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## The Sky Did Not Fall: The Supreme Court Invalidated Online Retransmission of Broadcast Television in *American Broadcasting Companies v. Aereo, Inc.*

By Michael Steger

The case of *American Broadcasting Companies v. Aereo*<sup>1</sup> offered the Supreme Court another opportunity to address the impact of new technology on existing copyright law. The decision, another of a relatively robust copyright and trademark docket in recent Supreme Court terms, was fraught with implications for new digital technologies, cloud computing, and remote data storage. The Court's narrow ruling overturned the Second Circuit's decision denying copyright owners an injunction against Aereo's service, and left questions about the Copyright Act's impact

on the viability of various other technologies, including cloud storage and other online streaming systems, for another day.

Through a review of recent trends in television delivery systems, the Supreme Court's evaluation of television exhibition under the Copyright Act, and the decision and dissent in *Aereo*, many questions remain about the viability of new television delivery systems, as well as other remote computing technologies.

### Act One: The Players

Most people get their broadcast television stations—ABC, NBC, Fox, PBS, and such—by paying monthly fees to a cable company or satellite broadcaster, or even to an online streaming company such as Hulu. The cable or satellite company in turn pays fees to the local broadcast television stations for the right to retransmit their broadcast signals. These retransmission fees provide significant revenue—as much as 10 percent

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**Michael Steger** is the founder of Steger Krane LLP in New York City, where his practice focuses on copyright, trademark and entertainment matters. He has extensive experience in the television industry, both as in-house and outside counsel. Mr. Steger frequently writes about intellectual property issues at [www.mistercopyright.net](http://www.mistercopyright.net), and he can be reached at [msteger@skattorney.com](mailto:msteger@skattorney.com).



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annually—to the broadcasters, whose old advertising model has taken quite a hit with the rise of cable programming.

Online streaming services such as Amazon Prime, Netflix, and Hulu provide a lot of must-see original dramatic and comedic television programming online, and many cable networks make some of their shows available online for free or for a small monthly fee. So, instead of paying as much as \$150 per month for cable or satellite programming, so-called “cord cutters” can get most of the television they want for \$10 to \$20 per month online. However, the online services lack many of the most valuable television properties that are still mostly watched live—sports, “event programming” such as awards shows, and other live programs that are only carried by broadcast television.

Along came Aereo to try to fill the void created by the consumer’s desire to watch live programming without paying for a monthly cable or satellite subscription. Aereo, based in Brooklyn, provided tiny, dime-sized antennas to its subscribers who paid as little as \$8 per month. These antennas, which were usually housed in warehouses and grouped together on tabletops, capture broadcast television signals and then store them in the cloud, where the customer can either watch them with a momentary delay (essentially live) or view them later on an Internet-connected device of their choice—a television, computer, or smartphone. The benefits for the consumer were that they did not need a cable box or satellite dish and they did not have to pay a large monthly bill. Aereo maintained that its technology was equivalent to giving each subscriber a personal digital video recorder (DVR); however, in an effort to circumvent existing retransmission rules requiring the retransmitter to pay fees to the broadcasters whose signals they copied, Aereo dedicated an individual dime-sized antenna for each subscriber.

Of course, Aereo and the broadcast networks had vastly different views on the legality of Aereo’s technology. Aereo viewed itself as an upstart technology that is not engaging in a public performance that would require the payment of retransmission fees or royalties. Aereo’s position is that the requirement that the consumer personally push the buttons to decide what to record and what to watch means that it is not a public performance and renders Aereo a mere equipment provider.

The broadcast networks viewed Aereo’s technology as a complicated contraption to engage in widespread theft of the networks’ copyrighted programming. Under their view, the fact that Aereo’s cloud servers record the programs and play them back at the customer’s demand

makes these programs public performances for which Aereo needs to pay license fees.

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Aereo ultimately began operations in 11 cities, but its operations in each market were almost immediately attacked by television broadcasters and other media companies, who argued that Aereo could not retransmit television signals without a negotiated license. With a notable exception, most courts that considered the issue found that Aereo’s technology infringed on the broadcasters’ exclusive rights, issuing injunctions against Aereo in jurisdiction after jurisdiction where they brought suit. However, the Southern District of New York denied the broadcasters’ request for a preliminary injunction in *American Broadcasting Cos. v. Aereo, Inc.*,<sup>2</sup> a decision that a split Second Circuit panel upheld the following year.<sup>3</sup> The Second Circuit opinion relied on an earlier Second Circuit case, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,<sup>4</sup> which had ruled that Cablevision’s remote storage DVR did not infringe the copyrights of various content owners and providers. In that case, the individual consumer had to first request that Cablevision remotely record a desired program, and then direct the system to play the program back at the desired time. In such a system, the Second Circuit held, the individual was doing the recording, so Cablevision was not publicly performing the selected works. In his dissent in the *Aereo* case, Judge Denny Chin (the district judge who had granted an injunction but was overruled in the *Cablevision* case) described Aereo’s technology as a “Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act.”<sup>5</sup>

## **Act Two: The Supreme Court’s Tortured History with the Copyright Act and New Technology**

Once the Supreme Court granted *certiorari* in the *Aereo* case, the technology industry’s concern that the Court could stifle innovation rose to the fore. Aereo itself tried to bolster its case by raising a “parade of horrors” that would result from a decision in the broadcasters’ favor. Even Cablevision itself argued that Aereo’s system was infringing, but urged that the Court issue

a narrow ruling to protect cloud storage and playback systems such as Cablevision's remote DVR.<sup>6</sup> The concerns of the parties and the various *amici* stemmed in part from a perception that the justices sometimes failed to grasp the technological implications of their copyright decisions and in part from a review of the conflicts between the Supreme Court's jurisprudence and the apparent intentions of Congress in amending the Copyright Act.

Beginning in the late 1960s, the Supreme Court, in three separate cases over a seven-year period, had ruled: (1) that a company that placed a television antenna on a hilltop did not infringe the copyrights of the programs the antenna received because the apparatus only allowed the end viewer to receive the over-the-air broadcast signals, *Fortnightly Corp. v. United Artists Television, Inc.*<sup>7</sup>; (2) a separate cable television system that received and retransmitted broadcast signals from distant television markets did not infringe the copyrights of the programs it retransmitted because the retransmission service only served to allow the end viewer access to the programs<sup>8</sup>; and (3) a restaurant did not engage in illegal public performances by playing broadcast radio music for his customers in the restaurant.<sup>9</sup> One of the key holdings from the *Fortnightly* case was that "Broadcasters perform. Viewers do not perform."<sup>10</sup> The *Teleprompter* decision contained a similar analysis.<sup>11</sup>

In response to these decisions, Congress, which has historically been very responsive to the concerns of television networks, entertainment studios and other purveyors of mass market entertainment, clarified the definition of the "public performance" right in the Copyright Act of 1976. Congress stated that to "perform" an audiovisual work such as a motion picture or television program was to "show its images in any sequence or to make the sounds accompanying it audible." To "perform" in "public" involved the exhibition of the work to "a substantial number of persons outside of a normal circle of a family and its social acquaintances" or to deliver it to such an exhibition or to transmit it 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."<sup>12</sup> In defining both the "performance" right and establishing a new definition of "transmit" as a public performance, Congress made clear that the new "amendments 'completely overturned' [the] Court's narrow construction of the Act in *Fortnightly* and *Teleprompter*."<sup>13</sup>

The Copyright Act of 1976 also mandated that cable television operators be given a license to retransmit television programs as well as a requirement to pay royalties—retransmission fees—to the copyright

owners whose shows they exhibit,<sup>14</sup> a regime that it later extended to satellite providers.<sup>15</sup>

Congress no doubt thought that its license and royalty scheme would cover television technology for the foreseeable future. Less than a decade later, however, television broadcasters sued Sony Corporation, claiming that its Betamax player violated their copyrights by allowing viewers to record copyrighted programs and then play them back at their leisure. In ruling on the networks' claims, the Supreme Court held that time-shifting of copyrighted programs for the consumer's own personal use was fair use and not an infringement of the broadcasters' copyrights.<sup>16</sup> In doing so, the Court ruled that because Sony's technology had legal, noninfringing uses, Sony could not be held liable for infringement. The television studios decried the *Betamax* ruling, with some affected parties predicting that it would lead to the demise of some types of television broadcast; instead, the Betamax player and its progeny, including the VHS and DVD players, paved the way for a booming home video business that contributed tremendously to Hollywood's bottom line for almost two decades.

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Fast forwarding to 2005, the Internet had enabled individuals to rapidly share copyrighted works, primarily music but also video works. Various peer-to-peer file sharing systems allowed individuals to trade or sell copyrighted works over the Internet through diffuse computer networks rather than through any type of central provider. In *MGM Studios, Inc. v. Grokster, Ltd.*,<sup>17</sup> a unanimous Supreme Court, to the dismay of the electronics industry, ruled that the defendant file sharing companies could be found liable for inducing copyright infringement. The key to the Court's ruling was that the defendants marketed their software as a tool for illegally copying copyrighted works.

Even a recent copyright decision from the 2012 term<sup>18</sup> upset generally-accepted Second Circuit law,

finding that the first sale doctrine applied to copyrighted goods that were first sold abroad and then imported into the United States without the consent of the copyright owner.

Against this background, content owners, broadcasters, technology companies, and commentators eagerly awaited oral arguments and the Court's decision. Twenty-seven different *amicus* briefs were filed on the merits alone.

## Act Three: The Decision

In a highly anticipated decision in June 2014, the Court ruled 6–3 that Aereo's technology violated the broadcasters' public performance rights. The only issue before the Court was Aereo's delayed live playback of broadcast signals, which were delayed by a few seconds at most; Aereo's remote delayed playback system was not formally at issue. Justice Breyer's opinion insisted that the Court was not thwarting new technology but instead that Aereo's system of capturing broadcast signals and making them available for individual subscribers to replay online at the subscriber's demand was similar to cable systems' retransmission of broadcast television. Breyer's opinion held that Aereo both "performed" the broadcasters' programs and did so "publicly" by making them available to the general public through its subscribers.

The history of the Copyright Act, Breyer wrote, "makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, 'perform[s]' (or 'transmit[s]'). Aereo's activities are substantially similar to those of the [cable television] companies that Congress intended the Act to reach."<sup>19</sup> Aereo's equipment received programs that had been released to the public and transmitted them to other viewers, offering all of the programming presented by each broadcast station in its coverage area.<sup>20</sup> While Aereo's technology may serve a "viewer function" or simulate equipment a viewer may have at home, the same was true of the equipment in the *Fortnightly* and *Teleprompter* cases that Congress sought to regulate.<sup>21</sup>

The Court rejected Aereo's argument that it was merely providing equipment to the consumer, such as Sony's Betamax player or current DVRs, but was instead actually providing the programs to the consumer. As such, it was "performing" the programs sent out by the broadcasters.

The Court next addressed whether Aereo performed the broadcasters' works "publicly." Aereo argued that the performance that it transmitted was a new performance created only by its act of transmitting, and that this performance was a private performance because it was transmitted to and "received by one and only one subscriber."<sup>22</sup>

Assuming *arguendo* that Aereo's first premise was correct, Justice Breyer then found that Section 101 of the Copyright Act—both in its language and its intent—held that Aereo's performance was a public one: "The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public 'whether the members of the public capable of receiving the performance... receive it... at the same time or at different times.'"<sup>23</sup> The Court went on to dismiss Aereo's technological distinction that it was transmitting personal copies of programs to each individual subscriber as irrelevant because it was sending copies of the *same* program to each subscriber who chose to view it.<sup>24</sup>

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Mindful that the *amici* supporting Aereo were leery of a broad ruling that would impose restrictions on developing (and unforeseen) technologies including cloud computing, the Court emphasized that its ruling was narrow, dealing only with technology that allowed the consumer to view programs live or with only a minor delay. "We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence of different kinds of technologies. But we do not believe that our limited holding today will have that effect."<sup>25</sup> The Court further emphasized that it was not deciding whether the public performance right was infringed when a consumer uses a technological service to pay for something "other than the transmission of copyrighted works, such as the remote storage of content," referring to the US government's argument that cloud storage offers consumers the option to play back copies of copyrighted content that the consumer has "already lawfully acquired."<sup>26</sup> Just as Justice Breyer's opinion in *Kirtsaeng* had rejected the parade of horrors set forth by publishers and other copyright owners in that case, his opinion for the broadcasters steered clear of broad statements of principle and avoided any discussion of other disruptive or remote storage technologies whose specter was invoked by Aereo's brief and arguments.

"We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree

with the Solicitor General that ‘[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,]’ should await a case in which they are squarely presented.’”<sup>27</sup>

### Act Four: The Dissent

In dissent, Justice Scalia, writing for himself and Justices Alito and Thomas, argued that Aereo was not guilty of any infringement. First, he wrote, the only issue before the Court was whether Aereo violated the broadcasters’ exclusive right to publicly perform their programs. While the broadcasters argued that Aereo infringed their copyrights by publicly performing the networks’ programs when Aereo’s subscribers logged in online, selected their channel and chose to watch a recorded program, Justice Scalia found that the subscribers’ conduct did nothing to impute liability to Aereo. Aereo merely provided the tools for the subscribers to copy and replay the programs they chose to watch; as such, Aereo could not be liable for direct copyright infringement (the issue before the Court), it could only be liable for secondary liability, which was not before the Court. Justice Scalia compared Aereo’s technology to a library card—either could be used to access copyrighted or public domain materials, but it was the patron’s choice to use the materials in respect of or in violation of any copyright restrictions.

Disparaging the majority opinion as “guilt by resemblance,” the dissent attacked the statutory interpretation of Justice Breyer’s opinion as an overreach. After stating that he felt that what Aereo was doing was wrong, Justice Scalia stated that “we need not distort the Copyright Act to forbid it... what we have before us must be considered a ‘loophole’ in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed and less disruptive fashion than the crude ‘looks-like-cable-TV’ solution the Court invents today.”<sup>28</sup> In the end, the Court’s focus on the intent of the 1976 Act instead of the statutory text was too much for Justice Scalia.

### Act Five: The Denouement

While it is too early to tell how courts will apply the *Aereo* decision to other technologies or even to systems similar to Aereo’s, commentators have fallen into several camps.

First, the decision made clear that technological upstarts who engineer clever technology to get around the restrictions of the Copyright Act will have an uphill

battle, because the court largely relied on the intent of the Act to reach its conclusions.

Meanwhile, some have argued that Justice Breyer’s opinion relied too heavily on legislative history and congressional intent while ignoring the ambiguities—or even conflicts—in the Copyright Act.<sup>29</sup> Other commentators, following Justice Scalia’s lead, have seized on the “looks like cable” rationale of Justice Breyer’s opinion as inconsistent with both the statutory text and prior case law. Because substantially similar services, including terrestrial, satellite, and Internet radio, for example, are treated quite differently under the Copyright Act, the “looks like cable” analysis does not neatly comport with the statutory text.<sup>30</sup> In addition, the “looks like cable” analysis is inconsistent with a recent Second Circuit case, which held that an Internet streaming service that was similar to Aereo, did not qualify for a compulsory cable license.<sup>31</sup> If a streaming service engages in public performances that are similar to cable television, why isn’t it entitled to a retransmission license like a cable company?

The *Aereo* decision held that the company’s technology was “for all practical purposes a traditional cable system,”<sup>32</sup> and it is now trying to use that language to its advantage by arguing to the lower courts that it should be entitled to retransmission rights as long as it pays negotiated license fees. Indeed, the Brief of *Amicus Curiae* FilmOn X, LLC argued in the alternative, that if Aereo were found to be transmitting public performances then it should be deemed as a cable company and issued a compulsory retransmission license.

In the end, if the court means what it wrote that the majority opinion was narrowly tailored and does not address—or affect—other technologies that were not before the court, the true questions about the intersection of copyright law, cloud computing, remote storage, and on-demand playback or exhibition of copyrighted works are left for another day. In that case, whether Aereo now qualifies as a cable company will be little more than a footnote, as true innovation in entertainment delivery systems will continue to move away from the broadcast television model.

### Notes

1. *Am. Broadcasting Cos. v. Aereo*, No. 13-461 (US Sup. 06/25/2014).
2. *Am. Broadcasting Cos. v. Aereo*, 874 F.Supp.2d 373 (S.D.N.Y. 2012).
3. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).
4. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).
5. *WNET, Thirteen*, 712 F.3d at 697.
6. Brief of *Amicus Curiae* Cablevision Systems Corp.

# Copyright

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7. *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968).
8. *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974).
9. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).
10. *Fortnightly*, 392 U.S. at 398.
11. *Teleprompter*, 415 U.S. at 408-409.
12. 17 U.S.C. § 101.
13. *Aereo*, No. 13-461 at 11, *citing* H.R. Rep. No. 94-1476, pp. 86-87 (1976).
14. 17 U.S.C. § 111.
15. 17 U.S.C. § 119.
16. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
17. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).
18. *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697, 568 U.S. \_\_\_ (2013).
19. *Aereo*, No. 13-461 at 12.
20. *Id.* at 13.
21. *Id.*
22. *Id.* at 15.
23. *Id.* at 17-18, *citing* 17 U.S.C. § 101.
24. *Id.* at 18.
25. *Id.* at 20.
26. *Id.*
27. *Id.* at 21, *citing* Brief for United States as *Amicus Curiae* (quoting *Sony*, 464 U.S. at 431 (alteration in the original)).
28. *Id.* at 34.
29. See Mitch Stoltz, “*Aereo* Decision Injects Uncertainty Into Copyright,” *SCOTUSBLOG* (June 27, 2014, 2:18 PM), <http://www.scotusblog.com/author/mitch-stoltz/>.
30. See, e.g., Matthew Schruers, “*Aereo* copyright decision creates uncertainty for the Cloud,” *SCOTUSBLOG* (June 26, 2014, 12:55 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-copyright-decision-creates-uncertainty-for-the-cloud/>.
31. *WPIX v. iVi, Inc.*, 691 F.3d 275 (2d Cir. 2012).
32. *Aereo*, No. 13-461 at 14.