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Copyright Decision: Aereo Performs Publicly within the Meaning of the Transmit Clause

***American Broadcasting Companies v. Aereo, Inc.*, 134 S. Ct. 2498 (2014)**

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The U.S. Supreme Court recently issued its opinion in the long-running *Aereo* litigation, holding that the tech start-up violated the Copyright Act of 1976 by retransmitting broadcast programming via the Internet. Aereo, funded in large part by IAC chairman Barry Diller, operated a system allowing customers to stream over-the-air television broadcasts through the Aereo.com website. Aereo subscribers would first go to Aereo's website and select the particular programming they wished to watch or record. Aereo then tuned one of its thousands of tiny antennas to the relevant broadcast station, captured the signal, and retransmitted the signal to the requesting individual.

The service raised legal issues from its introduction in early 2012, when broadcasters attempted to enjoin Aereo's operations, arguing that it violated the Transmit Clause, which gives copyright owners the "exclusive right" to "perform the copyrighted work publicly." 17 U.S.C. § 106. The United States District Court for the Southern District of New York ruled in favor of Aereo in *American Broadcasting Companies v. Aereo, Inc.*,874 F. Supp. 2d 373, 385 (S.D.N.Y. 2012), finding that because Aereo saved a unique playback copy of each program that was transmitted only to the particular requesting subscriber, it was providing a private rather than a public transmission. The United States Court of Appeals for the Second Circuit affirmed that decision in *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), upholding the district court's denial of a preliminary injunction and further reasoning that

because Aereo dedicated one antenna to one subscriber at any given time, and the potential audience of each transmission was therefore only a single user, there could be no "public" performance.

In overturning the decisions of both lower courts, the United States Supreme Court found that Aereo was virtually identical in basic character to earlier community antenna television (CATV) systems that received and amplified broadcast signals and transmitted them to subscribers' television sets through cable, and which were brought within the scope of the Copyright Act by the 1976 amendments to the Act. Ultimately, the Court determined that no technological differences between those earlier services and Aereo – including Aereo's use of thousands of coin-sized antennas to receive over-the-air broadcasts and stream them separately to its different users – could mask the fact that Aereo was, like the CATV systems, publicly performing the broadcasters' copyrighted works without paying license fees.

Justice Breyer, writing for the majority, first reviewed the question of whether Aereo "performed" within the meaning of the Copyright Act. The Transmit Clause of the Act defines "perform … publicly" as including "transmit[ting] … a performance." 17 U.S.C. § 101. Aereo argued principally that because its antennas emulated the function of an individual home antenna, including responding to user commands and streaming only when requested to do so by a customer, it did not perform or transmit, but instead merely supplied equipment that allowed others to do so. *See Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014). In rejecting this argument, the Court returned to the original purpose of the Transmit Clause, noting that the CATV systems that the Clause was drafted to address had also argued that because they simply enhanced subscribers' ability to receive a broadcast signal in their homes, they served a "viewer" rather than a "broadcaster" function. *See id.* at 2506-07. Ultimately, the Court found that because Aereo, like the CATV systems, was a commercial enterprise selling a service that allowed subscribers to watch broadcast television, and used equipment housed outside of its subscribers' home, Aereo could not stand in the viewers' legal shoes. *Id*.

After determining that Aereo "performed," the Court looked to whether that performance was "public." Under the Transmit Clause, "transmit[ting] … a performance … to the public" is a public performance. 17 U.S.C. § 101. Aereo argued that because its subscribers received broadcast television signals from individually-assigned antennas, and because each Aereo transmission was thus received by only one individual subscriber, the transmissions were not "to the public" within the meaning of the Act. *Aereo*, 134 S. Ct. at 2508. The Supreme Court rejected this theory, noting that the

Transmit Clause 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." *Id.* (quoting 17 U.S.C. § 101). Based on this language, the majority found that "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes." *Id.* at 2509. Accordingly, because Aereo "performed" broadcast programming and because that performance was made to multiple individuals at the same time, Aereo's system violated the Transmit Clause. *Id.* at 2509-10.

In dissent, Justice Scalia argued that Aereo did not engage in a volitional performance, but instead simply made it possible for its subscribers to request a performance of the broadcast programming. The dissent stated, "Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it." *Id.* at 2514. According to Justice Scalia, because Aereo "does not make the choice of content," and "subscribers call all the shots," Aereo's level of involvement is not sufficient for direct liability for copyright infringement. *Id.*

Following the Supreme Court's ruling, Aereo ceased operations but continued to fight the broadcasters, now raising a new argument that because the Supreme Court found that Aereo was effectively identical to a cable system, Aereo could operate under the compulsory license provided for by Section 111 of the Copyright Act, which allows cable systems to retransmit broadcast programming for a fee. *See* 17 U.S.C. § 111. This theory was rejected by the Copyright Office, which indicated that it would refuse to process Aereo's request to use the compulsory license, but Aereo has pushed forward with the argument in the United States District Court for the Southern District of New York, on remand, and in papers filed with the Tenth Circuit Court of Appeals in connection with *KSTU LLC v. Aereo, Inc.*, No. 14-4020 (10th Cir. 2014). The district court denied Aereo's emergency motion to resume operations as a cable company, however, instead requesting that both sides file briefs in support of their positions after the Supreme Court ruling. Most recently, the United States Court of Appeals for the Second Circuit declined to hear Aereo's arguments regarding the compulsory license, requiring Aereo to keep its fight at the district court level, dealing yet another blow to the now-beleaguered company.