Client Alert

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Which Way is *Aereo* Pointing? The Supreme Court Hears Arguments in Public Performance Copyright Case

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In a case that could have a broad impact on how companies deliver content to consumers, the Supreme Court heard oral argument this week in *American Broadcasting Companies, Inc. v. Aereo, Inc.* (No. 13-461). At issue is whether Aereo's service engages in public performances under the Copyright Act in transmitting broadcast television content to its subscribers' wired and wireless devices. While the Justices questioned both parties on a variety of issues, a clear focus for the Court was the potential impact of its decision on other technologies not at issue in this case.

BACKGROUND

Aereo provides broadcast television streaming and recording services to its subscribers, who can watch selected programing on various Internet-connected devices, including televisions, mobile phones and tablets. Aereo provides its service through individual antennas that pick up local television broadcast signals and transmit those signals to a server where individual copies of programs embedded in such signals are created and saved to the directories of subscribers who want to view such programs. A subscriber can then watch the selected program nearly live (subject to a brief time-delay from the recording) or later from the recording. No two users share the same antenna at the same time, nor do any users share access to the same stored copy of a program.

In 2012, various broadcasting companies sued Aereo for copyright infringement in the Southern District of New York claiming, among other things, that Aereo's transmission of the plaintiffs' copyrighted content to Aereo's subscribers violated the copyright owners' exclusive right to publicly perform those works. That public performance right, codified in the 1976 Copyright Act, includes (1) any performance at a place open to the public or any gathering with a substantial number of people outside the "normal circle of family and social acquaintances," and (2) the transmission of a performance to the public whether or not those members of the public receive it in the same location and at the same time. This latter provision, commonly referred to as the Transmit Clause, was added to the Copyright Act by Congress in part to overturn prior Supreme Court precedent that had previously allowed cable companies to retransmit broadcast television signals without compensating the broadcaster.

The district court denied the broadcast companies' preliminary injunction requests, finding that, based on Second Circuit precedent, Aereo's transmissions were unlikely to constitute public performances. The Second Circuit affirmed the decision, relying on the court's earlier decision in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), which found that a cable company's remote-storage DVR system did not run afoul of the public performance right because each transmission was sent only to an individual user. The Second Circuit held that Aereo does not engage in public performances because, as in *Cablevision*, Aereo's system makes unique copies of every recording, and each transmission of a program to a customer is generated from that customer's unique copy.

Aereo has been sued by other broadcasters in other jurisdictions as well. The District of Massachusetts reached the same result as the Second Circuit, while the District of Utah came to the opposite conclusion. Further, both the D.C. District Court and the Central District of California have issued preliminary injunctions against FilmOn X, a company that offers a service similar to Aereo's.

SUPREME COURT ORAL ARGUMENT

A recurring theme during the oral argument was the impact the Court's decision would have on other technologies and industries. The Justices' questions focused heavily on how their decision would affect other technologies, such as cloud computing and storage, how to balance technological innovation versus pure circumvention of copyright laws, and on how a decision against Aereo, were the Court to make such a decision, could be squared with the Second Circuit's *Cablevision* opinion.

Effect on Other Technologies

Justices Stephen Breyer and Sonia Sotomayor led off the discussion over the expected impact of the Court's decision on other technologies. Justice Breyer plainly stated: "And then what disturbs me on the other side is I don't understand what a decision for [Aereo] or against [Aereo] when I write it is going to do to all kinds of other technologies." Justice Samuel Alito echoed this sentiment when he remarked: "I need to know how far the rationale that you want us to accept will go, and I need to understand, I think, what effect it will have on these other technologies."

Neither party had a clear response that seemed to ease the Court's concerns. The broadcasters sought to distinguish Aereo's technology from cloud storage by pointing out that the cloud storage companies provide a "locker" for users to store their own rightfully owned content, and at times urged the Court to avoid the issue of cloud storage altogether—although the Court seemed unsure of how to accomplish that. Aereo stirred the pot by pointing out that a decision finding that the performance of content stored by a third party constitutes a public performance could result in "potentially ruinous liability" for the cloud storage companies. Several other companies and technologies were identified by name during the arguments, including Netflix, Hulu and Roku.

While the early discussion seemed to focus on how the Court could find Aereo's service a public performance without broader ramifications to the industry, most of the Court's questions did not portend how the Court would ultimately rule. The Court, however, was undoubtedly cognizant that the decision could have an impact beyond the dispute at issue.

Questioning the Merits of the Technology

Chief Justice John Roberts questioned both parties on the technological aspects of Aereo's service, first pointing out to the broadcasting companies that "[y]ou can go to Radio Shack and buy an antenna and a DVR or you can rent those facilities somewhere else from Aereo. They've—they've got an antenna. They'll let you use it when you need it and they can, you know, record the stuff as well and let you pick it up when you need it."

The broadcasters responded that allowing Aereo to take "a performance off the airwaves and transmit it to all the end-users" contradicts Congress's specific intent when it enacted the Transmit Clause in response to cable providers' prior transmissions of content without compensating the content owners.

Chief Justice Roberts then questioned Aereo as to the motive behind Aereo's multi-antenna set-up stating: "I mean, there's no technological reason for you to have 10,000 dime-sized antenna, other than to get around copyright laws." Justice Antonin Scalia followed up with "is there any reason you did it other than not to violate the copyright laws?"

According to Aereo, "All Aereo is doing is providing antennas and DVRs that enable consumers to do exactly what this Court in *Sony* [*Corp. of America v. Universal City Studios, Inc.*] recognized they can do when they're in [their] home and they're moving the equipment . . . ." Aereo distinguished itself from cable providers by the scope of content they provide (only content available over public airwaves) and how it is provided (upon a user's initiation).

Distinguishing *Cablevision*

The Court also inquired as to how Aereo's service differs, if at all, from the remote-storage DVR service provided in *Cablevision*. Justice Anthony Kennedy, in particular, seemed reluctant to reach a decision that effectively overruled *Cablevision*, even asking the broadcasting companies to "assume that *Cablevision* is our precedent." The broadcasting companies attempted to distinguish Aereo's service from the service in *Cablevision* by pointing out that the defendant in *Cablevision* paid royalties to carry programming in the first instance, whereas Aereo does not pay any royalties.

In any event, while the outcome of the case is as yet undetermined, it remains to be seen how any decision will impact other existing technologies and serve as a guide to innovators on crafting future technologies to avoid copyright infringement liability.

A decision is expected by the end of June.

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