

THE
NATIONAL LAW REVIEW

American Broadcasting Companies v. Aereo, Inc.: Supreme Court Departs from Volitional Act Test for Copyright Infringement

Thursday, July 3, 2014

On June 25, the Supreme Court issued its much-anticipated decision in the case of ***American Broadcasting Companies, et al. v. Aereo, Inc. f/k/a Bamboom Labs, Inc.***, Case No. 13-461 (June 25, 2014). The case centered on Aereo's **subscriber-based service**, which enables its customers to watch **copyrighted broadcast television programs** over the **Internet**. Users of the service are able to watch broadcast television shows in near-real time by selecting the television program they want to watch. The Aereo system then tunes an antenna designated to a specific user to receive the program and records it for the specific user. Then, in near-real time, the service streams the program over the internet to the device (i.e., tablet, computer, PDA) on which the user chooses to watch the program. If more than one user designates the same program, the service tunes a separate antenna and records an individual copy of the program for each of them.

The Copyright Act grants copyright holders the exclusive right to publicly perform their works. Accordingly, the central issues in the case were whether Aereo "performs" a program by transmitting it through its system to a subscriber, and if so, whether the performance is "to the public." In a ruling that relies more on the legislative history of the Copyright Act than recent precedent, the Court found that Aereo's service does constitute a public performance of a copyrighted program and hence that Aereo is a direct infringer of copyright holders' exclusive right to publicly perform their works.

In deciding that Aereo "performs" copyrighted programs, the Court declined to apply the test it used in previous copyright infringement cases involving technologically facilitated transmission, namely that direct infringement must involve an act of volitional conduct directed at the copyrighted work. *See, e.g., Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Aereo argued that it merely supplies equipment that responds to users' directives, akin to a home antenna with a digital video recorder, and therefore a performance, if any, is a result of the user's volitional act. The Court, however, focused instead on Congress's intent in amending the Copyright Act in 1976 to overturn prior Court holdings that community antenna television (CATV) providers, the precursors to cable television companies, did not commit copyright infringement by rebroadcasting television signals to remote viewers. The Court held that Aereo's service is substantially similar to those of the CATV companies that Congress amended the Copyright Act to reach. Accordingly, in the Court's view, Aereo does not merely supply the equipment for subscribers to "perform" a copyrighted work by causing it to be streamed to their viewing device. Rather, Aereo itself "performs" the work by receiving programs released to the public and carrying them by private channels to additional viewers, regardless of whether the transmission process itself constitutes a "volitional act" by Aereo to transmit specific shows designated by its subscribers.

The Court acknowledged technological differences between Aereo's service and those of the CATV providers that were the subject of its earlier decisions. Rather than transmitting signals constantly and simultaneously to all subscribers, as with CATV and cable providers, Aereo's transmission begins only when a particular user selects a program to watch. At that point, as noted above, Aereo's system activates a designated antenna that transmits a dedicated stream of a digital file unique to that user. Aereo argued that its infrastructure therefore put its service outside of the "public performance" contemplated by the Copyright Act. The Court, however, focused on



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the experience of the broadcaster and the end user. The Court concluded that, despite invisible behind-the-scenes differences in system architecture, Aereo's service is identical for all practical purposes to a traditional cable system. In addition, Aereo's commercial objectives are the same as those of cable companies. The Court found the technological differences irrelevant in light of Congress' intent to bring such companies within the reach of the Copyright Act. Accordingly, Aereo's transmissions constitute a "performance" of copyrighted works.

Addressing the second issue, the Court found that Aereo performs the works "publicly," despite the fact that an individual Aereo antenna transmits an individual program file to only one subscriber at a time, because (1) Congress intended the Copyright Act to provide that an entity may transmit a performance through multiple transmissions if the performance is of the same work; and (2) the "public" need not be situated together spatially or temporally. Therefore, Aereo's multiple individual transmissions of the same program are transmitted, in the aggregate, "to the public."

Justice Antonin Scalia, in dissent, argued that the Court should have applied the "volitional act" test as in prior cases. Under that test, according to Scalia, Aereo's system architecture would have insulated it from liability at least for direct copyright infringement because the subscriber, not Aereo's system itself, supplies the volitional act triggering performance of the copyrighted work. Scalia agreed with the majority that Aereo's service "ought not to be allowed," either under an alternate theory of primary or secondary liability or by Congress closing a "loophole" in the Copyright Act. Here, however, Scalia cautioned that the majority opinion departs from the "volitional act" test in favor of an ambiguous standard for primary liability based on a service's resemblance to traditional cable providers.

The majority dismissed concerns that its limited holding will discourage or disrupt the emergence of new technologies in digital media. "We cannot answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us," the Court stated. Indeed, it appears that in departing from the clearly defined "volitional act" test, the Court may have introduced a significant degree of unpredictability in the future application of the Copyright Act to transmission technology and service providers in the digital media field. The Aereo decision implies that transmission systems bearing enough resemblance, in terms of basic function and user experience, to the cable systems Congress intended to reach by amending the Copyright Act in 1976, will be found to infringe regardless of technological differences in their "invisible" system architecture. This fact-specific and potentially subjective standard will likely present challenges for companies in or entering the digital media field to design compliant systems and technologies.

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