Supreme Court Rules That Aereo's Real-Time Streaming of Over-the-Air Television Constitutes a Public Performance of Copyrighted Works

by David R. Todd

On June 25, 2014, the U.S. Supreme Court issued its decision in *American Broadcasting Companies v. Aereo, Inc.* The Court concluded that Aereo's real-time streaming of over-the-air television constitutes a public performance of copyrighted television programs.

Aereo operates a system which allows its customers to watch over-the-air television in real time on a computer, tablet, smartphone, or other Internet-connected device. In order to watch a show that is currently being broadcast over the air, a customer visits Aereo's website and selects that show from a list of all of the local, over-the-air programming. In response, Aereo selects one of many of its dime-sized antennas, uses it to tune to the selected show, and records a customer-specific copy of the show in a customer-specific folder on a hard drive. Once a few seconds of the show have been recorded, Aereo streams the recording to the customer over the Internet. The recording is not transmitted to any other customer. When two customers choose to watch the same show, Aereo's system uses two separate antennas, makes two separate recordings of the show, and makes two separate transmissions. Aereo not only allows its customers to view over-the-air television in real time, but it also allows its customers to visit its website and choose to record an over-the-air television show for later viewing. Aereo does not have a license from any of the television broadcasters.

The copyright laws allow the owner of a copyright not only to exclude others from making copies of the copyrighted work, but also to exclude others from performing the work publicly. The Copyright Act defines "perform," in the case of a motion picture or other audiovisual work, to mean "show its images in any sequence or to make the sounds accompanying it audible." The so-called Transmit Clause defines "perform publicly" to include "transmit or otherwise communicate a performance…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."

One purpose of adding these definitions to the 1976 Copyright Act was to overturn a pair of cases decided by the Supreme Court in 1968 and 1974. In *Fortnightly Corp. v. United Artists Television, Inc.*, the first of these cases, a cable company placed an antenna on a hill above a

city and used coaxial cables to carry the over-the-air television signals received by the antenna to the television sets of its customers in the community. The Supreme Court concluded that the cable provider did not "perform" the transmitted works, and that it was only doing for the customer what the customer could do for itself. Later in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, the Court came to the same result for a cable company that carried broadcast television programming into homes from hundreds of miles away.

After passage of the 1976 Copyright Act, the activities of the cable companies in *Fortnightly* and *Teleprompter*qualified as public performances. At the same time, the Act created a compulsory licensing scheme that allowed such cable companies to re-transmit over-the-air broadcasts in exchange for the payment of compulsory licensing fees.

After Aereo began operation, companies owning the copyrights in over-the-air television programs sued Aereo. They moved for a preliminary injunction, arguing that Aereo's real-time transmission of over-the-air television constituted an unauthorized public performance of those copyrighted works. In response, Aereo argued that because the content and the timing of the transmissions made using its equipment were controlled by its users, those transmissions were not performances by Aereo but only transmissions by its users. Aereo also argued that even if those transmissions were performed by Aereo, the transmissions were only private performances, not public performances. The preliminary injunction motion did not seek to enjoin Aereo's record-and-watch-later functionality, only Aereo's watch-in-real-time functionality.

The Supreme Court concluded 6-3 that the transmissions were performances by Aereo and that those performances were public. Writing for the majority, Justice Breyer observed that Aereo's activities "are substantially similar" to those of the cable companies in the *Fortnightly* and *Teleprompter* cases and then relied heavily on the fact that one of the purposes of the 1976 Copyright Act was to overrule those cases.

Does Aereo Transmit/Perform?

On the question of whether the transmissions in question were by Aereo (as opposed to transmissions by its customers), the Court found it significant that "Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes" and that, like the cable companies in *Fortnightly* and *Teleprompter*, Aereo's system "receives programs that have been released to the public and carries them by private channels to additional viewers." The Court then addressed the difference between Aereo's system and those involved in *Fortnightly* and*Teleprompter*. Whereas the systems in *Fortnightly* and *Teleprompter* "transmitted constantly" and "sent continuous programming to each subscriber's television set," Aereo's system "remains inert until a subscriber indicates that she wants to watch a program." However, the Court pointed out that in *both* systems, the user does not *receive* the transmission until the user takes some action. As such, the Court concluded that the only distinction between the two systems was insufficient because it "means nothing to the subscriber." Nevertheless, the Court was quick to point out that "[i]n other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act." The Court counseled that although the history of cable broadcast transmissions that led to the enactment of the 1976 Copyright Act informed the Court's conclusion that it is Aereo that "performs" in this case, that history "does not determine whether different kinds of providers in different contexts also perform."

Are Aereo's Transmissions/Performances to the Public?

On the question of whether the transmissions in question were transmissions "to the public," Aereo argued that they were not because each of the transmissions "is capable of being received by one and only one subscriber." Once again the Court relied heavily on the history of the 1976 Copyright Act and its purpose to overrule *Fortnightly* and*Teleprompter*. Specifically, the Court noted that the differences between (a) multiple transmissions, each to a single party or (b) one transmission that reaches multiple parties, are differences that "concern the behind-the-scenes way in which Aereo delivers television programming to its

viewers' screens" and "do not render Aereo's commercial objective any different from that of cable companies" or "significantly alter the viewing experience of Aereo's subscribers." The Court concluded that "Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies."

The Court found that the text of the Transmit Clause effectuates this intent. Aereo had argued that the Transmit Clause required a public transmission to be a single transmission to multiple parties because the singular noun "a performance" follows the words "to transmit." However, the Court provided examples of situations in which someone could transmit a single performance to multiple parties via multiple transmissions. And the Court reasoned that by allowing transmission "at different times," the Transmit Clause rebutted Aereo's argument: "Were the words 'to transmit…a performance' limited to a single act of communication, members of the public could not receive the performance communicated 'at different times.'" The Court concluded: "[W]hen 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." Therefore, "when Aereo streams the same television program to multiple subscribers, it 'transmit[s]…a performance' to all of them." And "the subscribers to whom Aereo transmits television programs constitute 'the public.'"

After providing this conclusion, the Court once again hastened to distinguish Aereo's situation from others involving ownership of, possession of, or a prior relationship to the works being transmitted:

"Neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute 'the public' often depends upon their relationship to the underlying work. When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars 'to the public.' We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cards to the public, for it sells cars to

individuals who lack a pre-existing relationship to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to 'the public,' where as entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform."

Justice Scalia's Dissent

Justice Scalia authored a dissent, joined by Justices Thomas and Alito. In the dissent's view, it is Aereo's customers that perform, not Aereo, because it is Aereo's customers that control the content and the timing of the transmissions from Aereo's equipment to the customers' equipment. As Justice Scalia emphasized, "Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it." The dissent notes that the owner of a copy shop does not "copy" copyrighted works when a user comes into the shop with a particular copyrighted work and uses the shop's equipment to make a copy of it. Although the dissent concedes that Aereo's operation of that system "is a volitional act and a but-for cause of the resulting performances," it reasons that "as in the case of the copy shop, that degree of involvement is not enough for direct liability." The dissent then emphasizes that even though Aereo does not perform and is therefore not a direct infringer, it might be secondarily liable as an indirect infringer.

The dissent then takes aim at the majority's opinion. First, it objects to the majority's reliance on the legislative history of the 1976 Copyright Act to establish that the 1976 Copyright Act was intended to overrule *Fortnightly* and*Teleprompter*. Second, it observes that there are differences between the cable companies in those cases and Aereo. Whereas the former "captured the full range of broadcast signals and forwarded them to all subscribers at all times," Aereo "transmits only specific programs selected by the user, at specific times selected by the user." To the dissent, this distinction should have made the difference, but according to the dissent the majority "blithely concludes" that this distinction does not make a difference. Third, the dissent complains that the majority "greatly disrupts settled jurisprudence" by ignoring a "bright-line test of volitional conduct *directed at the copyrighted work*." This seems to be the key distinction between the majority and the

dissent. The dissent would have required volitional conduct on a program-by-program basis, whereas the majority was satisfied with volitional conduct on a more general basis.