

The Evolution of Digital Media and Its Inevitable Entanglement with the Rights of Copyright Owners

American Broadcasting Cos. et al. v. Aereo, Inc.

No. 12 Civ. 1540 (S.D.N.Y.) (rel. case No. 12 Civ. 1543)

These cases were filed in March 2012. Plaintiffs have moved for a preliminary injunction based upon defendant's alleged violation of their "public performance" rights in television broadcast programming. Summarized below are the parties' respective arguments concerning that copyright claim. The motion remains pending. Stay tuned.

What Is Aereo?

- Aereo is an online technology platform that enables consumers to locate their television antennas and DVRs remotely. Aereo provides technology to users who wish to watch over-the-air broadcast television programs "live" at home or on mobile devices and to record programs to watch later. Aereo currently operates only in the New York metropolitan area.
- The user activates the Aereo system by selecting a program to watch, whereupon a tiny antenna located at a facility in Brooklyn is dedicated to that user and tuned to the broadcast signal of the selected program. The user records the selected broadcast signal on a dedicated remote, cloud-based DVR for live viewing and, if the user chooses, viewing later. As with any DVR, all content, whether viewed "live" or later, is recorded to enable functions such as pause, rewind, etc. Users can stream their personal recordings to themselves from their remote DVRs.
- The system does not require a set-top box or cables, but only a standard web browser or compatible Internet-enabled mobile device.

Plaintiffs' "Public Performance" Copyright Claim

- Plaintiffs, television broadcasters who claim copyrights in the programming they broadcast, have moved for a preliminary injunction against Aereo that would prevent users from playing back content from their remote DVRs while the program is still being broadcast. On this motion, Plaintiffs allege only that Aereo infringes their exclusive right to perform those works publicly, citing the provision of the Copyright Act that proscribes

“transmit[ting] or otherwise communicat[ing] a performance or display of 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 (the “Transmit Clause”).

- At a high level, Plaintiffs assert that the Aereo platform runs afoul of:
 - o The language of the Transmit Clause;
 - o An asserted “common understanding” that transmissions over the Internet to members of the public are public performances; and
 - o An asserted “public policy imperative” of protecting over-the-air television broadcasters from “free riders.”

Aereo’s Legal Position

- The Aereo platform and technology do nothing more than enable consumers to exercise three basic, well established rights:
 - o The right to use an antenna to receive over-the-air broadcast television;
 - o The right to use a remote DVR to make a copy of a television program for personal use; and
 - o The right to play that personal copy back to oneself.
- No one disputes that a broadcaster’s right to broadcast television programming over the public airwaves is conditioned upon the public’s right to access those broadcasts.
- In its 1984 *Sony* decision, the Supreme Court held that consumers have the right to record over-the-air television broadcasts for personal use. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-56 (1984).
- In its 2008 *Cablevision* decision, the Second Circuit held that providing remote equipment to enable consumers to engage in lawful recording and personal viewing of that recording does not violate copyright law. *See Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139-40 (2d Cir. 2008).
- The only relevant issues in determining whether a transmission constitutes a public performance are:
 - o The source of the transmission; and
 - o The potential audience for that specific transmission.

- The Aereo system does not create or involve a public performance because, among other reasons, the source of the transmission is the unique copy of the program recorded by the individual user on a remote DVR hard drive, and that same unique user is the sole potential audience for that specific transmission.
- By providing a remote antenna and DVR, Aereo is no more a “free rider” than Radio Shack when it sells an antenna or Best Buy when it sells a DVR.

Plaintiffs’ Arguments

- Plaintiffs assert that:
 - o Aereo infringes their public performance rights by transmitting their copyrighted broadcasts to the public.
 - o The Transmit Clause is unambiguous, and the Aereo service falls within its broad scope.
 - o If the use of user-specific copies is enough to render a performance private rather than public, nearly all performances of audio and visual works could be deemed private. Accordingly, *Cablevision* should be read as applying only in the context of complete “time-shifting” – that is, as allowing consumers to view the playback only after the recorded program has aired.

Aereo’s Response

- Aereo argues in opposition that:
 - o Congress intended the Transmit Clause to apply to “any sort of transmitting apparatus” and “techniques and systems not in use or even invented,” but only if the transmissions were “to the public.”
 - o Consumers have a right to access over-the-air broadcast television, and consumers who transmit to only themselves their own unique copies of a television program are engaging in private performances of that program, not a collective public performance. This has always been the case from VCRs to DVRs to remote DVRs.
 - o *Cablevision* never suggested that its holding was limited to time-shifting (complete or otherwise), but instead focused solely on whether the performance was public, which

is determined by reference to the source of the particular transmission and the potential recipients of that particular transmission.

- Even if *Cablevision* were limited to time-shifting technologies, it would still apply to Aereo because Aereo is a time-shifting technology.