

CLIENT MEMORANDUM

The Supreme Court Holds the Aereo Service Violates a Copyright Holder's Exclusive Right to Perform a Copyrighted Work Publicly under § 101

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AUTHORS

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On June 25, 2014, the Supreme Court issued its opinion in *American Broadcasting Cos. v. Aereo, Inc.*, holding that the technological manner in which Aereo provides its service is insufficient to avoid liability for direct copyright infringement, as Aereo's service is essentially akin to community antenna television (CATV) systems. *American Broadcasting Cos., Inc. Et Al. v. Aereo, Inc.*, ___ U.S. ___ (2014), No. 13-461, 2014 WL 2864485 (June 25, 2014).

The Court reached its decision by interpreting the Transmit Clause to apply not only to cable companies, but also to "their equivalents," shooting down Aereo's attempt to use new technology to attempt to design around copyright law. Justice Scalia's dissent referred to this majority rule as the "cable-TV-lookalike rule" and criticized the Court's deviation from the traditional volitional conduct test for direct infringement as blurring the line between direct and secondary infringement.

The decision is a clear victory for content holders over technology, and may have broad implications for the reach of copyright law over streaming internet technology in many different contexts. While the majority opinion does not provide guidance as to how it should apply to other industries and technologies, the decision would find most, if not all, internet streaming activity to be subject to liability for copyright infringement.

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Background

Aereo launched on March 14, 2012, and ever since has been offering free, over-the-air television to its subscribers, streaming directly to a subscriber’s internet-connected device for as little as eight dollars a month. Since its inception, Aereo has boasted about its clever antenna design, specifically created to comply with copyright laws. Because of this design, Aereo has expressly disavowed any obligation to pay license fees to the copyright owners of the programming offered through its service.

Aereo’s system is made up of thousands of dime-sized antennas. When a subscriber selects a show for viewing, Aereo’s servers communicate to a single antenna, which it designates solely for that individual subscriber’s use at that point in time. An Aereo transcoder then translates the broadcast signals received into data that is streamed to that particular subscriber over the internet. A subscriber-specific, personal copy of the data is saved onto Aereo’s servers. Aereo has argued that this subscriber-specific, personal technological construct, together with the transmission of free, over-the-air television, is what makes the Aereo service legal under copyright laws.

In July 2012, the Southern District of New York denied the broadcasters’ motion for a preliminary injunction against Aereo, as it found the plaintiffs were unlikely to prevail on the merits given the Second Circuit Decision in *Cablevision. Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (citing *Cartoon Network, L.P. v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)). The Second Circuit affirmed the district court’s decision in April 2013, finding the Aereo system indistinguishable from the system at issue in *Cablevision. WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (J. Chin, dissenting). The Second Circuit thereafter denied plaintiffs’ petition for rehearing *en banc. WNET v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013) (J. Chin, dissenting). Plaintiffs then appealed the decision to the Supreme Court.

Aereo’s Transmissions Constitute a “Performance”

A copyright owner “has the exclusive right[] to . . . perform the copyrighted work publicly.” 17 U.S.C. § 106. To *perform* a work, means “to transmit . . . the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.

In finding the Aereo service to constitute a performance under the Copyright Act, the Supreme Court focused on Congress’s intent when amending the Copyright Act in 1976 – to overturn Supreme Court precedent that CATV systems, the predecessors to the cable systems of today, fall outside the scope of the then-enacted Copyright Act. *American Broadcasting Cos. v. Aereo, Inc.*, ___ U.S. ___ (2014), No. 13-461, 2014 WL 2864485 (June 25, 2014). The Court found that “Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.” *Id.* at *8. In dissent, Justice Scalia noted that the Aereo system transmits only content selected by the subscriber and in response to a request from the subscriber, like “a copy shop that provides its patrons with a library card.” *Id.* at *16. The Court’s majority opinion refused to allow such an “invisible [difference] . . . [to] transform a system that is for all practical

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purposes a traditional cable system into” a non-infringing system, in stark contrast to Congress’s main purposes in amending the Copyright Act. *Id.* at *8.

Aereo Performs Copyrighted Works “Publicly”

After determining that the Aereo Service “performs” under the Act, the Supreme Court then discussed whether such performance is “to the public” under the Transmit Clause. 17 U.S.C. § 101.

Finding that Aereo transmits a performance each time a subscriber watches a program, the Court focused its analysis on whether such transmission is “to the public.” The Court recognized that an Aereo subscriber receives a transmission from a personal copy of the selected program streamed to that subscriber and no one else. *Aereo*, 2014 WL 2864485, at *10. In finding this to be a transmission “to the public,” the Court again focused on the Act’s purpose, and found that “the behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens . . . [does] not render Aereo’s commercial objective any different from that of cable companies. Nor [does it] significantly alter the viewing experience of Aereo’s subscribers.” *Id.* The Court relied on the fact that the Aereo system communicates different copies of “the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other.” *Id.* at *11. The Court also recognized the far-reaching effect a decision in Aereo’s favor could have, as traditional cable systems could then also circumvent copyright laws by simply altering their technologies, and this would go against Congress’s purpose in amending the Copyright Act. *See id.*

If you have any questions regarding this memorandum, please contact Eugene Chang (212 728-8988, echang@willkie.com), Danielle Clout (212 728-8847, dclout@willkie.com) or the Willkie attorney with whom you regularly work.

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