Aereo infringes broadcasters’ copyrights, US Supreme Court rules – coming impact for streaming and cloud services?

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The United States Supreme Court has held that online video startup Aereo Inc. infringes broadcasters’ copyrights in on-air programming when Aereo transmits the programs to its Internet subscribers.

Ruling on June 25, the Court held that such transmissions are a public performance, and thus infringe the exclusive right to publicly perform a work protected by copyright. It rejected the argument that Aereo is only an equipment provider, and that subscribers, rather than Aereo, “perform” each transmission.

The Court held that Congress, in enacting the Copyright Act, had intended to prohibit cable TV companies from rebroadcasting copyrighted programs without the copyright owner’s permission, and that to carry out this congressional purpose, Aereo’s system, which operates without such permission, must be enjoined.

The Court’s holding will doom Aereo’s business in its current form. Broadcasters’ ability to protect their content, and to require cable TV operators to pay large retransmission fees for over-the-air programming, has been reinforced.

The most important future question, however, is how the Aereo decision will affect Internet streaming and cloud-based services. The way in which copyrighted works are stored and retrieved from such systems falls uncomfortably close to the definition of “public performance” as given in Aereo. Although the Court was careful to say that it was not prejudging the legality of such services, future copyright litigation directed to cloud storage and retrieval is almost inevitable, and the issue is likely to be back before the Court within several years.

Background: Aereo’s business model

Although users can receive over-the-air broadcasts for free, cable TV companies, in order to retransmit the same programs on their systems, must pay billions of dollars each year to the copyright owners. Aereo was an attempt to find a legal end run around this requirement. Aereo’s system uses thousands of tiny antennas, each assigned to a single subscriber, to receive over-the-air broadcasts, and a remote server that creates individual copies of broadcast programs that its subscribers wish to watch live or at a later time.

A group of broadcasters sued Aereo, claiming that the transmissions infringed the public performance right, and sought a preliminary injunction. Aereo maintained that because each transmission of this system was actuated by a subscriber, not by Aereo, those transmissions were not public performances, and were no different than a user receiving the same signals through a home digital antenna.
A New York federal court denied the broadcasters’ initial demand for a preliminary injunction against Aereo, finding that the plaintiffs had not established a likely infringement of their public performance rights. The Second Circuit affirmed the denial of relief, then turned down the broadcasters’ request for en banc rehearing. Meanwhile, Aereo expanded its services to a number of other US cities. It encountered lawsuits in other cities from the local broadcasters; Aereo defeated a preliminary injunction in Massachusetts, but a Utah federal court enjoined Aereo from launching service in the states of Utah, Colorado, Montana, New Mexico, Oklahoma and Wyoming.

The losing broadcasters in the Second Circuit petitioned the Supreme Court to review the question, “Whether a company ‘publicly performs’ a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet,” and, unusually, Aereo also joined in the request for the Court to grant review. Given the interest and importance of the case, the Court decided to accept the appeal.

The Court decides

On June 25, 2014, a six-justice majority reversed the Second Circuit and concluded that the Aereo service did infringe the public performance rights of the plaintiffs. Justice Stephen Breyer wrote the majority opinion; Justice Antonin Scalia issued a dissent for himself and Justices Clarence Thomas and Samuel Alito.

The Court concluded that Aereo both “performs” in transmitting programming to its subscribers over the Internet, and that the performance is public. Aereo argued that it did not perform, because it “does no more than supply equipment that emulates the operation of a home antenna and digital video recorder (DVR).” It contended that only Aereo’s subscribers “perform,” when they use such equipment to stream television programs to themselves.

The Court rejected Aereo’s argument. It reasoned that Aereo’s transmission is a performance because it is similar in nature to the old community antenna television (CATV) services which Congress intended to address with its 1976 amendment to the Act’s definition of “perform.” Prior decisions of the Court, Fortnightly Corp. v. United Artists Television, Inc. and Teleprompter Corp. v. Columbia Broadcastings System, Inc, held that CATV systems did not perform broadcasters’ copyrighted television programs when they transmitted local television broadcasting to subscribers outside of the broadcast antennas’ range. The 1976 Act’s legislative history, the Court held, showed that Congress intended to overturn these cases, and “make clear that an entity that acts like a CATV system itself performs.”

The Court avoided interpreting the Act’s literal language, finding it to be ambiguous, and instead relying on legislative history and inductive reasoning to discover Congress’s intent. This is a substantially different approach than prior copyright decisions of the Court, which have adhered closely to literal textual analysis. See, e.g., Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1358 (2013) (“The language of § 109(a) read literally favors Kirtsaeng’s nongeographical interpretation, namely, that ‘lawfully made under this title’ means made ‘in accordance with’ or ‘in compliance with’ the Copyright Act.”).

The Court used the same reasoning by analogy to conclude that Aereo’s performances were public. Aereo argued that its performances of the programs were private because each performance of the programs is capable of being received by one and only one subscriber. The Court rejected this argument on grounds that the performances did not differ from CATV systems’ transmissions to the public.

The Court found that Aereo’s technological architecture did not distinguish its services from CATV transmissions, at least from the subscribers’ perspective, and that Congress did not intend to exempt similar services on the basis of technological differences that make no difference to the consumer of television programming: “Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds’ delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.”

In finding Aereo’s performances to be public, the Court gave no weight to the fact that each subscriber received a different transmission. It held that the Act suggests that an entity may transmit a performance through multiple discrete transmissions to more than one person, and that a performance need not be a single transmission.
Aereo’s model is no different than “one transmitting a message to one’s friends, irrespective of whether one sends separate identical e-mails to each friend, or a single e-mail to all at once.” Thus, the Court concluded that “when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.”

**How will this affect the legality of Internet-streaming and cloud-based systems?**

While the Aereo case is now concluded, and the Aereo model has now been rejected as a copyright infringement, there is an important open question: how the Court’s definition of “to transmit ... a performance,” will affect the legality of other Internet-streaming and cloud-based systems. Many of the amici, and the US government, devoted portions of their brief to the impact of a decision in the Aereo case on cloud storage. The Court essentially avoided the issue, saying that it was not prejudging the legality of such systems, and pointing out facts such as a user purchasing rights to play a recording or movie before storing it in the cloud, and legal issues such as fair use, that could differentiate cloud-based systems from the Aereo system.

But the Court’s definition of “public performance” may be broad enough to reach cloud computing and Internet streaming services, which use their own equipment to retransmit content to their customers, and often retransmit unique copies of the same program to the individual users who uploaded them – like Aereo, and Cablevision’s RS-DVR system. Because a cloud computing service arguably “communicates the same contemporaneously perceptible images and sounds to multiple people,” there is likely to be future litigation by content owners against such services, at least where the copies stored in the cloud have not been licensed.

Lower courts may struggle to determine whether cloud computing services transmit performances to the public when users upload and retransmit copies of protected works. The majority of cloud computing users upload purchased, or licensed, copies of content that they wish to retransmit at some other time, or in some other place. But purchasing a copy of a protected work does not necessarily entitle the purchaser to publicly perform that work, and, under a reasonable interpretation of Aereo, a cloud computing service’s retransmission of that work is a public performance.

So, what then? Fair use, the Court said, is available to defendants to “help prevent inappropriate or inequitable applications of the [Transmit] Clause.” It’s fair to say that the question of whether streaming, and cloud storage and retrieval is a public performance will soon make its way through the federal courts and up to the Supreme Court.

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