

Community Television of Utah LLC v. Aereo Inc.

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Can Aereo, Inc. enable its customers to watch or record broadcast television programs over the internet without violating the copyright interests of local and national broadcast companies? There is a split between the Second and Tenth Circuits on this question. The US Supreme Court will hear oral arguments on the Second Circuit Case¹ in late April and render a decision some months thereafter. Until then, if those customers are located in Utah or the five other states within the jurisdiction of the US Court of Appeals for the Tenth Circuit², the answer is ‘no.’

Aereo’s subscription service

Aereo uses circuit boards containing many remote dime sized antennas to capture over-the-air broadcasts from local stations. It makes digital copies of programs to stream to its subscription fee-based customers. When an Aereo customer sends a command to watch or record a program, one of the antennas is activated and specifically tuned for that customer. Customers can access Aereo’s service from any web-enabled device including computers, laptops, tablets and smartphones and also view programs on an internet-connected television set or through a device like Roku or Apple TV. Aereo first offered its service in the New York City area in March 2012 before expanding into other US locations.

The Utah case

Aereo began offering its service to customers in Utah in the summer of 2012. Shortly thereafter, Community Television of Utah, LLC, dba KTSU FOX 13 and several other local and national broadcast companies³ filed a copyright infringement action against Aereo in the US District

Court for the District of Utah⁴. Plaintiffs argue that Aereo’s service violates the US Copyright Act⁵ by ‘publicly performing’ the programs without plaintiffs’ permission⁶. Aereo responded that its customers’ use of its technology doesn’t constitute a public performance, and likened such use to a consumer recording a program with a DVR or similar device⁷.

In February 2014, the court heard arguments on Plaintiffs’ motion for a preliminary injunction as well as Aereo’s motion to transfer and motion to stay. On 19 February, the court in the Utah Case issued its decision on all three motions.

The ‘Transmit Clause’

The court first considered Plaintiff’s motion for injunctive relief and whether plaintiffs could show a likelihood of success on the merits of its copyright claim. Aereo did not dispute that Plaintiffs owned or were the exclusive licensee in the streamed programs. The issue then became whether Aereo was violating any of Plaintiffs’ exclusive rights under the Copyright Act, in particular, the public performance right. The court focused on whether Aereo’s service was subject to the ‘Transmit Clause’ of the Copyright Act: ‘to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.’⁸

This section also defined ‘device’, ‘machine’ or ‘process’ as ‘now known or later developed.’⁹

Plaintiffs asserted that this language applies to ‘any device or process that is used to transmit

their copyrighted works to people outside Aereo’s circle of family and social acquaintances.’¹⁰ Relying in part on the decision in the Second Circuit Case, Aereo argued that its technology falls outside the scope of the Transmit Clause because it ‘merely enables its customers to view the copyrighted work privately.’¹¹

The court rejected the holding of the Second Circuit Case, and instead interpreted the Transmit Clause broadly, applying it to Aereo’s service:

‘The entire clause “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times” appears to actually be Congress’ attempt to broaden scope of the clause, not an effort to distinguish public and private transmissions or otherwise limit the clause’s reach. The term “whether” does not imply that the ensuing clause encompasses a limitation. Rather, the introduction of the clause with the word “whether” implies an intent to explain the broad sweep of the clause and the many different ways it could apply to members of the public. Reading this final clause expansively is consistent with Congress’ intent to have the entire Transmit Clause apply to all technologies developed in the future.’¹²

Using this analysis, the court reached the ultimate conclusion that Plaintiffs demonstrated a likelihood of success on the merits of its copyright claim:

‘Aereo is engaging in copyright infringement of Plaintiffs’ programs. Despite its attempt to design a device or process outside the scope of the 1976 Copyright Act, Aereo’s device or process transmits Plaintiffs’ copyrighted programs to the public. Accordingly, the court concludes

that Plaintiffs have met their burden of establishing a likelihood of success on the merits.²¹³

Irreparable harm

The court found that all remaining requirements for injunctive relief were also met. Among these, the court held that plaintiffs showed irreparable harm, despite one plaintiff executive’s statement that Aereo’s infringement was ‘a drop in the bucket.’²¹⁴ The court determined that Aereo’s continued infringement ‘will interfere with Plaintiffs’ relationships and negotiations with legitimate licensees, impede and effect Plaintiff’s negotiations with advertisers, unfairly siphon viewers from Plaintiffs’ own websites...and cause Plaintiffs to lose control of quality and potential piracy of its programming.’²¹⁵

In considering the ‘balance of harms’ between the irreparable harm to Plaintiffs and the potential harm of an injunction to Aereo, the court found that the only harm to Aereo’s business would be limited to ‘its ability to expand into the geographic area of the Tenth Circuit.’²¹⁶

Enjoined during stay

After determining that Plaintiffs were entitled to a preliminary injunction against Aereo, the court went on to deny Aereo’s motion to transfer the case to the Southern District of New York¹⁷. The court granted Aereo’s motion to stay the case pending the Supreme Court’s ruling in the WNET case, but further held that the preliminary injunction would remain in effect during the stay¹⁸.

The impact of the Utah case

As a result of the court’s decision, Aereo was required to suspend its service in the six states making up the Tenth Circuit. Aereo cannot assume these operations unless and

until the Supreme Court hears and affirms the Second Circuit Case¹⁹. Whether other courts faced with interpreting the Transmit Clause for internet based services will follow the Utah case ruling remains to be seen. What is certain is that the decision in the Utah case will not be the final word on this subject.

If the Supreme Court affirms the decision of the Second Circuit Case, Aereo and others will be free to offer ‘enabling technology’ absent the copyright holders’ permission without violating the Transmit Clause. If, however, the Supreme Court reverses the Second Circuit Case, Aereo will have to seek Plaintiff’s permission (which Plaintiffs could deny) and pay copyright licence fees to Plaintiffs in order to continue offering its service.

Either way, the Supreme Court’s decision could also more generally impact the offering of internet-based enabling technology beyond those falling under the Copyright Act. Lower courts could apply the same reasoning to other laws and regulations whose current application doesn’t extend to such technologies, but where an argument could be made that the statutory language was intended to cover new internet-based technologies. Stay tuned for further developments!

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1. WNET v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Chin, J., dissenting) (‘Second Circuit Case’). Plaintiffs/Appellants were WNET, THIRTEEN, Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, WPIX, INC., Univision Television Group, Inc, The Univision Network Limited Partnership, Public Broadcasting Service, American Broadcasting Companies, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., NBC Universal Media, LLC, NBC Studios, LLC, Universal Network Television, LLC, Telemundo

Network Group LLC, and WNJU-TV Broadcasting LLC. The Second Circuit affirmed the dismissal of plaintiffs’ case against Aereo by the US District Court for the Southern District of New York.

2. Those states are New Mexico, Oklahoma, Colorado, Wyoming and Kansas.

3. KUTV Licensee, LLC dba KMYU and KUTV, Fox Broadcasting Company and Nexstar Broadcasting Company were also plaintiffs (collectively, with Community Television of Utah, ‘Plaintiffs’).

4. Community Television of Utah, LLC dba KTSU FOX 13, et al v. Aereo, Inc., Cons. Case No. 2:13CV910DAK (U.S. Dist. Utah)(‘Utah Case’).

5. The Copyright Act of 1976, 17 U.S.C. § 106(4).

6. By contrast, cable and satellite carriers retransmit Plaintiffs’ programming with consent under paid copyright licences.

7. The court rejected Aereo’s argument that it should follow the reasoning of Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (‘Cablevision’): ‘In Cablevision, the Second Circuit concluded that the cable company’s remote-storage DVR system did not result in an additional public performance under the terms of the Transmit Clause because each subscriber made a single unique copy. Given that the cable company already had a licence to transmit the performance, the only issue was essentially whether the customer’s ability to record the performance required an additional licence.’ The Utah Case at 9. (citations omitted).

8. The Copyright Act of 1976, 17 U.S.C. § 101(2).

9. *Ibid.*

10. The Utah Case. at 6, citing See Fox Television Stations, Inc. v. BarryDriller Content Systems, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); Fox Television Stations, Inc. v. FilmOn X LLC, 2013 WL 4763414 (D.D.C. 5 Sept 2013); WNET v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) (Chin, J., dissenting).

11. *Ibid.*, citing See WNET v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013) and Hearst Stations Inc. v. Aereo, Inc., 2013 WL 5604284 (D. Mass. 8 Oct 2013).

12. *Ibid.* at 10.

13. *Ibid.* at 14.

14. *Ibid.* at 15.

15. *Ibid.*

16. *Ibid.* at 16.

17. *Ibid.* at 18.

18. *Ibid.* at 25.

19. Even after a favourable Supreme Court decision, Aereo will likely have to file a motion before the court in the Utah case to have the injunctive order.