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Defending Deference: A Reply to Professor Sylvain's Disruption and Deference

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DEFENDING DEFERENCE: A REPLY TO PROFESSOR SYLVAIN'S *DISRUPTION AND DEFERENCE*

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I. AN INTRODUCTION TO *AEREO*

In *Disruption and Deference*,[1] Professor Olivier Sylvain offers a thorough analysis of one of the most important copyright cases of our era, *ABC v. Aereo*,[2] a case already beginning to spawn a great volume of responses in the legal literature and destined to be a lynchpin of copyright jurisprudence in the area of innovative technologies. During the lead-up to the Supreme Court's decision in *Aereo*, many important questions of media policy swirled around in the discussion of the case's possible impact. There were pundits and lobbyists worrying that it might represent the "end [of] TV as we know it," if Aereo's services were found non-infringing.[3] There was a great deal of hand-wringing over the possibility that if technologies designed to follow the Copyright Act to the letter were found infringing, innovation would be detrimentally chilled.[4] Some wondered whether *Aereo* would represent a turning-point for copyright law, a sanction of engineering that existed to exploit technical loopholes in copyright law, that is, what, in

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1. Olivier Sylvain, *Disruption and Deference*, 74 MD. L. REV. 715 (2015).

2. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

3. *See, e.g.*, Tom Ashbrook, *The Supreme Court on* Aereo *and the Future of TV*, ON POINT (Apr. 23, 2014), http://onpoint.wbur.org/2014/04/23/aereo-cord-cutting-tv-scotus; Joshua Brustein, *Aereo's Day in Court Won't End TV as We Know It*, BLOOMBERG BUS. (Apr. 21, 2014), http://www.bloomberg.com/bw/articles/2014-04-21/aereos-supreme-court-showdown-wont-end-tv-as-we-know-it; Cecelia Kang & Robert Barnes, *Supreme Court to Decide on* Aereo, *Obscure Start-up That Could Reshape the TV Industry*, WASH. POST (Apr. 21, 2014), http://www.washingtonpost.com/business/technology/aereo-case-goes-to-supremecourt/2014/04/21/50bbd1e8-c59d-11e3-9f37-7ce307c56815_story.html; Brendan Sasso, *Is the Supreme Court Preparing to End TV as We Know It?*, NAT'L JURIST (Jan. 10, 2014), http://www.nationaljournal.com/technology/is-the-supreme-court-preparing-to-end-tv-as-we-know-it-20140110.

4. *See, e.g.*, Scott Bomboy, *Cloud Computing Is the Plot Twist in the* Aereo *TV Case*, CONST. DAILY (Apr. 23, 2014), http://blog.constitutioncenter.org/2014/04/cloud-computing-is-the-plot-twist-in-the-aereo-tv-case/; Adam Liptak, *Justices Skeptical of Aereo's Business*, N.Y. TIMES (Apr. 22, 2014), http://www.nytimes.com/2014/04/23/business/media/supreme-court-hears-arguments-in-aereo-case.html?_r=0; Mike Masnick, *The* Aereo *Case Isn't About Aereo, but About the Future of Cloud Computing and Innovation*, TECHDIRT (Mar. 6, 2014), https://www.techdirt.com/articles/20140306/00350726450/aereo-case-isnt-about-aereo-about-future-cloud-computing-innovation.shtml.

his dissent from the Second Circuit's opinion, Judge Denny Chin referred to disdainfully as a "Rube Goldberg-like contrivance,"[5] and what Professor Dan Burk has called, more optimistically, "inventing around" the law.[6] The Second Circuit's holding in *Aereo* seemed to still others like the natural—though perverse—extension of the Second Circuit's holding in *Cartoon Network* (hereinafter, *Cablevision*),[7] and some speculation concerned whether that latter case would fall, or be bolstered, by *Aereo*.[8] Finally, it was unclear whether and how *Aereo* might reshape the future of the public performance right in copyright law, a provision which had never been before the Supreme Court.[9] The Court's decision did not answer all of these questions decisively,[10] but it did reverse the Ninth Circuit's holding that Aereo was not infringing.[11] In so doing, it set in motion a new set of questions about the scope of its holding and (despite the Court's attempts to craft a holding that would not implicate other technologies)[12] the risks posed by cloud computing.[13] Happily for court-watchers, Professor Sylvain has weighed into the fray to assess *Aereo*'s impact at the intersection of three crucial fields of media policy: copyright law, administrative law, and telecommunications law.

Professor Sylvain's coverage of *Aereo* is thus excellent as an introduction to the case itself. First, he reminds readers of how

5. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2d Cir. 2013) *cert. granted sub nom.* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 896 (2014) and *rev'd and remanded sub nom.* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

6. Dan Burk, *Inventing Around Copyright*, 109 NW. U. L. REV. ONLINE 64, 64 (2014), http://colloquy.law.northwestern.edu/main/2014/09/inventing-around-copyright.html.

7. Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008). The case is commonly referred to as "Cablevision" because CSC stands for Cablevision Systems Corporation and the product is better known under the brand name (Cablevision) than the entity name (CSC).

8. Jane C. Ginsburg, WNET v. Aereo*: The Second Circuit Persists in Poor (Cable)Vision*, THE MEDIA INST. (Apr. 23, 2013), www.mediainstitute.org/IPI/2013/042313.php.

9. Vivian I. Kim, *The Public Performance Right in the Digital Age:* Cartoon Network LP v. CSC Holdings, 24 BERKELEY TECH. L.J. 263, 296 (2009).

10. Matthew Sag, *The Uncertain Scope of the Public Performance Right After* American Broadcasting Companies v. Aereo, Inc., MATTHEW SAG: COPYRIGHT LAW, FAIR USE AND TECHNOLOGY (Nov. 18, 2014), http://matthewsag.com/?p=1160.

11. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014); WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) *cert. granted sub nom.* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 896 (2014) and *rev'd and remanded sub nom.* Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

12. *Am. Broad. Cos.*, 134 S. Ct. at 2510. *But see id.* at 2512 (Scalia, J., dissenting).

13. Amanda Asaro, *Stay Tuned: Whether Cloud-Based Service Providers Can Have Their Copyrighted Cake and Eat It Too*, 83 FORDHAM L. REV. 1107 (2014); Cecelia Kang, *Justices Test Aereo on Copyright Issue but Raise Concerns About Harming Cloud Services*, WASH. POST (Apr. 22, 2014), http://www.washingtonpost.com/business/technology/justices-test-aereo-on-copyright-issue-but-raise-concern-aboutharming-cloud-services/2014/04/22/1035912a-ca40-11e3-93eb-6c0037dde2ad_story.html.

anachronistic the Copyright Act's Transmit Clause is in an era of radically changed media consumption.[14] He concludes that the drafting Congress did not foresee[15] (and I would add, could not have foreseen) contemporary consumption and transmission practices.[16] Second, he offers detailed analysis of the trajectory of the legal fight over online video distribution, centering on *Aereo* but situating it in the larger landscape of prior and concurrent cases that included *FilmOn*, *Cablevision*, and others.[17] He helpfully revisits *Aereo*'s technological architecture in a simplified and accessible way.[18] He concludes by analyzing the dispute between Justice Breyer, who wrote the *Aereo* majority, and Justice Scalia, who dissented, as a proxy for their disagreement over interpretive politics. This approach is a clear-sighted way to frame what takes place, on the surface, as a debate about copyright and telecommunications policy.[19] If his article's contributions had ceased there, it would still be worth the reader's time simply for the understanding of *Aereo* the article provides.

II. THE ABSENCE OF JUDICIAL DEFERENCE

However, Professor Sylvain's article is noteworthy less for what he highlights within the opinion and more for what he reveals is absent from it. One of Sylvain's perhaps tongue-in-cheek subheadings is "Agency Work (or, What the *Aereo* Opinions Did Not Mention)."[20] The article

14. Sylvain, *supra* note 1, at 722 n.18 (referring to 17 U.S.C. § 101, defining the public performance right under 17 U.S.C. § 106 "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" (quoting 17 U.S.C. § 101 (2012) (internal quotation marks omitted)).

15. *Id.* at 718.

16. Peter S. Menell & David Nimmer, Aereo, Disruptive Technology, and Statutory Interpretation (June 26, 2014) (UC Berkeley Public Law Research Paper No. 2459312, 2014), *available at* http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2459312.

17. Sylvain, *supra* note 1, at 722–27.

18. *Id.* at 724.

19. *Id.* at 730–32. Sylvain joins a group of other voices addressing the jurisprudential questions lying below the surface of *Aereo*. *See, e.g.*, Andrew Tutt, *Textualism and the Equity of the Copyright Act: Reflections Inspired by* American Broadcasting Companies v. Aereo, Inc., 89 N.Y.U. L. REV. ONLINE 1 (2014), http://www.nyulawreview.org/sites/default/files/nyulawreviewonline-89-1-tutt.pdf; Menell & Nimmer, *supra* note 16, at 1 ("The *Aereo* case presented two fundamental showdowns: one between the cable industry and a charismatic disruptive technology and the other between textualists and jurists seeking to vindicate legislative intent."); Michael Dorf, *Technology and Methodology in* Aereo *and* Riley, DORF ON LAW (June 26, 2014), http://www.dorfonlaw.org/2014/06/technology-and-methodology-in-aereo-and.html ("[T]he lineup in *Aereo* is best understood as reflecting purposivist versus textualist sympathies on the Court.").

20. Sylvain, *supra* note 1, at 734.

demonstrates conclusively, to my mind, that courts remained oddly silent on the question of their authority to interpret the Copyright Act. That is, they skipped what Sylvain tells his reader is known informally as a "*Chevron* Step Zero," or an inquiry into "whether Congress has one way or another delegated to the agency at issue the authority to interpret and administer an ambiguous provision with the 'force of law.'"[21] If Congress has done so, *Chevron* analysis allows courts to determine whether agency judgments will control or what role they will play short of controlling.[22] In an area of law presenting novel legal questions in consequence of constantly emerging technologies, where Sylvain persuasively shows that agencies have been extremely active, it is remarkable that courts did not, at a minimum, discuss the question of their own interpretive authority relative to the executive branch. Hence Sylvain has raised the specter of administrative law and posed a pair of crucial questions: *why* did courts choose not to rely on existing agency rulings, and *why* did they choose not to discuss their authority even if they planned not to defer to agencies here?

In light of existing agency rulings that could have been relied on in the *Aereo* litigation, but appear to have been systematically overlooked, *Aereo* reflects important choices about the scope of judicial deference to the executive branch. In Sylvain's telling, *Aereo* is a compelling story about diffident—or perhaps hubristic—judicial decisionmaking in which judges repeatedly chose to make law rather than defer to expertise. Consequently, the key piece of Sylvain's account of *Aereo* is the intersection of copyright law with administrative law. His is a rare piece of scholarship displaying expertise across three different legal terrains—copyright law, administrative law, and telecommunications law—each one highly complex, and usually insufficiently travelled by most scholars in the other fields.

The article left me with a few unanswered questions that this review will offer up in the spirit of engagement with a very fine piece of work that leaves its reader wanting more. First, what accounts for the judicial silence on the proper authority to assess disruptive technologies? And why the silence, *now*? How could courts be remaining silent on the question of their proper interpretive authority, given the clear congressional delegation of authority to the Copyright Office and the FCC over their respective legislation, in the context of new technologies?[23] After reading *Disruption and Deference*, it seems almost incredible that courts would maintain silence in the face of what appears to be a clear, and unavoidable, legal question to address. Some hints at why and how would clarify the article's implications. Along those lines, Sylvain's article raised pressing questions

21. *Id.* at 769 (quoting United States v. Mead, 533 U.S. 218, 226–27, 229 (2001)).
22. *Id.* at 769–70.
23. *Id.* at 762–63.

about the role judicial philosophies play in case outcomes and reasoning. It seemed at times that Sylvain's commitment to proceduralism needed some bolstering, or at least further exploration as a stated commitment, given what might broadly be styled as a default to consequentialism in the legal academy, especially among IP academics.

III. ACCOUNTING FOR THE ABSENCE OF JUDICIAL DEFERENCE

Sylvain quickly convinced me that administrative law questions lurked, unattended to, in the *Aereo* litigation, leaving me wondering why. Disruptive technologies have long featured in copyright law's thorniest problems.[24] Are they somehow harder now than they once were? Is there, normatively, a sound policy reason for treating technological questions differently in the administrative law scheme? Is it that interpreting the Copyright Act is somehow exceptional? (And if so, why?) Or more broadly, are technological questions in need of different treatment under the law given the unique risks that innovators take, or the public benefit that technologies are capable of delivering? What makes a technology disruptive, and how should the benefits of their disruptions be determined?[25] Is Sylvain identifying an area of technological exceptionalism with respect to the separation of powers?

Especially given earlier judicial reticence to act in this area, *before* Congress had expressly spoken,[26] it seems difficult to understand independent judicial actions in this area *after* Congress had made its position clearer, both through amendments to the Copyright Act, and through clear delegations of power to agencies, not judges.[27] Sylvain makes us aware of a legal puzzle, but does not offer to lead us all the way through it.

For instance, it is unclear in the article whether judges faced with disruptive technologies are deciding the kinds of questions posed in *Aereo* because they see issues they would like to decide and believe they possess

24. *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3–4 (2010) ("Copyright law's confrontation with evolving technology has been a near-constant theme since Congress enacted its first copyright law in 1790." (citing Act of May 31, 1790, Ch. 15, 1 Stat. 124)); *see also* Burk, *supra* note 6, at 5.

25. Sylvain does not explicitly define disruptiveness, though implicitly it would seem he means communicative technologies that present themselves "as the modern-day alternative to the greedy old incumbents." Sylvain, *supra* note 1, at 726.

26. *See* Fortnightly Corp. v. United Artists Television, 392 U.S. 390, 401 (1968) ("We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress." (footnote call numbers omitted)).

27. Sylvain, *supra* note 1, at 731.

the authority to do so, or because they believe they are the interpreters of last resort. At times, Sylvain characterizes judges as though they believe they *may* decide such questions, and at other times, as though they *must* decide them.[28] The characterization matters, and a more robust explanation would be helpful for the reader in understanding Sylvain's argument and its implications. It would answer part of the question, "why," and also go a long way towards addressing why it matters that they are doing so.

Given how crucial the question of judicial deference is in the sphere of administrative law questions, it seemed to be a tension with copyright policy that the paper raised, and to which it ought to offer at least a tentative answer. Perhaps there are robust policy reasons for expertise to play a different-from-usual role in resolving legal questions raised by disruptive technologies, or maybe there are countervailing reasons inherent in the separation of powers, to define the scope of judicial power one way or the other, for these issues of novel and disruptive communicative technologies. These questions go beyond the scope of Sylvain's article, yet they are implicated by it, and may provide fruitful grounds for future analysis.

Finally, it is not entirely clear what effects were produced by courts' skipping *Chevron* Step Zero: Is there a likelihood that the case would have come out differently because following agency expertise here would have produced a different outcome? Or is the problem largely theoretical, a departure from procedure that could, in the future, have a significant effect, but here mattered more as a matter of setting dangerous precedent? Sylvain seems to imply that administrative pieces of the legal puzzle might have resolved *Aereo* had they been put into play, and thus it would have been interesting to hear even tentative thoughts about why these administrative law questions remained sidelined, and what effects this absence produced. Sylvain persuasively demonstrates that the regular course of deference business was, effectively, disrupted.

IV. A PROCEDURALIST'S DEFENSE OF DEFERENCE

A further aspect of the article raised but not fully developed is the jurisprudential philosophy Sylvain associates with the lack of deference he has so convincingly diagnosed. For example, he critiques information law, which he characterizes as "preoccup[ied] with finding the best positive

28. *See id*. at 724 ("The Justices and all of the federal judges who have heard the question . . . chose to interpret the scope of the public performance right without any real consideration of the agencies' findings or reports on the question. I posit here that they did so based on the myopic assumption that they alone have the duty of finding the proper balance between owners and creators in the first instance" [that is, they *must*] "—or at least that they are as well situated as anyone else to make legal sense of disruptive new technologies." [that is, they *may*]).

substantive outcome . . . that foster[s] innovation."[29] It does not seem to this author to be automatically problematic that one should seek to foster innovation. Thus, what I take to be at issue for Sylvain is the *consequentialism* that would prioritize innovation above all else, even when redrawing substantive rights under copyright law.[30] For Sylvain, the more pertinent questions relate to the proper scope of judicial deference to agency expertise, and under that view, attending to outcomes instead of paying attention to deference is thus a glaring oversight.[31] Yet in Sylvain's preference for procedural propriety and for respect of the separation of powers, there are implicit jurisprudential values: proceduralism over consequentialism, form over substance. While it bucks the contemporary academy's general approach to fly in the face of consequentialism, doing so can stimulate a profound discussion of the proper balance between law and technology, embedded in larger theories of democratic deliberation and the separation of powers. Still, if it is accurate to characterize a good majority of the academy—or at least intellectual property professors—as consequentialist, it is perhaps also fair to say that there is an important role for proceduralism and attention to formal justice. This may be an important contribution from copyright's intersection with administrative law; the latter area is, of course, governed in the main by a statute that includes the word "procedure" in its very title.[32] *Aereo* is an important case because it offers the Supreme Court's first pass at the public performance right, and its latest pass on the scope of disruptive technologies' impact on the laws of broadcasting and copyright. Yet it is surely also important for calling our attention to the importance of philosophies of law to understanding not just legal reasoning but legal outcomes. Sylvain does a nice job of bringing *Aereo*'s importance in numerous areas to light.

V. CONCLUSION

Professor Sylvain has written an engaging article full of contributions in a few related areas of law, and what he loses in doctrinal depth in a single area he more than makes up in the beneficial breadth of his comparative approach. Moreover, his syncretic approach across these three areas of law reflects the rare competence required fully to grasp contemporary media policy: More scholars *ought* to be attempting to cross these substantive

29. *Id.* at 736.

30. *See id.* at 737 ("The overwhelming focus on substantive policy outcomes ignores the far more pertinent question today of how courts ought to make legal sense of laws when technologies change and prevailing public law objectives are in tension.").

31. *Id.* at 737–38.

32. Federal Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2012).

boundaries to take in the entire picture. By drawing on insights from administrative law, and its telling absence as both a procedural and a substantive factor in the *Aereo* litigation, Sylvain offers a persuasive case for more attention to procedural authority in judicial review, and a case—though perhaps somewhat less persuasive—for greater judicial deference, too. *Aereo* provides a case study of judicial functionalism in service of achieving a particular outcome under copyright, an outcome in which substance seems to have trumped—we might say disrupted?—the proper scheme of judicial deference. Copyright's outcome-myopia may serve a particular, consequentialist vision of law suited to areas of (or developed in response to) rapidly emerging technological development. But Sylvain's article shows us that copyright's focus on outcomes leaves a great deal to be desired when considered from the perspective of administrative law's prescription of a carefully negotiated balance of powers.