

ALERT

Broadcasters Found Unlikely to Succeed in Suit Against Internet Television Streaming Service

July 20, 2012

A federal court in New York has rejected a preliminary injunction motion brought by major U.S. broadcasters to stop Aereo, Inc. from providing real-time internet access to broadcast television programming without permission from the relevant copyright owners. The court's decision builds on an earlier case that upheld the use of in-network DVRs, and is likely to cause significant concerns for broadcasters and for those who pay for the right to retransmit broadcast programming. On the other side, the decision is likely to be seen as a preliminary victory for those seeking to expand access to copyrighted materials without the need to seek or obtain licenses. The decision will not be the last word — plaintiffs have already filed a notice of appeal to the Court of Appeals for the Second Circuit.

Aereo has developed and deployed a system that uses dime-sized antennas to pick up over-the-air HD television signals upon request by a subscriber. Through a series of steps, the programming is copied in a server that performs DVR functions (such as pause, rewind and store) and is then sent to the user over the internet. The subscriber may view the programming on a mobile device, Apple TV or through a Roku device. From the user's perspective, Aereo's system is similar in operation to that of a DVR where playback may be near-contemporaneous or delayed; however, unlike other services providing DVRs or in-network DVR functionality, Aereo did not obtain copyright licenses or retransmission consent to provide the underlying broadcast signal.

Practice Areas

Media

Telecom, Media & Technology

The plaintiffs sued Aereo in March, alleging that various aspects of the service infringe their copyrights. They sought a preliminary injunction based on their claim that Aereo is directly liable for copyright infringement by transmitting plaintiffs' copyrighted works contemporaneously with the over-the-air broadcast of these programs "to the public."

The district court denied the preliminary injunction, relying on the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (*Cablevision*). That case, which upheld the lawfulness of Cablevision's in-network DVR functionality, held that a transmission made to a single subscriber using a single unique copy produced by that subscriber is not a performance "to the public," and, therefore, could not violate the copyright public performance right. The *Aereo* court found that a particular Aereo antenna can be used by only one user at a time and that each antenna functions independently. The court reasoned that unique copies created by Aereo's subscribers are not materially different from those made by the Remote Storage DVRs challenged in *Cablevision*; therefore, the performances are not made "to the public." The court warned, however, that not every creation of a fixed copy from which a transmission is made (for example, true buffer copies) will defeat a claim for a violation of the public performance right.

Finally, the district court found that, although the plaintiffs had demonstrated irreparable harm arising from the Aereo service, it did not believe that the plaintiffs would suffer substantial harm during the pendency of the litigation. The court balanced the plaintiffs' harm against the significant harm likely faced by Aereo should an injunction issue and found that the balance of hardships did not tip decidedly in plaintiff's favor. The court did agree, however, that an injunction in this case would not disserve the public interest.

The import of the *Aereo* decision for those who currently pay retransmission fees may be significant. The decision at least preliminarily recognizes a possible means to stream broadcast signals over the internet without obtaining copyright permission or retransmission consent. It is clear, however, that this dispute is only beginning. The Second Circuit will have the next word. After that, others may seek to present similar issues to courts in other circuits.