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Practice Update

Aereo: Another View

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Aereo Liable for Direct Copyright Infringement of the Public Performance Right for Virtually Contemporaneous Streaming of Over-The-Air TV Programming

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In *American Broadcasting Companies, Inc. v. Aereo, Inc.* (June 25, 2014), the Supreme Court reversed the Second Circuit's denial of a preliminary injunction against Aereo, finding Aereo liable for direct copyright infringement of the public performance right when it streamed network television content to its individual subscribers virtually contemporaneously with such content's availability over-the-air.

Background

Aereo provided online streaming services, which, in exchange for a monthly fee, enabled subscribers to watch and/or record free, over-the-air TV content via the Internet. Aereo's platform supplied users with a list of the programs currently airing on television. Once a user selected a program, Aereo's server would dedicate the use of one of its many miniature antennas to that user (and that user alone) to receive the broadcast. Rather than streaming the feed directly from the antenna to the subscriber, the feed from that antenna was used to save a copy of the program in a personal folder designated to that particular subscriber. Once several seconds of the

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program was saved, the program began streaming that copy to the subscriber over the internet while the copy of the program was still being saved, allowing the user to watch the program at virtually the same time as it was being broadcast over-the-air. Notably, when two subscribers were watching the same program, even if at the same time, each subscriber was watching his or her own personalized copy obtained from an individually assigned antenna.

The petitioners, a group of broadcasters, producers, and other owners of the content streamed by Aereo, brought a copyright infringement suit against Aereo and moved for preliminary injunctive relief. Although the petitioners claimed that Aereo was *directly and secondarily* liable for infringing both the public performance rights and reproduction rights of the copyright owners, the request for preliminary injunction was limited to the direct-liability portion of the public performance claim. In addition, although Aereo also provided a record-and-watch-later option, the relief sought was limited to Aereo's "watch" function.

The district court denied the request for preliminary injunctive relief, and the Second Circuit affirmed the district court's denial, relying on its previous decision in *Cartoon Network LP v. CSC Holdings, Inc.* (2d Cir. 2008). Specifically, the Court held that Aereo's transmissions were not "public" performances because its system created unique copies of a particular program on a portion of a hard drive assigned only to one Aereo user and when the subscriber chose to watch the recorded copy, the transmission received by the subscriber was generated by that unique copy – *i.e.,* no other user ever received a transmission from that particular copy. Despite the Second Circuit acknowledging that Aereo's system was specifically designed to avoid copyright liability, it refused to interpret the Transmit Clause of the Copyright Act in terms of functionality, but rather strictly adhered to the

express technical language of the Act and its prior precedent.

Under §106 of the Copyright Act, copyright owners are granted, among other rights, the exclusive right to "publicly" perform certain types of works. The Transmit Clause, within §101 of the Act, provides that to perform a work "publicly" means not only to perform at a place open to the public, but also "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."

The Supreme Court Decision

The Supreme Court reversed the Second Circuit's decision, finding Aereo directly liable for violating the petitioners' public performance rights. First, the Court held that Aereo "performed" an audiovisual work because its activities were substantially similar to those of community antennae television (CATV) companies (the precursors of modern cable). The basis of the Court's decision was that the Copyright Act of 1976, in part, was intended, through clarification of the definition of "perform" and enactment of the Transmit Clause, to overturn a prior Supreme Court ruling that the activities of the CATV providers fell outside the Act's ambit.

The Court stated without much detail that the Transmit Clause makes clear that an entity that acts like a CATV system actually "performs," even if when doing so it simply enhances viewers' ability to receive broadcast television signals. Despite Justice Scalia noting in his dissent a critical difference between Aereo's system and the cable systems – that the cable systems transmitted constantly while Aereo's system remained inert until a subscriber indicated he wanted to watch a program (the subscriber, rather than the cable system, chose the content to watch) – the 6-3 majority held that this

difference could not transform "a system that is for all practical purposes a traditional cable system..." The Court did suggest, however, that in other cases involving different services or technologies, a user's involvement in the operation of the provider's equipment and selection of content transmitted would bear on whether the provider or the user "performs" within the meaning of the Act.

Next, the Court held that Aereo's transmissions of the programs constituted "public" performances. The Court held that despite the fact that an Aereo subscriber received broadcast signals with an antennae dedicated to the subscriber alone and that Aereo's system made a personal copy of that program for that same subscriber and no one else, the performance was "public" because viewed in terms of Congress' regulatory objectives these technical differences between Aereo's system and cable systems did not render Aereo's overall commercial objective any different from cable companies, nor did it alter the viewing experience.

In addition, the Court held that Aereo's subscribers constituted "the public" because the Court held that the Transmit Clause suggests that an entity may transmit a performance through multiple discrete transmissions. Therefore, regardless of the number of discrete communications, Aereo transmitted the same contemporaneously perceptible images and sounds to multiple people outside of a family and friends. Whether the transmissions were from the same or separate copies was inapposite in the Court's opinion.

Implications of the Decision

Despite numerous technology and media companies expressing fear that the Court's ruling would stifle cloud-based services and other kinds of technology – both existing and emergent – the Court emphasized that its holding was narrow and that it "did not believe that [its] limited holding will have that effect." The Court repeatedly indicated that it

was influenced by Congress's amendment to the Transmit Clause to address CATV providers and thus the holding does not bear on whether different types of providers in different contexts also "perform." The Court also expressly stated that it had not considered whether the public performance right is infringed by acts of owners or possessors of the relevant product, when non-contemporaneous images and sounds of a work are transmitted, and/or when a user pays for something other than the transmission of a work, such as the remote storage of content or if a transmission is not made to a substantial number of people outside of a family and its social circle.

Justice Scalia's dissent, joined by Justices Alito and Thomas, properly labeled the majority opinion "result-driven" and criticized it for disregarding "widely accepted rules for service-provider liability and adopting in their place an improvised standard ('looks-like-cable-TV') that will sow confusion for years to come."

Justice Scalia's dissent is well-founded, considering the way courts have addressed in the past differences between direct and secondary liability for copyright infringement of the reproduction right. Direct liability applies when an actor personally engages in infringing conduct, while secondary liability holds a defendant responsible for third party conduct when it intentionally induces or encourages the infringing activity or profits from such acts while declining to stop or limit them.

For example, it was argued that Sony was *secondarily* liable for selling its Betamax VCRs because its customers were making copies of copyrighted works. In addition, record labels relied on a similar theory when they sued Grokster for supplying its peer-to-peer file-sharing software.

Justice Scalia noted that under current precedent, a defendant may only be held directly liable if it engages in a volitional act that violates the Act. Thus, the Act makes it illegal to copy or perform

copyrighted works, not to copy or perform in general. Accordingly, the dissent posited that the applicable question is who does the performing. Justice Scalia makes the case that Aereo simply offers access to an automated system of routers, servers, transcoders, and antennae that lies dormant until a subscriber activates it and selects a program, which then leads to the transmission and display of the images and sounds on the user's laptop or other Internet-enabled device. Justice Scalia finds that this is the volitional act of the subscriber because they "call all the shots," and points out that the consequence of the Court's holding is that someone who implements this type of technology "performs" under §106(4) of the Copyright Act, essentially disposing of the bright-line test of volitional conduct directed at copyrighted works, without providing for a test to replace it.

Justice Scalia further noted that although he shared the Court's "evident feeling that what Aereo [was] doing...ought not to be allowed," a finding that Aereo was not directly liable would not have ended the inquiry because Aereo's secondary liability for performance infringement and primary and secondary liability for reproduction infringement remained to be determined by the lower court. Justice Scalia added that, if those claims proved to be deficient, it was up to Congress, not the Court, to identify and plug the legal loopholes from which Aereo had benefitted.

Considering the Court's express acknowledgment that its decision was heavily influenced by the enactment of the Transmit Clause directed toward cable companies and Justice Scalia's dissent expressing concerns of service-provider liability, courts should interpret the *Aereo* decision narrowly to apply only in limited circumstances involving cable broadcast transmissions communicating contemporaneously perceptible images and sounds of copyrighted works, and not attempt to apply *Aereo* to a determination of whether a service provider is directly or secondarily liable for

copyright infringement.

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