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Alert

Supreme Court Rules Aereo's Retransmission Model Violates Copyright Law

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On June 25, 2014, the U.S. Supreme Court decided *American Broadcasting Cos., Inc., et al. v. Aereo, Inc.*, holding that Aereo's nearly-live transmission of television programming to consumers over the internet constitutes an infringement under the Copyright Act of 1976. The Court's 6-3 ruling overturned the Second Circuit's denial of injunctive relief to a group of broadcasters who sought to enjoin Aereo from streaming programs to subscribers in exchange for a monthly fee, with no compensation to the broadcasters themselves.

As Justice Breyer's majority decision explained, the Copyright Act of 1976 gives a copyright owner the "exclusive right[t] to perform the copyrighted work publicly."[1] The Transmit Clause further defines that exclusive right as the right to "transmit or otherwise communicate a performance … of the [copyrighted] work … to the public, by means of any device or process."[2] The question at issue was whether Aereo – by using warehouses of antennae to pick up television content and converting and streaming that content to subscribers over the internet with only a seconds-long delay – was "publicly performing" and thus infringing under the meaning of the Act.

What Constitutes a Performance?

Aereo argued that it was not "performing" under the meaning of the Copyright Act, because it was merely providing equipment that "emulate[s] the operation of a home antenna" or DVR.[3] Aereo further argued that because its equipment simply responded to subscribers' directives, it was the subscriber who was "performing," rather than Aereo itself.[4]

Drawing on Congress' 1976 amendments to the Copyright Act, the Court held that Aereo was unmistakably performing under the meaning of the Act because Congress enacted the Transmit Clause in response to two earlier Supreme Court decisions, *Fortnightly* and *Teleprompter*,[5] which held that community antenna television (CATV) systems (the predecessors to modern cable providers) fell outside of the Act because they merely "carr[ied]" rather than "performed" any content.[6] Recognizing Congress' intent to override *Fortnightly* and *Teleprompter* by defining the transmission of a performance as "communicat[ing] it by any device or process whereby images or sounds are received beyond the place from which they are sent," the Court concluded that Aereo's streaming technology fit squarely within Congress' definition.[7]

Public versus Private

The Court then considered whether Aereo was performing "publicly." Aereo argued that because its technology has an antenna dedicated to each subscriber which then creates a distinct copy of every program it streams, that such transmissions were not "public" within the meaning of Act.[8]

Relying once again on Congress' intent in amending the Copyright Act, the Court held that creating and transmitting a distinct stream of each re-distributed program from a personal copy did "not distinguish Aereo's system from cable systems, which do perform 'publicly,'" nor did it "render Aereo's commercial objectives any different from that of cable companies," who pay broadcasters for the right to transmit content.[9]

The Court also focused on the text of the Transmit Clause which states that an entity may "publicly" transmit a performance "whether the members of the public capable of receiving the performance … receive it … at the same time or at different times."[10] The notion that members of the public could receive transmissions "at different times," the Court reasoned, means that "publicly" transmitting a work could involve multiple discrete transmissions, as per Aereo's model.[11]

While the Court further noted that despite receiving separate or discrete transmissions, Aereo subscribers still constitute the "public," it distinguished between Aereo subscribers and situations where members of the public receive streams of content from copies that they already "own" or "possess," in a nod to cloud-based storage services.[12] Transmissions from such copies, the Court held, would not constitute public performance.[13] Along the same lines, the Court was careful to note that it did "not consider[] 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."[14]

The Dissent and Future Implications

The dissent, authored by Justice Scalia and joined by Justices Thomas and Alito, focused instead on "volitional conduct."[15] This, Scalia explained, "demands conduct *directed to* the plaintiff's copyrighted material," a distinction noted in *Sony Corp. of America v. Univ. City Studios, Inc.*, 464 U.S. 417 (1984), in which the Supreme Court analyzed whether Sony was secondarily liable for its customers use of VCR's to make unauthorized copies of content.[16]

The dissent analogized Aereo to a copy shop where it is the patron, not the shop, who must choose whether to use the copier to reproduce anunprotected child's drawing or a copyrighted work of art.[17] Aereo, Justice Scalia explained, essentially provides its patrons with a "library card," allowing the user (not the shop) to select which content to copy.[18] "The key point is that subscribers call all the shots."[19] Because Aereo's activities are not *directed to* copyrighted material in the sense that Aereo "does not make the choice of content," the dissent concluded that Aereo does not "perform" under the meaning of the Act and the question of public versus private becomes moot.[20]

Although the dissent "share[d] the Court's evident feeling that what Aereo is doing (or enabling to be done) … ought not to be allowed," for Justice Scalia, if Aereo is not an example of secondary liability for performance infringement, then it must be considered a "loophole" in the law, which only Congress can address.[21]

While the majority's ruling delivered a major victory to broadcasters, the Court was careful to limit the scope of its ruling. Expressly noting that it "cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply" to other emerging technologies such as cloud computing and cloud-based DVR's, the Court left open unanswered questions for future litigation to address.[22]

1. *American Broadcasting Cos., Inc., et al. v. Aereo, Inc.*, No. 13-461. slip op. (U.S. June 25, 2014) ("*Aereo*") at 1 (*citing* 17 U.S.C. §106(4)).
2. *Id*.
3. *Id*. at 4.
4. *Id*.
5. *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).
6. *Aereo* at 4-9.
7. *Id*. at 7 *citing* 17 U.S.C. §101.
8. *Id*. at 11-12.
9. *Id*. at 12.
10. *Id*. at 13-14.
11. *Id*.
12. *Id*. at 15-16.
13. *Id*. at 15.
14. *Id*. at 16.
15. *Id*. at 2-3 (Scalia, J. dissenting).
16. *Id*. at 3 (Scalia, J. dissenting) (emphasis added).
17. *Id*. at 4 (Scalia, J. dissenting).
18. *Id*.
19. *Id*. at 6 (Scalia, J. dissenting).
20. *Id*.
21. *Id*. at 12.
22. *Aereo* at 17.

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