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Aereo: The Supreme Court Case That May Change How We Watch Television

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In recent weeks, the U.S. Supreme Court granted certiorari in *American Broadcasting Companies, Inc. vs. Aereo, Inc.* The case centers around a copyright dispute between major television broadcast companies including CBS, ABC, NBC, Fox and PBS and a small tech start-up backed by media mogul Barry Diller. The broadcast companies allege that Aereo violates their copyrights by using thousands of antennas to obtain broadcast signals without paying any licensing fees. Aereo argues that it is merely aiding Americans in their right to use a television antenna to watch television. It sounds dramatic, but the outcome of the case has the potential to completely change the way broadcast companies do business in the United States.

Aereo is an online streaming subscription service that allows subscribers to stream and/or record over-the-air television broadcasts through the Internet. Aereo's service functions much like a DVR. Aereo owns thousands of standard television antennas, identical to the antennas an average person would use to receive broadcast stations in his or her home. Aereo assigns customers an individual antenna for a nominal monthly fee. Customers can then record and stream live broadcasts through the Internet and view such broadcasts on their computer, tablet or smartphone. In order to carry network programming, cable and satellite companies pay what are known as "retransmission consent fees," which are licensing fees that make up a large portion of the networks' revenue. According to SNL Kagan, broadcasters are expected to receive more than $4 billion in retransmission fees this year, and that revenue is projected to exceed $7 billion by 2018. Aereo does not pay any retransmission consent fees in connection with its current practices. Using a novel interpretation of the Copyright Act, Aereo argues that the complex mechanics of its service mean that it doesn't have to pay any retransmission consent fees. Although a customer could use an antenna the same way as Aereo without legal implications, the broadcast companies claim that Aereo is committing copyright infringement because it is retransmitting broadcast performances in violation of the Copyright Act.

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The Copyright Act gives copyright owners several exclusive rights, one of which is the exclusive right to perform a copyrighted work "publicly." 17 U.S.C. § 106(4). The Copyright Act defines "perform" as "to recite, render, play, dance or act [a work], either directly or by means of any device or process, or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." *Id.* § 101. The Copyright Act defines "publicly" as "to transmit or otherwise communicate a performance or display of the work to a place [open to the public] or to the public, by any 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." *Id.* This definition of public, often referred to as the "Transmit Clause," is at the heart of *Aereo*. The Copyright Act does not prohibit showing a copyrighted work "privately" to "a normal circle of family" or "social acquaintances." This exception is what allows you to host a Super Bowl party at your house without paying an additional fee to the network broadcasting it. Aereo claims that its system merely facilitates the individual, private viewership explicitly permitted by the Copyright Act itself.

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The Road To The Supreme Court

Two weeks before Aereo was set to launch in New York in 2012, plaintiffs sought a preliminary injunction in the Southern District of New York. The district court denied the injunction, holding that while the broadcasters would likely suffer irreparable harm if Aereo was allowed to launch, the broadcasters did not show a likelihood of success on the merits of their copyright claims. The court relied on its prior decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.,* 536 F.3d 121 (2d Cir. 2008) *("Cablevision"),* which held that a system where customers could record television broadcasts on a remote hard drive assigned to each individual customer was not a retransmission because the potential viewing audience was limited to that specific customer. Plaintiffs appealed to the Second Circuit, but the court upheld the Southern District's decision.

In both their motion for a preliminary injunction and their appeal to the Second Circuit, plaintiffs argued that Aereo's transmission of broadcast television programs is a public performance prohibited by the Copyright Act. More specifically, plaintiffs contended that Aereo's transmission of television programs while the programs simultaneously air on broadcast television falls squarely within the plain language of the Transmit Clause and is no different from the retransmissions of network programming made by cable systems, which the drafters of the Copyright Act viewed as public performances. Therefore, plaintiffs asserted, Aereo should be required to obtain a license prior to transmitting any copyrighted works over its system. To address this argument, both the district court and the Second Circuit thoroughly reexamined the Second Circuit's previous interpretation of the Transmit Clause in *Cablevision.*

In *Cablevision,* the Second Circuit considered whether Cablevision's DVRs infringed copyright holders' reproduction and public performance rights. Prior to the development of the DVR, Cablevision would receive programming from its various content providers, such as ESPN or a local affiliate of a broadcast network, process it, and transmit it to its subscribers through a coaxial cable in real time. *Cablevision* at 124-5. With the advent of the DVR, Cablevision started to split this stream into two. One stream went to customers live, as it had before. The second stream was routed to a server, which determined whether any Cablevision customer had requested to record a program in the live stream with their DVR. If so, the data for that program was buffered, and a copy of that program was created for the applicable customer on a portion of a Cablevision remote hard drive assigned specifically to that customer. Thus, if 10,000 customers wanted to record the Super Bowl, 10,000 separate recordings were created, one for each customer. Only the customer who requested that the DVR record the Super Bowl could access the copy created for him or her. No other customer would be able to view that particular copy. *Id.*

Copyright holders in movies and television programs sued Cablevision, arguing that the DVR system infringed upon their copyright and their public performance rights. Both the district court and the Second Circuit disagreed, holding that Cablevision's transmissions of programs recorded with its DVR were not public performances under the Act for two reasons: (1) the DVR system created unique copies of every program a Cablevision customer wished to record; and (2) the DVR's transmission of the recorded program to a particular customer was generated from that unique copy and no other customer could view that particular copy. *Id.* at 137. Thus, because the potential audience of the transmission was only one Cablevision subscriber, the transmission was not "made to the public." *Id.*

Applying the *Cablevision* holding to the facts at hand in *Aereo,* the Second Circuit held that Aereo's system does not violate the Transmit Clause. The same two features present in Cablevision's DVR system are present in Aereo's system. First, when an Aereo customer elects to watch or record a program, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. *Aereo* at 23. Second, when the user elects to watch the recorded program, the transmission sent by Aereo and received by the user is generated from that unique copy. No other Aereo user can receive a transmission from that copy. Therefore, the court reasoned, just as in *Cablevision,* the potential audience of each Aereo transmission is the single user who requested that the program be recorded, and the transmission is not "made to the public." *Id.*

While *Aereo* was being considered by the Second Circuit, two other cases involving nearly identical subscription streaming services reached courts in Los Angeles and Washington, DC. The broadcasters were successful in both of those cases, and the courts held that the streaming companies violated the broadcasters' public performance rights when they did not pay to retransmit the broadcasts. As a result of these conflicting circuit opinions, *Aereo* was ripe for the Supreme Court. *See Fox Television Stations, Inc. et al. v. FilmOn X LLC,* 2013 WL 4763414 (D.C. Cir. 2013) and *NBCUniversal Media, LLC et al. v. Barry Driller, Inc. et al.,* 2012 WL 6784498 (C.D. Cal 2012).

Repercussions Of *Aereo*

The putative question before the Supreme Court is whether Aereo is violating the Copyright Act by putting on "public performances" without appropriate licensing. The Court's decision will likely have far-reaching implications, and many third parties have taken an interest in the case. The National Football League and National Baseball League; the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music Inc. (BMI); Time Warner; Metro-Goldwyn-Mayer and the Screen Actors Guild have all filed amicus briefs in support of the broadcasters. The broadcasters believe a verdict upholding the Second Circuit decision will destroy the business models of all broadcasting companies. The underlying problem for the broadcasters is that a significant portion of their revenue comes from the retransmission fees paid by cable and satellite providers to rerun shows. The Second Circuit's ruling is a slippery slope for other services to use an Aereo-like infrastructure to avoid paying the broadcasters. Therefore, the broadcasters fear that if *Aereo* is upheld, no one will pay to retransmit copyrighted shows and the broadcasters will lose a significant portion of their revenue. Aereo, on the other hand, argues that the case is about the right of every American to use a television antenna and exercise choice about what television programming they watch and where they choose to watch it.