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

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by Jessica Ekhoff, Associate

Describing its Internet-based television streaming services, tech start-up Aereo proclaims, "It's not magic. It's wizardry."[1] In yesterday's 6-3 decision 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

[1] https://www.aereo.com/about

[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).

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] 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.

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[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.

[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.

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, there are surely some who will take no comfort from the Court's assurances. Aereo, unfortunately, may not have a spell to resurrect itself.

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