Copyright Alert: *ABC v. Aereo*

What the Supreme Court Decided – And What It Did Not

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On June 25, 2014, a 6-3 majority of the Supreme Court held that Aereo's service that allows customers to view over-the-air TV broadcasts via the internet violated the public performance right under the Copyright Act. Applying what the dissent characterized as "an improvised standard ('looks-like-cable-TV')," the majority held that Aereo infringed copyrights owned by television networks. The Court was extraordinarily careful in attempting to restrain the reach of its holding, leaving many issues as to different technologies unanswered. But however those questions are resolved, the Supreme Court's decision appears likely to doom the "view" functionality of Aereo's internet/mobile device transmission service. *American Broadcasting Companies v. Aereo, Inc.* (U.S., No. 13-461, June 25, 2014).

The bottom line: Notwithstanding Aereo's deployment of a complex transmission system carefully designed to avoid copyright infringement, the High Court found Aereo liable for direct infringement on the ground that it was Aereo, not merely its users, that had "performed" the copyrighted works, and that Aereo's performances were "public." That conclusion was substantially driven by the Court's sense that Aereo's viewing service was functionally equivalent to cable TV and therefore that a contrary result would be inconsistent with Congress's intent, when it amended the Copyright Act in 1976, to apply copyright restrictions to cable.

Although the outcome may be a huge defeat for defendant Aereo, its ultimate implications for other internet-based services will be much debated. On the one hand, the majority sought to downplay fears that its "limited holding" would discourage the emergence or use of new technologies such as cloud computing, expressly disclaiming any conclusion as to remote DVR or cloud storage services. On the other hand, the dissent argued that the Court's analysis would sow confusion and generate uncertainty regarding the application of the well-established "volitional act" standard and the distinction between direct and secondary liability for copyright infringement. **Stay tuned for a more detailed Fenwick & West program that addresses these issues after the dust settles, in July 2014.**

Factual Background

The plaintiffs included television networks that broadcast copyrighted programs over the public airwaves for all to see. Defendant Aereo set up an automated system that allowed its subscribers to receive, on internet-connected devices, such programming when they selected it.

After a subscriber chose a television program at Aereo's website, that user would automatically be assigned to one of the thousands of dime-sized antennas that Aereo maintained, and that antenna would be tuned to the selected over-the-air broadcast. The programming would be transcoded into data suitable for internet transmission and then briefly stored in a subscriber-specific folder on one of Aereo's hard drives. After several seconds of programming had been recorded, it would be streamed to the subscriber's computer or device. Importantly, although multiple subscribers might view the same program, each subscriber would have his or her own unique (temporary) copy, received via a transmission from the antenna uniquely assigned to him or her.

The networks sued, alleging *inter alia* that Aereo directly infringed the copyright holders' exclusive right under 17 U.S.C. § 106(4) to publicly perform their works. As the Court noted, "the [Copyright] Act's Transmit Clause defines that exclusive right as including the right to

> 'transmit or otherwise communicate a performance…of the [copyrighted] 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.' [17 U.S.C.] § 101."

The Court's Analysis

Justice Breyer wrote the Court's opinion, joined by Roberts, Kennedy, Ginsburg, Sotomayor and Kagan. Scalia filed a dissent in which Thomas and Alito joined.

Breyer considered two issues. First, did Aereo "perform" the works? Second, did it perform them publicly?

Although the Court did engage in an analysis of the text of the statute, it basically resolved these issues via judicial-cum-legislative history. The Court had previously considered a similar issue in connection with community antenna television systems (CATV). In the earlier cases, the court had ruled in favor of the defendant antenna services, holding that the CATV operators had not engaged in "performances" of the copyrighted broadcast works. *Fortnightly Corp. v. United Artists Television, Inc.,* 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System,* 415 U.S. 394 (1974). Those rulings were overturned by Congress when it amended the Copyright Act in 1976, clarifying what it meant to "perform" a work, and enacting the Transmission Clause.

These amendments made clear that anyone who causes an audiovisual work to be played (made visible and audible) has "performed" the work. Hence, if you, the consumer, put a DVD of a rock concert in your DVD player and press Play, you will have "performed" the songs under copyright law. But that doesn't necessarily mean you would be an infringer: if you "perform" them in this way at home, by yourself or among family and friends, it would not be a *public* performance.

In this case, the Court held first that Aereo performed the works. Although the Aereo technology was new, for performance and Transmission Clause purposes there was no material difference between Aereo's activity and what Congress had intended to bar when it overturned *Fortnightly* and *Teleprompter*. In light of the "overwhelming likeness to the cable companies targeted by the 1976 Amendments," the difference which the dissent focused on – that the CATV system sent programming continuously to each subscriber, whereas the Aereo system responds to subscriber requests – "does not make a critical difference here." This is particularly true, the Court stated, because the technical difference "means nothing to the subscriber" nor to broadcasters.

In considering whether the performance was "public," the Court accepted *arguendo* Aereo's position that the performances at issue consisted of the multiple performances that occurred when the copyrighted programs were retransmitted to multiple subscribers through the Aereo system, after being separately received on multiple unique antennas and stored separately for each viewing subscriber. By Aereo's logic, since each subscriber's transmission was a distinct performance, then none should be deemed public because each such performance went to only one subscriber, not to the public.

The Court rejected this argument on two grounds. First, again, similarity to CATV providers: This consideration did "not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers," who did not care whether their program came from one big antenna or myriad small dedicated antennas. Moreover, the text of the Transmission Clause supports the conclusion that Aereo's performances are public because that clause expressly anticipates that a public performance can be received by members of the public "at different times." The multiplicity of viewers of the different streams of the same underlying performance of the work therefore made the performance a public one.

The Dissent

Justice Scalia's dissent argued that the majority ignored what the minority consider "a simple but profoundly important rule: A defendant may be held

directly liable only if it has engaged in volitional conduct that violates the Act." (Emphasis added.) Under the volition rule, service providers have commonly been held not directly liable for copyright infringement for hosting an automated, user-controlled system that end-users may use to infringe or may use for non-infringing purposes, though *secondary* liability might still attach. *See, e.g., CoStar Group v. LoopNet,* 373 F.3d 544 (4th Cir. 2004).

In other words, under the "volition" line of cases, the subscriber or consumer who used a technology to engage in a volitional act of selecting and triggering a performance or some prima facie act of copyright infringement might be directly liable. But *direct* liability would not apply to the company that provided the automated technology; to hold the technology provider liable, a plaintiff would have to prove secondary liability.

Curiously, although the majority responded to part of the dissent's argument, it did not directly or expressly address the volition issue, neglecting even to utter the term "volition." The majority opinion found Aereo directly liable without discussing whether Aereo (as opposed to its users) had engaged in any volitional act in regard to any particular performance. The Court did not explain whether the Copyright Act would or would not require a volitional act for a service that did not so closely resemble cable TV.

The majority's failure to engage with this rule, Scalia argued, throws into doubt and confusion the line between direct and secondary liability. It leaves uncertainly about the scope of the ruling because the Copyright Act doesn't say that "operations similar to cable TV are subject to copyright liability," and it is not clear just how much similarity to cable TV may cause the *Aereo* holding or its similar-to-cable standard to apply.

One way to understand the majority's approach might be that they did not want to disturb the volitional standard as a general matter, but felt that Congress's intent to preclude activities like Aereo's should prevail irrespective of the volition issue in this case. This turns *Aereo* into a *sui generis* decision, which is almost what the majority says it is, but one in conflict with the generally applied volition principles.

What Does the Aereo Decision Not Do?

The majority, in attempting to calm concerns that its decision will discourage new technologies, states:

> "[T]he history of cable broadcast transmissions…informs our conclusion that Aereo 'perform[s],' but does not determine whether different kinds of providers in different contexts also 'perform.'"

The Court adds further comments emphasizing its limited approach.

- An entity "only transmits a performance when it communicates *contemporaneously perceptible images and sounds* of a work" (emphasis added), as opposed, for example, to distribution of DVDs which the recipients might perform.
- The Court notes that its ruling on the scope of "the public" does not include those who act as owners or lawful possessors of a product. And, moreover, the decision does 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 remote storage of content."
- The Court states: "We agree with the Solicitor General that '[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which "Congress has not plainly marked [the] course," should await a case in which they are squarely presented.'"
- And the dissent notes that even for Aereo itself, it may be unclear whether the Supreme Court's "looks-like-cable" analysis should apply to Aereo's time shifting service – which functions more like a remote DVR than like a contemporaneous retransmission by cable TV.

In light of these comments, any analysis of the broader impact of *Aereo* requires the caveat that these disclaimers by the Supreme Court will neither preclude

the application of *Aereo* in other contexts, nor predict how the decision may be applied by other courts in the future. That is a subject that deserves more than an instantaneous reaction – and one which we will take up at the live CLE program Fenwick & West will provide on this topic during July 2014. Stay tuned.

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