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Lawyers Weigh In On Supreme Court's Aereo Ruling

Law360, New York (June 25, 2014, 6:44 PM ET) -- The U.S. Supreme Court on Wednesday ruled that online television streaming service Aereo Inc. violates copyright law by retransmitting over-the-air programming without authorization. Here, attorneys tell Law360 why the decision in American Broadcasting Companies Inc. v. Aereo Inc. is significant.

Sandra Aistars, The Copyright Alliance
"We welcome the Supreme Court's decision in the Aereo case. This confirms that authors of work deserve to be compensated for their work. Copyright law needs to remain technology neutral to ensure that a healthy relationship exists between those who create works and those who distribute them. This incentivizes true innovation. The symbiotic relationship between the creative community and those who create technologies and services to distribute their works to consumers has resulted in the launch of countless services and even industries over the years. We also think it is important that the court took efforts to ensure that its opinion would not be read as to cast a shadow over cloud computing services. Cloud computing services are an important and dynamically growing field that existed prior to Aereo and should continue to thrive after this decision."

Ian Ballon, Greenberg Traurig LLP
"This is an important decision and a big win for television companies, in which the court held that a company can be liable for the way it designs its system. At the same time, the court was careful to make clear that it was not holding that a user's conduct in all instances could make a service liable for a public performance, and this is not a case that is likely to retard the development of cloud services — other than services built on Cartoon Network, which had sought to make re-transmit copyrighted content to users without taking a license. This is especially true because the act of transmission already typically implicates the reproduction and distribution rights under the Copyright Act, depending how a given service operates."

Michael G. Bennett, Northeastern University School of Law
"Aereo gambled bodily, but poorly. The modifications that Congress made to copyright law in 1976 were more or less designed to deal with situations just like this. Congress explicitly clarified that to 'perform' a copyright-protected work meant 'to show its images in any sequence or to make the sounds accompanying it audible.' This change made a broadcaster like Aereo and its subscriber-viewers infringers. Congress also said in 1976 that when a broadcaster shows 'images in any sequence or to make[s] the sounds accompanying it audible,' it performs publicly. From the beginning, Aereo was legally dead and simply didn't know it."

Jason Bloom, Haynes and Boone LLP
"The Supreme Court's decision is essentially a death knell for Aereo and the similar but unrelated

company FilmOn X. While the court found Aereo to be enough like a cable system to fall within the intent of the Copyright Act, the court certainly did not find Aereo to be a cable system or to be entitled to the type of compulsory license specifically afforded cable systems in the Copyright Act. Aereo therefore has nowhere to go but away. However, the court was careful to limit its ruling to the facts before it, in an effort to minimize any impact on cloud computing, remote storage DVR services, and other technologies. Yet, the ruling is not so clear. While the court did not outlaw cloud computing when it comes to legally obtained content, the ruling could be read to create direct liability for cloud computing companies to the extent their users are storing and retrieving illegally-obtained content. If multiple users of a cloud service are storing and retrieving the same unlawfully obtained bootleg recording, even from different copies at different times, that could cause the cloud companies to be directly liable under the Supreme Court's ruling."

Felicia Boyd, Barnes & Thornburg LLP
"The Supreme Court ruled that online television streaming service Aereo Inc. violates copyright law by retransmitting over-the-air programming without authorization. Aereo had sought to avoid copyright infringement by using elaborate banks of tiny antennas, each assigned to individual users, to capture and transmit signals. Although Aereo tried to distinguish itself from cable companies, it was not successful in doing so. The court held that this system violated copyright law. As a result, Aereo will have to change its business model. In reaching its decision, the court took care not to have an expansive holding discouraging innovation in the world of cloud technology."

Ross Buntrock, Arent Fox LLP
"In failing to recognize the significance of the obvious technological differences that put Aereo outside of the Copyright Act, this is court's majority opens the way for application of the Copyright Act to any number of existing or forthcoming disruptive technologies involving transmission of content to end-user subscribers."

Dale Cendali, Kirkland & Ellis LLP
"At the broadest level, the decision is interesting for its holding's emphasis on the policy and Congressional intent behind the Transmit Clause. At a narrower level, the decision sheds light on the construction of what it means to 'perform a copyrighted work publicly.' Of particular interest, the court draws a line between 'an entity that transmits a performance to individuals in their capacities as owners or possessors' of copyright-protected works, on the one hand, and 'an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works,' on the other. This distinction appears to be intended to address the policy concern raised by Aereo and its amici that the court's decision could have troublesome implications for other innovative technologies, such as cloud computing."

Ross A. Dannenberg, Banner & Witcoff Ltd.
"In Aereo, the Supreme Court took a common sense approach by telling technologists not to put form over substance. This is the second time the Supreme Court has held that you can't manipulate technology to skirt copyright laws. They said it to Grokster, and now they've said it again to Aereo. If you're sitting in a technology development meeting at your company, and someone asks 'How can we deploy this technology to avoid paying a license fee?', I'd think twice about that approach, and make sure that you have legal counsel weigh in on the risks associated with that technology. Despite this, the ruling is not a death knell for technology development, and in fact reinforces the viability of cloud computing solutions in general. However, just as the Supreme Court has done here, technologists must take a common sense approach when designing new products to determine whether those products will run afoul of copyright law."

Seth Davidson, Edwards Wildman Palmer LLP
"I'd summarize the decision as a complete victory for the broadcasters with regard to Aereo. However, the majority goes out of its way to describe its holding as 'limited' and to base its reasoning on the 'overwhelming likeness' of Aereo and traditional cable service and on the fact that Congress' intent in the 1976 Act was to bring cable systems under the copyright law. Cloud services in general, and even the Cablevision remote storage DVR, appear to survive under the majority's limited decision, at least for now — and, reading between the lines, probably in the future in most instances."

Anderson Duff, Wolf Greenfield & Sacks PC
"This fairly fact-specific and limited ruling makes it clear that a party capturing broadcast signals and retransmitting them online must obtain a license from the content owners. It protects the rights of broadcasters to control their content and negotiate with service providers who may want to retransmit the broadcasters' content online or elsewise. There are already companies working to do this, and it is probably just a matter of time before companies similar to Aereo are operating on a large scale with the broadcasters' blessings."

Scott Flick, Pillsbury Winthrop Shaw Pittman LLP
"The ruling in Aereo is a reminder that complicated cases don't require complicated decisions. In finding Aereo engaged in public performances of copyrighted works, the decision distills complexities that bedeviled lower courts into a simple result: if it walks like a duck and quacks like a duck, no amount of technology will alter the fact that it is a duck. The biggest surprise was that even the three dissenters had difficulty supporting Aereo's business model, with Justice Antonin Scalia noting that he shared the Majority's view that Aereo's use of broadcast content 'ought not to be allowed.'"

Jonathan Hudis, Oblon Spivak McClelland Maier & Neustadt LLP
"In Aereo, the Supreme Court found that Aereo's audiovisual content retransmission and delivery service was a public performance of copyrighted over-the-air television content, and thus infringed upon the copyrights held by the producers, marketers, distributors and broadcasters of that content. The court's majority opinion attempts to limit the reach of its decision so that it does not unduly impinge upon the growth of new content storage and delivery technologies not presently before the court. On the other hand, the majority's opinion is of little comfort to new technology providers in making business decisions. Considering the breadth of the court's decision in interpreting the public performance right, new content storage and delivery providers now must be very careful to ensure that their technologies are not infringing."

Neal Katyal, Hogan Lovells, An adviser to the broadcasters.
"Today's decision is a sweeping victory for the Broadcast Networks and for American consumers more generally. The court today said that something for nothing is not the American Way, and if people want to transmit and sell other peoples work, they have got to pay for it."

Jonathan L. Kramer, Telecom Law Firm PC
"The Aereo decision opens a door for broadcasters to demand copyright payments from apartment landlords who provide their tenants with over-the-air TV signals from a rooftop antenna. Like Aereo, a building owner's antenna 'simply carr[ies], without editing, whatever programs [it] receive[s]' and the tenant can 'choose any of the programs he [or she] wished to view by simply turning the knob.' While building antenna systems might serve just a few tenants in a particular building, Aereo made it clear that even landlord-provided antennas may trigger copyright fees even when copyrighted TV signals are seen

by even a single viewer."

Bart Lazar, Seyfarth Shaw LLP
"The Aereo case is significant for copyright law because it involves the first application of re-transmission and 'fair use' provisions relating to the use of a cloud to accomplish the re-transmission of copyrighted material. Since its inception, copyright law has never been able to keep up with technological developments. With the broadcasters winning, the basic structure of copyright law, as flawed as it is, will continue — re-transmission of copyrighted material for commercial purposes is illegal. As a practical matter, businesses will ultimately adapt to paying royalties in much the same way other new, potentially disruptive technologies, like satellite TV and music sharing technologies — adapted, by getting licensed."

David Leichtman, Robins Kaplan Miller & Ciresi LLP
"The court confirmed that the contrivance of using millions of tiny antennas could not be successfully used to avoid the public nature of Aereo's re-transmissions. In so doing, the court acted consistently with its past approach to new copyright-evading technologies, with substance triumphing over form."

Harley Lewin, McCarter & English LLP
"The Supreme Court properly saw through Aereo's position that it is merely technology, recognizing that Aereo maintained control over that technology to rebroadcast network content. Just as cable stations and satellite systems pay license fees to rebroadcast, so should Aereo. Had this gone the other way, it would have fundamentally altered the copyright landscape in this digital age, in which consumers binge-watch content via all manner of technology. Digital technology drives sales of copyrighted material, and licensing generates income that incentivizes the development of new delivery methods as well as creation of content. This logical holding clearly warns those who would infringe on protected material."

Gina McCreadie, Nixon Peabody LLP
"In what the Supreme Court contends is a narrow ruling limited to the application of the Transmit Clause to Aereo's conduct, its decision reveals a willingness to apply congressional intent and purpose of the Copyright Act, as amended, to new technologies likely not contemplated when the applicable law was enacted. Although the court believes that its decision will not have the effect of 'discourag[ing] or . . . control[ing] the emergence or use of different kinds of technologies,' it may have done just that."

Antony J. McShane, Neal Gerber & Eisenberg LLP
"The Supreme Court rendered its ruling in the Aereo case today, handing down a decision that broadens copyright protection for content providers. For example, as a result of the ruling, businesses that designed their business strategies to avoid paying license fees for content, based on the new technologies that enabled individual copies of copyrighted works to be made for individual subscribers, will now have to pay royalties to continue to provide their service. Opponents of the decision fear that it will deter such technological innovations in the future."

Paige Mills, Bass Berry & Sims PLC
"In the short run, this decision will pave the way for television networks to continue to charge significant fees for the transmission of their content. The long term impact of the decision is harder to predict. Which technologies are now infringing because they are too close to 'cable services,' and which ones still require 'volitional' conduct by the provider of the service? Because uncertainty almost always stifles growth and investment, inventors and investors may be reluctant to create and invest in new technologies if the specter of an injunction for direct copyright infringement looms murkily in the distance."

Alina S. Morris, Christensen O'Connor Johnson Kindness PLLC
"Aereo is significant because it is a rare opinion by the court on substantive copyright law dealing with technology. However, it is not entirely ground-breaking because regardless of this ruling, Aereo still would not have been allowed to continue its activities. The issue on appeal was denial of preliminary injunction on the theory of Aereo's direct liability for infringement of the performance right, which it found. The court was not considering here the issue of secondary liability (nor direct or secondary liability regarding infringement of reproduction right). These remaining issues, on remand, will likely still be fatal for Aereo."

Bill Munck, Munck Wilson Mandala LLP
"The Aereo decision is a win for copyright owners, especially entertainment companies attempting to providing content as the methods for delivering that content continue evolving. By focusing on the simple terms 'public' and 'performance,' the court protected the incentive to create content by defending the copyright owner's monetization streams. The business reality is that the absence of such protection would have limited consumer access to content. While tech companies will likely be concerned about the court's test as to whether new content delivery methods infringe, the court deflected concerns about future technology by noting the holding was limited to Aereo's specific offering."

Joseph T. Nabor, Fitch Even Tabin & Flannery LLP
"This decision is significant because it closes a potential exception in the copyright statute that Aereo sought to exploit. By foreclosing that exception, the court provides further guidance on the use of new technologies to circumvent copyright protections, and it further defines the meaning of a public performance as it relates to copyrighted works. Fortunately, the decision is sufficiently narrow that it will not likely have an adverse effect on the use of copyrighted works in cloud-based technologies."

Brad Newberg, Reed Smith LLP
"In briefs and argument, Aereo and some amici briefs argued that a decision against Aereo could have sweeping negative ramifications for other technologies, including cloud computing. The court went out of its way to clarify that its decision did not consider and would not affect such technologies today. The court focused narrowly on assessing whether Aereo's service counts as a public performance of over-the-air broadcasts. Ultimately, Aereo never recovered from its difficulty at oral argument to explain why it constructed its system other than to evade copyright law; its inability to differentiate itself from a traditional cable system sealed its fate."

Gregory A. Sebald, Merchant & Gould PC
"The Aereo decision is important for the broadcast industry as it maintains their revenues from retransmission fees. The Aereo decision provides clarification on what 'public performance' means, but different technologies may present new questions that are not clearly answered by the ruling."

Stephen Shaw, Womble Carlyle Sandridge & Rice LLP
"Today's opinion concludes that the technological machinations of Aereo's service should be disregarded, and the controlling issue is that Aereo delivers services that 'are substantially similar to those of the CATV companies.' The majority in this case appears to be of the opinion that a business model designed by lawyers around perceived legal loopholes still runs afoul of congressional intent behind the '76 amendments to the Copyright Act. This case leaves unresolved many legal issues related to future tech innovation in the areas of media streaming, remote content delivery, and cloud

computing services."

Jonathan Steinsapir, Kinsella Weitzman Iser Kump & Aldisert LLP
"The Aereo case, in my opinion, returns copyright law to the status quo prior to the Second Circuit's creative interpretation of the Copyright Act in the Cablevision case — a case which got the right result for all the wrong reasons. The Supreme Court went out of its way to limit the decision to the precise technology at issue. Although the decision calls the reasoning of some cases into question — e.g., the Cablevision case and the still pending DISH Hopper case's interpretation of a 'performance' — I believe that the results in those cases won't change, for better or worse."

John I. Stewart Jr., Crowell & Moring LLP
"America's unique system of free broadcasting provides unparalleled programming service. The Copyright Act carefully balanced the interests of creators, distributors and viewers to sustain this service. The court's decision was plainly driven by the transparency of Aereo's attempts to evade Congress's balance. Even the dissent agrees it 'ought not to be allowed.' The court's opinion reinforces the balance, without impinging on new methods of program delivery developed in cooperation with content owners. The court's analysis of the Transmit Clause and users' prior rights in stored content may affect the remand on Aereo's delayed-transmission services, notwithstanding prior court of appeals decisions."

Bea Swedlow, Honigman Miller Schwartz and Cohn LLP
"There is a message here for innovators whose business models are based on legal loopholes: proceed at your own risk. The court was not persuaded by and was unimpressed with significant technological differences between Aereo's model and that of cable systems. For example, in the opinion, the court notes that, 'Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter?' The court clearly understood the differences and merely chose to ignore them. These differences, however, represented the very technological advancements that Aereo created in order to take advantage of loopholes in the Copyright Act. The court also made efforts to ease concerns — raised at oral argument and in amicus briefing — about the impact an adverse decision would have on the fledgling cloud industry. In summary, the court said, 'We don't think our opinion puts a target on the backs of the cloud industry; however, we won't know until a case is brought before us or you can seek attention from Congress.' Cloud-based companies should take little comfort from this opinion."

Stephen P. Wiman, Nossaman LLP
"The Supreme Court's ruling in Aereo is a blockbuster win for broadcasters but may not have larger implications. The opinion did not enunciate any far reaching rule. Rather it was limited to a fairly prosaic statutory analysis. Amicus briefs filed feared a ruling in favor of broadcasters would stifle the development of new technologies. The court was sensitive to this, emphasizing that its ruling was limited to the facts before it. According to the court, whether other existing and new technologies such as cloud computing run afoul of the Copyright Act must be left for another day and another case."

David Wittenstein, Cooley LLP
"The court decided the Aereo case correctly. Not only is the court's decision right on the law, it's right from a policy perspective. Aereo set itself up as the functional equivalent of a cable system. If Aereo had won, it would've succeeded in creating a commercial video distribution business without any of the obligations imposed on other commercial video distributors. In fact, if Aereo had succeeded, cable operators presumably would've tried to follow Aereo's model, which would have undercut the careful scheme Congress has laid out in the Copyright Act and the Communications Act. The case does leave a little unfinished business. The court declined the chance to discuss cloud storage and network DVR,

saying that these issues weren't squarely presented by the case. Those issues remain for another day."

Lynda Zadra-Symes, Knobbe Martens Olson & Bear LLP
"The Supreme Court's decision indicates that it is not willing to permit the use of new technology architecture to circumvent the language of the Copyright Act, but will instead assess the commercial realities involved in deciding the scope of the Transmit Clause under the Act. While the court restricted its decision to the specific technological solution utilized by Aereo, the holding is likely to stifle many internet television transmission services by requiring them to cease their transmissions or obtain licenses from broadcasters and content providers. Consumers should expect less choice in providers and an increase in subscription services from those that remain."

--Editing by Emily Kokoll.
