Intellectual Property Alert:
U.S. Supreme Court Hears Oral Arguments in *ABC v. Aereo*

By Rajit Kapur

April 23, 2014 – Yesterday, the U.S. Supreme Court heard oral arguments in *American Broadcasting Companies, et al. v. Aereo*. The case presents issues of copyright law in the context of streaming video content over the Internet, but the ruling could have a broader impact on cloud computing technologies.

Case Background

In Boston, New York and other select cities where Aereo has launched its service, Aereo enables its customers to receive and view broadcast television content on their computers or mobile devices via the Internet. Aereo charges its users a relatively small monthly fee for access to its service ($8 or $12 per month depending on the city), but unlike cable and satellite providers, does not pay a retransmission fee or provide any other compensation to the broadcasters whose signals Aereo captures to provide its service.

Notably, Aereo presents itself as an equipment rental company that merely provides an antenna and a digital video recorder (DVR) to each of its users — something that its users could purchase and legally use in their own home to view and record broadcast television — except that Aereo provides its users with access to their antenna and DVR over the Internet.

In addition, Aereo has designed its signal reception systems to include arrays of tiny antennas, each of which is about the size of a dime and can be dynamically assigned to an individual user when a user requests to view a particular broadcast channel. The video signal received by each antenna is individually recorded for only the one specific user to which the antenna has been assigned, allowing Aereo to further analogize its system to the rabbit ears antenna and personal DVR that each of its users could legally use in their own home to view and record broadcast television.

In March 2012, several broadcasters, including ABC, CBS, NBC Universal and Fox, sued Aereo, alleging copyright infringement. In particular, at issue in this case is the copyright laws' protection of the right of public performance of a copyrighted work. The broadcasters argue that Aereo infringes this right because its retransmission of their video broadcasts to Aereo users constitutes an unauthorized public performance of the copyrighted video broadcasts. In its defense, Aereo essentially argues that it is merely renting equipment to its users — in the form of an individual antenna, receiver and DVR — and simply providing access to this equipment via the cloud.

The Oral Arguments

Aereo's defense is grounded in its clever system design, which is seemingly tailored to avoid the provisions of the copyright laws — something that was not lost on the Supreme Court. Indeed, early on, Justice Ginsburg asked Aereo's counsel if there was a "technically sound reason" for using multiple antennas or if "the only reason for that was to avoid the breach of the Copyright Act."[1]

At several other points during the oral argument, Chief Justice Roberts pressed Aereo's counsel on whether there is any technological basis for its system design. For example, in a line that garnered laughter from the audience in the courtroom, Chief Justice Roberts told Aereo's counsel that "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's — you know, lawyers do that."[2]

Humor aside, however, the Justices seemed very concerned from the outset about how a ruling against Aereo could impact the cloud computing industry more generally. Justice Sotomayor peppered the broadcasters' counsel very early on about this point, and her concerns seemed shared by several other Justices, including Justice Breyer and Justice Kagan.

Of particular concern to the Court was how its definition of "public performance" in this case could have a broader impact on cloud computing technologies. The right to publicly perform a copyrighted work is one of the rights protected under copyright law, and transmitting a copyrighted work to multiple recipients (e.g., via a broadcast television signal or radio signal) has traditionally been understood to implicate this right.

If, in this case, the Court were to rule that Aereo's transmission of a user-specific video recording to an individual user constituted a "public performance" of a copyrighted work, such a ruling might result in other types of user-specific transmissions of copyrighted works from cloud service providers to end users also being considered "public performances." Justice Sotomayor specifically identified Dropbox and iCloud as examples of the types of services that she was concerned about impacting.[3]

Rather than ultimately ruling on whether Aereo is "publicly performing" a copyrighted work in providing its users with access to broadcast video content, however, the Court may be able to find another creative way to dispose of this case without affecting cloud computing technologies. For example, Justice Breyer raised the notion of the "first sale doctrine" during the oral arguments,[4] which could allow the Court to draw a line between content that an end user has purchased and other types of content. Alternatively, the Court could remand the case — something else that Justice Breyer hinted at[5] — perhaps to explore the question of whether Aereo

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[1] Transcript of Oral Argument at page 30, lines 4-7.
[2] Transcript of Oral Argument at page 41, lines 20-25.
[3] Transcript of Oral Argument at page 8, lines 6-16.
[4] Transcript of Oral Argument at page 6, lines 7-18.
[5] Transcript of Oral Argument at page 6, line 24, to page 7, line 7.

should be treated as a cable company that must play by the same rules that other cable and satellite providers are subject to.

Overall, the questioning of the broadcasters' counsel during the oral arguments seemed to reveal a great deal of concern that a ruling against Aereo might have a broader impact on cloud computing technology, while the questioning of Aereo's counsel seemed to reveal at least some skepticism that Aereo's service as it stands complies with the copyright laws. Nevertheless, it is difficult to predict how the Court will ultimately rule in this case, given the issues that the Justices seemed to struggle with on both sides of the argument.

We will continue to monitor this interesting case, which is *American Broadcasting Companies, et al. v. Aereo*, No. 13-461.

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