” He felt, however, that it was not up to the Supreme Court to “bend and twist” copyright law to “produce a just outcome.” Rather, the justices should “leave to Congress the task of deciding whether the Copyright Act needs an upgrade.”

As a result of the Supreme Court decision, Aereo suspended operations. This may not be the end of the story, however, as the company has said it can operate like a cable television network. Under this model, Aereo would apply for a compulsory license that would allow it to stream copyrighted content. It remains to be seen whether Aereo qualifies to be treated like a conventional cable system. Anyone interested in the complex relationship between communication technology and copyright law will want to stay abreast of developments in this area.