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The Supreme Court's Summer Decisions on Modern Technology

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This summer, the U.S. Supreme Court issued two decisions involving modern technology that highlight the extent to which judges and practitioners can—and cannot—rely on existing precedent to respond to legal issues that arise from the use of such technology.

In *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), decided on June 25, 2014, the Supreme Court applied precedent relating to twentieth-century technology to hold that Aereo, a service that allows cable subscribers to stream content to their computers and mobile devices online, violated the content copyright owners' "'exclusive righ[t]' to 'perform the copyrighted work publicly.'" *Id.* at 2502.

In an opinion authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan, the Supreme Court held that Aero did violate that exclusive right as codified in the Copyright Act's "Transmit Clause," which makes exclusive the right to

transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

Id. at 2502.

Importantly, the Supreme Court reasoned that in 1976, Congress changed the Copyright Act to reject two cases, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v.*

Columbia Broadcasting System, Inc., 415 U.S. 394 (1974), in which the Court had held that CATV systems (precursors to cable) did not infringe copyright holders' exclusive right to perform their works publicly because the CATV providers were mere viewers and not broadcasters. *Aereo*, 134 S. Ct. at 2505. The addition of the Transmit Clause in 1976, according to the Supreme Court, meant that "both the broadcaster and the viewer of a television program 'perform,' because they both show the program's images and make audible the program's sounds." *Id.* at 2506.

The Court's analogy to twentieth-century technology to address the application of the Copyright Act to Aereo was notable. However, the Supreme Court indicated that the same analogy is not always appropriate:

"We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that "[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,' should await a case in which they are squarely presented."

Id. at 2511.

In another important case decided by the Supreme Court this summer, *Riley v. California*, 134 S. Ct. 2473 (2014), also decided on June 25, 2014, the Court rejected the application of existing precedent and generally forbade the warrantless search of mobile phones incident to arrest.

Riley involved two cases of police officers accessing the contents of mobile phones, including text messages, call logs, contacts lists, videos, and photographs, without a warrant. Specifically, the Court discussed the question of "how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 2484.

The Court ruled that "officers must generally secure a warrant before conducting such a search" of a mobile phone. In doing so, the Supreme Court opined on—and rejected—the persuasiveness of traditional rationales, set forth in Supreme Court decisions starting with *Chimel v. California*, 395 U.S. 752 (1969), for permitting searches incident to arrest: protecting officer safety, preserving evidence, and the diminished privacy of an arrestee. The Supreme Court made the following observations.

First, the Court distinguished the 1973 case of *United States v. Robinson*, 414 U.S. 218 (1973), which permitted the search of a person incident to a lawful arrest without any additional justification: "Cell phones . . . place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*." *Riley*, 134 S. Ct. at 2485.

Second, with respect to police-officer safety, the Court noted that

[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Id.

Third, with respect to preserving evidence, the Court acknowledged that police officers are permitted to seize mobile phones to prevent destruction of evidence while seeking a warrant, but the Court rejected the argument that this rationale further justifies searching the mobile phone, reasoning that "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* at 2486. The Court further pointed out that the risk of the phone's data being remotely deleted or encrypted does not justify a warrantless search because "it is not clear that the ability to conduct a warrantless search would make much of a difference." *Id.* at 2487.

Finally, the Court expressed a deep concern for protecting privacy, demonstrated an acute understanding of the way Americans use mobile phones and those devices' capabilities, and explained that these technological advances require the law to adapt. After quoting Learned Hand's 1926 observation "that it is 'a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him,'" the Court noted that

[i]f his pockets contain a cell phone . . . that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Id. at 2490–91.

These two Supreme Court cases have generated a vast amount of media coverage, and rightly so, given the impact on ordinary citizens. For practitioners and judges, however, they are important for another reason. They demonstrate that existing precedent and principles of law can aid in resolving legal issues that arise with the use of modern technology; but under certain circumstances, especially where modern technologies dramatically alter the way that citizens live, work, and communicate with one another, these existing precedents and principles of law must adapt.

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