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Copyright Disruption in the Cloud: Latest Appellate Court Decision in Aereo Case Widens U.S. Court Split Over Rights Required for Streaming Entertainment Content from the Cloud – One Step Closer to U.S. Supreme Court Showdown?

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The ongoing convergence of cloud-based products and services with the delivery and consumption of entertainment content continues to raise novel legal questions in the United States. As more and more businesses turn to the cloud, the scope and bounds of copyright law, in particular, continue to be impacted by new and disruptive offerings promising consumers the "cloudification" of their entertainment content. Whether conceived of in the form of a remote, cloud-based DVR, a Slingbox-enabled satellite TV set-top box or a dime-sized antenna receiving and transmitting TV broadcasts via the cloud, U.S. courts over the last six years have continually weighed in on the balance between copyright holders' exclusive rights to exploit their works and consumers' and service providers' ability to make lawful use of these works through emerging cloud-based technology solutions.

Most notably of late, a new type of TV-based offering has set in motion a legal conundrum concerning the rights implicated when streaming audio/visual content from the cloud. Litigation over the matter (which is ongoing and occurring in two separate U.S. courts as described below) has led to an East Coast versus West Coast split and may set the matter on a collision course for the U.S. Supreme Court. The paramount issue in dispute is whether a service provider's distribution of entertainment content to end users (such as music, movies, TV shows, etc.) that is both stored in and streamed from the cloud implicates the public performance right of the content owner (part of the bundle of exclusive rights afforded copyright holders in the U.S. (see 17 USC §106)). The technology prompting

the litigation is being deployed by two different service providers (Aereo and Filmon.com/Aereokiller) and consists of a cloud-based solution that captures and digitizes over-the-air television broadcast signals for transmittal to individual subscribers utilizing remotely located, miniature TV antennas. Both services follow a similar protocol in assigning each individual subscriber his/her own thimble-sized antennae located at the service provider's facility which can be used solely by that subscriber to view live, as well as time and place shifted, streams and downloads of over-the-air television broadcasts on any Internet-connected device, including mobile devices.

Like several other businesses in the cloud-based storage and transmission space, both Aereo ("Aereo") and Filmon.com/Aereokiller (unrelated to Aereo) ("Aereokiller") developed their business models and corresponding operational protocols in reliance upon, and in reaction to, the Second Circuit's controversial 2008 holding in Cartoon Network, LP v. CSC Holding Inc., 536 F.3d 121 (2d Cir. 2008) ("Cablevision Case"), which addressed the copyright implications of a remotely located, cloud-based DVR system ("RS-DVR"). There, the Second Circuit, in a controversial pronouncement, overturned a lower court decision and held, most notably, that the transmission of television/movie programming from the RS-DVR to Cablevision's cable subscribers who requested playback in their homes did not violate the copyright holders' public performance rights. The defendant, Cablevision, argued against the TV network plaintiffs (and the court found relevant) that, "because each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber" only one subscriber is capable of receiving the transmission of that particular work and thus the performance is not "public". It was this holding—that individualized, unique digital copies of audio/visual content stored in the cloud at a user's direction and streamed back to that particular user constitute private (as opposed to public) performances—which seemingly has provided many cloud-based businesses—from Dropbox and SoundCloud to Apple iCloud and Google Play—with sufficient legal cover necessary to stream user uploaded content without first securing authorization from the applicable copyright holders. Complying with the dictum in the Cablevision Case to accomplish this feat, however, is frequently a daunting task–requiring technological tailoring and operational procedures that can be both inefficient and costly (e.g., renting thousands of tiny, individually-assigned antennae (as opposed to relying on one master antenna) and storing and streaming individual copies of the same digital file millions of times (as opposed to relying on one master copy)).

The strength of the Cablevision Case's private versus public performance distinction was recently put to the test, however, when the TV networks sued Aereo in the Southern District of New York for direct and secondary copyright infringement. The court's ruling on the plaintiffs' preliminary injunction motion in the matter, American Broadcasting Companies, Inc. v. Aereo, Inc., No. 12 Civ. 1540 (AJN), 2012 U.S. Dist LEXIS 96309 (S.D.N.Y. July 11, 2012) ("Aereo District Case"), was specifically limited in scope, dealing only with the plaintiffs' claims that Aereo was directly liable for publicly performing the plaintiffs' copyrighted works. At the outset, the court acknowledged that the core issue in deciding the motion was "the applicability of the Second Circuit's decision in Cablevision" given the similarity between Aereo's technology and Cablevision's RS-DVR. Accordingly, Aereo argued, much like Cablevision, that it effectively rents to its users remote equipment comparable to what these users could install at home, characterizing its system "as merely allowing users to rent a remotely located antenna, DVR and Slingbox-equivalent device, in order to access content they could receive for free and in the same manner merely by installing the same equipment at home."

As a technological matter, the court agreed, finding that "the overall factual similarity of Aereo's service to Cablevision on these [technical] points suggests that Aereo's service falls within the core of what Cablevision held lawful," noting that "Aereo's system created a unique copy of each television program for each subscriber who requested to watch that program" with only that subscriber being able to receive its transmission. Accordingly, the court found that private (not public) performances were implicated because just one individual subscriber was capable of receiving the transmission of each unique copy. As such, the court's decision held true to the requirements of court precedent (NY courts are bound by Second Circuit decisions), and found that "faithful application of [the Cablevision Case] requires the conclusion that plaintiffs are unlikely to succeed on the merits of their public performance claim."

The decision in the Aereo District Case was promptly appealed to the Second Circuit by the plaintiffs. There, American Broadcasting Companies, Inc. v. Aereo, Inc., 12-2807-cv (2d Cir. April 1, 2013) ("Aereo Case"), the Second Circuit went on to uphold the lower court's holding in the Aereo District Case, relying heavily on the contours of its own holding in the Cablevision Case, stating that, "In evaluating [the plaintiffs'] claims, we do not work from a blank slate. Rather, this Court in Cablevision closely analyzed and construed the [public performance right] in a similar factual context." Accordingly, the court recognized at the outset that its analysis and corresponding holding turned on whether the Aereo service was materially distinguishable from the RS-DVR in the Cablevision Case. Specifically, the court stated that "Cablevision's holding that Cablevision's transmissions of programs recorded with its RS-DVR system were not public performances rested on two essential facts." The court described them as follows:

"First, the RS-DVR system created unique copies of every program a Cablevision customer wished to record. Second, the RS-DVR's transmission of the recorded program to a particular customer was generated from that unique copy; no other customer could view a transmission created by that copy. Given these two features, the potential audience of every RS-DVR transmission was only a single Cablevision subscriber, namely the subscriber who created the copy. And because the potential audience of the transmission was only one Cablevision subscriber, the transmission was not made 'to the public.'

Based on the foregoing, the court found that the same two features were present in Aereo's system. As the court noted:

When an Aereo customer elects to watch or record a program using either the "Watch" or "Record" features, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy. Thus, just as in Cablevision, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.

Accordingly, the court concluded that the plaintiffs had provided "no adequate basis to distinguish Cablevision from the Aereo system" and as a result it could "see no error in the district court's conclusion [in the Aereo District Case] that plaintiffs are unlikely to prevail on the merits." This reliance by the court on the Cablevision Case in reaching its decision could have been predicted, but the most unexpected element of the holding was, in fact, the strongly worded dissent from Judge Denny Chin. In his opinion, "by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act." Judge Chin went on to dub Aereo's technology platform a "sham", stating that "there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law."

The dissent further went on to argue the multitude of factors distinguishing the RS-DVR in the Cablevision Case from the Aereo system and their corresponding business models. Most significantly, the Cablevision Case involved a cable company that "paid statutory licensing and retransmission consent fees for the content it retransmitted" while Aereo paid no licensing fees, statutory or otherwise, to the applicable copyright holders. Moreover, "while Cablevision promoted its RS-DVR as a mechanism for recording and playing back programs, Aereo promoted its service as a means for watching "live" broadcast television on the Internet and through mobile devices." In other words, as the dissent detailed, "the core of Aereo's business is streaming broadcasts over the Internet in real-time; the addition of the record function, however, cannot legitimize the unauthorized retransmission of copyrighted content." Judge Chin also questioned whether the majority's decision in case ran afoul of other decisions of the Second Circuit. Specifically, Chin noted that in WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d Cir. 2012) ("ivi Case") the Second Circuit recognized that "the retransmission of copyrighted television programming by streaming it live

over the Internet constituted a 'public performance' in violation of the Copyright Act." He went on to quote the Second Circuit's holding in the ivi Case where the court granted a preliminary injunction against the ivi TV service due in part to the fear that retransmissions of copyrighted television programming over the Internet with copyright holder authorization would "threaten to destabilize the entire industry." Accordingly, Judge Chin found that those concerns in the ivi Case "apply with equal force in [the Aereo Case], where Aereo is doing precisely what ivi was enjoined from doing."

Meanwhile, across the country, while the Aereo District Case was being decided, the TV networks also filed a similar copyright infringement suit against Aereokiller, a cloud-based distribution service virtually identical to Aereo, in the Central District of California. Akin to the Aereo District Case, the scope of the plaintiffs' preliminary injunction motion and the corresponding decision, FoxTelevision Stations, Inc., et al. v. BarryDriller Content Systems, PLC, et al., CV 12-6921-GW (JCx), 2012 WL 6784498 (C.D. Cali. December 27, 2012) ("Aereokiller Case"), was confined to whether Aereokiller was directly liable for publicly performing the plaintiffs' copyrighted works. Predictably, Aereokiller argued that its service was legal because it was "technologically analogous to the service which the Southern District of New York found to be non-infringing in the Aereo Case." However, the court in this case was not bound by the Second Circuit's holding in the Cablevision Case, as California courts are encompassed by the Ninth Circuit and its corresponding precedent. As such, the court quickly noted that if Second Circuit law had, in fact, controlled, then it would support Aereokiller's position because "cases there have held that where a transmission of a work over the Internet that is made from a copy of a work at the direction of and solely for use by a single user, there is no public transmission."

Then, in a bold proclamation, the court stated that "Ninth Circuit precedents do not support adopting the Second Circuit's position on the issue," and declared that Aereokiller's transmissions are indeed public performances, infringing plaintiffs' copyrights. In arriving at the conclusion, the court vehemently disagreed with the Second Circuit's holding in the Cablevision Case (and by extension the Aereo District Case), attacking its interpretation of the Copyright Act, legislative history and case law from the Ninth Circuit. The thrust of the court's argument was centered around, what it considered to be, the Second Circuit's flawed interpretation of the Transmit Clause of the Copyright Act (see17 U.S.C. § 106(4), which vests in a copyright holder the exclusive right "to perform the copyrighted work publicly") and the corresponding statutory definition of a public performance (see 17 U.S.C. §101, which 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."). Conducting its own statutory parsing, the court rejected the notion that a transmission of a performance had to be public for a work to be publicly performed, and panned the Second Circuit's focus on "which copy of the work the transmission was made from." Instead, the court found that

[T]he [Copyright] statute provides an exclusive right to transmit a performance publicly, but does not by its express terms require that two members of the public receive the performance from the same transmission. The statute provides that the right to transmit is exclusive '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. Again, the concern is with the performance of the copyrighted work, irrespective of which copy of the work the transmission is made from... Thus, [the Cablevision Case's] focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.

In the end, the court acknowledged the ramifications of, and problems posed by, its ruling given the application of Ninth Circuit law differs from Second Circuit law, noting that "principles of comity prevent the entry of an injunction that would apply to the Second Circuit." Therefore, the court issued an injunction against Aereokiller covering its activities only in those territories encompassed by the Ninth Circuit (i.e., Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam), and, consequently created a vexing, geographical split in the U.S. (as the Second Circuit encompasses New York, Connecticut and Vermont) on this

issue which is of paramount importance to the media industry—effectively, allowing certain conduct in some states while simultaneously prohibiting it in others.

The diametrically opposed holdings in the Aereo Case and the Aereokiller Case have placed stakeholders in the cloud-based distribution space (content creators, copyright holders, distributors and service providers alike) in an extremely precarious position, both legally and financially, with further muddying of the waters likely if and when other U.S. courts have the opportunity to weigh in on the issue as long as the litigation expands into any one of the jurisdictions in which Aereo intends to offer its service – in fact, Aereo recently announced plans to expand its service to 22 new cities. Against this backdrop, additional proceedings on the matter in the U.S.'s highest court appear to be all but inevitable. In other words, if the Ninth Circuit affirms the preliminary injunction decision in the Aereokiller Case, then a Circuit Court split on the matter exists, which is a chief justification for Supreme Court review. In fact, in 2009, when the plaintiffs in the Cablevision Case sought Supreme Court review of the Second Circuit's decision, the Obama Administration arguedagainst certiorari, with then-Solicitor General (and now Supreme Court Justice) Elena Kagan advocating on behalf of the Department of Justice and stating that none of the Second Circuit's "specific holdings in this case conflicts with any holding of this Court or another court of appeals," and "Network-based technologies for copying and replaying television programming raise potentially significant questions, but this case does not provide a suitable occasion for this Court to address them." Well, it appears that "suitable occasion" is about to arrive.

For those in the TV/Film industry, the stakes could not be higher. A U.S. Supreme Court decision affirming the private versus public performance stance taken by the court in the Aereo Case (and, by extension, the Cablevision Case) would likely cause significant financial harm and force broadcasters to evaluate the effectiveness of the largely ad-supported business model that supports over-the-air television programming. Specifically, the consumption of TV content via Aereo-style businesses and other IP-connected technologies cannot, as of yet, be adequately measured for purposes of determining show ratings or viewership, which adversely affects the TV networks' ability to effectively negotiate with advertisers and monetize their programming. As the Aereo court remarked, "[B]y siphoning viewers from traditional distribution channels, in which viewership is measured by Nielsen ratings, into Aereo's service which is not measured by Nielsen, [Aereo] artificially lower[s] these ratings."

In addition, the ongoing operation of Aereo-style businesses may also provide MVPDs with substantial leverage in negotiations with network programmers and broadcasters concerning the licensing of programming for distribution on MVPDs' systems, including the payment of retransmission fees—effectively, Aereo's and Aereokiller's mini-antenna farms and other similar content distribution systems offer an alternate means for acquiring network programming without having to pay broadcasters license fees and without having to be bound by broadcaster-mandated restrictions on the use of TV content through new technologies (e.g., online and mobile distribution/viewing, authenticated TV Everywhere initiatives, etc.). As the court in the Aereo Case affirmed, "Aereo's activities will damage plaintiffs' ability to negotiate retransmission agreements, as these [MVPD] companies will demand concessions from plaintiffs to make up for this decrease in viewership [attributable to Aereo]... The record reflects that such agreements amount to billions of dollars of revenue for broadcasters." Accordingly, on the issue of the threat of harm, even the Aereo court (though bound by precedent on the legal issues in the Cablevision Case) agreed with the plaintiffs, concluding that "Aereo threatens plaintiffs with irreparable harm by luring cable subscribers from that distribution medium into Aereo's service, diminishing plaintiffs' ability to benefit from their content in ways that are fundamentally difficult to measure or prove with specificity."

The music industry—labels, publishers, performing rights organizations and distributors alike—also have skin in the game on the issue. Arguably, it was the holding in the Cablevision Case that facilitated major music locker services like Google Play and Amazon's Cloud Player to launch and commence streaming music to its subscribers without securing licenses from the applicable music rights holders. Specifically (and in contrast to Apple which at the time had allegedly secured all of the necessary rights upfront to offer its iCloud and immediately begin streaming music from a master file once music tracks were authenticated on a user's device), Amazon and

Google had yet to reach agreements with all of the necessary parties and instead seemingly relied on the Cablevision Case to launch their cloud music services. As such, this approach required that each of its users upload his/her own unique copy of each music file in his/her music collection to the cloud to enable playback—a laborious process, demanding excessive amounts of time and data. Since that time, however, both Amazon and Google have cut deals with certain key rights holders, but Apple, Google and Amazon undoubtedly still rely on the private versus public performance holding in the Cablevision Case when unable to scan-and-match a particular track on a user's device with its centrally located and licensed files. When this occurs, the full, unauthenticated music file is uploaded to cloud storage for playback to the particular user, all in compliance with the requirements of the Cablevision Case which demands a unique copy be uploaded, stored and used exclusively to stream back to the particular user. In fact, the current Terms of Service for Google Play, all but recites such requirements pertaining to unique copies stored and played back at the user's direction: "By storing Music Products and Stored Content in Music Storage, you are storing a unique copy of such content and requesting Google to retain it on your behalf and to make it accessible to you through your Google account."

Accordingly, if the U.S. Supreme Court were to side with the Ninth Circuit and reject the holding in the Aereo Case and Cablevision Case, music performers, labels, publishers, writers and performing rights organizations would have the means to assert their copyrights against cloud-based digital locker services providing unlicensed streaming functionality—specifically, claims for direct copyright infringement attributable to unauthorized public performances. Even though the big three—Apple, Amazon and Google—all have industry agreements in place covering the majority of the music they stream, numerous cloud services continue to provide cloud storage and streaming music functionality without any music licensing agreements at all, all in (conscious or unconscious) reliance on the Cablevision Case.

Needless to say, a ruling one way or the other on the private versus public performance issue by the U.S. Supreme Court, or even other Circuit Courts along the way, will cause material disruption in the entertainment and technology industries in the U.S. As always, we will keep a close eye on future developments in these matters and any case law potentially impacting the ongoing operation and future deployment of cloud-based products and services.

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