

The US Supreme Court's ruling in the Aereo Inc case

The US Supreme Court ruled on 25 June in the widely awaited case of *American Broadcast Companies, Inc. v. Aereo, Inc* that Aereo's over-the-air internet TV service is in violation of the US Copyright Act. Kathy Ossian of Ossian Law PC explores the Supreme Court's decision and its potential impact on other cloud service providers.

On 25 June 2014, the US Supreme Court rendered its decision in the copyright infringement case of *American Broadcast Companies, Inc. v. Aereo, Inc*¹. The case was an appeal from a Second Circuit Court of Appeals decision in Aereo's favour². Last fall, the Tenth Circuit ruled in favour of the broadcasters³, so there was a split between circuits prior to the Supreme Court granting *certiorari*. In a 6-3 decision, the Supreme Court found Aereo's service in violation of the US Copyright Act⁴.

Background

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 and 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 several other US locations.

Plaintiff broadcasters argued that Aereo's service violated the US

Copyright Act by 'publicly performing' the programs without plaintiffs' permission⁵. Aereo did not dispute that Plaintiffs owned or were the exclusive licensee in the streamed programs, but responded that its customers' use of its technology doesn't constitute a public performance, comparing such use to a consumer recording a program with a DVR or similar device. The Second Circuit affirmed the dismissal of the broadcast company plaintiffs' case against Aereo by the US District Court for the Southern District of New York. The Supreme Court heard oral arguments in April and rendered its decision two months later.

'Performance' and 'public performance'

In writing for the majority, Justice Breyer began by quoting the 'Transmit Clause' of the Copyright Act which vests in the copyright holder the exclusive right: '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.'⁶

The Supreme Court focused on whether Aereo 'performs' plaintiffs' copyrighted works and, if so, whether those performances are 'public.'⁷ Justice Breyer reviewed the history of the US Copyright Act, including the 1976 amendments and the legislative intent behind the amendments: "Congress enacted new language that erased the Court's line between broadcaster and viewer, in respect to 'perform[ing]' a work. The amended statute clarifies that to 'perform' an audiovisual work

means 'to show its images in any sequence or to make the sounds accompanying it audible'... Under this new language, both the broadcaster and the viewer of a television program 'perform,' because they both show the program's images and make audible the program's sounds."⁸

The majority of the Court then concluded that Aereo's services constituted performances as defined by the US Copyright Act and that "Aereo is not simply an equipment provider' but itself 'performs or transmits."⁹

The Supreme Court next turned to the question of whether such performances were 'public': "whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it 'transmit[s]... a performance' to all of them. Moreover, the subscribers to whom Aereo transmits television programs constitute 'the public.'"

This matters because although the Act does not define 'the public,' it specifies that an entity performs publicly when it performs at 'any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.' The Act thereby suggests that 'the public' consists of a large group of people outside of family and friends¹⁰.

Ultimately, the Supreme Court concluded that "Aereo transmits a performance of petitioners' copyrighted works to the public within the meaning of the Transmit Clause."¹¹

The dissent

Justice Scalia, writing for himself and Justices Thomas and Alito, in dissent, described Aereo's services

as “akin to a copyshop that provides its patrons with a library card.” The dissent saw no copyright violation in Aereo’s provision of its subscription services: “Aereo does not provide a prearranged assortment of movies and television shows. Rather, it assigns each subscriber an antenna that - like a library card - can be used to obtain whatever broadcasts are freely available. Some of those broadcasts are copyrighted; others are in the public domain. The key point is that subscribers call all the shots: Aereo’s automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it.”

The dissent also pointed out limitations in the majority’s opinion: “Today’s decision addresses the legality of Aereo’s ‘watch’ function, which provides nearly contemporaneous access to live broadcasts. On remand, one of the first questions the lower courts will face is whether Aereo’s ‘record’ function, which allows subscribers to save a program while it is airing and watch it later, infringes the Networks’ public-performance right.”

Impact on cloud services

How will the Supreme Court’s decision impact the offering of internet-based enabling technology beyond those falling under the Copyright Act? It is noteworthy that the Supreme Court made an effort to limit its decision specifically to the Aereo service: “We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to

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technologies not before us. We agree with the Solicitor General that ‘[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.”¹²

Nevertheless, the Supreme Court’s opinion is contrary to the reasoning employed by federal appellate courts in other cases. For example, in *Fox Broadcasting Company, Inc. v. Dish Network, LLC*³, the Ninth Circuit Court of Appeals held that Fox failed to state a claim for copyright infringement against Dish over its ‘Prime Time Anywhere’ and ‘Auto Hop’ features. These features allow Dish subscribers to record prime time programming and to skip over advertisements when viewing recorded programs. In affirming the district court’s denial of injunctive relief to Fox, the Ninth Circuit held: ‘Fox argues that because Dish participates in the operation of PrimeTime Anytime on a daily basis, Dish made the copies, either alone or concurrently with its users. However, operating a system used to make copies at the user’s command does not mean that the system operator, rather than the user, caused copies to be made.’ Here, Dish’s program creates the copy only in response to the user’s command. Therefore, the district court did not err in concluding that the user, not Dish, makes the copy¹⁴.

As a practical matter, it is difficult to distinguish between the Dish subscribers’ ‘copying’ and the Aereo subscribers’ ‘performance.’ It is

therefore quite possible that lower courts could apply the same reasoning employed by the Supreme Court in *American Broadcasting Cos. v. Aereo* to other similar technologies and even 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.

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1. American Broadcasting Cos., Inc., et al., v. Aereo, Inc. fka Bamboom Labs, Inc., 573 U.S. No. 13-461 (2014).
2. 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.
3. Community Television of Utah, LLC v. Aereo, Inc., Case No. 14-4020 (10th Cir. 2014).
4. The Copyright Act of 1976, 17 U.S.C. § 101(2).
5. By contrast, cable and satellite carriers retransmit Plaintiffs’ programming with consent under paid copyright licences.
6. The Copyright Act of 1976, 17 U.S.C. § 101(2).
7. American Broadcasting Cos., v. Aereo, id. at p. 4.
8. Ibid. at p. 7 (citations omitted).
9. Ibid at p. 8.
10. Ibid at. 13-14.
11. Ibid. at 15.
12. Ibid. at 17 (citations omitted).
13. Fox Broad. Co. v. Dish Network, LLC, No. 12-57048 (9th Cir. 2014).
14. Ibid. at 2.

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