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ALERT

Aereo Wins Another Round in its Battle with Copyright Owners

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On Monday, a divided panel of the U.S. Court of Appeals for the Second Circuit affirmed the denial of a preliminary injunction against Aereo, Inc., allowing Aereo to continue its transmission of broadcast television programs over the Internet to subscribers in New York City without copyright licenses. The decision has been much anticipated and could alter the way in which television programming is made available to consumers both over the Internet and over traditional media. It could also have a significant impact on the economics of broadcasters, cable companies, and new media companies attempting to develop new means of video distribution to the marketplace. In the meantime, though, the decision is likely to spawn additional litigation and could reach the Supreme Court.

Background

Aereo offers a service that allows subscribers in the New York City metropolitan area (excluding New Jersey) to receive television broadcasts over the Internet. To offer this service, Aereo developed and deployed a system that uses thousands of dime-sized antennas on a rooftop in Brooklyn, NY. The antennas can receive over-the-air HD television signals. Each subscriber is assigned a single antenna for the duration of a particular viewing or recording session. The programs sought by the subscriber and received by each antenna are copied in a server. A separate copy is made for each subscriber. The recorded program is then made available to the subscriber either for viewing within seconds of the original broadcast or at a later time. The copy enables the viewer to perform DVR playback functions (such as pause, rewind and replay).

Practice Areas

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Aereo's subscribers can watch the programs on their computers; on a variety of mobile devices such as tablets or smart phones; on Internet-connected TVs; or on non-connected TVs using a device such as a Roku. From the user's perspective, Aereo's system is similar in operation to that of a DVR where playback may be near-contemporaneous or delayed, coupled with a Slingbox-like device to enable remote viewing. Unlike other services such as cable providers that provide DVRs or in-network DVR functionality, Aereo does not obtain copyright licenses or retransmission consent to provide the underlying broadcast signal to its subscribers.

Aereo was sued by television broadcasters and television networks in two suits that asserted multiple theories of copyright infringement, including infringement of the public performance right, infringement of the right of reproduction and contributory infringement. The plaintiffs moved for a preliminary injunction to stop Aereo based on the public performance right, which grants copyright owners the exclusive right to make or to authorize the making of performances to the public. The Copyright Act defines a "public performance as transmitting or otherwise communicating a performance or display of the work at (1) a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, or (2) to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times (the "Transmit Clause"). 17 U.S.C. § 101.

The district court denied the preliminary injunction, relying on the Second Circuit's 2008 decision in *Cartoon Network LP, LLLP v. CSC Holdings Inc.*, 536 F.3d 121 (2d Cir. 2008). That case upheld the lawfulness of Cablevision's in-network DVR functionality on the ground, among others, that a transmission made to a single subscriber using a single unique copy produced by that subscriber was not a public performance. The *Aereo* district court found that, as in *Cartoon Network*, the Aereo system caused unique copies to be made for each subscriber and that the transmission from the subscriber to himself or herself was not "to the public."

The Decision

The three-judge panel of the Second Circuit split 2-1, with one of the majority judges sitting by designation from the Eastern District of New York. The majority, in an opinion by Circuit Judge Christopher Droney, agreed with the district court, finding that the Aereo system was, for relevant purposes, the same as the Cablevision Network DVR function and thus that the case was governed by the court's binding *Cartoon Network* precedent. The dissenting judge (Circuit Judge Denny Chin) argued that there were relevant differences between Aereo and the Cablevision network DVRs. The discussion focused on *Cartoon Network*'s interpretation of the Transmit Clause – holding that the critical inquiry is "to discern who is 'capable of receiving' the performance being transmitted." 536 F.3d at 134 (quoting 17 U.S.C. § 101).

The majority found that because Aereo's transmissions to each subscriber were made from a copy unique to that subscriber, the transmissions were not "to the public." Slip op. at 23. The majority then rejected the plaintiffs' efforts to distinguish *Cartoon Network.* The court found that Cablevision's license to transmit programming was irrelevant because the issue was whether Aereo's transmissions were public performances in the first place. *Id.* at 24. The court also rejected the arguments that the transmissions to each individual subscriber should be aggregated, an argument similarly rejected in *Cartoon Network.* Third, the court

rejected the plaintiffs' argument that unlike Cablevision's system, Aereo's system was not primarily a DVR, finding that the public performance analysis in *Cartoon Network* did not rely on the similarity of the system to a DVR. *Id.* at 27. Finally, the Court disagreed with the plaintiffs' argument that the copies made by Aereo's system differed from Cablevision's network DVR copies in the extent to which the copies "broke the continuous chain of retransmission to the public." The court reasoned that (a) in both cases, the viewer exercised the same level of volitional control over the copying[1] and (b) in *Aereo*, each antenna generated a single copy just as with a transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room. *Id.* at 27-29. Thus, "since the entire chain of transmission from the time a signal is first received by Aereo to the time it generates an image the Aereo user sees has a potential audience of only one Aereo customer," the transmissions were not "public performances." *Id.* at 30.

Most notably, the court declined to overrule *Cartoon Network* on the basis of *stare decisis* – particularly in light of the numerous media and technology companies that have relied on *Cartoon Network* as an authoritative interpretation of the Transmit Clause. *Id.* at 33-34, n. 19.

Judge Chin (who, as a district court judge authored the decision overturned by the Second Circuit in *Cartoon Network*) wrote an impassioned dissent. In Judge Chin's view, Aereo's technology platform is "a sham ... a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." Dissent at 2. Judge Chin agreed with the plaintiffs' views that *Cartoon Network* is distinguishable because Cablevision had paid statutory licensing and retransmission consent fees. *Id.* at 2-3. Citing a California district court's recent decision in *Fox Television Stations, Inc. v. BarryDriller Content Sys.,* PLC, No. CV 12-6921, 2012 WL 6784498, at *1-6 (C.D. Cal. Dec. 27, 2012), which held that the "technologically analogous" "Aereokiller" service was engaged in public performances, Judge Chin reasoned that Aereo's system of thousands of antennas and other equipment is a "device or process whereby images or sounds are received beyond the place from which they are sent," 17 U.S.C. §101. Judge Chin argued that Congress intended, in the 1976 Copyright Act, to create expansive definitions of "perform" and "publicly" to render the unlicensed retransmissions by community antenna television systems illegal and that the Aereo system and cable television systems are functionally indistinguishable. *Id.* at 12-15. Judge Chin also agreed with the plaintiffs that Aereo's system, which he argued was designed primarily to allow subscribers to watch live TV, was distinguishable from Cablevision's system, which was designed to allow subscribers to record a licensed broadcast for later viewing.

Impact of the Decision

The majority's decision endorses the reasoning of *Cartoon Network*, a case that has provided comfort to technology companies seeking to comply with copyright law while devising innovative means of delivering video content and allowing consumers to time-shift, space-shift and device-shift content to which they have lawful access. Given that even Judge Chin appears to accept the central premises of *Cartoon Network*, that case seems to have found a secure place in the law of an important copyright circuit.

The decision also has given Aereo a legal basis to expand its service beyond the reaches of the Second Circuit. Aereo has announced plans to make its service available in 22 cities this year – but none in the Ninth Circuit, where, as noted above, at least one district court has enjoined a system (Aereokiller) that is similar to Aereo's system. That case is currently at the briefing stage on appeal to the Ninth Circuit.

Broadcasters and video copyright owners are likely to be greatly concerned about the effect of the decision on their ability to license their programming for Internet transmission. Similarly, the decision is likely to raise concerns among those who currently pay for retransmission and copyright rights about the long term viability of that business model and their ability to compete with services that rely on the reasoning of the *Aereo* decision.

The *Aereo* plaintiffs have several litigation options at their disposal. They may accept the loss on preliminary relief and return to the district court for trial. Given the prevalence of legal issues in the case, they alternatively may ask the full Second Circuit to consider the case *en banc*. While that is a step the Second Circuit is known to take very rarely (about one *en banc* every three years, on average) this is an important copyright decision in an important copyright circuit, with one active circuit judge on each side of the issue. In addition, even a strong dissent from denial of *en banc* review can give a case momentum for certiorari in the Supreme Court. There is a reasonably strong likelihood that plaintiffs ultimately will seek Supreme Court review of the issues presented in this case. Any petition for certiorari would be significantly strengthened if the Ninth Circuit agrees with the district court in the *Aereokiller* case that it is different from that of the Second Circuit and, in particular, that the Ninth Circuit does not follow *Cartoon Network.* Conflicting decisions from two of the most important copyright circuits in the country could meet at the Supreme Court, with both *Cartoon Network* and the extension of its principles in *Aereo* at stake. In sum, both *Aereo* and *Aereokiller* bear careful scrutiny by in-house and outside copyright counsel in counseling clients on business plans and new media business models. Links to the Second Circuit's decision in *Aereo* and the district court decision in *Aereokiller* are provided below.

The issue may also be addressed in other fora. Aereo could well be challenged by other copyright owners as it expands, possibly leading to decisions from other Circuits. The FCC has asked for public comment on whether to re-define "multichannel video programming distributors" (MVPDs) to include Internet-based video services, which would require *Aereo* to seek retransmission consent from broadcasters. Alternatively, copyright owners or broadcasters may seek legislation, either to amend the definition of public performance or to create a new broadcaster transmission right. As a general rule, however, copyright-related legislation is often difficult to enact in the face of opposition.

Second Circuit's decision in *Aereo*.

District court decision in *Aereokiller*.

[1] It appears that the Aereo system causes copies to be made regardless of whether the subscriber wants to watch the program in near-real time or store it for later viewing.