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US Supreme Court Issues Important Opinion on Copyright Act in *ABC v. Aereo* – Right of Public Performance – TV Broadcasting

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Aereo – Right of Public Performance Under the Copyright Act

American Broadcasting Cos., Inc., et al. v. Aereo, Inc., f/k/a Bamboom Labs, Inc.

Aereo – Right of Public Performance Under the Copyright Act

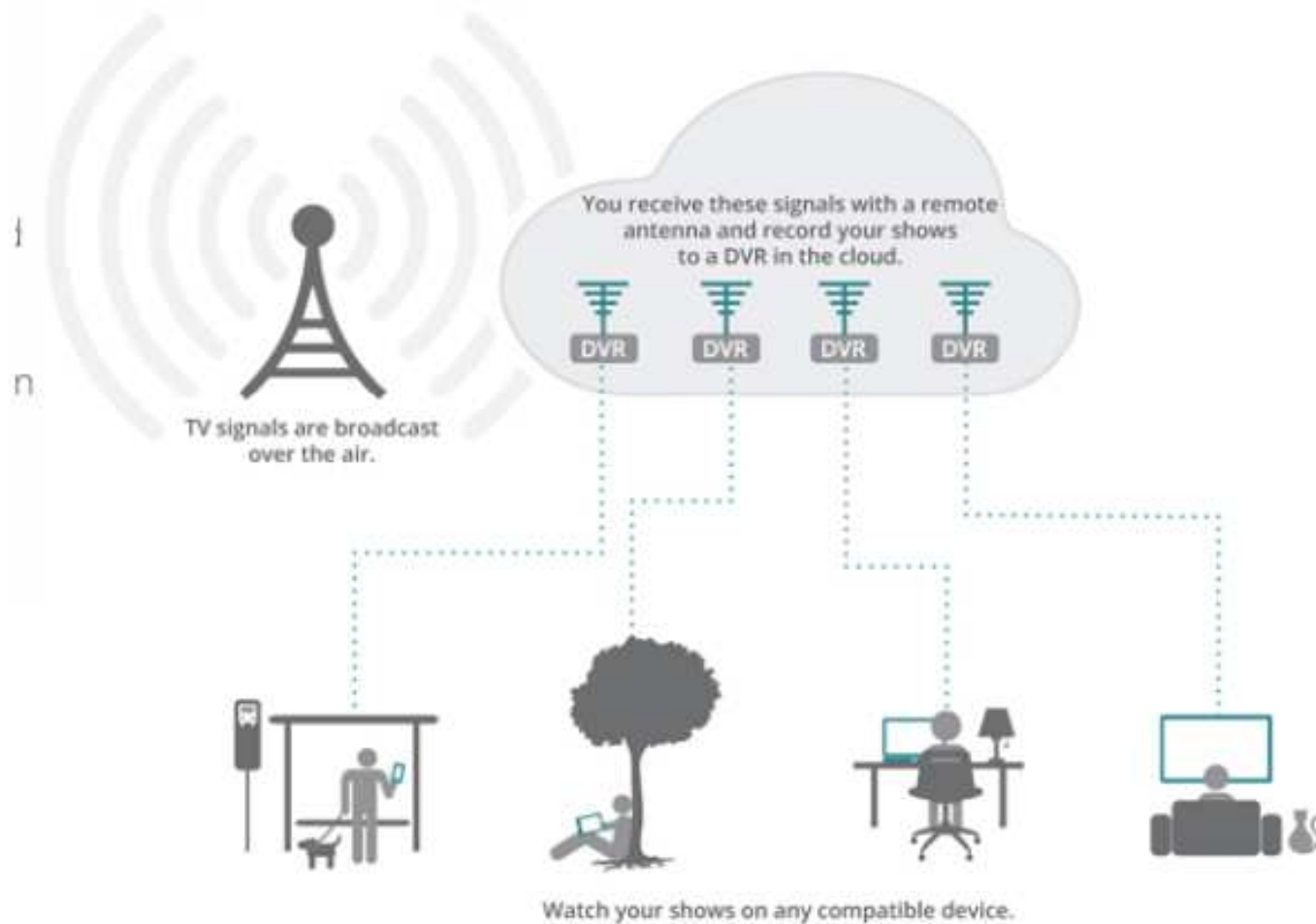
- Section 106(4): States that a copyright holder possesses the exclusive right “to perform the copyrighted work publicly.”
- Section 101: Defines the exclusive right as including the right to “transmit or otherwise communicate a performance...of the [copyrighted] work ... to the public, by means of any 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.”

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Background:

- For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet.
- When a subscriber logs on to Aereo's website and selects a program to watch, a specific Aereo antenna is assigned to that subscriber and tuned to his or her desired program, which is then captured and streamed to the user over the Internet.
- Aereo subscribers can use the service to watch live television or schedule programs to be recorded for later viewing.
- Recorded programs are stored in subscriber-specific folders on Aereo's hard drive.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)



Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Second Circuit :

- *Cablevision* decision held that playback transmissions of copies from centrally located digital video recorders were not performances “to the public.”
- Following *Cablevision*, the Second Circuit held that Aereo’s transmission of unique copies of broadcast television programs created at its users’ requests were not “public performances” of copyrighted works.
- Aereo’s system held little different than a transmission from an antenna on a consumer’s roof-both were private transmissions received by only one individual.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Supreme Court (Parties' and US Govt positions):

- **ABC:**

- Aereo transmits performances to thousands of paying strangers, who all “Watch live TV” programs at the same time. This is a textbook public performance.
- Congress enacted the transmit clause to overturn Supreme Court decisions holding that a commercial retransmission system is not engaged in public performance.
- Ruling for Aereo threatens future of over-the-air television.

- **U.S. Gov't:**

- Although each transmission is ultimately sent only to a single individual, those transmissions are available to any member of the public who is willing to pay. Thus, the transmissions are made “to the public” within the meaning of the Transmit Clause.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Supreme Court (Parties' and US Govt positions):
 - **Aereo:**
 - A transmission is a public performance only if it is available “to the public” and Aereo’s equipment facilities are only “one-to-one” transmissions.
 - Aereo’s users-not Aereo-create, play, and transmit their recordings of broadcast content and therefore “perform” within the meaning of the Copyright Act.
 - Because petitioners’ free, over-the-air broadcasts are supposed to be accessible to the entire public, they are not entitled to royalties when a consumer uses an antenna and DVR to access the content carried by their signals.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

– Impact on Cloud Computing Services (*Aereo* and *Amici*)

- Same argument about aggregating individual downloads could be made about-for example-multiple individuals' downloads of Star Wars or a popular song or book or video.
- Cloud services providers often aren't aware whether their customers have licenses for the information/music/movies/videos/etc. that is being stored-they don't monitor content.
- Risk of liability for cloud providers-adverse impact on new technology.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Supreme Court (opinion):

- Aereo **performs** petitioners' works **publicly** within the meaning of the Transmit Clause.
- Aereo's transmissions are performances. It does not supply equipment that allows others to do so.
 - One of Congress's primary purposes in amending the Copyright Act in 1976 was to overturn this Court's holdings that the activities of CATV providers fell outside the Act's scope.
 - §101 states to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." Thus, both broadcaster and viewer perform.
 - Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Copyright Act to reach.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Supreme Court (opinion):

- Aereo performs petitioners' works “publicly.”

- The fact that Aereo transmits user-specific copies, using individually assigned antennas, is a behind-the-scenes technological difference that does not distinguish Aereo's system from cable systems, which do perform publicly.
- Under the Transmit Clause, an entity may transmit a performance through multiple transmissions, where the performance is of the same work.
- Aereo's subscribers constitute “the public” under the Act. Aereo communicates the same contemporaneously perceptible images and sounds to subscribers who are unrelated and unknown to each other, and who are not receiving such images and sounds in their capacities as owners of the underlying works.

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Supreme Court (opinion):
 - Court emphasized that the ruling in *Aereo* is a “limited holding.”
 - Does not impose copyright liability on other services, such as the “remote storage of content” by cloud network services providers.
 - Like cable subscribers, *Aereo*’s customers did not “receive performances in their capacities as owners or possessors of the underlying works.”

Aereo – Right of Public Performance Under the Copyright Act (Cont'd)

- Aereo's Response to Decision

- Aereo has paused operations and users will be refunded their last paid month.
- Aereo's CEO, Chet Kanojia, issued a statement saying, "The spectrum that the broadcasters use to transmit over the air programming belongs to the American Public and we believe you should have a right to access that live programming whether your antenna sits on the roof of your home, on top of your television or in the cloud. ... [o]ur journey is far from done."

Aereo – Practice Pointers and Policy Implications

- What about other video-related services?
 - DISH litigation
 - Remote DVR
- *Cablevision* called into question?
 - In *Cablevision*, the Second Circuit held:
 - Copies produced by the DVR system at issue were “made” by the customer, and Cablevision was merely an equipment provider.
 - Because each DVR playback transmission is made to a single subscriber, such transmissions are not performance “to the public.”

Aereo – Practice Pointers and Policy Implications (Cont'd)

- Has the Court protected cloud network computing services providers?
 - “[A]n entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to ‘the public.’”
 - That is what service providers generally do when they enable their customers to access remotely stored works.
 - Court drew contrast with “an entity like Aereo that transmits to large numbers of paying subscribers ***who lack any prior relationship to the works.***”
- What about other future innovators?

Aereo – Practice Pointers and Policy Implications

- What happens to *Aereo*?
- Reinforces protection of content
- Narrowly tailored to avoid chilling future innovation
- Open invitation for a legislative fix
- What about a regulatory fix?
- Effect on MVPD-broadcaster retransmission negotiations

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Questions?

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