

Chicago Daily Law Bulletin®

Volume 160, No. 155

Is the cloud in peril internationally after the high court's *Aereo* ruling?

According to the blogosphere, the murky legal world of video streaming and cloud storage has grown darker since the U.S. Supreme Court issued its decision in *American Broadcasting Companies Inc. v. Aereo Inc.* in late June.

In a 6-3 decision, the court found that Aereo's video-streaming services qualified as an unauthorized public performance under U.S. copyright laws, even though end users were only viewing content from individual on-demand copies.

The court's failure to give weight to technological differences between Aereo's delivery system and traditional cable TV systems has created a firestorm of criticism. Many have questioned whether other technologies, such as cloud storage, will be next in line for copyright liability.

Surprisingly, such treatment also may be in full accordance with international practices.

Technological innovations always create issues regarding the application of a copyright law developed in the pre-digital era. From the early days of Napster and peer-to-peer file trading, U.S. courts have often based liability decisions on the way in which the technology at issue operated.

Thus, Napster was found to be an illegal site and facility for copyright piracy because its website was fully involved in individual copying activities. By contrast, Cablevision's DVR system was found lawful because its system only provided on-demand copies of its cable shows created at the request of individual end users.

In *Aereo*, the Supreme Court expressly rejected any special consideration for Aereo's technological innovations in providing Internet access to broadcast programming.

As opposed to traditional broadcast providers, Aereo paid no copyright license fees for the copyrighted content it provided. It used a system of websites, servers and dime-sized antennas that allowed end users to make

individual copies of selected programming for immediate streaming.

In particular, under Aereo's system, an antenna, dedicated to the individual subscriber, was tuned to the selected show. A personal copy of that show was created and stored on Aereo's server for immediate access by the end user.

Analogizing Aereo's system to a traditional local cable TV provider, the court held that Aereo was performing the streamed works publicly — a clear violation of the content owners' rights under copyright. The court rejected any effort to distinguish Aereo's liability based on its use of small dedicated antennas to deliver content after on-demand-style personal copies were made.

It found that such "technological differences ... concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies." It further found that these differences did not "significantly alter the viewing experience of Aereo's subscribers."

This emphasis on technological neutrality by the Supreme Court is fully aligned with international standards. Article 8 of the WIPO Copyright Treaty, which the United States ratified in 1999, requires signatories to provide authors "the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." (Emphasis added).

The "making available" right granted under Article 8 targets on-demand access. The technological means used to achieve such access is irrelevant under the language of the treaty.

Many countries have recognized the important role of tech-

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nological neutrality in protecting the make-available right on the Internet. In February, the Court of Justice of the European Union recognized that the "concept of communication" protected under the make-available right "must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used." *Ochranný svaz autorský pro prák dílum hudebním o.s. v. Léčbné lázně Mariánské Lázn a.s.*, Case C 35/12.

The Canadian Supreme Court similarly concluded in 2012 in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada* that consideration of the perspective of the recipient in determining liability would "produce arbitrary results." These results would incentivize copyright avoidance simply by executing distribution and communication tasks serially.

Despite U.S. ratification of the WCT 15 years ago, the term "making available" does not appear in U.S. copyright law. The congressional decision to rely on the existing definition of a public performance right to meet U.S. treaty obligations has been borne out by the court's decision in *Aereo*.

Although the court does not discuss the WCT, it does make clear that the public "need not be situated together, spatially or temporally" for Aereo's performance activities to fall within U.S. copyright prohibitions. This decision complies fully with international obligations that on-demand services, regardless of the manner in which such services are provided, be subject to copyright. It is less clear whether such obligations may bring cloud-storage services within copyright.

The Supreme Court in *Aereo* was careful to limit its decision regarding on-demand activities to the cable TV equivalents. The court specifically rejected any attempt to apply its reasoning to cloud storage and similar activities.

The justices unequivocally stated: "[W]e have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content." It further advised those worried about the application of the public performance right to cloud-storage activities that "they are ... free to seek action from Congress." Such action may be under way.

The U.S. Copyright Office has already held hearings on the desirability of including a specific make-available right and is currently drafting a report on the issue. Such reports are often the first step in new copyright legislation. For those who seek more security for their cloud services, the time is ripe to seek congressional clarification regarding the issue.

In the meantime, at least until such clarifications evolve, providers of cloud-storage services will have to await further domestic and international developments before they can be assured of their legal obligations.

— *Special thanks to Chris Saba for all her assistance throughout the years.*