

Supreme Court Rules Aereo's Streaming Service Violates Copyright Law

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In a case closely watched by the television, cable and online content industries, the Supreme Court ruled today that online start-up Aereo Inc. violates copyright law by redistributing over-the-air broadcast content without paying licensing fees to broadcasters. The decision is a significant victory for the major television broadcasters that argued Aereo's business practices constitute a "public performance" of their content under the Copyright Act and result in the infringement of their copyrights. The Court characterized its holding as "limited" and underscored that it was not intended to encompass the larger universe of cloud-based content services. The decision reverses and remands the case back to federal district court where the broadcasters originally sought an injunction against Aereo.

Background

Aereo markets and sells a subscription-based service that streams local broadcast television channels to online subscribers in a number of cities for a small monthly fee. Aereo captures the over-the-air television broadcast signals through the use of micro-antennae individually assigned to a subscribing customer. The company then records and streams the stored content to each customer for online playback on tablets, smartphones, laptops or smart TVs. Aereo does not compensate the broadcast television networks for recording and streaming their content to its customers.

Aereo has defended the service against claims of copyright infringement, arguing that the streaming video each consumer plays back is their own personal copy of the show recorded via an assigned, Aereo-housed micro-antenna. In the company's view, the online retransmissions are not public performances, but rather personal, private performances permissible under copyright law. The broadcasters vehemently objected to these claims, arguing that Aereo's retransmissions of copyrighted content are unauthorized public performances in violation of copyright law. The broadcasters have maintained that Aereo's carriage of television broadcast content over the Internet is no different than cable companies carrying broadcast TV signals over cable except that cable operators are required to pay broadcasters a fee for this retransmission.

The major television broadcasters, ABC, NBC, CBS, and FOX, sought a preliminary injunction in early 2012 in the U.S. District Court for the Southern District of New York to prevent the company from launching its service. The court denied the broadcasters' request for an injunction, relying on the U.S. Court of Appeals for the Second Circuit's "Cablevision" decision that had held the individual delivery to customers of shows recorded via off-site digital video recorder technology was not the same as a transmission to the public. The broadcasters appealed the decision to the Second Circuit. Based on its *Cablevision* decision, the federal appeals court affirmed the lower court's decision in an April 2013 ruling that held Aereo's streams to subscribers were not "public performances" under the Copyright Act, and thus did not constitute copyright infringement. The U.S. Supreme Court heard oral argument on April 22.

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The U.S. Supreme Court's Decision

In a 6-3 decision, the Supreme Court reversed the Second Circuit and found that Aereo was “publicly” performing over-the-air broadcast content. Justice Stephen Breyer, writing for the majority, explained that though some technological differences exist, Aereo was comparable to cable companies regulated under the Copyright Act. Justice Breyer was joined by Chief Justice John Roberts, Jr. and justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan. Justice Antonin Scalia was joined by Justices Clarence Thomas and Samuel Alito in dissent.

The ruling rejected Aereo’s position that it was merely an equipment provider, and instead found Aereo’s activities to fall under the Copyright Act. In doing so, the Court acknowledged what it viewed as an inconsequential distinction between Aereo and cable systems. While cable systems transmit programming continuously, Aereo requires a prompt from a subscriber before activating an antenna and beginning transmission of the requested program. The Court gave this sole technological difference between Aereo and traditional cable companies little weight. As Justice Breyer explained, to access content via the “turn of the knob” (cable) or the “click on a website” (Aereo) makes no difference to subscribers or broadcasters. The Court concluded that for all practical purposes, Aereo is a traditional cable system, not an equipment supplier. As such, it “performs” under the statute when transmitting broadcaster content.

The Court also rejected Aereo’s argument that it does not transmit performances to the public. Aereo argued that each individual subscriber receives a unique copy of his or her requested television programming via an individual antenna. This antenna is dedicated to that subscriber alone and delivers, according to Aereo, a personal copy of the program not provided to anyone else. The Supreme Court again viewed this as a negligible, technical distinction from cable companies’ transmissions. The Court noted that a broadcast performance of a work does not avoid being “public” simply because its transmission is broken out by individual subscribers. In the Court’s view, user-specific copies merely serve as another process for transmitting a performance of the same images and sounds to the public.

The majority opinion concluded by recognizing concerns in the *amici* and broader technology community that its decision could impose new liability on other technologies beyond what Congress intended. As a result, Justice Breyer explicitly described the Court’s holding as limited and that it was not intended “to discourage or to control the emergence or use of different kinds of technologies.” Moreover, the opinion highlights that the Court did not address “cloud computing, [remote storage] DVRs [the technology at issue in *Cablevision*], and other novel issues not before the Court.”

In dissent, Justice Scalia noted he does “share the Court’s feeling that what Aereo is doing (or enabling to be done) to the Networks’ copyrighted programming ought not to be allowed.” He accused the majority of distorting the Copyright Act by labeling Aereo’s conduct as “public performance.” Because Aereo does not provide a prearranged selection of television shows, it is not choosing the content made available and viewed. The dissent argues that Aereo does not “perform” because, unlike cable companies and video-on-demand services like Netflix, it does not make the choice of content, which prevents Aereo from being held directly liable under the Copyright Act for violating broadcasters’ public-performance right.

Looking Ahead

The Supreme Court’s decision likely means a difficult, uncertain future for Aereo and its television streaming business model. CEO Chaitanya “Chet” Kanojia has previously said that a loss would mean the end of his company. For Aereo, going forward as a viable business may require reaching agreement on the subject of negotiating licenses with broadcasters or persuading Congress to enact compulsory licenses for Internet retransmissions.

For broadcasters, however, the decision allows for preservation of the current system requiring payment for distribution of their programming. Broadcasters expressed concerns that a decision in Aereo's favor would have compromised, and likely eroded, the revenue networks receive for retransmission of their programming. For almost all broadcasters, the growth in these fees over the years has compensated for continuing declines in advertising revenue. Some networks had claimed that this revenue was crucial enough that a move to cable-only delivery of their content may have been required if the Court had endorsed the Aereo model. The Aereo decision effectively moderates these concerns. Moreover, the Court's decision also provides broadcasters with additional time to develop their own online streaming platforms and services, and may stem the tide of consumers moving to online-only viewing of televised content.

For cloud-based content services, including those used for storage of personal files, the decision has no explicit ramifications. It appears the Court attempted to reach a reasonable compromise in limiting its opinion to the retransmission of broadcast television that violates copyright law, while avoiding implication of the larger cloud-based technologies ecosystem.