Aereo v. Aereokiller: New York and California District Courts Disagree on What Constitutes a Public Performance Under the Copyright Act

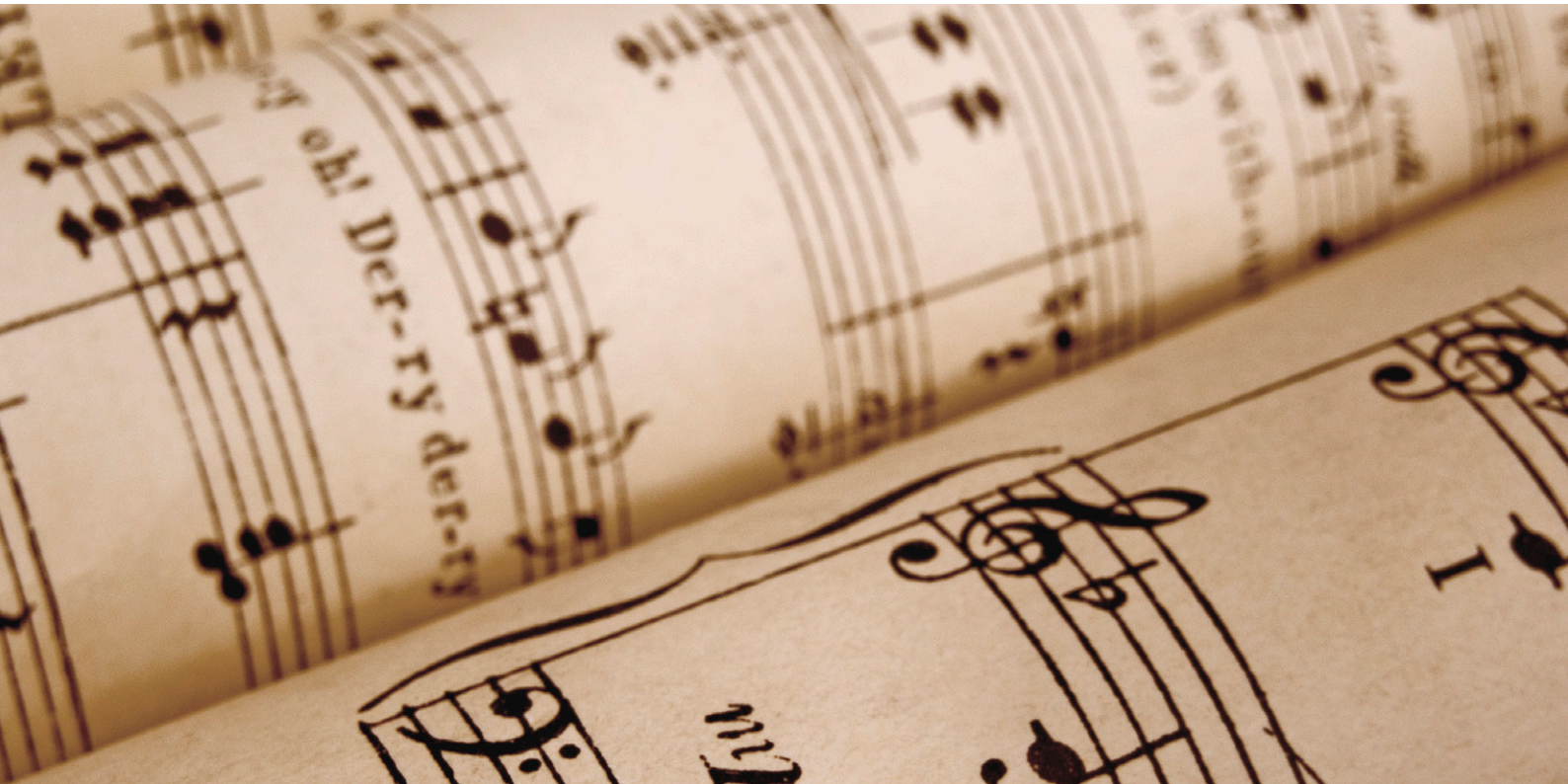
Technology continues to evolve at an ever increasing pace, often leaving in its wake lawsuits that require the application of laws enacted before the technological advancements occurred. Perhaps it is not too surprising, then, that in struggling to apply "old laws" to "new technologies," courts sometimes reach contrary conclusions.

A recent example of this phenomenon involves two companies that provided their subscribers with access to copyrighted content over the Internet using virtually identical technologies. Although neither service was licensed by the copyright owners, one service was preliminarily enjoined, but the other was not as the courts grappled with the issue of what constitutes a public performance under the Copyright Act.

In *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F.Supp.2d 373 (S.D.N.Y. 2012)[1], copyright owners of broadcast television programming sought to preliminarily enjoin a service that allowed defendant Aereo's subscribers to contemporaneously view those same programs over the Internet. One of the liability theories asserted by the plaintiffs was that Aereo's retransmissions of the broadcasts constituted "public performances" of the plaintiffs' copyrighted programs. The District Court for the Southern District of New York denied the motion, however, finding that the plaintiffs had not demonstrated a likelihood of success on the merits based on the Second Circuit's prior construction of the Copyright Act's "transmit clause" in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). [2]

> "The cable operator split the programming data into two streams"

The *Cablevision* case involved a cable operator's "RS-DVR" system that allowed subscribers to record cable programming on central hard drives housed and maintained by the cable operator at a remote location. To provide the service, the cable operator split the programming data it received from cable networks into two streams: one of which was routed immediately to its customers (as authorized by the content owners), while the other stream was used to create a unique, unlicensed "playback copy" that was stored on a portion of the hard drive allocated to a particular subscriber following the subscriber's request that the programming be recorded. This allowed numerous subscribers to



watch the very same programming via the RS-DVR, but through the playback of unique copies of the programming, each of which was accessible only by a particular subscriber.

The district court originally concluded that the RS-DVR playbacks constituted unauthorized public performances because the cable operator was transmitting the same program to members of the public. *Id.* at 135. The Second Circuit, however, determined that "a transmission of a performance is itself a performance," *id.* at 134, and that the focus of the inquiry, therefore, should be on the potential audience "of a particular transmission," rather than on the potential audience "of the underlying work (i.e., 'the program') whose content is being transmitted." *Id.* at 135. Thus, because each RS-DVR playback transmission (i.e., "performance") was "made to a single subscriber using a single unique copy produced by that subscriber," the court held that the performances were not "to the public." *Id.* at 139.

> Each user is assigned a dime-sized antenna

Aereo's service achieves a similar result as the *Cablevision* RS-DVR, but through a different technological platform that assigns a single, dime-sized antenna to a particular user at a particular time, such that no two subscribers are assigned the same antenna at the same time. Each antenna separately receives the incoming broadcast signal, which then goes to a unique directory before being sent to the subscriber over the Internet.

The plaintiffs argued that the antennas function collectively, and effectively act like a "community antenna" that simply passes along a broadcast signal to the public. *Aereo*, 874 F.Supp. at 385. The court, however, found that the antennas function independently of one another, id. at 381, and that "the copies Aereo's system creates are not materially distinguishable from those in *Cablevision*... " *Id.* at 385. Accordingly, it determined that the plaintiffs were unlikely to succeed on the merits in light of the *Cablevision* decision.

The Aereokiller Case

A few months later, and 3000 miles to the west, many of the same plaintiffs sought to preliminarily enjoin Aerokiller, another entity that captured and retransmitted broadcast programming using individual mini-digital antennas. *Fox Television Stations, Inc. v. BarryDriller Content Systems, Plc*, 2012 WL 6784498 (C.D. Cal Dec. 27, 2012). Aereokiller opposed the plaintiffs' preliminary injunction motion, arguing that its service was technologically analogous to the service found to be non-infringing in *Aereo. Id.* at *1. The District Court for the Central District of California, however, refused to apply Second Circuit law and issued a preliminary injunction, holding that Aereokiller's retransmissions were public performances that infringed the plaintiffs' copyrights. *Id.* at *2. [3]

Based on prior Ninth Circuit law, and the language and legislative history of the "transmit clause," the district court rejected *Cablevision's* focus on the "transmission of a performance." *Id.* at *3-4. Instead, the court reasoned that the focus should be on "the performance of the copyrighted *work*, irrespective of which copy of the work the transmission is made from." *Id.* at *4 (emphasis in original). As the court practically observed:

"Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the *work*. And it is the public performance of the copyrighted work with which the Copyright Act, by its express language, is concerned. Thus, *Cablevision's* focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute." *Id.* (emphasis in original).

1 This case was previously discussed in the GMC Watch by Dan Brenner and Steve Kay.

2 The "transmit clause" provides, in relevant part, that "[t]o perform or display a work 'publicly' means... to transmit or otherwise communicate 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.

3 Recognizing its disagreement with Second Circuit law, and refusing to assume that other circuits would cleave to its analysis, the Aereokiller court limited the geographic scope of the injunction to the Ninth Circuit. *Id.* at *7.

Appeals may bring clarity

Both cases are now on appeal, and oral argument already has been heard by a Second Circuit panel whose questions during the oral argument indicated it was troubled by the outcome in *Aereo*. Whether that will ultimately lead the court to revisit the *Cablevision* decision or to seek some basis for distinguishing *Aereo* from *Cablevision* – such as the fact that the *Cablevision* retransmission service (as opposed to the RS-DVR service) was licensed by the plaintiffs, even though that license does not appear to have been material to the decision – remains to be seen.

As this edition of the GMCQ was about to be published, the Second Circuit, in a 2-1 ruling that will be the subject of an upcoming article, affirmed the district court's denial of a preliminary injunction over a strong and lengthy dissent by Judge Chin, who also authored the district court opinion that was subsequently reversed by the *Cablevision* court. This could lead to a split between the circuits (if the Ninth Circuit affirms the contrary *Aereokiller* ruling) and, ultimately, possible Supreme Court review.

Tony Basich
Partner, Los Angeles
T +1 310 785 4626
anthony.basich@hoganlovells.com