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ABC v Aereo – A big (or maybe not-so-big) win for the networks

By David Post
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[I'm guest-blogging over at ScotusBlog on this case and will shortly post a (hopefully) more considered version of my thoughts on the outcome in ABC v. Aereo, decided today, but herewith my initial reactions]

ABC v Aereo was always going to come down to a battle of the metaphors:

1. Aereo is the functional equivalent of a cable company. Cable companies are required (oddly enough, by the Copyright Act, instead of where it really belongs, the Communications Act) to pay retransmission fees to the network broadcasters when they re-transmit the signals transmitted over-the-air by the broadcasters to cable company subscribers, because the Copyright Act deems them (the cable companies) to be "transmitting performances of copyrighted works to the public." That's exactly what Aereo is doing: re-transmitting over-the-air broadcast signals to its subscribers. It, too, should be deemed to be "transmitting performances of copyrighted works to the public." QED.

2. No, Aereo's not the functional equivalent of a cable system, it's the functional equivalent of a rooftop TV antenna connected to a DVR in the living room. It simply gives consumers a tool that enables them to do what they are already permitted to do: pull down over-the-air signals, record those signals, and then transmit those signals at a later time to some device (TV, laptop, phone). If it's not infringing for customers to do that for themselves (and it isn't), why should it be infringing when Aereo does it for them, in a more efficient manner? Aereo's equipment (like the rooftop antenna) transmits performances – those performances are not transmitted "to the public"; each transmission is a private performance to the individual subscriber whose antenna/DVR, controlled by that subscriber, was called into play.

The majority (Breyer +Roberts, Ginsburg, Kennedy, Kagan, and Sotomayor) took route 1; the dissent (Scalia + Thomas and Alito), route 2.

Although I was very much a partisan of route 2 (James Grimmelmann and I wrote an amicus brief in support of Aereo, and Justice Scalia's dissenting opinion, citing the brief, follows much of the structure of the arguments we made there), I'm not entirely surprised at the outcome. Nor, after a quick reading, am I all that despondent about the result.

The big question lurking in this case was: How much damage will the Court do to settled copyright understandings in coming out one way or the other? Something had to give. The two metaphors are each quite compelling; they both "work," given the statutory language. But they can't co-exist, because that would mean that Aereo is, and is not, infringing. Choosing one was always going to mean breaking whatever piece of copyright law was propping up the other.

This was, to me, particularly worrisome, because the broadcasters were pushing a theory of the case that would have dramatically altered widely-shared understandings about the meaning of some very, very important copyright terms – "perform," and "performance," and "transmit," and "to the public." 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, and a positively immense amount of innovative technological activity, is premised on the stability of that copyright edifice. That the Court would find for the broadcasters didn't worry me too much; at bottom, I don't think the world changes very much depending on whether Aereo does, or does not, have to pay royalties to the broadcasters. What worried me was that it would take the opportunity to re-define these basic copyright principles in the course of finding for the broadcasters, in a way that could have rather dire implications for a very wide range of content-delivery and content-storage systems out there (or not yet deployed).

So after I (rather quickly) got over my disappointment upon hearing the result, the question I had as I read Justice Breyer's opinion was: How much copyright blood was on the floor?

I think the answer is: Not too much. The majority is at pains, in several places, to say that the case is just about broadcast television and the re-transmission of broadcast signals. Not about cloud storage, or streaming services, or gaming platforms, or anything else. Just broadcast TV, and what you may or may not do with over-the-air broadcast signals. Congress has made a choice about those signals; anyone who re-transmits them (like the cable companies do) has to pay royalties to the broadcasters.

If that's what it means – and I think that is what it means, though as I said, I'll be reading it over a few times more closely in the coming days to find the cabalistic messages hidden in the text – the decision has nothing to say about any other content-delivery or content-storage platforms that deal with the vast array of *non-broadcast-TV* content. The share of that latter category will continue to grow, as it has been doing for the last 20 years or so; I don't think I'm giving away any secrets here in saying that over-the-air broadcast TV is probably not where the action is going to be over the next 10 or 20 years. [When the Chairman of Fox Broadcasting said, during the run-up to this case, that he'd recommend getting out of the broadcast business entirely and relying entirely on cable distribution (ala ESPN, HBO, Comedy Central, . . .) if Aereo were to prevail in the case, I think the collective response was: And we should care about that why, exactly?] How the money gets carved up in that little corner of the entertainment universe (which this case definitively resolves) is really of rather limited significance. What matters, and what the Court seems to leave untouched, are the many ways in which copyright could encourage, or stifle, the development of all other forms of information-delivery.

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