COPYRIGHT COMMENT

Aereo's day in Supreme Court

Jeffrey M Dine

The oral arguments in a copyright case that tests the US Transmit Clause outlined the difficulty of the justices' predicament, says **Jeffrey M Dine**

On 22 April, the US Supreme Court heard oral argument in the closely watched copyright case *American Broadcasting Companies, Inc v Aereo, Inc.*[1] On its face about the narrow technical interpretation of the term 'performance' in the US Copyright Act of 1976, the case has potentially significant impact not only on US broadcasters' business model, but widely on cloud computing as well.

Aereo's operation

Aereo offers subscribers the ability to digitally record and live stream local broadcast television over the internet to their computers, tablets and smartphones.[2] When a subscriber wants to record a show, she logs onto the site and selects a current or future programme from the programme guide. At the time of recording, a dime-sized antenna on a circuit board is assigned to her request, the programme is recorded to storage permanently assigned to her and, if she desires, streamed with a brief delay.[3]

Aereo in the Supreme Court

Broadcast networks and television stations brought suit, claiming that Aereo's service infringes their rights under the Copyright Act, and sought to enjoin Aereo's service. Their motion was denied by the district court,[4] and the Second Circuit Court of Appeals affirmed. The Supreme Court granted review in January.

The case has caused concern in the entertainment and cloud computing industries. The US weighed in on the side of the plaintiffs, and 30 *amicus* briefs were filed by groups ranging from the Electronic Frontier Foundation to the National Association of Broadcasters.

The case focuses on whether Aereo's transmissions of broadcast programs to subscribers constitute 'public performances' under the Copyright Act and are therefore infringing. The term includes 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."[5] The problem with the literal definition, as Justice Breyer said at argument, is that it is so broad that it would cover a record store selling copies of a record to its customers. The leading US treatise on copyright law concludes that a transmission is a public performance only if one copy of the work is used for multiple transmissions.[6]

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, did not transmit public performances.[7] Aereo designed its service to conform to that decision.

The oral argument

Plaintiffs' counsel took the position that any provider streaming a recorded broadcast, whether or not created at the volition of the user, would infringe the performance right. Justice Breyer was concerned (as was Justice Alito) that he could not see how to exclude cloud services from the scope of 'public performance' under the plaintiffs' interpretation. Counsel suggested that the difference was that the user of a cloud locker was simply placing her own pre-existing copy there. The government's attorney was similarly pressed by the justices, and admitted that in his view there is not a bright line between infringing and non-infringing services.

Aereo's counsel presented the service as an equipment provider, with streaming and recording entirely under user control. He emphasised, in response to a question from Justice Sotomayor, Aereo's belief that the proper analysis is not of the public performance right but the reproduction right, and that the right of individuals to record broadcast programming is indisputable. Moreover, he emphasised that under plaintiffs' interpretation, every time two users stored copies of the same programme in the cloud, the public performance right would be violated.

Chief Justice Roberts, asking about Aereo's calculated compliance with Second Circuit precedent, had perhaps the most trenchant observation (to laughter): "I'm not saying it's outcome determinative or necessarily bad, I'm just saying your technological model is based solely on circumventing legal prohibitions that you don't want to comply with, which is fine. I mean, that, you know, lawyers do that.'

Summary

Aereo confronts the Supreme Court with a serious dilemma. If it rules against the company, the court's interpretation of the Transmit Clause risks disrupting the cloud computing industry. On the other hand, the justices were concerned that Aereo's model evades fees to the detriment of broadcasters and content owners. Oral argument gave a clear view of the justices' concerns, but few clues about the court's ultimate decision.

Footnotes

1. No. 13-461 (22 April, 2014). The transcript, synchronized with audio, is available at http://www.oyez.org/cases/2010-2019/2013/2013_13_461
2. Aereo is estimated to have 350,000 subscribers. JJ Colao, If Aereo loses in the Supreme Court, can it rise again?, Forbes.com (26 May, 2014).
3. *WNET v Aereo, Inc*, 712 F.3d 676, 680-83 (2d Cir 2013).
4. *Am Broad Cos, Inc v Aereo, Inc*, 874 F Supp 2d 373, 405 (SDNY 2012).
5. 17 USC § 101.
6. See 2-8 Melville Nimmer & David Nimmer, Nimmer on Copyright § 8.14[C][[3]
7. *Cartoon Network LP, LLLP v CSC Holdings, Inc*, 536 F.3d 121 (2d Cir. 2008) (known as "Cablevision").

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