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Intellectual Property

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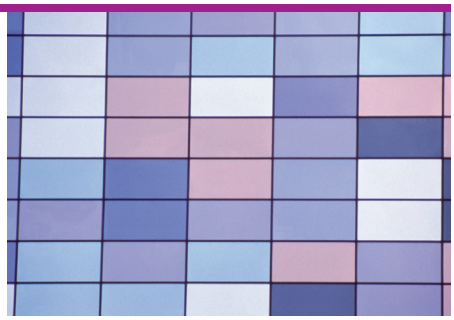

Supreme Court Issues Ruling on Aereo and the Public Performance Right

On June 25, 2014, the US Supreme Court reversed a decision of the Second Circuit and held that Aereo publicly performs copyrighted television programming.[1] The case has important implications for the public performance right under the Copyright Act and for new technologies and online services that make copyright-protected content available to the public.

The Aereo Service

Aereo is an online service that gives its subscribers the ability to view broadcast television programs on a variety of internet-connected devices like smartphones and tablets. Aereo's system consists of thousands of individual antennas connected to a remote server. Each subscriber is assigned an antenna, and no two users share the same antenna, even when watching the same program. Rather than transmit the feed directly to the user, Aereo creates a unique copy for each user of the desired program on its remote server. Then, depending on whether the user chooses "watch" or "record," the user-specific copy either is transmitted directly to the user or saved for later viewing. Aereo does not pay the copyright owners of the programming for the right to make their content available to its subscribers.

The Proceedings Below

In March 2012, several broadcast networks sued Aereo for copyright infringement. The district court denied their request for a preliminary injunction.

The networks appealed, claiming that Aereo's service infringed the exclusive right to publicly perform their copyrighted programming. In a split decision, the Second Circuit affirmed the district court's ruling. The court found that, because Aereo created a unique copy of the programming for each individual user, the potential audience for any Aereo transmission was only a single consumer. Unlike the transmissions made by cable system operators, which are capable of being received simultaneously by multiple recipients, Aereo's transmissions were private performances. The majority relied heavily on its 2008 *Cablevision* decision, which held that a remote-storage DVR system did not publicly perform the copyright owners' content. According to the court, the Aereo system was "not materially distinguishable" from the Cablevision system because each subscriber's selection created a unique individual copy of a given program that was accessible only to the user who made it rather than to the public at large.

1 *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. __ (2014).

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The Supreme Court Decision

Writing for the majority, Justice Breyer addressed two questions: whether Aereo "performs" and whether Aereo does so "publicly."

First, the majority found that Aereo "performs" the plaintiffs' works. Congress's purpose in amending the Copyright Act was to overturn the Supreme Court's rulings from the late 1960s and early 1970s regarding community antenna television (CATV) systems, the precursors of modern cable systems. In *Fortnightly Corp. v. United Artists Television, Inc.*[2] and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[3] the Supreme Court ruled that a CATV system, which merely used antennas to amplify a viewer's capacity to receive broadcasters' signals, did not perform the broadcasters' copyrighted works. In response to these decisions, Congress amended the Copyright Act to clarify that to peform an audiovisual work meant "to show its images in any sequence or to make the sounds accompanying it audible." The amendments effectively erased the court's distinction between broadcaster and viewer: because both the broadcaster *and* the viewer show a program's images and make its sounds audible, both necessarily performed the work. Congress also enacted the Transmit Clause, which states that an entity performs when it transmits a performance to the public.[4] This made it clear that CATV entities peform even when they merely enhance viewers' ability to receive broadcast television signals.

The court found Aereo's activities substantially similar to those of CATV systems. The majority recognized that Aereo's system differed from CATV because those systems made constant transmissions while Aereo's system remains inert until a subscriber chooses to watch a program. The court conceded that "[i]n other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act."[5] Without elaborating on this hypothetical distinction, however, the court concluded that, "[g]iven Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here."[6] The majority noted that the difference "means nothing" to the subscriber who, under both systems, can select what program to display.

On the second question, the court found that Aereo's performances are "to the public" within the meaning of the Transmit Clause. The court rejected Aereo's argument that because its transmissions generate user-specific copies through individually assigned antennas, it does not transmit a performance to the public because each transmission is available to only one subscriber. In light of Congress's regulatory objectives, these "behind-the-scenes" technological differences "do not render Aereo's commercial objective any different from that of cable companies,"[7] which do perform publicly. Moreover, the differences Aereo highlights do not "significantly alter the viewing experience of Aereo's subscribers."[8]

The Transmit Clause provides that one may transmit a performance to the public "whether the members of the public capable of receiving the performance...receive it...at the same time or at different times."[9] Under the majority's interpretation, this language suggests that when an entity communicates the same contemporaneous work (in other words, it shows the same images and makes audible the same sounds), it transmits a performance to the public regardless of whether it is through a single transmission or multiple discrete transmissions. The fact that Aereo transmits programs through user-specific copies is also irrelevant. The majority reasoned that a "copy" of a work is simply a material object in which a work is fixed and from which the work can be communicated. Regardless of whether Aereo transmits a program using a single copy of the work or an individual copy for each viewer, it is engaging in a public performance when it "streams the same television program to multiple subscribers" who are unrelated and unknown to each other.[10] The court concluded that "Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies."[11]

2 392 U.S. 390 (1968).

3 415 U.S. 394 (1974).

4 17 U.S.C. § 101 ("To perform...a work 'publicly' means...to transmit or otherwise communicate a performance...of the 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.").

5 *Am. Broad. Cos. v. Aereo, Slip* Op. at 10.

6 Id.

7 Id. at 12.

8 Id.

9 Id. at 13-14 (quoting 17 U.S.C. § 101).

10 Id. at 14.

11 Id. at 13.

In concluding its opinion, the majority addressed the argument made by Aereo and its supporting *amici* that finding Aereo's conduct to be a public performance would impede the development of new technologies. The majority emphasized the limited nature of its decision, stating that "to the public" did not extend to those who act as owners or possessors of products in which copyrighted works are embodied, and noting that the opinion did not consider whether the public performance right is infringed when a user of a service pays for something other than the transmission of a copyrighted work, such as the remote storage of content in a cloud-based storage service.

Implications

The decision has several key implications:

- Aereo will have to change its business, obtain retransmission licenses or, more likely, shut down.
- Television producers, marketers, distributors, and broadcasters have, for the time being, preserved their established business models. Retransmission royalties will continue to be a large source of revenue for copyright owners.
- The decision probably will not have a large chilling effect on new and emerging technologies. The court declined to overturn *Cablevision*, and it explicitly confined its reasoning to the facts of the case. Moreover, online services independently can continue to benefit from the fair use doctrine and the Digital Millennium Copyright Act safe harbors.
- New online services will seek to fill the void left by Aereo. Further litigation in this area is likely as these services test the limits of the *Aereo* ruling.