Schnader
ATTORNEYS AT LAW

Schnader Harrison Segal & Lewis LLP

NEW YORK PENNSYLVANIA CALIFORNIA WASHINGTON, D.C. NEW JERSEY DELAWARE

INTELLECTUAL PROPERTY
INTELLECTUAL PROPERTY LITIGATION
ALERT

JUNE
2014

Supreme Court Invalidates Aereo's Streaming Service, Finding Existing Copyright Law Applies to the New Technology of Internet Retransmission of Television Signals

By Eric A. Boden

The recent rapid development of the Internet and other new modes of communication has raised significant questions about whether existing copyright laws adequately protect the rights of content creators.

On June 25, 2014, the United States Supreme Court answered those questions in the affirmative, at least in the area of Internet retransmission of broadcast television signals in the matter *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 U.S. ____ (2014). In a 6-to-3 opinion authored by Justice Stephen Breyer, the Court reversed the Second Circuit Court of Appeals and decided that Respondent Aereo, Inc.'s transmission of over-the-air broadcasts to its network of subscribers constituted a public performance of copyrighted works owned by Petitioners (a group of television producers, marketers, distributors and broadcasters), within the meaning of the Copyright Act's "Transmit Clause" (17 U.S.C. § 101), thereby infringing Petitioners' exclusive right to perform their copyrighted works publicly.

The decision marks the death knell for Aereo's way of doing business and, at the same time, reassures the television broadcast industry that its programming content will be protected, at least as against unauthorized use by cable companies ***and*** their equivalents.

For a monthly fee, Aereo had provided a service to its network of subscribers permitting them to access and watch television programs over the Internet. It did so by utilizing a network of thousands of small antennae from which Aereo would designate one antenna for each particular subscriber who selected a program to view from the broadcasts available on Aereo's website.

Rather than sending the broadcast directly to the subscriber, Aereo would save the digital data captured by the subscriber-specific antenna to a subscriber-specific folder on Aereo's hard drive, creating in essence a "personal" copy of the transmission. Finally, Aereo would stream the content chosen by the subscriber to the subscriber over the Internet.

Petitioners brought suit against Aereo for copyright infringement in the U.S. District Court for the Southern District of New York, seeking a preliminary injunction, arguing that Aereo's business model directly infringed Petitioners' exclusive right to perform their copyrighted works publicly. The district court denied the preliminary injunction. Reasoning that Aereo's transmission of broadcast content did not constitute a public performance under the Transmit Clause because each transmission to a particular subscriber was private, recorded on an antenna specifically designated for the particular subscriber requesting the broadcast, and available only to that subscriber, the Second Circuit Court of Appeals affirmed the district court. Petitioners requested, and were denied, a rehearing *en banc* by the Second Circuit Court of Appeals. Certiorari was granted by the Supreme Court.

Legislative Background

The Court's analysis begins with a study of the legislative history of the Copyright Act of 1976, which was amended in order, *inter alia*, to abrogate holdings in two cases — *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). Decisions by the Court in *Fortnightly* and *Teleprompter* had permitted community antenna television (CATV) providers to capture broadcast signals, sometimes enhancing them, and re-transmit the signals to viewers on the grounds that enhancing and rechanneling broadcast signals served a viewer function and it was the viewer, not the provider, who

(continued on page 2)

(continued from page 1)

actually performed the function. The amended statute rendered CATV retransmissions illegal under the Copyright Act, as the new language of the Act eliminated any notion that a distinction existed between viewer and provider performance. To "perform" under the amended Copyright Act, in the context of television broadcasts, means to show "images in any sequence or to make the sounds accompanying it audible." Accordingly, under the statute, both providers and viewers "perform."

Also introduced by the amended statute was the Transmit Clause, which applies when a person "transmits … a performance … of the work … to the public." Transmission of a performance is defined under the amended Copyright Act as communication of the performance "by any device or process whereby images or sounds are received beyond the place from which they are sent." The legislative history indicates that cable companies were a chief concern of Congress in implementing these amendments to the Act.[1]

Analysis of Aereo's Services under the Copyright Act

The Court analyzed Aereo's services in the context of these amendments, focusing on whether: (i) Aereo's services constituted a performance under the Copyright Act; and (ii) if so, whether that performance was public, and thus violative of the programming copyright holders' exclusive right to public performance. The Court answered "yes" to both questions.

Concluding that Aereo's retransmission did constitute a performance under the Copyright Act, the Court dismissed the notion, advanced by Aereo and endorsed by the dissent,[2] that Aereo's service differed from that of the CATV providers in the late 1960s and early 1970s because, whereas the systems at issue in those cases (i.e., *Fortnightly* and *Teleprompter*) transmitted a continuous signal to the receiver's television set, Aereo's system is inert, and only triggers a transmission once the subscriber selects a program to watch. Invoking the terminology of the erstwhile television sets, the Court found that there was no material difference between "turning the knob" to capture a broadcast transmission from a CATV provider and "click[ing] on a website" to do so with Aereo's retransmitted signal. Further rejecting Aereo's argument, the Court stated that it did "not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into 'a copy shop that provides its patrons with a library card.'"

Looking to the Copyright Act's purpose, in the context of its legislative history, and declining Aereo's invitation to elevate form over substance, the Court next found that Aereo's performance was a public, not a private, performance. Aereo's principal argument that its transmissions were each capable of being received by only one subscriber, even if true, did not carry the day. These technological differences between cable providers and Aereo were of no moment to the Court's analysis. The Court stated that "in terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform 'publicly.'"

Indeed, Aereo's "commercial objective," from a regulatory perspective, was the same as that of the cable companies — to profit from its provision of programming to the public. Why, based on mere technological nuance, the Court rhetorically asked, should Aereo be permitted to profit without paying license fees while cable companies are required to pay such fees to broadcast copyrighted works?

The Court further supported its holding by pointing to the text of the Transmit Clause, which defines a public performance as a transmission of the copyrighted work to the public "in the same place or in separate places and at the same time or at different times," clearly encapsulating Aereo's separate and individual transmissions as public performances of the underlying work. Additionally, the Court found it clear that Aereo's individual subscribers, each of whom had no "prior relationship" to the broadcasted programming selected, represented the public.

(continued on page 3)

1. Congress further regulated cable companies by adding Section 111 to the Copyright Act, which created a licensing scheme under which cable companies were permitted to retransmit broadcasts for a compulsory fee.

2. The dissent, authored by Justice Antonin Scalia, disagreed that Aereo could be found directly liable for impermissible public performance under the Copyright Act because, under Aereo's business model, the subscriber, not Aereo, "make[s] the choice of content," while Aereo merely supplies the technology to deliver that choice to the subscriber. The dissent did acknowledge that Aereo might be secondarily liable for its conduct, an issue, however, not before the Court on the Petitioners' direct infringement claims. As to whether Aereo's conduct should be prohibited under the Copyright Act as direct infringement, the dissent emphasized that it is not the Court's place to fix a "loophole" in the law. Instead, it argued, it is the exclusive province of Congress to do so.

(continued from page 2)

Finally, the Court allayed the professed concerns of Aereo and its supporting *amici* that to apply the Transmit Clause to Aereo's business model would have the harmful effect of saddling other technologies, even those not yet invented, with unintended copyright liability. The Court responded that its application of the Transmit Clause broadly to cable companies and their equivalents such as Aereo was meant to be expressly limited to those types of providers. Accordingly, the immediate impact of this decision is narrow, and the holding applies only to systems that are similar to cable television. How the Copyright Act's Transmit Clause, or copyright laws in general, will apply to innovative technologies such as cloud computing, remote DVR storage and other as yet uninvented advances in communication technology was not before the Court and remains to be seen. ◆

For more information about Schnader's Intellectual Property Practice Groups or to speak with a member of the firm, please contact:

Daniel J. Brooks
212-973-8150
dbrooks@schnader.com

Eric A. Boden
212-973-8015
eboden@schnader.com

Michael M. Carlson
Chair, Intellectual Property Litigation
415-364-6715
mcarlson@schnader.com

Ronald E. Karam
Co-Chair, Intellectual Property
215-751-2364
rkaram@schnader.com

Joan T. Kluger
Co-Chair, Intellectual Property
215-751-2357
jkluger@schnader.com

www.schnader.com