Supreme Court Affirms Copyright Law's "Public Performance" Right, Upholds Broadcasters' Challenge to Aereo

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On June 25, 2014, the Supreme Court ruled, in a strongly worded 6-3 decision authored by Justice Stephen Breyer, that startup Aereo's Internet streaming service violates the 1976 Copyright Act. In particular, Aereo's service, which enables its subscribers to watch television programs over the Internet at about the same time as they are broadcast over the air, violates the exclusive right of the copyright owner to "perform the copyrighted work publicly," 17 U.S.C. § 106(4). In so ruling, the opinion reaffirms the application of the Copyright Act's "Transmit Clause," 17 U.S.C. § 101, to processes such as Aereo's. The Transmit Clause defines the exclusive public performance right as including the right to "transmit or otherwise communicate a performance . . . to the public . . . whether the members of the public capable of receiving the performance receive it in the same place or in different places or at the same time or at different times."

Aereo had sought to convince the court that it did not "perform," and that any performance by the user was not public. Rejecting that argument, the Court instead followed in the path of prior "new technology" cases such as *Columbia Pictures Industries, Inc. v. Redd Horne*, 749 F.2d 154 (3d Cir. 1984), which had applied the Transmit Clause to video performances received one-on-one. Here, the Court did not follow the contrary 2008 ruling of the Second U.S. Circuit Court of Appeals in *Cartoon Network LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) which had held that Cablevision's remote DVR ("RS-DVR"), which allowed a customer to play back copies of programming saved on Cablevision's RS-DVR on request, did not create an infringing public

performance. The Supreme Court's carefully crafted ruling in *Aereo* may call *Cartoon Network*'s holding into question.

Although the ruling was carefully limited so as to avoid confronting as yet untested technologies, of great concern to copyright holders and technology creators is the impact of this important decision on those other technologies on which this opinion does not comment.

Background

Aereo offers its subscribers broadcast television programming streamed over the Internet at virtually the same time as over-the-air broadcasts are taking place. There is no question that most of the works being so distributed are protected by copyright. Aereo's system is complex, consisting of servers, transcoders, and tiny antennae. The subscriber visits Aereo's website and selects the program she wishes to view. An Aereo server then selects an antenna which is dedicated exclusively to that subscriber's use for the duration of the program. The antenna begins to receive the telecast but rather than transmitting it directly to the subscriber, records it in a folder specific to that subscriber only. In other words, an individual personal copy is created. Each subscriber receives data from her own personal copy and no subscriber's folder is transmitted to another subscriber.

Relying on its prior decision in *Cartoon Network*, the Court of Appeals for the Second Circuit had ruled below *In Re NET Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) that Aereo's streaming service did not constitute a "public performance" under the Transmit Clause because the transmission was essentially private, not public. Although this controversial ruling was consistent with *Cartoon Network*, in the broadcasters' view, it opened the door to further exploitation of the "'loophole' in the law" (dissent by Justice Scalia, Slip Op. at 12), a concern both the majority and the dissenters voiced.

Discussion

The majority here rejected Aereo's argument that Aereo subscribers, not Aereo itself, are the individual parties who "transmit" the performance within the meaning of the Copyright Act. The majority relied in large part on the history of the 1976 amendments to the Copyright Act which specifically sought to bring the activities of cable system providers within the scope of the Copyright Act. At that time, cable providers had asserted a similar argument that their technology merely "enhances" the viewer's ability to tune in to television broadcasters' signals by providing a well-located antenna and efficient connection to the viewer's television set. In particular, the majority observed that the 1976 Transmit Clause provided that when an entity "transmit[s]" a performance to the public by "communicat[ing] it by a device or process whereby images or sounds are received beyond the place from which they are sent," such a performance falls within the scope of the Copyright Act. Observing Aereo's "overwhelming likeness to the cable companies targeted by the 1976 amendments," and rejecting its argument that its transmissions were not "to the public" because it created a separate copy to transmit to each subscriber, the majority held that Aereo's activities likewise

constituted a “public performance” within the scope of the Copyright Act.

This interpretation is consistent with several decisions that preceded *Cartoon Network* involving what at that time was evolving technology. A similar argument that performances received by individuals in separate spaces one by one were “private” had been unsuccessfully used in *Redd Horne*. There, a video store provided isolated “viewing booths” for individual customers to play cassettes (“new technology” at the time). Ruling for the motion picture distributors and citing the legislative history, the Third Circuit wrote that: Thus, the transmissions of a performance to members of the public, even in private settings such as hotel rooms or Maxwell’s viewing rooms, constitutes a public performance. As the statutory language and legislative history clearly indicate, the fact than members of the public view the performance at different times is of no legal consequence.

Redd Horne, 749 F.2d at 159.

Implications

The majority here roundly rejected Aereo’s claim that a decision in favor of the broadcasters would impose liabilities on other nascent technologies. It specifically rejected claims that “cloud” services involving lawfully acquired copyrighted material -- which Aereo was not providing -- would be impaired by the holding. It declined to opine further, noting that: We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. 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.” And we note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from the Congress.

Slip Op. at 17.

In sum, the majority sought to diminish fears that cloud computing and other services would be broadly impacted by the ruling in *Aereo* – fears that are nonetheless being expressed, but which Justice Breyer sought to allay. Nevertheless, this opinion undoubtedly will not stop such comments or discourage technology entrepreneurs from trying to find new means of delivery, including those that seek to use “loopholes” in the law as well as those that fully comply with it.

If you have questions about how this ruling may affect your business, contact your Lathrop Gage attorney or one of the attorneys listed above.