wiley

ALERT

Supreme Court Sides with Broadcasters, Holding that Aereo Internet TV Service Infringes Public Performance Copyright Rights

June 25, 2014

In a significant win for broadcasters, today the Supreme Court of the United States declared (6-3) in a broadly-worded ruling that transmissions of television programs by the Aereo Internet television service are "public performances" that infringe copyright owners' rights under the Copyright Act. In *American Broadcasting Companies, Inc. v. Aereo, Inc.* , the Court held that, despite technological differences, Aereo's system functions in essentially the same way as the cable television (CATV) systems that Congress intended to capture in the 1976 amendments to the Copyright Act. Justice Breyer wrote the majority opinion. Justice Scalia dissented, joined by Justices Thomas and Alito, and would have held that the user, not Aereo, engages in the performance.

The Court reasoned that Aereo, by providing a system that transmits television programs in near real time to its subscribers, engages in the act of "performing" copyrighted works. According to the Court, under the language adopted by Congress in 1976, "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." Further, according to the Court, under the "transmit clause" of the definition of public performance, "an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances the viewers' ability to receive the broadcast transmission signals." The Court was influenced by the similarity between Aereo and cable systems, and by the facts that "[i]n providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes." The Court

Practice Areas

Copyright
Intellectual Property

believed that the technological distinctions between Aereo's service and cable systems "mean[] nothing to the subscriber" and "mean[] nothing to the broadcaster."

The Court then held that Aereo's performances are made to the public, despite the fact that the transmissions are made from separate copies that are created for each user. According to the Court, the differences between Aereo's system and traditional cable systems, "concern only the behind-the-scenes way in which Aereo delivers television programming to its viewers screens. They do not render Aereo's commercial objective any different from that of cable systems. Nor do they significantly alter the viewing experience of Aereo's subscribers."

The Court did not expressly overrule the Second Circuit's *Cablevision* decision (which held that performance of a copy made for a specific user by that user in a network DVR does not infringe the public performance right), but the ruling is likely to lead to additional litigation over the significance of the *Cablevision* analysis as applied to other technologies. At least in the context of Aereo's cable-like service, the Court expressly rejected the significance of the one-copy-to-one-user architecture that formed the basis for the *Cablevision* decision and accepted the argument of the broadcasters and copyright owners that an entity may transmit a performance "to the public" "through one or several transmissions, where the performance is of the same work." According to the Court, "[w]e do not see how the fact that Aereo transmits via personal copies of programs could make a difference."

Despite the apparently broad language of its statutory construction analysis, the Court attempted to limit its opinion to the facts presented by Aereo's service. The Court emphasized that it was not addressing the circumstances where the recipient of the transmissions "receive performances in their capacities as owners or possessors of the underlying works." It also stated that, "we have 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 content, such as the remote storage of content." Further, the Court expressly did not address Aereo's function of recording programming for later viewing. Rather, it addressed transmissions that are nearly simultaneous with the original broadcast. It also stated that, although Congress intended the public performance right, "to apply broadly to cable companies and their equivalents, [it] did not intend to discourage or control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect."

Justice Scalia argues, in a strongly-worded Dissent, that the Majority's Opinion does not decide the fate of those other technologies and provides no criteria for determining when this expanded public performance rule applies. Further, Justice Scalia contended that it is the subscriber, not Aereo, that is "performing" within the meaning of the Copyright Act. According to the Dissent, a defendant accused of direct liability must have volitional conduct toward the content. Thus, although Aereo's service fits the definition of a performance "to a tee," the Dissent would find that those performances are not the product of Aereo's volitional conduct. Rather, according to the Dissent, "Aereo does not 'perform' for the sole and simple reason that it does not make the choice of content." The Dissent would have affirmed the Second Circuit's decision, and returned the case to the lower courts for consideration of the remaining claims, including the secondary liability claim.

The Court's decision spells the end of Aereo – its financial backer Barry Diller has already conceded defeat – and similar services, such as Aereokiller. Interestingly, the decision opens the possibility that new services will attempt to qualify for the cable statutory license, or that Congress will attempt a legislative fix to bring such systems under the scope of a statutory license as it has in the past. As Justice Scalia suggests, however, the decision almost certainly will spark continued controversy and litigation over the scope of the public performance right as it is applied to new technologies. Technology providers have relied on the "one-copy-to-one-user" rule adopted in the *Cablevision* case, and the scope of that rule is no longer clear. Although the Court's decision suggests possible ways to distinguish cloud storage services and network DVRs from Aereo's service, litigation likely will be required to determine the precise scope and meaning of those distinctions.