Is Place-Shifting the New Time-Shifting?

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Chairman of the Committee on the Judiciary for the House of Representatives, Bob Goodlatte recently announced “that the House Judiciary Committee will hold a comprehensive series of hearings on U.S. copyright law [and that] [t]he goal of these hearings will be to determine whether the laws are still working in the digital age.” Canada just finished such a process and thus could provide fruitful area of inquiry for American policy-makers. According to Jessica Litman, the entertainment industry has employed three primary strategies to control copyright infringement on the Internet which directly impact the utilization of the cloud. The industry has vilified any unlicensed uses of copyright using loaded, or very negative, metaphors, such as “piracy”. Copyright lobbyists in the US have also tried repeatedly to download responsibility for policing the Internet onto ISPs. Lastly, copyright holders have drawn new businesses into expensive and lengthy litigations, resulting in the bankruptcy of many new businesses, such as Napster, Limewire, Scour, Veoh, LokiTorrent and many others. The digital environment is a global one, and Comparative Law as a general area of inquiry can very usefully inform policy-making. Several cases currently making their way through United States courts are challenging the way television studios

and networks monetize their content in the digital era. The outcomes in these cases may change the way television makes money, and several rely heavily on Copyright law. One such case, *WNet v Aereo Inc.* involves Aereo recording and retransmitting broadcast content to paying users via individual antennas thus sidestepping publicly broadcasting the content. Larry Downes has described Aereo TV as “barely legal by design,” and points out that “its entire business is engineered to exploit existing copyright law.” The Second Circuit Court of Appeals decision, however, did rule that it was legal, and its ruling upheld the lower court’s decision. The decision relied heavily on the decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, but the decision also suggests in *stare decisis* that some of the issues, especially in regards to the Cablevision decision would be more properly heard by the Supreme Court. The case also referenced the landmark decision in *Sony Corp. of America v. Universal City Studios, Inc.*. In *Fox v Dish Network*, the network was denied a preliminary injunction to stop the use of Dish Network’s AutoHop feature – a device that allowed users to program shows and filter out the commercials. In a further preliminary injunction, Fox attempted to halt Dish Network’s Dish Anywhwere feature which allows users to view content remotely on multiple devices and which Dish

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††††††††† Docket Nos. 12-2786-cv, 12-2807-cv


‡‡‡‡‡‡‡‡‡ 536 F.3rd 121 (2nd Cir 2008) (“Cablevision”).

calls “place-shifting.” The cases turn on two significant issues: what is a public performance as opposed to a private performance and what constitutes the making of a copy. Both of these issues are complicated by the addition of the digital environment and new technology.

Canada’s Supreme Court recently heard five copyright cases, referred to as the Pentalogy, and Parliament passed a significant amendment to the Copyright Act, making Canadian law a particularly useful comparator. In Rogers Communications Inc., v. Society of Composers, Authors and Music Publishers of Canada, the Court’s decision rested on the distinction of what constituted a public performance and the right to communicate a work by telecommunication. The decision also considered the necessity of remaining technology-neutral in an ever evolving technological environment and clarified which tariffs online activities were liable for. Re:Sound v. Motion Picture Theatre Associations of Canada et al. also considered public performance and the right to communicate a work by telecommunications. In Society of Composers, Authors and Music Publishers of Canada v. Bell, the Court considered communication to the public over the Internet. Several bedrock cases were referred to in these cases as well, including CCH Canadian Ltd. v. Law Society of Upper Canada, Théberge v.

Of the five cases, Entertainment Software Association et al. v. Society of Composers, Authors and Music Publishers of Canada may well have the most significant points to make on this issue. The decision written by Abella J. turns on “the principle of technological neutrality.” Abella J. elaborates that

[t]he Internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user. The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.

Rothstein J. wrote the dissent which distinguishes between technological neutrality and media neutrality. The decision emphasizes that the Act needs to be applied equally between different media. Michael Geist points out that “[t]he linkage between technological neutrality and the limited nature of creators' rights could prove very significant as the court is concerned that a non-neutral approach may result in overcompensating creators.” This paper will more closely analyze the facts and issues in the Aereo and DirectTV cases and

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Ibid., headnote.

Ibid.

Ibid., at para 122.

determine whether a similar case in Canada would come to a different conclusion given the recent cases and amendments in Canada. A general principle of technological neutrality as set out in the recent Canadian cases could be useful governing principle in the United States as well. This paper will seek to determine whether the issue in these cases should be a rights issue, a broadcasting issue, or a technological issue.