Patterson Belknap Webb & Tyler LLP

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Supreme Court Nixes Aereo TV, Holding That Internet Streaming of Broadcast TV to Subscribers Violates Copyright Law

On June 25, 2014, the United States Supreme Court decided *ABC v. Aereo*, one of the more important (and most closely watched) copyright cases of the digital era. The Court's 6-3 decision that streaming-TV startup Aereo "publicly performs" sounds the death knell of Aereo, at least in its present form. However, the Court limited its holding in several ways that may allow other Internet-based technologies and services that transmit media content to avoid "public performance" liability.

Aereo allows paying subscribers to watch broadcast TV over the Internet, virtually in real-time. It maintains an array of dime-sized TV antennas at its headquarters. When a subscriber chooses to watch a particular program via Aereo's website, Aereo temporarily assigns one of those tiny antennas to that subscriber; tunes the antenna to the subscriber's desired channel; encodes the signal being broadcast over that channel as a digital file; and then streams the contents of that digital file to the subscriber over the Internet. Aereo has no license from the owners of the copyrights in the programming that it transmits, and it pays them no royalties. All of the major television broadcasters sued Aereo for copyright infringement, alleging (among other things) that, by engaging in this process, Aereo "publicly performs" their copyrighted programs within the meaning of the Copyright Act.

In response, Aereo raised two main arguments. First, Aereo argued that *its subscribers* may "perform" the works they choose to receive, but that *Aereo itself* does not "perform" at all. In Aereo's view, it is merely acting as an equipment provider, leasing out remote antennas for its subscribers to use. The subscriber makes the volitional choice to employ that equipment to receive and transmit a particular program, and Aereo's equipment "simply responds to its subscribers' directives." Thus, the argument goes, while Aereo might be *secondarily* liable for *its users'* performances—a question not before the Court—*Aereo itself* cannot be found liable for "performing." Notably, several recent decisions have relied on this same "volitional conduct" principle to hold that providers of automated technologies (such as DVR services) do not "copy" TV programs, within the meaning of the Copyright Act, when *their users* direct those services to make recordings. *See, e.g., Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2014); *Cartoon Network LP v. CSC Holdings, Inc.* ["*Cablevision*"], 536 F.3d 121, 130-31 (2d Cir. 2008).

Justice Breyer's majority opinion rejected this argument. The Court granted that, "[i]n other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act." But in Aereo's case, history compelled an exception to the "volitional conduct" rule. In the majority's view, the legislative history of the Copyright Act of 1976 "ma[de] plain that one of Congress' primary purposes" was to "to overturn" two Supreme Court decisions (from 1968 and 1974) holding that traditional cable TV providers did not "perform" the works they retransmitted—and thus, to bring traditional cable TV providers within the scope of copyright liability. Because Aereo's service "acts like a [traditional cable TV] system," in the majority's view, Aereo must also be "performing"—even if it makes no volitional choices in connection with the programming it offers.

Second, Aereo argued that even if it "performs," it does not perform "*publicly*," which is necessary for Copyright Act liability. This follows from Aereo's technological architecture: each subscriber is assigned a user-specific antenna

during a viewing session. The programming requested by each subscriber is received through her private antenna and encoded into a user-specific digital file. The contents of that private file are then streamed to the subscriber in question, and no one else. Thus, in Aereo's view, if ten thousand subscribers are watching the Super Bowl via Aereo, ten thousand simultaneous *private* performances are taking place—but no "*public*" performance.

The *Aereo* majority rejected this argument, too. Directly disagreeing with the Second Circuit's holding below, the Court held that, when determining whether a defendant performs "publicly," multiple "discrete communications" of the same work to different recipients should be viewed *in the aggregate*. The Court believed that this outcome was compelled by the Copyright Act's "regulatory objectives"—namely, Congress' desire to bring cable companies (and presumably also those that resemble them) within the Act's regulatory ambit. Textually speaking, the Court found support for its aggregative approach in a provision of the Copyright Act stating that a transmission may constitute a "public" performance "whether the members of the public" receive it "at the same time *or at different times*."

Justice Scalia's dissent (joined by Justices Thomas and Alito) criticized the majority for deviating from the "volitional conduct" rule for so-called "cable-system lookalikes," thereby creating a double standard for performance liability. The dissent also criticized the majority for failing to provide clear criteria for determining when a technology sufficiently resembles cable TV to come within the scope of the majority's holding. As Justice Scalia put it, "[i]t will take years, perhaps decades, to determine which automated systems . . . are governed by the traditional volitional-conduct test and which get the *Aereo* treatment."

One of the reasons why *Aereo* was so closely watched was the potential of the Court's holding or reasoning to impact any number of other digital technologies, including digital music sales via download (such as Apple's iTunes); "cloud-based" storage services (such as Amazon's Cloud Drive), and remote DVR services (such as the remote-storage DVR at issue in the Second Circuit's 2008 *Cablevision* decision). However, the majority took pains to limit its decision to cable TV lookalikes (whatever that category may include). In future cases involving other technologies, at least three caveats in the *Aereo* majority opinion may come into play.

First, as noted above, the Court suggested that providers of automated technologies that are not the "equivalent" of cable TV may well be able to raise a "lack of volitional conduct" defense. The RS-DVR from *Cablevision*, for example, would seem to potentially fall under this category. (In *Cablevision* itself, the Second Circuit declined to reach the question of *who* was "performing," holding instead that any "performance" was not a "public" one because each viewer received her own *private* transmission. It is doubtful that this aspect of *Cablevision* survives *Aereo*'s holding that such performances must be aggregated.)

Second, presumably to avoid undoing the distinction between streaming and downloading—settled in *United States v. ASCAP*, 627 F.3d 64, 73 (2d Cir. 2010)—the *Aereo* majority suggested that an entity "performs" a work only when it "communicates *contemporaneously perceptible* images and sounds." Thus, for those services that provide only downloadable content for future viewing, and not streaming functionality, *Aereo* changes little.

Third and finally, in an aside directed toward cloud-storage services, the *Aereo* majority stated that even where a service "performs" the works that it transmits, those performances will not be "to *the public*"—and thus, cannot result in liability—if the recipients of the performances already "own[] or possess[]" the "underlying work[s]" being transmitted.

In sum, *Aereo* was not the cataclysmic decision that many technology companies feared. While Aereo itself, and Aereo copycats such as FilmOn X, will likely find themselves out of business absent a major change in their business model, other cloud-based content services may well be able to distinguish themselves—and thereby avoid "the Aereo treatment."

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