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1 Year Later: What We've Learned About Aereo

By **Bill Donahue**

Law360, New York (July 2, 2015, 5:16 PM EDT) -- It's been a whole year since the U.S. Supreme Court declared Aereo Inc.'s unauthorized streaming television service illegal, giving courts time to weigh in on volitional conduct, the compulsory license, and the ruling's carefully-written limits.

Aereo's Impact Is Pretty Limited

Plenty was at stake ahead of the Aereo ruling — billions in retransmission fees, to name a big one — but it's looking like the decision could have a somewhat limited impact on jurisprudence.

That's by design. Faced with widespread concerns about collateral damage that would chill innovation, Justice Stephen Breyer went out of his way to limit the Aereo decision to its facts. The ruling shouldn't "discourage the emergence or use of different kinds of technologies," he wrote, and copyright questions relating to other technologies like storage lockers "should await a case in which they are squarely presented."

In the year since the ruling, several courts asked to apply the ruling have seemingly stuck with Breyer's intent, quoting passages about the limited nature of the ruling and saying it really only applies in a case where a service has an "overwhelming likeness" to a cable company.

In September, for instance, a New York federal judge refused in to apply it in the long-running case against defunct music storage service MP3Tunes and its founder, Michael Robertson. The site is still on the hook for millions in damages, but the court refused to apply Aereo to several public performance claims in the case.

"Because the [websites] here are not substantially similar to a community antenna television provider, they are beyond Aereo's reach," the court wrote, adding later that "Aereo does not buttress plaintiffs' argument because its holding was explicitly limited to technologies substantially similar to the one before the Supreme Court."

The best example came in January, when U.S. District Judge Dolly M. Gee flatly rejected Fox Broadcasting Co.'s effort to buoy its mostly unsuccessful three-year effort to shut down Dish Network's Hopper DVR by relying on Aereo.

"Fox contends that the Supreme Court's recent decision in American Broadcasting Companies Inc. v.

Aereo Inc. is a game-changer that governs the outcome of its copyright claims in this case," she wrote. "The court disagrees."

Even with several key similarities between Aereo and the Hopper — which allows Dish subscribers to stream live and recorded content from their home cable boxes to mobile devices — the high court's ruling still didn't apply, she said, since Dish customers, unlike Aereo's, had already paid for and legally possessed the content at issue.

That's a key distinction, and one that will likely resonate as courts continue to weigh the legacy of Aereo.

“The [Hopper] case will surely influence how courts interpret Aereo in the future,” said Alexander J. Lawrence, a partner with Morrison & Foerster LLP. “Judge Gee suggested that the decision should be largely limited to its own or closely analogous facts. Under this narrow reading of Aereo, the case has limited application to services that do not look like cable companies.”

'Volitional Conduct' Isn't Gone

One area of case law that was somewhat in doubt after Aereo was the so-called volitional conduct requirement — the idea that a service provider can't be held directly liable for infringement if users, rather than the provider, actually caused a performance or copying to occur.

The majority in Aereo said it was the company itself who “publicly performed” the networks' content because it looked so similar to a cable company, but it didn't explicitly discuss the nitty-gritty details about volitional conduct — about why it was Aereo, and not its users, who were actually doing the deed.

Justice Antonin Scalia warned that jettisoning that “bright-line” requirement for direct infringement would “sow confusion for years to come,” and indeed many wondered if the high court's ruling had affected or eliminated the long-standing volition test.

In her January ruling on the Hopper, Judge Gee said volitional conduct remains the touchstone of direct infringement — even if Aereo never mentioned it.

“The volitional conduct doctrine is a significant and long-standing rule, adopted by all courts of appeal to have considered it, and it would be folly to presume that Aereo categorically jettisoned it by implication,” she wrote.

“The Aereo majority’s analysis can be reconciled with the volitional-conduct requirement for direct infringement,” Judge Gee continued. “The court held that a sufficient likeness to a cable company amounts to a presumption of direct performance, but the distinction between active and passive participation remains a central part of the analysis of an alleged infringement.”

A month earlier, another court had said the same thing. In a case that was closely watched for other reasons, a wildlife photographer that was suing online merchandise market CafePress over user-generated merchandise bearing his photos argued that Aereo meant he didn't need to prove volitional conduct to hold CafePress directly responsible.

In December, however, a California federal judge overseeing the case said that “the Supreme Court expressly decided not to address the volitional conduct issue,” meaning Ninth Circuit case law upholding the requirement was “undisturbed.”

Other courts will need to weigh in on the subject, but early indication is that Aereo clarified and massaged volitional conduct, rather than overturning it.

“While the majority in Aereo did not discuss the volitional actor test, Judge Gee made it clear that the test is alive and well," Morrison Foerster's Lawrence said.

Aereo's Not a Cable Company, Even if It's a Cable Company

The high court's decision was decisively — and perhaps infamously — based on the idea that Aereo looked and operated enough like a cable provider to be subject to the same Copyright Act provision, the Transmit Clause, that was specifically created by Congress to force early cable companies to pay when they retransmit broadcast content.

So it's unsurprising what Aereo did next: Ask for access to the Copyright Act's Section 111 compulsory license, which affords cable TV providers automatic use of broadcasting television content for a set fee.

It was the only play Aereo had left, and it didn't work.

Technically, a "cable system" under Section 111 and the “cable company” mentioned in regard to Aereo are two distinct concepts, and courts have interpreted the former quite narrowly, most prominently in the Second Circuit's 2012 decision that online service Ivi Inc. didn't qualify for the license.

In that case, the appeals court noted that Congress had amended the Copyright Act on several occasions to add new compulsory licenses for other formats — once for satellite, once for microwave transmissions — but had chosen not to do so yet for Web streaming.

In October, U.S. District Judge Alison Nathan cited that precedent in shooting down what she called Aereo "doing its best to turn lemons into lemonade."

"Aereo's argument suffers from the fallacy that simply because an entity performs copyrighted works in a way similar to cable systems it must then be deemed a cable system for all other purposes of the Copyright Act," the judge wrote.

“The Supreme Court in Aereo III did not imply, much less hold, that simply because an entity performs publicly in much the same way as a CATV system, it is necessarily a cable system entitled to a ... compulsory license,” Judge Nathan continued. “Stated simply, while all cable systems may perform publicly, not all entities that perform publicly are necessarily cable systems, and nothing in the Supreme Court's opinion indicates otherwise."

Less than a month later, Aereo filed for Chapter 11 bankruptcy, which effectively wrapped up last month.

--Editing by John Quinn and Kelly Duncan.