IP Alert: U.S. Supreme Court Rules in ABC v. Aereo

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U.S. Supreme Court Rules in *ABC v. Aereo*

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Yesterday, the U.S. Supreme Court decided *American Broadcasting Companies, et al. v. Aereo.* The 6-3 ruling holds that Aereo's business model of streaming live broadcast television content over the Internet to its users, without a license from those who own the copyright in that content, violates the copyright owners' exclusive rights to publicly perform the copyrighted works.

But the impact of this case — beyond putting an end to Aereo's unlicensed live streaming of broadcast TV content — may be relatively limited, despite earlier concerns that the Court's ruling here could have an impact on cloud computing technologies and other emerging technologies.

The Story So Far…

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 computer or mobile device via the Internet. Aereo charges its users a small monthly fee for access to its service ($8 or $12 per month depending on the city), but unlike cable and satellite providers, Aereo does not have a license from – or provide any compensation to – the broadcasters whose signals Aereo captures to provide its service.

As we discussed in our initial alert on this case, many of the issues in this case stem from Aereo's clever system design, which is seemingly tailored to avoid the provisions of the copyright laws. In

particular, Aereo's signal reception systems include arrays of tiny antennas, each of which are 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 analogize its system to the rabbit ears antenna and personal digital video recorder (DVR) that each of its users could legally use in their own home to view and record broadcast television. Aereo provides a "watch" function that allows its users to watch live broadcast television content, as well as a "record" function that allows its users to record broadcast television content in the cloud for future playback.

In March 2012, several television networks and broadcasters, including ABC, CBS, NBC Universal, and Fox, sued Aereo for copyright infringement, seeking, among other things, a preliminary injunction on the grounds that Aereo's service constituted an unauthorized public performance of their copyrighted video broadcasts. In its defense, Aereo argued 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 Majority Opinion

At issue in the case is a copyright owner's exclusive right to publicly perform his or her copyrighted work. In deciding this case, the Court therefore had to address whether Aereo "performed" the broadcasters' copyrighted works, and if so, whether it did so "publicly."

In addressing the first question of whether Aereo "performed" the copyrighted work, Justice Breyer, writing for the majority of the Court, analogized Aereo to the community access television (CATV) systems that predated modern cable television.[1] The Court noted that, when Congress enacted the 1976 Copyright Act, Congress amended the copyright laws "to bring the activities of cable systems within the scope of the Copyright Act," and that under these amended laws, "both the broadcaster and the viewer of a television program 'perform,' because they both show the program's images and make audible the program's sounds."[2]

Based on this analysis, the Court rejected Aereo's claim that it is merely an "equipment provider." Instead, the Court determined that "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach," essentially holding that Aereo has to play by the same rules as other cable companies, such as the compulsory licensing scheme created by Congress to address the retransmission of copyrighted works by such cable companies.[3]

In addressing the second question of whether Aereo performed the copyrighted works "publicly," the majority rejected Aereo's arguments that its transmission of a "personal copy" of a broadcast video recording to an individual user could not be considered a transmission "to the public" within the meaning of the statute.[4] The Court dismissed the "behind-the-scenes" technological differences

that Aereo relied on to distinguish itself from other cable systems, in view of the "regulatory objectives" underlying the relevant law.[5] The Court states that "[i]nsofar as there are differences [between Aereo and other solutions], those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service."

After concluding that Aereo both "performed" the broadcaster's copyrighted work and did so "publicly," the Court held that Aereo's service violates the broadcasters' exclusive rights in the public performance of their copyrighted works.

Justice Scalia's Dissent

Justice Scalia dissented from the majority of the Court, and his dissenting opinion was joined by Justice Thomas and Justice Alito.

In his dissent, Justice Scalia seemed to find the technological differences between Aereo, on the one hand, and cable systems, on the other, to be of more significance than the majority. For example, in applying the relevant law to Aereo, Justice Scalia argued that because an Aereo user — not Aereo itself — selects a program to watch and activates Aereo's system as a result of this selection, there is no direct infringement of the public performance right by Aereo. Rather, it is the Aereo user, not Aereo, which "performs" the copyrighted work.[6]

Justice Scalia also argued that the Court, in its majority opinion, has created a "looks-like-cable-TV" standard that disregards other accepted rules and will create confusion in the future.[7] In particular, Justice Scalia criticized the majority's reliance on "a few isolated snippets of legislative history" in deciding the case by essentially determining that Aereo should be treated like a cable company.[8] Justice Scalia also argued that the technological differences between Aereo's system and cable systems are significant enough that even Aereo should not satisfy the "looks-like-cable-TV" rule seemingly established by the majority in this case.[9]

Finally, Justice Scalia argued that the majority's opinion disrupts settled law without making clear what the new rule is or should be in cases like this going forward.[10] Justice Scalia suggests that this might even lead to future confusion in this dispute between the broadcasters and Aereo. For example, as Justice Scalia points out, when this case is returned to the lower court on remand, the lower court will have to consider whether Aereo's "record" function also runs afoul of the new rule established in this case, since only Aereo's "watch" function is at issue before the Court here.

Despite reaching the opposite conclusion on the public performance issue, however, Justice Scalia makes clear that his conclusions do not necessarily mean that Aereo's service complies with the copyright laws. As Justice Scalia observes, the broadcasters have alleged that Aereo is directly and secondarily liable for infringing both their public performance rights, as well as their separate reproduction rights, in the copyrighted works. However, because this appeal arises from the

broadcasters' request for a preliminary injunction, the only issue before the Court at this point in time is whether Aereo is directly infringing the public performance right with respect to the "watch" function.[11] The questions of whether there is secondary liability for infringement of the public performance right, whether the reproduction right has also been violated, and whether Aereo's "record" function violates either of these rights all still remain to be addressed by the lower court.

Justice Scalia concludes by acknowledging that he shares the majority's "evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed."[12] But Justice Scalia believes that the Court should "leave to Congress the task of deciding whether the Copyright Act needs an upgrade," instead of trying to "bend and twist" the law to reach a "just outcome."[13]

What Does This Mean For The Cloud?

Perhaps to the relief of those who saw this case as a potential setback for cloud computing technology, the majority opinion took great pains to emphasize what it was not deciding in addition to what it was. And it seems clear that at least one of the many things that was not decided was whether a cloud storage platform, such as Dropbox or iCloud, would run afoul of the copyright laws' protection of the "public performance" right in providing access to video recordings and other copyrighted content stored by its users.

Indeed, in noting what was not being decided, the Court seemed to recognize some of the ways in which a cloud storage platform might distinguish itself from Aereo and from the result reached in this case. For example, the Court noted that it has "not considered 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 the remote storage of content."[14] Additionally, in noting that the term "the public" "does not extend to those who act as owners or possessors of the relevant product,"[15] the Court seems to suggest that an instance in which a user of a cloud-based storage platform purchases copyrighted content — and then stores it in the cloud for personal playback on demand — would not implicate the "public performance" right at issue in this case, at least because the user lawfully owns and possesses that content.

Nevertheless, it will be interesting to see what new issues may arise in this case once it returns to the lower court, particularly in view of the concerns raised by Justice Scalia in his dissent, such as how, if at all, the Court's opinion will affect the legality of Aereo's "record" function. For now, however, the majority's limited ruling with respect to Aereo and its technology should not affect — and hopefully will not have a chilling effect on — future development of cloud computing technologies.

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[1]Majority Opinion at 5.
[2]See Majority Opinion at 7-8.
[3]See Majority Opinion at 8.
[4]See Majority Opinion at 11-12.
[5]See Majority Opinion at 12-13.
[6]See Scalia Dissent at 2-6.
[7]See Scalia Dissent at 1.
[8]See Scalia Dissent at 7.
[9]See Scalia Dissent at 8.
[10]See Scalia Dissent at 9.
[11]See Scalia Dissent at 6-7.
[12]Scalia Dissent at 12.
[13]See Scalia Dissent at 13.
[14]Majority Opinion at 16-17.
[15]Majority Opinion at 16-17.

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