CASE NOTE

ABC, INC. V. AEREO, INC.

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INTRODUCTION

Background

Aereo, Inc. was an American technology service that enabled its subscribers to view and record live broadcast television content on their computers and mobile devices.[1] From its inception in 2012, Aereo positioned itself as a competitor to the cable industry.[2] Aereo's competitiveness lay in its cost – at twelve dollars a month, it was far cheaper than a standard cable subscription.[3] Whereas cable companies pay broadcasters billions of dollars annually for the rights to retransmit the broadcasters' copyrighted television content, Aereo declined to pay these fees, and was therefore able to keep its costs low.[4] It is therefore unsurprising that a coalition of cable companies and broadcasters moved to stop Aereo before it ever got off the ground.[5]

Aereo operated by "[pulling] broadcast signals out of the air and then [streaming] them directly to subscribers," who could view those broadcasts

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[†] My thanks to my parents, Rob and Nancy Sterling; to Professor Stacey Dogan; and to ZhenHe Tan.

[1] Beth Carter, *Introducing Aereo: One Small Step for Cord Cutting, One Giant Leap of Faith*, WIRED (Feb. 14, 2012, 2:46 PM), http://www.wired.com/business/2012/02/aereo-cord-cutting/ (archived at perma.cc/HTG7-FZQ2).

[2] Brian Stelter, *New Service Will Stream Local TV Stations in New York*, N.Y. TIMES (Feb. 14, 2012, 11:40 AM), http://mediadecoder.blogs.nytimes.com/2012/02/14/new-service-will-stream-local-tv-stations-in-new-york/ (archived at perma.cc/F7N6-NTYB). At Aereo's launch, CEO Chet Kanojia explained that, "if you have this and you have Netflix, you absolutely have the ability to not have a standard cable subscription." *Id.*

[3] *See* Carter, *supra* note 1.

[4] *See, e.g.*, Sam Gustin, *NFL, MLB Warn of the End of Free Sports on Television*, TIME (Nov. 18, 2013), http://business.time.com/2013/11/18/nfl-nba-warn-of-the-end-of-free-sports-on-television/ (archived at perma.cc/BH8U-ZQXF).

[5] Sam Byford, *Networks File Suit Against "Unauthorized" Streaming Service Aereo Ahead of NYC Launch*, VERGE (Mar. 1, 2012, 9:22 PM), http://www.theverge.com/2012/3/1/2838009/aereo-suit-pbs-univision-fox-streaming-unauthorized/in/2779059 (archived at perma.cc/BU2B-Y5EH).

from local broadcast networks via an Aereo application on their smartphones, tablets, or computers.[6] Aereo transmitted this content to its subscribers through its custom arrays of dime-sized antennas.[7] Each antenna was dedicated to a single subscriber, so that no two subscribers used a given antenna at the same time.[8] When a subscriber selected a program, that user's designated antenna tuned to the channel airing the program, made a copy of the broadcast, and stored the copy in a hard drive reserved for that subscriber.[9] Thus, although many Aereo users may have viewed the same program content at the same time, each one received a separate copy that was not accessible to any other subscriber.[10]

Procedural History

Broadcasters first sued Aereo on March 1, 2012 in the Federal District Court for the Southern District of New York, alleging copyright infringement and seeking a preliminary injunction to prevent Aereo from operating.[11] The district court denied the injunction, and the broadcasters appealed to the Second Circuit Court of Appeals.[12] Over a strident dissent, the Second Circuit affirmed the lower court's decision.[13] At the same time, lawsuits unfolded – against Aereo and its competitor FilmOn.tv – in other circuits, with mixed success.[14] The U.S. Supreme Court took up the appeal of the Second Circuit decision and, on June 25, 2014, in a 6-3 decision, held that Aereo's content delivery model constituted copyright infringement.[15]

Prior Litigation

At the Southern District of New York, broadcasters argued that, by allowing

[6] Nathan Ingraham, *Aereo Launching Streaming Broadcast TV Service in NYC on March 14th*, VERGE (Feb. 14, 2012, 12:24 PM), http://www.theverge.com/2012/2/14/2797616/aereo-streaming-broadcast-tv-pilot-launch-nyc/in/2779059 (archived at perma.cc/2PKY-5QEN).

[7] *Id.*

[8] WNET, Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 682-83 (2d Cir. 2013).

[9] *Id.* at 682.

[10] *Id.* at 683.

[11] *See generally* Am. Broad. Cos., Inc. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373 (S.D.N.Y. 2013).

[12] *Id.* at 405; *See generally Aereo II*, 712 F.3d.

[13] *Aereo II*, 712 F.3d at 696.

[14] *See generally* Hearst Stations, Inc. v. Aereo, Inc., 977 F. Supp. 2d 32 (D. Mass. 2013) (denying preliminary injunction against Aereo); Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013) (granting preliminary injunction against FilmOn.tv); Fox Television Stations, Inc. v. BarryDriller Content Sys., Inc., 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (granting preliminary injunction against FilmOn.tv).

[15] *See generally* Am. Broad. Cos., Inc. v. Aereo, Inc. (*Aereo III*), 134 S. Ct. 2498 (2014).

its subscribers to stream the broadcasters' copyrighted content without authorization, Aereo violated their exclusive rights to publicly perform this content.[16] This argument was rejected – at the district court and on appeal[17] – in two opinions that drew heavily from the Second Circuit's prior holding in *Cablevision*.[18] The *Cablevision* court considered whether, through its remote storage digital video recorder ["RS-DVR"] system, Cablevision engaged in unauthorized public performances of the copyright owners' works.[19] Like Aereo's streaming service, Cablevision's RS-DVRs made discrete copies of television programs that could only be viewed by the specific subscribers who chose to record these programs.

In holding for Cablevision, the court wrestled with a particularly opaque provision of the Copyright Act: a subpart of the definition of "public performance" known as the "transmit clause."[20] The *Cablevision* court distinguished between the transmission of a *performance* of a work and the transmission of the underlying work itself.[21] It determined that the relevant "performances" implicated by the transmit clause were the specific recorded copies of programs, rather than the underlying broadcasted works from which these copies were made.[22] Because each copy was only transmitted to the particular subscriber who selected the program, the transmissions could not be said to be made "to the public," and therefore they did not violate the transmit clause.[23] As Aereo specifically designed its service to comply with the *Cablevision* de-

[16] *Aereo I*, 874 F. Supp. 2d at 376. The right to publicly perform a copyrighted work is one of six exclusive rights protected by the Copyright Act. 17 U.S.C. § 106 (2012).

[17] *Aereo I*, 874 F. Supp. 2d at 396; *Aereo II*, 712 F.3d at 696.

[18] *See generally* Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008).

[19] *Id.* at 134.

[20] *Id.* The "transmit clause" of the Copyright Act defines "public performance" in relevant part as "to transmit or otherwise communicate a performance or display of the work . . . 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." 17 U.S.C. § 101.

[21] *Cablevision*, 536 F.3d at 134-35.

[22] *Id.* at 136. The court justified this interpretation of the transmit clause by pointing to absurd results that could result from a contrary interpretation. If the transmission of a performance was conflated with the transmission of the underlying work itself, the court writes, then "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public. We do not believe Congress intended such odd results." *Id.*

[23] *Id.* The court concluded: "Although the transmit clause is not a model of clarity, we believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission." *Id.*

cision,[24] the Second Circuit determined that broadcasters' charges against Aereo were indistinguishable from the charges against Cablevision, and thus concluded that Aereo did not infringe the broadcasters' exclusive right to publicly perform their works.[25] Indeed, so closely were Aereo and Cablevision intertwined that many observers saw the Supreme Court's decision to hear the Aereo case as an implicit referendum on *Cablevision*.[26]

THE OPINION

Whether Aereo Performs

The Supreme Court focused its inquiry on two questions: "First, . . . does Aereo 'perform' at all? And second, if so, does Aereo do so 'publicly'?"[27] On the first issue, Aereo argued that it merely sold equipment that allowed its *subscribers* to "perform," rather than performing itself.[28] Instead of beginning with the transmit clause, as the Second Circuit had done, the Court instead turned to several other provisions of the Copyright Act for guidance.[29]

Specifically, the Court focused on a series of amendments that Congress made to the Copyright Act in 1976 to regulate the activities of cable companies.[30] Prior to this regulation, the Court had issued several opinions drawing a

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[24] Joe Flint, *Cablevision Blasts Broadcasters' Supreme Court Filing Against Aereo*, L.A. TIMES (Oct. 11, 2013, 6:12 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-cablevision-aereo-20131011,0,872596.story#axzz2jXJXnfr6 (archived at perma.cc/MM9B-FD2F). Indeed, the dissenting judge in *Aereo II* noted that Aereo seems to have forsaken cheaper and more effective methods of delivering its services in its effort to adhere as closely as possible to the parameters set forth in the *Cablevision* decision: "The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to . . . take advantage of a perceived loophole in the law." *Aereo II*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, C.J., dissenting).

[25] *Aereo II*, 712 F.3d at 695. The court notes that "many media and technology companies have relied on *Cablevision* as an authoritative interpretation of the Transmit Clause." *Id.* n.19.

[26] *See, e.g.*, Joan E. Solsman, *Why the Aereo Supreme Court case over TV's future is too tough to call*, CNET (Apr. 21, 2014, 4:00 AM), http://www.cnet.com/news/why-the-aereo-supreme-court-case-over-tvs-future-is-too-tough-to-call/ (archived at perma.cc/8UPQ-XJTH); Joe Mullin, *At oral arguments, Supreme Court isn't sold on Aereo*, ARS TECHNICA (Apr. 22, 2014, 7:30 PM), http://arstechnica.com/tech-policy/2014/04/at-oral-arguments-supreme-court-isnt-sold-on-aereo/ (archived at perma.cc/MXT2-LDCL).

[27] *Aereo III*, 134 S. Ct. 2498, 2504 (2014).

[28] *Id.*

[29] *Id.* at 2504-05.

[30] *Id.* at 2505-06.

line between broadcasters and viewers, and emphasizing that only broadcasters performed within the meaning of the Copyright Act.[31] Cable companies, these opinions clarified, fell on the viewers' side of the line, and therefore were incapable of performing.[32]

Justice Breyer explained that Congress amended the Copyright Act in 1976 precisely to reject these decisions, and pointed to three specific changes to illustrate this contention.[33] First, Congress amended the statutory definition of "perform," adding more expansive language.[34] "Under this new language, *both* the broadcaster *and* the viewer of a television program perform,"[35] demonstrating Congress's intent to dispel the notion that performance was the exclusive domain of the broadcaster. Second, Congress added the transmit clause to the definitions section of the Copyright Act.[36] Justice Breyer wrote that "[c]able system activities . . . lie at the heart of the activities that Congress intended this language to cover," a conclusion reinforced by the legislative history.[37] Third, Congress enacted § 111 of the Copyright Act, which created a compulsory licensing system for cable retransmissions of broadcasts.[38] In Justice Breyer's view, each of these three changes demonstrated Congress's rejection of the Court's earlier decisions, and signaled its intent to bring cable companies within the reach of the Copyright Act.[39]

After establishing that cable companies "perform" under the Copyright Act, Justice Breyer wasted no time in drawing the analogy with Aereo: "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach." On this point, Aereo emphasized what it considered to be a key difference between its service and cable television systems: whereas cable systems transmitted constantly, sending "continuous programming to each subscriber's television set . . . Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, *in automatic response to the subscriber's request*, does Aereo's system activate an antenna and begin to transmit the requested program."[40] According to

[31] *Id.* at 2504-05. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398 (1968) ("Broadcasters perform. Viewers do not perform."); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 408 (1974) ("The reception and rechanneling of [broadcast] signals for simultaneous viewing is essentially a *viewer* function, irrespective of the distance between the broadcasting station and the ultimate viewer.") (emphasis added).

[32] *Aereo III*, 134 S. Ct. at 2505.

[33] *Id.* at 2505-06.

[34] *Id.*

[35] *Id.* at 2506.

[36] *Id.*

[37] *Id.* (citing H.R. REP. NO. 94-1476, at 63 (1976)).

[38] *Id.*

[39] *Id.*

[40] *Id.* at 2507 (emphasis added).

this view, Aereo merely sold equipment that allowed subscribers to initiate performances, rather than performing itself.

Although this line of reasoning was determinative for Justice Scalia in his dissent,[41] the Court dismissed it as "[making] too much out of too little. . . . [T]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike," could take "a system that is for all practical purposes a traditional cable system" out of the reach of the Copyright Act.[42] In the Court's view, Aereo was the functional equivalent of a cable company, and Congress had already determined that cable companies perform. The Court was unwilling to suspend this determination as it applied to Aereo simply because Aereo shifted the work of initiating a performance to its subscribers.

Whether Aereo Performs Publicly

After concluding that Aereo performed within the meaning of the statute, the Court assessed whether these performances were "public." Aereo asserted that the structure of its content delivery mechanism precluded public performance.[43] The relevant performances, Aereo explained, were the discrete copies of programs sent to the subscribers who sought to view those programs.[44] As such, the performance could not be public, because each performance was delivered to only one subscriber.[45]

Even as it assumed *arguendo* that Aereo's characterization of the definition of "performance" was correct, the Court rejected Aereo's argument as elevating form over function.[46] Justice Breyer laid out his reading of the statute – that a single work may be "performed" through "multiple, discrete transmissions. . . . One can sing a song to his family, whether he sings the same song

[41] *Id.* at 2514 (Scalia, J., dissenting) ("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. Aereo's operation of that system is a volitional act and a but-for cause of the resulting performance, but . . . that degree of involvement is not enough for direct liability.").

[42] *Id.* at 2507 (majority opinion).

[43] *Id.* at 2508.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2509 ("Viewed in terms of Congress's regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. . . . 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?").

one-on-one or in front of all together."[47] Similarly, "whether Aereo transmits from the same or separate copies, it performs the same work."[48] Aereo's performances, taken in the aggregate, reached many members of the public.[49] As such, Aereo publicly performed the broadcasters' copyrighted content in violation of the Copyright Act.

Response to Policy Concerns

Aereo sought to bolster its position by articulating several policy arguments, all of which centered around the view that the Court should take care not to discourage the development of new and innovative technologies.[50] In response to these arguments, the Court took care to explain the limited reach of its decision: "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.'"[51]

Justice Scalia's Dissent

In his dissent, joined by Justices Thomas and Alito, Justice Scalia wrote that Aereo could not perform publicly within the meaning of the statute, because *Aereo* did not perform at all: "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."[52] Moreover, by highlighting several key differences, Justice Scalia disputed the notion

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[47] *Id.*

[48] *Id.*

[49] *Id.* at 2509-10. The Court explained that, although the statute itself does not supply the definition of "public," "it specifies that any 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 a family and friends." *Id.* at 2510 (quoting 17 U.S.C. § 101 (2012)) (internal citation omitted).

[50] *Id.* Several justices expressed similar concerns during oral arguments. *See, e.g.*, Transcript of Oral Argument at 12, *Aereo III*, 134 S. Ct. (No. 13-461) ("Mr. Clement: '. . . I don't think that just operating the hardware in the privacy of your own home is going to result in anything but a private performance.' Justice Sotomayor: 'Go to the iDrop in the cloud.' Mr. Clement: 'Sure.'"). *See also* Danielle Wiener-Bronner, *Justice Scalia Might Not Totally Get How HBO Works*, WIRE (Apr. 22, 2014, 3:33 PM), http://www.thewire.com/national/2014/04/justice-scalia-doesnt-totally-get-how-cable-television-works/361054/ (archived at perma.cc/TDB8-SBL9).

[51] *Aereo III*, 134 S. Ct. at 2510 (quoting Brief for United States as Amicus Curiae Supporting Petitioners at 34, *Aereo III*, 134 S. Ct. (No. 13-461) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984))).

[52] *Id.* at 2514 (Scalia, J., dissenting) (emphasis added).

that Aereo was the equivalent of a cable company and thus necessarily "performed."[53] Ultimately, he concluded:

> what we have before us must be considered a 'loophole' in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude "looks-like-cable-TV" solution the Court invents today.[54]

AFTERMATH

After the Court's decision, Aereo suspended its service and provided refunds to its subscribers.[55] Now forced to pay the licensing fees that it had long avoided, Aereo chose instead to close up shop.[56] Proponents of the service, however, took solace in the fact that several of Aereo's former rivals announced plans to follow Aereo's cord-cutting lead and make their content available over the Internet, with no need for a cable subscription.[57]

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[53] *Id.* at 2515-16.

[54] *Id.* at 2517.

[55] Russell Brandom, *Aereo to Suspend Service at 11:30 EST Today*, VERGE (June 28, 2014, 9:26 AM), http://www.theverge.com/2014/6/28/5852116/aereo-to-suspend-service-at-11-30-est-today (archived at perma.cc/E6YM-SGLV).

[56] Jacob Kastrenakes, *Aereo Files for Chapter 11 Bankruptcy*, VERGE (Nov. 21, 2014), http://www.theverge.com/2014/11/21/7258901/aereo-bankruptcy-chapter-11-filed (archived at perma.cc/VTX5-CZU2).

[57] *See* Jacob Kastrenakes, *CBS Becomes First Major Network to Launch Internet TV Service*, VERGE (Oct. 26, 2014), http://www.theverge.com/2014/10/16/6987543/cbs-all-access-streaming-service-no-cable-required-launches (archived at perma.cc/BEE3-VABM); Chris Welch, *HBO Is Finally Going to Let You Watch Its Shows Without Cable*, VERGE (Oct. 15, 2014, 10:57 AM), http://www.theverge.com/2014/10/15/6982049/hbo-go-will-offer-standalone-subscription-2015 (archived at http://perma.cc/8RPV-YWUN).