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Why the ABC v Aereo case matters – and why it doesn't

By David Post

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The Supreme Court is hearing oral argument today in the *ABC v. Aereo* case, and the buzz has been building to a crescendo (at least *mezzo forte*). I've been involved in this case for a while; when it was before the 2d Circuit, I wrote an amicus brief (supporting Aereo) on behalf of 34 copyright law professors – on a rather small question involving interpretation of statutory ambiguities in the Copyright Act. And for the Supreme Court version, James Grimmelmann of U-MD Law School and I wrote an amicus brief, again on behalf of a fairly broad coalition of law professors, this time with a considerably broader focus on the merits of the case.

It's the strangest and most peculiar case I've ever been involved with. The facts are straightforward and largely undisputed – summarized here and in the merits briefs posted here. [In a nutshell: the technology involves assigning a tiny antenna and a portion of disk space to each subscriber, which allows the subscriber to record and subsequently to view over an Internet connection, anything he/she has recorded from the over-the-air TV broadcasts. See my earlier blog posting, here]. Is this a "public performance" of the copyrighted programming (in which case Aereo is infringing, unless it obtains a license)? Or is it a (large) number of private performances, one for each subscriber, in which case it's not an infringement and no license is necessary.When I first heard about it several years ago – at a conference presentation by a couple of the broadcasters' lawyers, describing the lawsuit they were about to file against Aereo in the district court – my intial reaction was: huh? Why, in heaven's name, would the broadcasters want to shut down Aereo? After all, they give their content away for free, over-the-air. They can do that because they earn money from advertisers. And the more eyeballs they can get, the more money they should be able to get from advertisers – right? So why would they object to a service that gives them more eyeballs?

It just shows how little I understood the TV business. The answer to the question is: over-the-air network broadcasters get a royalty from the cable companies who retransmit their programs to subscribers, and this source of revenue has become increasingly significant as the growth of advertising revenue has slowed. It's pretty bizarre, when you think about it. Broadcast programming is distributed for free, to anyone who has a television and an antenna. Why should cable companies (or anyone else, for that matter) have to pay for it? Answer: because Congress decided, as part of the copyright reform in 1976, that they should. Why? Who the hell knows

why – it's just a naked subsidy to the broadcasters from cable companies, of the kind Congress (too often) engages in.

But there it is, in section 111 of the Copyright Act – easily the most godawful mess of a statutory provision in a statute that is full of godawful messes. In brief, the statute makes it an infringement of copyright to "transmit a performance of a [copyright-protected] work to the public," and it enacts a compulsory license in sec. 111 to enable cable companies to engage in that infringing conduct as long as they comply with certain formalities and pay the broadcasters a statutory-set royalty.

[And just to make things a little messier, the cable companies are in fact *required by law* to carry much of this programming, by the terms of the so-called "must carry" provisions of the Telecommmunications Reform Act of 1996. It's a pretty sweet gig for the broadcasters -- cable systems have to carry your stuff, and they have to pay you for the privilege of doing so (even though you give it away to the public for free!!! Nice work if you can get it!]

So the broadcasters' argument here is: Aereo is the functional equivalent of a cable company. They're pulling in signals that we broadcast over the air and retransmitting those signals to its paying subscribers -just like Comcast does. Comcast pays us a royalty to do so, because Congress deemed that they're infringing our copyrights. So should Aereo.

It's a plausible characterization of the case, and if the Court buys it, the broadcasters will win.

There is, though, an equally plausible (actually, in my eyes, a more plausible) characterization of the case. Aereo's not the functional equivalent of a cable company – it's the functional equivalent of a rooftop antenna connected to a DVR/VCR. It just gives consumers a tool *to do what they are already lawfully authorized to do:* pull in over-the-air broadcasts and record and/or watch what they pull in. Consumers don't have to pay the broadcasters a royalty when they do that, because it's not an infringement of the broadcasters' copyright; giving them a tool to do (more efficiently) what they can already do for themselves has never been deemed to be copyright infringement – it's called "innovation." If putting an antenna on your roof and recording/watching broadcast programming is lawful (and it is), it surely shouldn't matter that the antennas in this case are not on the roof but in Aereo's facility, and that to retrieve those signals you use the Internet instead of a wire running into your living room.

This case turns entirely on which of these metaphors the Court thinks best captures the situation. And what makes it even stranger: *neither* characterization really "works" given the express language in the statute. I've never, in almost 30 years of lawyering, seen a case quite like in that respect. I'll spare you the gory statutory details – this case involves some of the most complicated bits of copyright law, and you can read our brief if you are interested. But having worked on this case for 3 years or so, I haven't yet seen a way to make this statute internally consistent with respect to the issues raised here. Something has to give.

And because something has to give, the important question here is what parts of copyright law the Court is going to change/modify/ignore/re-interpret in order to reach whatever outcome it wants to reach. What worries me about this case is its potential to make a *substantial* impact on

some very, very basic copyright principles — the definitions, for starters, of "perform" and "performance" and "public" ad "private" and "transmit" and "work of authorship." These couldn't be more foundational in the copyright world; the entire edifice of copyright law is built upon reasonably settled expectations of what they mean. And, in turn, many hundreds of billions of dollars of economic activity is premised on the stability of that copyright edifice.

So I am very much hoping that the Justices look at this and say: "What a mess!! Something has to give. What's the least damage that we can do to this very intricate copyright system? What's the narrowest possible holding we can find?"

I do think if the Court takes this approach, that Aereo prevails, because I think its interpretation — that it is facilitating *private*, not public, performances — fits more comfortably within that statute and existing interpretations of copyright law. But I wouldn't get terribly bent out of shape if the Court were to go the other way while invoking some narrow, new, *sui generis* rule only applicable to these special facts and the re-transmission of *over-the-air broadcasts*, and that it has nothing to do, more generally, with "transmitting" or "performing" or anything else.

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