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The supreme court's Aereo effect might evaporate Silicon Valley's cloud

The majority's odd rule creates new legal uncertainties for innovative tech start-ups and established cloud providers alike

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When is an online streaming service like a cable company? The US supreme court's answer on Wednesday – sure to send chills down the spines of Silicon Valley entrepreneurs – was this: when five justices think it kinda sorta looks like one.

In a 6-3 ruling – which, in a dissenting opinion, Justice Antonin Scalia predicted would "sow confusion for years to come" – the court held that a company called Aereo violates copyright when it lets users tune into broadcast TV signals over the internet. But the "improvised standard" established by the court's majority in American Broadcasting Companies v Aereo creates new uncertainty about just what an innovative tech startup must do to stay on the right side of the law – and raises questions about the legal status of familiar cloud services run by companies like Apple and Amazon.

In essence, Aereo combined two services to allow subscribers to watch free over-the-air broadcast television on a computer or mobile device. First, each subscriber effectively rented their own miniature, remotely-controlled antenna that the user could activate and tune to any local broadcast TV station. Second, subscribers got a remote DVR drive that could record, store and stream those broadcasts over the internet. The court tacitly permitted remote DVR services in 2008, when it allowed a lower court ruling blessing them to stand – yet the logic of that decision is at odds with the court's finding on Wednesday that Aereo "publicly performs" the shows that it allows users to stream, violating federal copyright law.

Aereo's lawyers had argued that they're not "publicly performing" any copyrighted works at all, because each user create a personal stream using their own personal antennas. As they saw it, the service was no different than a cloud storage service like Dropbox: each user would be downloading her individual copy of a file (even if a file with the same content could be found in the personal folders of many different users). If individuals are allowed to record broadcast programming using a rented antenna on their own rooftops, and store their recording on a cloud drive, why should it make a difference whether the antenna is on Aereo's rooftop instead of the user's?

The court rejected that argument, noting that Congress had changed federal statute specifically to cover cable companies retransmitting broadcast programming, redefining

the "public performances" restricted by copyright law to include "transmissions". Even though Aereo functions very differently from traditional cable companies – each user remotely controlling their own antenna and drive – the court dismissed that set-up as trivial "behind-the-scenes technological differences". The majority reasoned that, since Aereo functions "for all practical purposes" like a traditional cable company from the user's perspective, "Congress would have as much intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies".

Confusingly, Justice Stephen Breyer also insisted in his opinion for the majority that Congress "did not intend to discourage or control the emergence or use of different kinds of technologies", and sought to dispel the fears of Silicon Valley that the ruling might spell doom for other types of cloud services. The Aereo decision's definition of "performance", Breyer wrote, only applies to a service that "communicates contemporaneously perceptible images and sounds" – distinguishing *streaming* a video from downloading and then playing it. Nor does the opinion state whether the "public performance right is infringed" by services whose users are paying "primarily for something other than the transmission of copyrighted works, such as the remote storage of content".

In other words, Aereo might be legal if it streamed videos that had been first captured and uploaded by an antenna on your own rooftop. But it doesn't – this isn't 1998 – and so Aereo may not be allowed to exist anymore. And that doesn't bode well for disruptive technologies that have managed to avoid being disrupted by lightning strikes. Or maybe it does.

As Scalia's dissent points out, there's an obvious contradiction there: on the one hand, the court says that "behind-the-scenes technological differences" between Aereo and traditional cable companies don't matter if they serve the same function for the user because Congress meant to regulate anything cable-company-ish. On the other hand, in a confused effort to avoid spooking Silicon Valley, the justices have said that *other* subtle technological differences might save some services from ruinous litigation. By the majority's odd rule, as Scalia's characteristically blistering dissent observes, "Aereo would be free to do exactly what it is doing right now so long as it built mandatory time shifting into its 'watch' function" – so, whether a streaming service is legal might depend on exactly how long a video buffers on a user's computer before it starts playing.

The court's incoherent rule creates two possibilities: one, that this decision will prove to be Pyrrhic victory for broadcasters, because a few technical tweaks could render an Aereo-like service legal. But the more disturbing alternative is that future courts will decide that those "behind-the-scenes technological differences" aren't so important either – imperiling a wide array of innovative cloud computing services. Either way, the uncertainty created by the court seems bound to chill innovation in this burgeoning sector of the economy.

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