Aereo crashes in copyright battle

THE CASE:
American Broadcasting Companies, Inc v Aereo, Inc
Supreme Court of the US
25 June 2014

The Supreme Court of the US' long-awaited *Aereo* decision highlights the need for copyright reform, Seward & Kissel's **Jeffrey M Dine** says

On June 25, the Supreme Court of the US (SCOTUS) issued its decision in *American Broadcasting Companies, Inc v Aereo*, Inc ('Aereo').[1] Reversing the district and appeals courts, the Supreme Court, in a majority opinion written by Justice Breyer, ruled 6-3 that Aereo's live internet streaming of local over-the-air broadcast television programming infringes copyright owners' exclusive right to perform their copyrighted works publicly. In a strong dissent, Justice Scalia (joined by Justices Alito and Thomas) criticised the majority for adopting an "improvised standard… that will sow confusion for years to come".[2]

Shortly after the decision, Aereo suspended its operations. As of this writing, its future is very much in doubt, but Aereo is continuing to litigate in the district court and seeking to operate under the compulsory licensing scheme applicable to cable companies.

Aereo's operation

Aereo offered subscribers the ability to digitally record and live stream local broadcast television over the internet to their computers, tablets and smartphones. When a subscriber wanted to record a show, she would log onto Aereo's website (accessible by computer and smartphones) and select a current or future programme from its programme guide. At the time of recording, a dime-sized antenna on a circuit board at Aereo's local server site would be assigned to her request, the programme is recorded to storage permanently assigned to her and, if she desired, her copy is live-streamed with a brief delay.[3]

Post-decision filings by Aereo showed that Aereo had about 77,500 subscribers in its 10 markets at the end of 2013, 27,000 of those in the New York City area.[4]

Aereo in SCOTUS

In 2012, broadcast networks and television stations brought suit, claiming that Aereo's service infringed their rights under the US Copyright Act of 1976, and sought to enjoin the live-streaming part of Aereo's service. Their motion was denied by the district court,[5] and the Second Circuit Court of Appeals affirmed. SCOTUS granted review in January 2014.

The case attracted great interest on both sides. The US Solicitor General weighed in on the side of the plaintiffs, and 30 *amicus* briefs were filed by groups ranging from the Electronic Frontier Foundation (favouring Aereo) to the National Association of Broadcasters.

The arguments focused on whether Aereo's transmissions of broadcast programmes to subscribers constituted 'public performances' under the Copyright Act and were therefore infringing. As defined in the Copyright Act's 'Transmit Clause,' public performances include transmissions "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".[6]

The leading US copyright treatise concludes that a 'transmission' is a public performance only if one copy of the work is used for multiple transmissions.[7] The Second Circuit agreed and in 2008, found that a cable company's remote streaming DVR service, where the user controlled the creation of individual recordings on a remote server accessible only by the user, did not transmit performances to the public.[8] Aereo unquestionably designed its service to conform to that decision.

The majority decision

Justice Breyer's analysis focused on two questions: does Aereo (rather than the user) 'perform' within the meaning of the Transmit Clause, and, if so, does it perform 'publicly'?[9] Aereo contended that it did not perform because all it did was provide equipment that the user operated remotely, the equivalent of a home antenna and digital video recorder (DVR). Justice Breyer conceded that the language of the Transmit Clause 'does not clearly indicate when an entity "perform[s]" (or "transmit[s]") and when it merely supplies equipment that allows others to do so".[10]

Absent statutory clarity, Justice Breyer turned to the history of the Transmit Clause. Beginning in 1968, prior to the adoption of the Transmit Act in the Copyright Act, the Supreme Court held that community antenna television (CATV) systems (the precursors of cable systems, in which a single antenna on a hill would amplify and carry a signal, from local or distant broadcasters to subscribers' home televisions) did not violate the copyright law.

In 1976, Congress amended the Copyright Act to incorporate the Transmit Clause, a revised definition of 'perform' and a section[11] setting out a compulsory licensing scheme for cable systems' retransmissions of broadcast programming. Congress' intent was to effectively overturn SCOTUS' case law, so that 'a cable television system is performing when it retransmits [a network] broadcast to its subscribers'.[12]

The court rejected Aereo's contention that it was a mere equipment provider, furnishing the equivalent of an antenna and a DVR to its subscribers. Rather, it found that 'Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.'[13] Thus, the court found that Aereo performed broadcast works that it streamed to its subscribers.

The court also dismissed Aereo's argument (pivotal to the dissent) that Aereo's role in transmitting broadcasts was passive, in

that its subscribers selected the copyrighted material that was transmitted to them and set the machinery in motion. The court found that this argument was not meaningful, as CATV subscribers chose the programming they wanted to watch by 'turning the knob' on their own television sets, and that Aereo's 'click on a website' was simply the modern-day equivalent.

The court disclaimed the effect of this part of its analysis on 'different kinds of service or technology providers,' emphasising the similarities between Aereo and cable companies.

Turning to the question of whether Aereo performs 'publicly', the court assumed for the sake of argument that the performance being transmitted (by live-streaming) was the transmission from Aereo to its subscriber, not the transmission made by the broadcaster. Nonetheless, the court found that Aereo's 'behind the scenes' use of individual antennas and streaming from individual copies of a broadcast did not meaningfully distinguish Aereo's system from cable companies. Instead, the court found that Aereo's 'commercial objective' (presumably the delivery of broadcast programming to its subscribers) is the same as a cable company's, and Aereo's technical mechanisms did not impact Aereo subscribers' 'viewing experience'.

Having found that the fact that each subscriber received a transmission of a copy made uniquely for her was not relevant to its analysis, the court had no difficulty holding that Aereo's subscribers "constitute 'the public'" - 'ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted'. As a result, Aereo's transmissions violate the public performance right.

The court took pains to limit its holding to the circumstances before it – the application of the Transmit Clause to 'equivalents' of cable companies transmitting to 'the public'. The public does not include "those who act as owners or possessors of the relevant product". The court made clear that 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".

Justice Scalia dissents

Justice Scalia, in a strong dissent, criticised the majority for ignoring (in his view) a basic requirement of US copyright law: for an actor to be held liable for direct copyright infringement, it must engage in 'conduct directed to the plaintiff's copyrighted material' (the 'volitional-conduct requirement'). US appeals courts have consistently held that a defendant who operates an automated, user controlled system, such as an internet service provider or cable-company operated DVR system, does not engage in volitional conduct. On this view, it is not Aereo (which, unlike cable systems, passively made only local over-the-air signals in a given service area available to users; did not pick and choose which stations it would make available; or add its own commercials) but the user who 'performs' any given stream. Because it is the user, not Aereo, who makes the choice of content to stream, it is the user, not Aereo, who performs, and Aereo is not liable for direct copyright infringement.

Instead of applying the traditional rules for liability, according to Justice Scalia, the majority instead applied an "ad hoc rule for cable-system lookalikes", the parameters and extent of which are unclear. As a result, he said, it will take "years, perhaps decades", to determine what automated systems (including cloud-storage systems and cable-television systems) will satisfy the copyright law.

What next?

After the decision, Aereo submitted filings with the US Copyright Office under the compulsory licence for secondary transmissions by cable systems of Section 111 of the Copyright Act. The Copyright Office's response suggested, without deciding, that "internet retransmissions of broadcast television fall outside the scope of the [statutory] licence".[14] Whatever the merits of SCOTUS' decision and the Copyright Office's position, at the moment, Aereo is in the bureaucratic contradiction of being too much like a cable company to operate outside Section 111, and too unlike a cable company to operate inside it. Aereo has since argued to the district court that it should not be enjoined from live streaming because it ought to be treated as a cable system.

Summary

Copyright reform in the US has drawn increasing attention from the Copyright Office, industry participants, academics and Congress. *Aereo* demonstrates the need for copyright reform that addresses not only the explosion and continuing evolution of digital creation, reproduction and transmission of creative works, in ways not anticipated almost 40 years ago, but also the convergence of copyright and telecommunications law and policy.

The way that consumers obtain content is changing. Netflix makes up 34% of peak-period US internet traffic,[15] and 'cord-cutting'[16] is becoming increasingly common. The media and telecommunications industries are changing too. Cable company Comcast has purchased NBCUniversal and is seeking to merge with content provider Time Warner. Telecommunications company AT&T is seeking to buy DirectTV to strengthen not only its cable offering but its mobile television offerings as well. *Aereo* is at the intersection of technological and industry change. While the impact of SCOTUS' decision on, for example, cloud computing is unclear and may be minimal, its impact on cord-cutting consumers on the one hand and broadcasters/cable companies on the other, is immediate and significant.

Footnotes

1. 134 S Ct 2498 (2014).
2. Id at 2512.
3. *WNET v Aereo, Inc*, 712 F 3d 676, 680-83 (2d Cir 2013).
4. Peter Kafka, 'Here's how many subscribers aereo had last year', re/code (July 21, 2014).
5. *Am Broad Cos, Inc v Aereo, Inc,* 874 F Supp 2d 373, 405 (SDNY 2012).
6. 17 USC § 101.
7. *See* 2-8 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 8 14[C][[3]
8. *Cartoon Network LP, LLLP v CSC Holdings, Inc*, 536 F 3d 121 (2d Cir 2008) (known as "*Cablevision*").
9. 134 S Ct at 2504.
10. Id.
11. 17 USC § 111.
12. 134 S Ct at 2506 (quoting H R Rep No 94-1476 at 63 (1976)).
13. Id.
14. Letter from US Copyright Office to Aereo, dated 16 July 2014 (available at http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf)
15. Sandvine, 'Global internet phenomena report 1H 2014', at 5.
16. Cord-cutting refers to the process of cutting expensive cable connections in order to change to a low-cost TV channel subscription through over-the-air free broadcast via antenna, or over-the-top broadcast over the internet.

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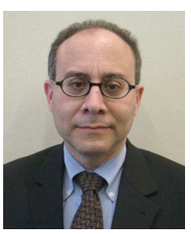

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