

March 9, 2018

D.C. CIRCUIT APPLIES U.S. COPYRIGHT LAW TO VIDEO CONTENT STREAMED FROM ABROAD

To Our Clients and Friends:

On March 2, 2018, the United States Court of Appeals for the D.C. Circuit decided an important case addressing two separate, still unsettled questions about the scope of copyright infringement liability. *See Spanski Enterprises v. Telewizja Polska, S.A.*, No. 17-7051 (D.C. Cir. Mar. 2, 2018). In brief, the court held that the defendant infringed the plaintiff's exclusive public performance right when, without authorization, it made copyright-protected television programming available to stream inside the United States, even though the stream was hosted outside the United States. This was the first time a federal court of appeals considered whether streaming content originating extraterritorially is subject to U.S. copyright liability. Separately, though the defendant insisted that it could not face liability unless it "volitionally" selected the content delivered to each user, the court held that operating a video-on-demand system which allowed members of the public to receive a copyright-protected performance constituted copyright infringement.

Spanski Enterprises involved a longstanding licensing agreement between Telewizja Polska (TVP), the national broadcasting company of Poland, and Spanski Enterprises, a Canadian corporation in the business of distributing Polish-language programming. A 2009 settlement agreement between the parties established that Spanski alone could distribute the programming at issue in North and South America, whether over the Internet or otherwise. TVP continued to distribute its programming everywhere else in the world, including by offering episodes for streaming on its website, but used geoblocking technology to ensure that no IP address associated with North or South America could access any programming to which Spanski held the license. However, in 2011 attorneys for Spanski discovered that users in North and South America could still access programming that should have been geoblocked. Spanski sued TVP for infringement and, after a five-day bench trial, Judge Tanya Chutkan of the United States District Court for the District of Columbia found TVP liable.

On appeal, TVP raised two main challenges to the district court's ruling. First, it argued that it could not commit copyright infringement because none of its conduct took place within the United States, and the Copyright Act does not apply extraterritorially. Second, it argued that a defendant only faces copyright liability if its "conduct was volitional." Because TVP merely operated an "automatic content delivery system" from which the user "selects the content it will view" without TVP's involvement in processing that request, TVP insisted it had not violated the law. The United States filed an amicus brief on behalf of Spanski, urging the court to reject both TVP's arguments.

In an opinion written by Judge Tatel and joined by Judges Griffith and Wilkins, the court of appeals affirmed, holding TVP liable for infringing Spanski's exclusive rights. Applying the Copyright Act to

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TVP's conduct is not an impermissible extraterritorial application, the Court explained, because "the infringing performances—and consequent violation of Spanski's copyrights—occurred on the computer screens in the United States on which the episode's images were shown." TVP argued that when a performance originates internationally but is shown to the public within the country, only the domestic viewer was liable for copyright infringement. The court disagreed, holding that a broadcaster remains liable for "the infringing display of copyrighted images on the viewer's screen" whenever such a performance occurs "in the United States," no matter where the broadcaster is located.

The court also held that an unauthorized performance via a video-on-demand system like TVP's infringed Spanski's exclusive rights, even without proof that TVP took a "volitional" act, because TVP made it possible for end users to select copyright-protected content. The text of the Copyright Act, the court explained, imposes liability whenever a defendant makes it possible for "members of the public" to "receive[] the performance" of copyrighted content. The court found it unnecessary to decide whether a "volitional conduct" requirement exists at all or how far it extends, holding that TVP's conduct constitutes infringement "whatever the scope of any such requirement might otherwise be."

In rejecting TVP's "volitional conduct" argument, the court of appeals relied heavily on the Supreme Court's 2014 decision in *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014). In *Aereo*, the Supreme Court held that an intermediary service that automatically captured and retransmitted broadcast television signals infringed the public performance right, even where the end user and not the service selected which content to capture. The D.C. Circuit concluded that *Aereo* "forecloses [TVP's] argument that the automated nature of its video-on-demand system or the end user's role in selecting which content to access insulates it from Copyright Act liability." The court noted that TVP's video-on-demand service involved TVP itself even more directly in the infringing performances than did the system in *Aereo*: unlike in *Aereo*, TVP itself selected and uploaded the content its system made available.

Both holdings are important developments. No other federal court of appeals has yet squarely held that U.S. copyright law applies to performances originating internationally that can be viewed inside the United States—though, as Professor Nimmer puts it in his copyright treatise, it requires only "a straightforward application of the statute" to hold that such performances are actionable. 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.02 (rev. ed. 2017). This holding will prevent would-be infringers from evading liability simply by relocating across a border.

Separately, though the court refused to decide whether a "volitional conduct" requirement exists, its application of *Aereo* to TVP's on-demand system adds fuel to the ongoing debate over the Copyright Act's scope. Several courts of appeals, both before and since the Supreme Court's *Aereo* decision, have held that the Copyright Act only applies to "volitional conduct." *BWP Media USA, Inc. v. T & S Software Associates, Inc.*, 852 F.3d 436 (5th Cir. 2017); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004); *Parker v. Google, Inc.*, 242 F. App'x 833 (3d Cir. 2007). In its amicus brief, however, the Government argued that *Aereo* "rejected" a volitional-conduct argument. Thus, it will be up to future courts to decide the ultimate fate of the defense.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the authors:

*Howard S. Hogan - Washington, D.C. (+1 202-887-3640, hhogan@gibsondunn.com)
Connor S. Sullivan* - New York (+1 212-351-2459, cssullivan@gibsondunn.com)*

**Prior to joining the firm, Connor Sullivan contributed to an amicus curiae brief filed in this appeal in support of Spanski Enterprises.*

Please also feel free to contact the following practice group leaders:

Intellectual Property Group:

*Wayne Barsky - Los Angeles (+1 310-552-8500, wbarsky@gibsondunn.com)
Josh Krevitt - New York (+1 212-351-4000, jkrevitt@gibsondunn.com)
Mark Reiter - Dallas (+1 214-698-3100, mreiter@gibsondunn.com)*

Media, Entertainment and Technology Group:

*Scott A. Edelman - Los Angeles (+1 310-557-8061, sedelman@gibsondunn.com)
Ruth E. Fisher - Los Angeles (+1 310-557-8057, rfisher@gibsondunn.com)
Orin Snyder - New York (+1 212-351-2400, osnyder@gibsondunn.com)*

Appellate and Constitutional Law Group:

*Mark A. Perry - Washington, D.C. (+1 202-887-3667, mperry@gibsondunn.com)
Caitlin J. Halligan - New York (+1 212-351-4000, challigan@gibsondunn.com)
Nicole A. Saharsky - Washington, D.C. (+1 202-887-3669, nsaharsky@gibsondunn.com)*

Technology Transactions Group:

*David H. Kennedy - Palo Alto (+1 650-849-5304, dkennedy@gibsondunn.com)
Daniel Angel - New York (+1 212-351-2329, dangel@gibsondunn.com)
Shaalu Mehra - Palo Alto (+1 650-849-5282, smehra@gibsondunn.com)*

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