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Supreme Court takes on copyright, technology and broadcast clash

INSIDE IP LAW

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We Americans love to watch television. The Nielsen Co. reports that the average American watches about five hours of television a day.

This might not be such a good thing in light of another report, from a group of Australian researchers, that every hour of television we watch shortens our life expectancy by 22 minutes. But that's not much of a deterrent because, after all, is a long life without "Two and a Half Men" really worth living?

We love television so much that the way we watch it is changing. In the old days, we had to keep the Friday night calendar clear and rush home from the office to make sure we didn't miss "The Dukes of Hazzard," followed by "Miami Vice." A VCR would help, but only if you knew how to program it.

Now we demand to watch our programs when we want, where we want and on whatever device we happen to have with us. If I want to watch Sunday night's episode of "Downton Abbey" on my iPad while I ride the train on Monday morning, then I shall do so.

We can thank services like Hulu, Netflix and Slingbox for this ubiquitous connection to television. One of the popular new services is Aereo, a subscription service that allows users to watch broadcast television programs over the Internet, either at the time of the broadcast (e.g., I'm at the opera on Sunday night watching "Downton" on my phone to see whose heart Lady Mary Crawley will break) or later by recording the show.

Aereo's service, however, is controversial. Unlike Hulu and others, Aereo does not pay a license fee to the broadcasters for the right to retransmit the programs. In a technological tour de force, Aereo has developed a new mode of transmitting programs that, it says, does not require a license.

Aereo's deployment of this system has landed it in federal court around the country facing copyright infringement claims.

It is for this reason that we can expect that within the next six months, the U.S. Supreme Court will have a lot to say about how we view television in the future. The court has agreed to hear a case now known as *ABC, Inc. v. Aereo, Inc.*, an appeal from *WNET, Thirteen v. Aereo, Inc.* (2d. Cir. 2013).

At the risk of losing my audience, whether digital or print, I will attempt to explain the copyright principles that govern this dispute and the technology employed by Aereo, which, it contends, allows it to retransmit the broadcast signals without payment of license fees.

> *"The broadcasters call it theft, saying Aereo is doing essentially the same thing as cable television but is not paying license fees."*

Copyright law gives a content owner the exclusive right to publicly perform a copyrighted work. Anyone else wishing to publicly perform the work must obtain a license to do so. Public performance is defined broadly in the Copyright Act. It includes not only performing a work at a place open to the public, but also includes the transmission of a work (such as a television show) to the public.

This latter mode of performance was included in the act to make it clear that when cable companies retransmit a broadcast television program (as when Comcast retransmits ABC's "Dancing With the Stars" to millions of viewers on cable television), it is a public performance and Comcast must pay a license fee to ABC.

But the copyright laws do not prohibit anyone from making a private performance of a copyrighted work. I can sing the Beastie Boys' song "You Gotta Fight for the Right to Party" in my car or in my shower without paying any license fees.

Aereo seeks to build its empire upon this principle that private performances are not regulated by copyright.

It has developed a technology whereby it picks up over-the-air broadcast television signals not on a single large antenna, but on thousands of tiny, dime-sized antennas in one of the geographic areas where Aereo is available, such as New York City.

When an Aereo user wants to watch or record the Super Bowl, the user is assigned to one of the thousands of Aereo antennas in the area, and the show is streamed to or recorded by the user.

This, Aereo says, is not a public performance, but rather a private performance. The content is transmitted through a single antenna to a single user. According to Aereo, if 10,000 of its users choose to watch the Super Bowl, there are 10,000 separate transmissions and 10,000 private performances, but no public performances.

The broadcasters call it theft, saying Aereo is doing essentially the same thing as cable television but is not paying license fees. They argue that these separate performances should be aggregated, in which case they really are being distributed to "the public," even if one by one.

In WNET, the 2nd U.S. Circuit Court of Appeals agreed with Aereo based on the precedent of *Cartoon Network v. CSC Holding* (2nd Cir. 2008). *Cartoon Network* found transmission of a program to a cable customer's DVR (digital video recorder) was not a public performance.

U.S. District Judge Denny Chin dissented in *WNET*, calling Aereo's technology platform "a sham." "The system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." Several lower court decisions have ruled against Aereo or similar service providers on this issue. *Community Television of Utah v. Aereo* (2014); *Fox v. Filmon X LLC* (2013); *Fox v. Barry Driller* (2012).

What can we expect from the Supreme Court in picking sides between the interests of content providers and content

consumers? Both Aereo and the broadcasters claim that the plain language in the act supports their respective position as to whether Aereo's transmissions are to the "public."

But whether the statutory language applies to Aereo's device is far from plain.

It might come down to how the justices view emerging technologies. Justice Stephen G. Breyer is favorably disposed to giving a wide berth to new technologies in copyright cases. In a concurring opinion in *MGM v. Grokster* case (2005), involving peer-to-peer music downloading, Breyer wrote that "the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently."

Justice Ruth Bader Ginsburg, joined by the Chief Justice William Rehnquist and Justice Anthony M. Kennedy, in a separate concurring opinion in *Grokster*, seemed less inclined to allow the "new technology" shibboleth to defeat a claim of infringement.

It might just come down to common sense. I don't foresee the Supreme Court embracing Aereo's clever system architecture as a justification to circumvent the public performance right of copyright owners.

The effect of Aereo's system is very similar to the transmissions made by cable television companies, for which a license is required. Common sense should not be overshadowed by technical linguistic parsing of ambiguous statutory language. If 10,000 transmissions of the Super Bowl are taking place, it hardly seems to be a private performance.

Internet television will not disappear if Aereo loses. I'll still be able to achieve my requisite five hours and watch "Downton Abbey" at the opera, but it will have to be from a licensed provider.

The price (and my obsession level) will determine whether I will watch it then or wait until I get home to watch it on the DVR.