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Aereo hit a roadblock, but others are now filling the innovation gap

In the U.S. Supreme Court's opinion in *American Broadcasting Cos. Inc. v. Aereo Inc.*, 573 U.S., 134 S.Ct. 2498 (2014), the court held Aereo's "watch live" Internet streaming service constitutes a "public performance" within the meaning of the transmit clause of the U.S. Copyright Act, 17 U.S.C. 106(4).

The court's ruling resulted in the immediate and voluntary shutdown of Aereo's subscription service, which had allowed subscribers to watch network television programs over the Internet at approximately the same time those programs were broadcast live over the air.

The court's decision comes amid a "cord-cutting" revolution by consumers who have done away entirely with expensive cable packages, opting instead to watch TV through streaming services such as Hulu and Netflix.

One issue that has prevented many consumers from gleefully canceling their cable service altogether is the inability to stream local news and live sports through the Internet. Aereo sought to fill this gap through its streaming service, which provided subscribers with the ability to watch live broadcast TV over the Internet for less than $10 a month.

The Aereo system is composed of thousands of dime-sized antennas housed in a central Aereo warehouse. When a subscriber wanted to watch a show currently being broadcast, according to the court opinion, "he visits Aereo's website and selects, from a list of the local programming, the show he wishes to see."

Once the subscriber selected his or her desired show, one of Aereo's servers "selects an antenna, which it dedicates to the use of that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show."

Aereo's service frustrated producers, distributors, marketers and broadcasters who own copyrights in many of the programs Aereo made available to its subscribers because, according to these copyright holders, Aereo was infringing on their right to "publicly perform" their works.

Reading between the lines, these entities wanted to be paid a license fee for Aereo's transmission of their content, which Aereo was seemingly exempt from paying. For this reason, among others, several broadcasters filed suit against Aereo, seeking to enjoin Aereo from streaming live broadcast TV to its subscribers.

The U.S. District Court denied the broadcasters' motion for preliminary injunction on the basis that Aereo did not "publicly" perform programs within the meaning of the transmit clause, since each time Aereo streamed a program for a subscriber, it would send an individual and private transmission of the program that was available only to that subscriber. The 2nd U.S. Circuit Court of Appeals affirmed the ruling, which led to the Supreme Court granting certiorari.

Consistent with the lower courts' ruling, Aereo argued to the Supreme Court that each performance it transmits is capable of being received by one and only one subscriber, and its transmissions are therefore done "privately" and not "publicly." The court rejected this argument, indicating that the technological difference between Aereo and traditional cable systems does not distinguish Aereo from these cable systems.

The court continued: "They do not render Aereo's commercial objectives any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers ... Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies."

In the opening paragraph of its opinion reversing the lower courts' denial of the broadcasters' motion for preliminary injunction, the high court quoted the transmit clause, which defined a "public performance" as the right to:

"Transmit or otherwise communicate a performance ... of the [copyrighted] work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. 101.

According to the Supreme Court, by enacting the transmit clause Congress intended to "erase[] 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.'"

The Supreme Court concluded: "We note that Aereo's subscribers may receive the same programs at different times and locations. This fact does not help Aereo, however, for the transmit clause expressly provides that an entity may perform publicly 'whether the members of the public ... receive it in the same place or different places and at the same time or at different times.'

"In other words, 'the public' need not be situated together, spatially or temporally. For these reasons, we conclude that Aereo transmits a performance of petitioners' copyrighted works to the public, within the meaning of the transmit clause."

More interesting than the Supreme Court's ruling (which was rather predictable) is what has transpired over the two months following issuance of the opinion. Upon remand to the

IN THE LIMELIGHT

JEFFREY BECKER

Jeffrey Becker is chair of Swanson, Martin & Bell LLP's entertainment and media law practice group. Among his clients are recording artists, screenwriters, filmmakers, record labels and publishers, actors, theatrical producers and various entertainment-related businesses for whom he provides comprehensive counseling and litigation services. He can be reached at (312) 321-8425 or jbecker@smbtrials.com.

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district court, Aereo submitted 14 statements of account to the U.S. Copyright Office, along with royalty and filing fees to cover two years of retransmissions to its subscribers.

This submission was premised upon the Supreme Court's recognition that when Congress enacted the transmit clause, it also enacted a compulsory licensing scheme that allowed cable systems to procure a compulsory license and pay a statutorily regulated license fee to the copyright office so they may legally retransmit these broadcasts. See 17 U.S.C. 111.

Aereo sought this compulsory license so it could retransmit network broadcasts in the same manner as the cable systems to which the Supreme Court had compared it to only one month earlier. The copyright office did not agree. On July 16, the copyright office sent a letter to Aereo stating that, in its view, "Internet retransmissions of broadcast television fall outside the scope of the Section 111 license."

In relying on a 2012 2nd Circuit decision in *WPIX Inc. v. ivi Inc.*, the copyright office declared that Section 111 is meant to encompass "localized retransmission services" that are "regulated as cable systems by the FCC."

The copyright office did not yet outright deny Aereo's request, however, opting instead to accept the request on a provisional basis and reserving its final decision in recognition of the fact that Aereo has raised this issue before the courts in its pending litigation.

With respect to the pending litigation, Aereo filed an emergency motion before the district court upon remand asking the court to deny the broadcasters' motion for preliminary injunction on the basis that it is entitled to a compulsory license under Section 111 of the Copyright Act.

The district court struck this motion as procedurally improper. Aereo then sought a declaration by the 2nd Circuit that it qualifies as a "cable system" under the Copyright Act and is entitled to a compulsory license under Section 111. On Aug. 21, the 2nd Circuit rejected Aereo's request, stating it is for the district court to consider and rule upon these issues.

Aereo's status therefore remains in flux for the foreseeable future, which is troublesome for Aereo, given that it is spending substantial sums of money on legal fees while generating absolutely no income since its service remains shut down.

Whether Aereo survives these ongoing legal battles may be of little concern to consumers, since Aereo's existence has already spawned further innovation.

Following the Supreme Court's ruling, technology companies such as Tivo are vying for Aereo's target market. Less than a week after the 2nd Circuit denied Aereo's request to be classified as a "cable system," Tivo announced it would be releasing a DVR that allows "cable-free" viewers to legally view and record over-the-air content from broadcast networks.

There is little doubt that technology will progress as the public continues to demand more efficient, flexible and cost-efficient ways to consume media. As the entertainment industry has learned time and again (but requires a reminder every few years), content owners must work alongside technology and innovation, not against it.

The result of such collaborative efforts should benefit everyone from the content owner to the content consumer. It is yet to be determined whether Aereo will be around to share in this benefit as well.