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Intellectual Property ADVISORY ■

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Supreme Court Holds Aereo's Online Streaming of Broadcast Television Violates Copyright Law

Overview

On June 25, 2014, the U.S. Supreme Court held that a service which uses thousands of tiny, individually assigned antennas to allow its customers to watch television programs over the Internet at nearly the same time as the programs are broadcast violates the Copyright Act. ***American Broadcasting Cos., Inc. v. Aereo, Inc.***, No. 13-461, slip op. (U.S. June 25, 2014) ("***Aereo***"). Reversing the Second Circuit, the Supreme Court's 6–3 decision ruled that such a system "publicly performs" copyrighted works and thus infringes the exclusive rights of the copyright owners of those works.

Background

The ***Aereo*** case involves an online service provided by the Respondent, Aereo, Inc. A subscriber to the Aereo service is able to stream broadcast television signals in the subscriber's area to a smartphone, tablet or PC. When a subscriber clicks on the "Watch" button for a program on Aereo's site, Aereo automatically assigns that subscriber one of several thousand antennas in Aereo's facility, and Aereo's server begins making a personal copy of that program for the subscriber via that individual antenna. The subscriber has the option to watch that copy of the program "live" as it is being recorded (in reality, delayed by a few seconds) or to record it to watch at a later time.

Several television broadcasters, producers and content owners brought suit against Aereo, claiming Aereo infringed the copyright in the Plaintiffs' programs. Though the complaint asserted claims of direct infringement of the public performance right, the reproduction right, and also claims for contributory infringement, the Plaintiffs based their initial motion for preliminary injunction only on the theory that Aereo was itself "publicly performing" the Plaintiffs' copyrighted works.

Relying on the Second Circuit's precedent in ***Cartoon Network LP v. CSC Holdings, Inc.***, 536 F.3d 121 (2d Cir. 2008) (referred to as the "***Cablevision***" case), the Southern District of New York denied the preliminary injunction and the Second Circuit affirmed. In ***Cablevision***, the Second Circuit had held that a remote storage digital video recorder system set up by a cable company that allowed individual subscribers to make individual copies of programs on the cable company's servers and play those individual copies back at a later time did not "publicly perform" those programs within the meaning of the Copyright Act. The lower courts in the ***Aereo*** case viewed Aereo's service in a similar light. Because Aereo made an individual, discrete copy of a program for each subscriber that chose to watch that program, those courts reasoned that Aereo did not "publicly perform" those programs—each individual copy of the program only had a potential audience of one.

U.S. Supreme Court Decision

The U.S. Supreme Court reversed the Second Circuit in a 6–3 decision. Justice Stephen Breyer, writing for the majority, held that Aereo's delivery of television programs to its subscribers fell within the Copyright Act's definition of what it means to perform a work "publicly."

Prior to the passage of the Copyright Act of 1976, the Supreme Court had held on two occasions that a cable company that delivered broadcast television programs to subscribers in distant cities did not publicly perform those copyrighted works. Instead, the cable companies served more of a "viewer function," enhancing the viewer's ability to receive a broadcast signal it already had the right to receive for free. Intending to overrule these decisions, Congress added a "Transmit Clause" to the 1976 Act as part of the definition of what it means to perform a work publicly, stating that one publicly performs a work by "transmit[ting] or otherwise communicat[ing] 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." The 1976 Act also created a compulsory licensing scheme for cable providers to pay retransmission fees to broadcast stations.

Aereo "Performs" the Copyrighted Works

In deciding that Aereo's system violated the Copyright Act, the Court first determined whether Aereo in fact "performed" anything, or whether instead it was the Aereo subscriber that did the performing. The Court believed that, due to Aereo's "overwhelming likeness" to cable companies, Aereo in fact performed the broadcasters' copyrighted works. The Court did acknowledge that, unlike a cable service, where "television signals . . . lurk[] behind the screen, ready to emerge when the subscriber turn[s] the knob," Aereo's system "remains inert until a subscriber indicates that she wants to watch a program." However, the Court found this difference was immaterial to Aereo's users. Driven by what it viewed as Congress's intent in amending the Copyright Act, the Court held that Aereo performs the broadcasters' works.

Aereo's Performance Is "Public"

The Court next had to determine whether Aereo performed those works "publicly." Aereo argued that it did not, because it only transmits a *single* copy of a work to a *single* subscriber, not the "public." The Court disagreed, holding that Aereo's transmission was public. This holding was again driven by what it viewed as Congress's intent in amending the Copyright Act. The Court felt that, even if the method by which Aereo delivered programs to the public differed from the methods used by a cable provider, these differences were immaterial and accomplished the same "commercial objective" as cable companies. The Court also looked to the text of the Transmit Clause, which it held was broad enough to include Aereo's service.

Dissent

Writing for the dissent, Justice Antonin Scalia criticized the majority for ignoring what he viewed as a well-settled rule that one can only be directly liable for copyright infringement if one has engaged in "volitional conduct." Justice Scalia did not foreclose, however, the possibility that Aereo may be liable for the *contributory* infringement of the Plaintiffs' public performance rights, or perhaps directly or secondarily liable for infringing the reproduction rights. ("I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed.) Because the only issue before the Court was whether Aereo *directly* infringed the Plaintiff's public performance right, Scalia wrote that Aereo had not engaged in the volitional conduct necessary to support the majority's ruling. He acknowledged that Aereo may have discovered a "loophole" in copyright law, but stated "[i]t is not the role of this Court to identify and plug loopholes."

Significance of Decision

Prior to the Court's decision, there was a great deal of public concern over the effect a ruling against Aereo might have on other technologies, especially on "cloud computing" and remote data storage. The majority opinion attempts to assuage those concerns by making clear the holding is confined to the specific facts of Aereo's system. The Court specifically noted it was not considering "whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content." Nevertheless, Scalia's dissent calls into question the Court's assurances. He notes that though the "Court vows that its ruling will not affect cloud-storage providers and cable-television systems . . . it cannot deliver on that promise given the imprecision of its result-driven rule."

The decision is primarily a win for broadcasters—which will continue to receive retransmission fees from cable companies—and the cable companies themselves, which will not face competition from a service that can offer similar functionality without paying the cost of retransmission fees.

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