Supreme Court Holds that Technical Differences Don't Save Aereo From Infringement Liability

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June 25, 2014

Television broadcasters and other digital content providers issued a collective sigh of relief on June 25, 2014 when the United States Supreme Court issued its much-awaited opinion in *American Broadcasting Companies, Inc. v. Aereo, Inc.* The Court reversed the Second Circuit and held that Aereo's television service, which allowed viewers to watch broadcast television programs over the internet, infringed the broadcasters' exclusive right to publicly perform their work.

For prospective customers of Aereo and similar services, this means that the ability to legally watch television over the internet is unlikely to be a reality any time soon, unless licenses are worked out with the copyright holders. As to its broader implications, the opinion was careful to limit its holding to the technology at issue, as opposed to cloud computing and other innovations. However, the Court's approach suggests a "substance over form" attitude to digital technology. In other words, it just got harder to engineer your way around the text of the Copyright Act.

The Public Performance Right

A copyright owner has the exclusive right "to perform the copyrighted work publicly." To perform a television program publicly means "*to transmit or otherwise communicate 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.*" This definition is called the "transmit clause," which was incorporated into Section 101 of the 1976 Copyright Act in order to prevent the unauthorized retransmission of broadcast television signals via analog coaxial cable.

In 2008, the Second Circuit confronted the transmit clause in the context of digital age technology in *Cartoon Network LP, LLLP v. CSC Holdings* (known as the "*Cablevision*" decision). In that case, the defendant cable company allowed its subscribers, via remote control, to direct the cable company's computer servers to record and store a program, and then to transmit that program to the subscriber's television at a later time. Even if 10,000 customers recorded the same show, each of them would be watching their own separate copy stored on the servers. The Second Circuit held that, because each copy was transmitted only to one person, the cable company was not "publicly" performing the work, and thus did not infringe on the public performance right.

Aereo's Technology

Aereo developed a technology specifically designed to fit within the Second Circuit's reasoning in *Cablevision*. Aereo charged its users for access to antenna boards, each containing thousands of dime-sized antennae, to receive local television broadcasts. Each individual antenna transmitted a signal only to one user at a time. Therefore, Aereo argued, its technology was no different than that pair of rabbit ears you used to put on your black and white television set. Aereo asserted that it was not infringing the broadcasters' copyrights - and shouldn't have to pay them - because it was not performing any program publicly, but rather facilitating thousands of individual private performances, just like in *Cablevision*. The Second Circuit agreed.

But predictably, the broadcasters didn't see it that way. They urged the Supreme Court to reverse the Second Circuit and instead adopt the approach taken by the Central District of California in *Fox TV Stations v. BarryDriller Content Sys.*, in which a technology similar to Aereo's was held to create a "public performance" under the transmit clause. Whether or not Aereo's technical specifications include individual antennae, the argument goes, it is still commercially retransmitting someone else's work to thousands of consumers and, as

Judge Denny Chin wrote in his Second Circuit dissent, such activity "is not in any sense private."

What the Supreme Court's Decision Means

In an opinion by Justice Breyer, the Supreme Court agreed with Judge Chin and held 6-3 that Aereo was engaged in "public performances" under the transmit clause. For the Court, the fact that each antenna transmitted to only one subscriber at a time was a mere "behind-the-scenes" technological issue that did not make a difference to Aereo's customers and did "not render Aereo's commercial objective any different" that that of the unauthorized coaxial cable transmissions that were the original target of the transmit clause.

Justice Scalia, joined by Justices Thomas and Alito, dissented. According to the dissent, the saving grace for Aereo should have been the fact that its users were the ones "calling all the shots," in that they controlled which programs their individual antennae were transmitting. Justice Scalia further argued that the majority opinion imposed on Aereo "guilt by resemblance," holding it liable for copyright infringement not so much because it violated the text of the Copyright Act, but because it resembled past technologies that were found to have done so.

What this means in the short term is that Aereo will have to change or stop the way it does business. It also means that other internet television transmissions similar to Aereo are likely to be held infringing unless authorized by the copyright holders. As to cloud computing and other technologies, Justice Breyer cautioned that the majority's interpretation of the transmit clause did not apply to anything not before the court. Nevertheless, the holding suggests that, going forward, a majority of the court will take a "substance over form" approach to new technologies accused of copyright infringement, looking more to the consumer realities and commercial incentives involved than to whether the specific architecture of the technology adheres to the text of the Copyright Act.

The opinion is available on the **Supreme Court's website**.

This summary was prepared with the assistance of Kelly A. Caiazzo, Law Clerk

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