

# Expert Q&A on *ABC v. Aereo* and Copyright Public Performance Rights

Copyright and Internet

In July 2012, the US District Court for the Southern District of New York denied broadcasters' and content owners' request for a preliminary injunction in *American Broadcasting Companies, Inc. v. Aereo, Inc.* Aereo's service captures free over-the-air broadcast television signals and delivers programming to its subscribers over the internet. Currently on appeal to the Second Circuit, the case is being watched closely for its potential impact on the television industry and, more broadly, how copyright law is applied to new methods of online distribution and performance. Practical Law Company asked Daniel Brenner of Hogan Lovells US LLP to discuss the implications of the decision.



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## What copyright issues were at issue in the *Aereo* motion for preliminary injunction?

Copyright law grants copyright owners the exclusive rights, among others, to reproduce and publicly perform their works. The *Aereo* plaintiffs have claimed that Aereo's service violates both these rights. However, they sought the preliminary injunction only on the basis that Aereo violates the public performance right. At issue in particular is the Copyright Act's "transmit clause," which provides that transmitting a performance of a work to the public by a device or process is a public performance, whether the members of the public are capable of receiving the performance in the same place or in separate places and at the same time or at different times.

Aereo argues that it does not require a public performance license under the Copyright Act, because its service only reproduces the programming at the subscribers', not its own, instance and effects private, not public, performances of the programming.

The district court held that the plaintiffs had not demonstrated a likelihood of showing that the Aereo service publicly performs the content on the broadcast signals.

## How does the Aereo service operate, and how does it differ from other internet video sites that have been found likely to infringe copyright?

A customer who is logged into her account on Aereo's website can watch a broadcast television program as it is performed over-the-air or record it for later viewing. When Aereo's application server receives a customer's request to watch or record, it sends requests to Aereo's:

- Antenna server, which allocates resources to that user, including a dime-sized antenna, and sends a "tune" request for the assigned antenna to receive the desired programming. Most of Aereo's users are randomly assigned an antenna each time they use the service, but no two users use the same antenna at the same time.
- Streaming server, which creates a directory specifically assigned to the user to store output from the antenna.

The antenna output is processed into data by a transcoder and sent to the streaming server, which saves it on a hard disk to a file in the previously created directory. If the user selects "watch," the program starts after a short delay, but roughly at the same time as the broadcast.

The Aereo system creates and stores a separate copy of a program for each customer, but only if a customer requests that program. It also transmits a customer's copy of a program only to that customer's account. These are key differences between the Aereo system and, for example, iCraveTV and ivi, which were both found likely to infringe copyright (*Twentieth*

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*Century Fox Film Corp. v. iCraveTV*, 53 USPQ 2d 1831 (W.D. Pa. 2000); *WPIX, Inc. v. ivi, Inc.*, No. 11-788-cv (2d Cir. Aug. 27, 2012)).

### What key factors influenced the court's decision on the public performance right, including its interpretation of the transmit clause?

The court followed the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*, which held that Cablevision's remote-storage digital video recorder (RS-DVR) system did not infringe cable programmers' public performance rights when the system recorded and transmitted their programming (536 F.3d 121 (2d Cir. 2008)).

Cablevision's RS-DVR system operates like traditional DVRs, but instead of recording programs on a hard disk in the customer's home, it stores them on customer-dedicated disk space at the cable system's facilities. This configuration allows Cablevision to deploy less expensive DVR boxes in customers' homes.

The Second Circuit in *Cablevision* grappled with the transmit clause, concluding that Cablevision's transmissions are not public performances because the key inquiry is who precisely is "capable of receiving" the relevant performance, and the relevant *performance* is the transmission to the single subscriber of that subscriber's unique copy.

### Does the Aereo decision suggest a possibility of the Second Circuit adopting an alternate interpretation of the public performance right in the context of the transmit clause?

While the district court denied the preliminary injunction and concluded that the service is likely lawful, it did not find that all factors weigh in Aereo's favor. This mixed result could lead the Second Circuit to reach a different conclusion.

*Aereo* and *Cablevision* placed great weight on the existence of a distinct copy that is created at the customer's instance and replayed as the customer chooses. However, the Second Circuit in *Aereo* could find that time-shifting is an essential element that explains the *Cablevision* case, an argument that the district court rejected. The *Aereo* plaintiffs argued that RS-DVRs are always time-shifted, breaking the chain of transmission from the original broadcast, but that Aereo subscribers are not using copies created for time-shifting because they can watch programs while they are still being broadcast. Under this reasoning, the relevant performance arguably includes the original broadcast, which is capable of being received by the public regardless of Aereo's system architecture so that Aereo's service would effect a public performance. But the District Court concluded that time shifting was not the basis for the Second Circuit's decision and so did not see this distinction as making the difference that the plaintiffs sought.

### What implications does this decision have for television programmers, cable and satellite television operators and developers of content delivery technologies?

The Copyright Act's definition of "public performance" was considered opaque even before its application to these new technologies. The district court's interpretation risks toppling a web of distributor/programmer relationships for which the statute's "public performance" language historically has been an afterthought.

The public performance right is one economic interest, but when it comes to popular network broadcasts, the bigger interest is tied to retransmission consent, a right found in the Communications Act, not the copyright law, even though in many ways it is an intellectual property doctrine. By way of background, pay TV services, including cable and direct-broadcast satellite (DBS) operators, in many cases must pay retransmission license fees to broadcast networks for the right to deliver broadcast programming on affiliated stations that the operators deliver as part of a service. However, broadcast programming remains free to viewers who obtain it over-the-air via an antenna.

Retransmission consent fees paid by cable and DBS services to broadcasters have constituted an increasing share of network-affiliated TV stations' income, and retransmission consent negotiations have become increasingly heated. Online distributors of broadcasting upend that economic relationship if they can carry for free what is otherwise paid for by other distributors.

Some have suggested that if the Aereo system is lawful, cable operators should be able to use a similar configuration to avoid paying retransmission consent. If the Aereo service is ultimately found to be non-infringing, many observers expect a material effect on negotiations between cable and DBS operators, and broadcast network affiliates.

*Cablevision* did not present these potential effects on the economics of the TV ecosystem. The economic issue was only whether the RS-DVR replay feature was covered by Cablevision's existing license or entitled the programmers to another payment.

Notably, however, the district court's decision relied on only one part of the test for a preliminary injunction: the likelihood of success in showing that Aereo's system effects public performances. The court left open other criteria that the appeals court may consider in deciding whether to uphold the denial of an injunction.

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