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Supreme Court Finds Aereo Performs Copyrighted Works Publicly As Prohibited Under The Copyright Act

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On June 25, 2014, the U.S. Supreme Court, in a 6-3 decision, reversed the Court of Appeals for the Second Circuit and found that Aereo, Inc.'s system of rebroadcasting television over the internet was a "public performance" of copyrighted works and a violation of the Copyright Act of 1976. *American Broadcasting Companies, Inc., et al. v. Aereo, Inc., fka Bamboom Labs, Inc.*, No. 13-461, 573 U.S. __ (June 25, 2014) ("*Aereo*").

The highly-financed upstart Aereo sought to re-transmit over-the-air broadcast television to its paid internet subscribers. Aereo's theory was that by housing thousands of dime-sized antennas, each one dedicated to a single subscriber, it fell within the law which allows individual consumers to set up their own rabbit-ear antennas, and without paying a fee, watch television programs as they are being broadcast. Aereo argued that by dedicating a single antennae to a single user, it was not "publicly performing" the copyrighted content even though numerous subscribers could watch such programs simultaneously, and that this was the deal that broadcasters struck with Congress when Congress provided other lucrative rights to such broadcasters.

In contrast, the broadcasters said that this was a slight of hand using a technology studiously designed to circumvent the Copyright Law, and it was indeed a public performance since the result was that Aereo transmitted the same copyrighted works to numerous subscribers at the same time, which required a license. The broadcasters, moreover, said that they would eventually lose billions of dollars in re-transmission fees that cable companies now pay, and without that income, they would be forced to lower their level of content and thus, the public would suffer.

The U.S. Supreme Court sided with the broadcasters, while the dissent argued that Aereo had indeed found a viable loophole in the law.

The Second Circuit Decision

Previously, petitioners, *i.e.*, the copyright holders, sued Aereo for infringing their exclusive right to "publicly perform" their copyrighted works, and sought a preliminary injunction. The District Court for the Southern District of New York denied the preliminary injunction, and the Second Circuit affirmed, relying on its precedent set

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forth in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)("*Cablevision*"). *See WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013). In *Cablevision*, the Second Circuit had held that Cablevision's remote storage digital video recorder system (RS-DVR) did not infringe copyright holders' public performance right. 536 F.3d at 140.

The Conflicting Decisions From Other Circuits

Aereo's competitor, FilmOn X, formerly known as Aereokiller, and also formerly known as BarryDriller, was unable to replicate the success that Aereo found with the Second Circuit. The Central District of California issued an injunction barring FilmOn X from using similar technology to rebroadcast copyrighted television programs throughout the Ninth Circuit. *Fox TV Stations, Inc. v. Aereokiller, LLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012). The District of D.C. similarly enjoined FilmOn X across the country *except* for the Second Circuit, where *Cablevision* is law. *Fox TV Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013).

Both the petitioners and the respondent, in light of the conflicting decisions, petitioned for a writ of certiorari, which the Supreme Court granted.

Before the Supreme Court heard oral arguments, however, the District of Utah granted a preliminary injunction against Aereo itself, which extended to the Tenth Circuit. *Cmty. TV of Utah, LLC v. Aereo, Inc.*, No. 2:13CV910DAK, 2014 U.S. Dist. LEXIS 21434 (D. Utah Feb. 19, 2014).

The Supreme Court Decision

The Majority

In the decision penned by Justice Breyer, the majority of the Supreme Court found Aereo's service to be a "public performance" of copyrighted works in violation of the Copyright Act.

Section 106(4) of the Copyright Act provides a copyright owner with the "exclusive righ[t]" to "perform the copyrighted work publicly." 17 U.S.C. § 106(4). The Act's Transmit Clause further defines this right as the right "to transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, 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." *Id.* at § 101.

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When Congress amended the Copyright Act in 1976, it overturned its prior holdings in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), where the Court distinguished between broadcasters and viewers in regards to performing. Of relevance to the case-at-hand, three changes were made to the Copyright Act resulting in the following:

(1) "[*B*]*oth* 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." *Aereo*, slip op. at 7 (emphasis included).

(2) "[A]n entity performs publicly when it 'transmit[s] . . . a performance . . . to the public.'*Id.*

(3) "[A] complex, highly detailed compulsory licensing scheme [was created] that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts." *Id.* at 8.
In doing so, Congress brought "the activities of cable systems within the scope of the Copyright Act" and made it so that service providers like Aereo are more than "simply an equipment provider." *Id.* Thus, here, the Court recognized that Aereo does more than "merely supply equipment that allows others to [perform]," rather Aereo itself "performs." *Id.* at 4. The Court analogized Aereo's activities to those of the cable companies in *Fortnight* and *Teleprompter*. Specifically, the Court stated that Aereo uses its own equipment, located outside of its subscribers' homes, to carry programs to viewers via private channels. *Id.* at 8-9. The fact that subscribers "'selec[t] the copyrighted content' that is 'perform[ed]'" was of no consequence to the Court. *Id.* at 9 (quoting dissent of Scalia, J.).

The Court further held that Aereo "performs" the copyrighted works "publicly" when it streams a program over the internet to one of its subscribers. *Id.* 14-15. The Court considered the fact that each transmission is to only one subscriber, but found this to be no different from that of a cable system that does perform "publicly." *Id.* at 14. Specifically, the Court held that "whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it 'transmit[s] . . . a performance' to all of them." *Id.*

In an apparent attempt to counter the concern that a ruling in the broadcasters favor would hinder cloud computing, the majority opinion concluded by stating its belief that its decision is limited and will not "discourage or . . . control the emergence or use of different kinds of technology." *Id.* at 16.

The Dissent

Justice Scalia dissented, joined by Justices Thomas and Alito, arguing that the "claim fails at the very outset because Aereo does not perform at all." *Id.* at 1 (Scalia, J., dissenting). According to Justice Scalia, Aereo does not "perform" copyrighted works, and that, even if it did, it would not be directly liable for copyright infringement. He analogized Aereo to "a

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copy shop that provides patrons with a library card." *Id.* at 9 (Scalia, J., dissenting). Just as "a copy shop is not directly liable whenever a patron uses the shop's machines to 'reproduce' copyrighted materials found in the library," Justice Scalia believes that "Aereo should not be directly liable whenever its patrons use its equipment to 'transmit' copyrighted television programs to their screens." *Id.*

Justice Scalia concluded by criticizing the majority's view of the limited nature of the holding, writing that "[t]he Court vows that its ruling will not affect cloud-storage providers and cable-television systems, but it cannot deliver on that promise given the imprecision of its result-driven rule." *Id.* at 11.

The Significance

The Supreme Court's decision is a victory for major broadcasters—including CBS, NBC, ABC and Fox. Had the Court found in favor of Aereo, the decision would have paved the way for cable and satellite companies to avoid paying high retransmission fees to broadcasters and instead create systems similar to that of Aereo.

The decision, however, may prove to be a fatal blow to Aereo, a company that has raised nearly $100 million in venture capital, which will have to shut down at least a portion of its business and has publicly stated that there is no back-up plan.

Whether this decision will have a broader impact on developing technologies remains to be seen. We will continue to follow this development.

In the meantime, please feel free to contact our attorneys regarding issues raised by this case.

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