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Our incoherent copyright law, cont'd

By David Post
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Remember Aereo? The Internet service streaming over-the-air TV broadcast programming to consumers over the Internet that the Supreme Court, last June, determined was infringing the networks' copyrights? It was back in court this week. The Supreme Court's decision (over 3 dissenters) hinged on its conclusion that (a) Congress intended, in the Copyright Act, to include re-transmission of over-the-air signals by "cable systems" as infringements of copyright; (b) given Aereo's "overwhelming likeness" to cable systems, "the many similarities between Aereo and cable companies," and the inability to "distinguish Aereo's system from cable systems," (c) Aereo was infringing the broadcasters' copyrights.

So Aereo took the next logical step: the Copyright Act not only says that cable system re-transmissions are infringing, but it also, importantly, provides them with a compulsory statutory license, at a fixed rate, to do so, in sec. 111 of the Act. That is, Congress didn't merely make cable systems liable for infringement – it provided them with a defense to an infringement claim (provided that they paid the statutorily-set royalty to the copyright owners). So Aereo said, in effect: OK, if we're a cable system, we can (like other cable systems) continue to re-transmit these signals to our customers (just like the cable companies do), so long as we pay the royalty.

Not so fast, the federal court in the Southern District of NY held the other day; Aereo, it held, may be a "cable system" for purposes of determining whether it is infringing, but it's not a "cable system" for purposes of determining eligibility for the statutory license. It's bizarre and counter-intuitive – but just the latest small example of how the Copyright Act is an incoherent mess. Perfectly timed to coincide with a presentation I'm about to give tomorrow at Cardozo Law School (New Yorkers take note) on "Our (Somewhat) Incomprehensible Copyright Act."

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