Supreme Court Rules in Favor of Broadcasting Companies in Aereo's Copyright Battle Over Internet Television Streaming

The United States Supreme Court on June 25, 2014, held that Aereo's system for capturing and recording broadcast TV programming, and then streaming that programming to individual subscribers, "performs" that programming "publicly" and so infringes the copyright holders exclusive right to transmit those works. In finding the Aereo system to directly infringe the transmit clause, the Court's 6-3 majority decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, No 13-461 (June 25, 2014), viewed the Aereo system as akin to the CATV systems that Congress had specifically brought within the Copyright Act's ambit by amending the transmit clause after the Court had earlier found those systems not to be infringed. The dissent in *Aereo* expressed the "evident feeling" that what the Aereo system did should not be allowed – perhaps under principles of secondary liability or reproduction infringement – while disagreeing with the manner in which the majority construed the Copyright Act's transmit clause to find infringement on that basis.

Aereo provided a technically complex system. It set up farms of dime-sized television antennas in certain broadcast areas. A subscriber would select a program to watch. Aereo would temporarily assign a single antenna to that subscriber. The antenna was connected to a device that stored the program locally. The service would then stream the program to the subscriber's device. If multiple subscribers wanted to watch the same program at the same time, multiple separate antennas would record the programs separately, and each would receive a personal stream of the separate recordings.

A number of broadcasters sued in New York City, alleging that the service infringed and seeking a preliminary injunction. The district court denied the injunction, which the Second Circuit affirmed. In doing so, the Second Circuit relied on its *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) opinion on DVR technology, which found that the automated copying of content at user request did not constitute direct infringement, replaying content to the original audience did not constitute "public performance," and the copying of streaming content for the purposes of buffering did not itself constitute unlawful copying. The broadcast industry turned to the Supreme Court, which granted *certiorari* and heard oral arguments in the case in April.

The Supreme Court's analysis focused on whether the Aereo record-and-stream system infringes a copyright owner's exclusive right to "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public." 17 USC 101. That right, along with Section 111 (which governs the compulsory licensing scheme for cable systems) was added to the Copyright Act through the 1976 amendments. That was done to reverse findings of the Supreme Court in *Fortnightly* and *Teleprompter* that early CATV systems, which captured broadcast signals through antennas and passed them along their systems, did not infringe.

Finding that Congress intended to create infringement liability for CATV systems and systems like them, such as Aereo's, the majority held that Aereo did "transmit" the broadcasts "publicly." Focusing on the legislative history of the 1976 Act, the Court held that Aereo's activities are substantially similar to those of CATV systems, and that they transmit. The Court showed little interest in analyzing whether internet streaming is different from CATV transmission. The dissent, in construing "transmit," made much of the fact that streaming in the Aereo system does not occur until the user starts the stream. CATV systems send the signals constantly, though the user only sees a particular broadcast when the receiver selects the right broadcast stream. The majority found the difference to be of no import.

As for the requirement that the performance be "public," the Court found the "personal" transmission that occurred in the Aereo system to be part of a public performance. The Court perceived a contrary finding to

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be contrary to Congress' intent and to make no difference: "[W]hether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds." The dissent chided the majority for its analysis here as a results-driven rule, though it expressed misgivings about the system's legality on other potential copyright infringement grounds.

Aereo illustrates the difficulties that emerging technologies present to right holders, technology companies and those who invest in both. The only certainty is that the struggle between those interests will likely continue, and that the Supreme Court will, as it has done before, not grant new technologies or business methods free passes. Rather, it will continue to struggle to apply existing laws to those technologies.

To discuss how copyright law, including the Supreme Court's decision in *Aereo*, and other intellectual property principles may affects your interests, please contact your usual Ropes & Gray attorney or one of the following Ropes & Gray IP attorneys listed below.

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