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Aereo's Internet-Based Television Streaming Services May Be Wizardry, But the Supreme Court is in No Mood for Magic

By Jessica A. Ekhoff

> "DESCRIBING ITS INTERNET-BASED TELEVISION STREAMING SERVICES, TECH START-UP AEREO ONCE PROCLAIMED, 'IT'S NOT MAGIC. IT'S WIZARDRY.'"

Describing its Internet-based television streaming services, tech start-up Aereo once proclaimed, "It's not magic. It's wizardry."[1] In its 6-3 decision on June 25th the Supreme Court disagreed, or at the very least, adopted a staunchly anti-wizardry stance.[2]

Justice Breyer, writing for the majority in *American Broadcasting Cos. v. Aereo, Inc.*, characterized the issue before the Court as whether "Aereo, Inc., infringes this exclusive right [of public performance under §106(4) of the Copyright Act] by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over air."[3] Despite Aereo's self-description as a mere equipment supplier doing no "performing" of its own, the Court held in the affirmative.

The Court analyzed the issue in two parts: whether Aereo "performed" under the Copyright Act, and if so, whether the performance was "public."

In concluding that Aereo did, in fact, perform under the Copyright Act, the majority of the Court turned to the 1976 amendments to the Act, which were adopted, in large part, to bring community antenna television, or CATV—the precursor to cable television—within the scope of the Act. CATV functioned by placing antennas on hills above cities, then using coaxial cables to carry the television signals received by the antennas into subscribers' homes. CATV did not select which programs to carry, but rather served as a conduit for the transmission and amplification of television signals. Before the 1976 amendments, Supreme Court precedent considered CATV to be a passive equipment supplier that did not "perform" under the Act.[4] After the amendments, to "perform" an audiovisual work such as a television program meant "to show its images in any sequence or to make the sounds accompanying it audible."[5]

1. https://www.aereo.com/about on June 25, 2014. The site has since been updated.
2. http://www.supremecourt.gov/opinions/13pdf/13-461_l537.pdf
3. *American Broadcasting Cos. v. Aereo, Inc.*, No. 13-461, slip op. at 1, 573 U.S. __ (2014).
4. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).
5. 17 U.S.C. § 101.

CATV thus "performed" the shows it transmitted because it both showed the television programs' images to its subscribers, and made the accompanying sounds audible. Over a strong dissent authored by Justice Scalia[6], the majority found that, because its services were so similar to those once offered by CATV, Aereo also "performed" under the post-1976 definition of the term.[7]

Having determined that Aereo's services constitute a performance under the Copyright Act, the Court next turned to the issue of whether those performances are public. Aereo argued its services do not constitute public performance because whenever a subscriber selects a program to watch, Aereo places a unique copy of the show in that subscriber's folder on Aereo's hard drive, which no one other than that subscriber can view. If another subscriber wants to watch the same show, she will receive her own copy of the program in her own folder from Aereo. The Court dismissed this argument, finding the "technological difference" inconsequential in light of Congress's clear intent to bring anything analogous to CATV within the scope of the Copyright Act's requirements. Under the post-1976 Act, an entity performs a copyrighted work publicly any time it "transmits" a performance. A performance is "transmitted" when it is communicated by any device or process beyond the place from which it is sent, whether the recipients receive the transmission at the same time and place, or at different times and places.[8] Aereo therefore publicly performs a copyrighted television program each time its system sends a copy of that program to a subscriber's personal Aereo folder.

The majority characterized its holding as a "limited" one, and was careful to emphasize that its decision does not apply to other new technologies, such as cloud-based storage and remote storage DVRs. But with a slew of *amici curiae* predicting the decision could have a catastrophic impact on the tech industry, and Fox Broadcasting announcing it will rely on the Aereo decision in its similar lawsuit against DISH Network[9], there are surely some who will take no comfort from the Court's assurances. Aereo, unfortunately, may not have a spell to resurrect itself.[10] ■

"BUT WITH A SLEW OF *AMICI CURIAE* PREDICTING THE DECISION COULD HAVE A CATASTROPHIC IMPACT ON THE TECH INDUSTRY, AND FOX BROADCASTING ANNOUNCING IT WILL RELY ON THE AEREO DECISION IN ITS SIMILAR LAWSUIT AGAINST DISH NETWORK, THERE ARE SURELY SOME WHO WILL TAKE NO COMFORT FROM THE COURT'S ASSURANCES."

6. Justice Scalia argues that Aereo does not "perform" because it is the subscriber, rather than Aereo, who selects the program she wishes to watch, which in turn activates the individual antennae Aereo has assigned to her for the purpose of viewing that program. This means it is the subscriber who is doing the performing, since she is the one rousing Aereo's antennae from dormancy and calling up a specific program to watch. Justice Scalia went on to note that although he disagrees with the majority's interpretation of "perform," he agrees that Aereo's activities ought not to be allowed, either because Aereo is secondarily liable for its subscribers' infringement of the Networks' performance rights, or because it is directly liable for violating the Networks' reproduction rights. If future courts fail to find Aereo liable under either of those theories, Justice Scalia advocates relying on Congress to close the loophole. Slip Op. at 12.
7. Slip Op. at 8.
8. 17 U.S.C. § 101.
9. http://www.theguardian.com/media/2014/jun/26/fox-aereo-ruling-against-dish-streaming
10. On its website, Aereo states that it has "decided to pause our operations temporarily as we consult with the court and map out our next steps." https://aereo.com/about

*firm*UPDATE

APPOINTMENTS

Seth I. Appel

Seth has been appointed to the Editorial Board of the *Journal of the Copyright Society of the U.S.A.*

Jessica A. Ekhoff

Jessica was appointed to the Young Professionals Board of the Chicago Bar Foundation.

Jonathan S. Jennings

Jonathan has been appointed to the 2014 Annual Meeting Program Committee for the Intellectual Property Owners Association's Annual Meeting in Vancouver, Canada, September 7-9.

Robert W. Sacoff

Bob will be a speaker in the Workshop on "Use of Survey Evidence in Trademark Cases" at the AIPPI World Intellectual Property Congress in Toronto on September 16.

PRESENTATIONS

Phillip Barengolts

Phil was a speaker at the Chicago Bar Association's Media & Entertainment Law Seminar on June 17. Phil will also be a panelist on the "Recent Hot Topics at the TTAB" program at the 2014 ABA Annual Meeting in Boston.

Jonathan S. Jennings

Jonathan will moderate a panel discussion entitled "#UnauthorizedTweets! The Intersection of Social Media, the Rights of Publicity, Privacy and Intellectual Property" at the IPO Annual Meeting in Vancouver, Canada on Monday, September 8.

Jonathan will speak on "The Interplay between Trade Marks and Identity Rights" at the Pharmaceutical Trade Marks Group (PTMG) 89th Conference in Chicago on Thursday, October 9.

Janet A. Marvel

Janet gave a presentation on "The Intersection of Trade Dress, Design Patent and Copyright, Trade Dress Functionality" at the Chicago Bar Association on April 11.

Robert W. Sacoff

Bob led an International Franchise Association Business Solution Roundtable on "Fair Use of Trademarks and Creative Works in Advertising" on May 6, at the IFA 47th Annual Legal Symposium in Chicago.

PUBLICATIONS

Seth I. Appel

Seth's case note, *Raging Bull Copyright Infringement Claim is Not Knocked-Out by Laches Defense, U.S. Supreme Court Holds*, was published in the June edition of *AIPPI e-News*.

Phillip Barengolts

Phil's case note, *Cancellation Petitioner Prevails upon Misrepresentation Claim Despite Lack of U.S. Trademark Use or Registration: Bayer v. Belmora*, was published in the June edition of *AIPPI e-News*.

Uli Widmaier

Uli authored two case notes that were published in the April edition of *AIPPI e-News: Sherlock Holmes and the Peculiar Case of the Partial Copyright,* and *U.S. Supreme Court Creates New Standard for False Advertising Claims.*

NOTEWORTHY

Northwestern University School of Law

Jonathan S. Jennings has been appointed an Adjunct Professor at Northwestern University School of Law and will teach the course on Trademarks and Unfair Competition Law. Jonathan currently is teaching an online course at The John Marshall Law School on Right of Publicity Law.

Chambers USA-2014

Pattishall McAuliffe has been recognized as attracting "the respect of the business community for its prowess in trademark matters." Chambers also notes that Pattishall "[m]aintains a particularly good profile for litigation."

"**David Hilliard** is everything an IP attorney should be. He is a respected arbitrator, mediator and expert witness."

PTMG Conference

Pattishall McAuliffe is proud to sponsor the Pharmaceutical Trade Marks Group (PTMG) 89th Conference in Chicago, October 8-11.

firm HONORS & AWARDS

American Bar Foundation

Thad Chaloemtiarana has been nominated by his peers to be a Fellow of the American Bar Foundation, an honor limited to less than one percent of the lawyers admitted to practice in the United States. Thad joins the other Pattishall lawyers who are ABF Fellows: **David C. Hilliard**, **Jonathan S. Jennings**, **Robert M. Newbury**, **Robert W. Sacoff** and **Joseph N. Welch II**.

2014 IP Stars, *Managing Intellectual Property* Magazine

Pattishall McAuliffe has been nationally recognized in Trademark Prosecution, Trademark Contentious and Copyright, and "Highly Recommended" in Illinois.

Brett A. August, **Bradley L. Cohn**, **David C. Hilliard**, **Jonathan S. Jennings** and **Joseph N. Welch II** have been named as "IP Stars."

Who's Who of Trademark Lawyers 2014 and *Who's Who Legal 2015*

David C. Hilliard, **Robert W. Sacoff**, **Belinda J. Scrimenti** and **Joseph N. Welch II** have been recognized as being among the world's leading trademark lawyers.

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