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Court To Determine the Fate of Broadcast Television

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On April 22, 2014, the Supreme Court heard oral arguments in a case that could decide the continued viability of broadcast television. In *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.*, the Court granted certiorari to address a seemingly straightforward question of statutory interpretation involving a single clause of the Copyright Act: whether a company "'publicly performs' a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet." How the Court answers that question will have enormous implications for the future of television.

At issue in the case is the novel interpretation of the Copyright Act advanced by Aereo. Under the Act, a copyright holder possesses the exclusive right "to perform the copyrighted work publicly." In the 1976 Copyright Act, Congress provided that a public performance is one in which someone "transmit[s] or otherwise communicate[s] 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." This "Transmit Clause" was meant to overturn two Supreme Court cases that had held that community-antenna television systems (the precursors to cable systems) were not publicly performing when they captured broadcast television off the air and retransmitted the programs to their subscribers.

Enter Aereo and its interpretation of the "Transmit Clause." Backed by media mogul Barry Diller, in February 2012, Aereo began offering a service in New York under which subscribers could pay a monthly fee to receive either live or time-shifted streams of over-the-air broadcast television on their Internetconnected devices. The trick is that each subscriber is assigned an individual antenna in Aereo's large antennae farms, and each Internet stream originates from a separate copy of the broadcast made by Aereo's servers. Thus, Aereo contends that it is not "publicly performing" the broadcasters' copyrighted work. Instead, Aereo argues it is offering a private performance to each subscriber because each Internet transmission from a separate antenna and a separate copy should be viewed in isolation. The broadcasters sought to enjoin Aereo from offering its service in New York, but the Second Circuit agreed with Aereo's interpretation of the Copyright Act, finding that because Aereo sends each of its subscribers an individualized transmission of a performance from a unique copy of each copyrighted program, it is not transmitting performances "to the public,"

but rather is engaged in tens of thousands of "private" performances.

Upon receiving the Second Circuit's unfavorable decision, the broadcasters promptly took their case to the Supreme Court. Somewhat unusually, when the broadcasters filed their petition for certiorari, Aereo actually agreed with the broadcasters that the Supreme Court should hear the case. With both parties in agreement as to the importance of the issue, the Court set the case for argument on April 22, 2014.

Not surprisingly given what is at stake, the case has attracted enormous interest from various *amici*, who have weighed on both sides. Perhaps the most important "friend of the Court," the Solicitor General, has filed a brief supporting the broadcast networks. The Solicitor General argues that the scheme established by Aereo "violate[s] the[] statutory requirements" of the Copyright Act and "infringe[s] petitioners public-performance rights." However, the Solicitor General cautions that a "decision rejecting respondent's infringing business model … need not call into question the legitimacy of innovative technologies that allow consumers to use the Internet to store, hear, and view their own lawfully acquired copies of copyrighted works." Thus, the Solicitor General appears to be addressing concerns raised by some about the implication of the Aereo decision for cloud computing services.

Other *amici* filing in support of the broadcasters include organizations like the National Football League and Major League Baseball, who warn the Court that if it allows services like Aereo to retransmit broadcast programming—such as football and baseball games—without payment to anyone, it may be that the Leagues' only "option will be to move that content to paid cable networks (such as ESPN and TNT) where Aereo-like services cannot hijack and exploit their programming without authorization." Similarly, the National Association of Broadcasters and other organizations warn that "Aereo's free riding creates a substantial danger that quality programming will migrate from broadcast television to pay services."

Aereo argues that these concerns are irrelevant, unfounded, and overblown. And Aereo's *amici* have their own warnings about the consequences of the Court's decision if the Court rules in favor of the broadcasters. According to the Computer & Communications Industry Association, "[a]doption of petitioners' position would threaten one of the most important emerging industries in the U.S. economy: cloud computing." Joining the Association in urging the Court to rule for Aereo are dozens of intellectual property professors, who argue that Aereo's service is the "functional equivalent" of a VCR because "consumers use it to record television programs for subsequent playback to themselves." Aereo has also garnered support from the American Cable Association, which claims that its members "welcome the development of new technologies that allow their customers to have better reception of free over-the-air local television broadcasts."

As the *amici* on both sides of the case have made clear, there is a tremendous amount at stake here. As we go to press, we are eagerly awaiting the Court's decision, which is expected by the end of June.

Endnotes

1. 117 U.S.C. § 106(4).
2. Id. § 101.
3. Brief of the United States at 12, *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.*, No. 13-461 (March 3, 2014).
4. Brief of the National Football League and Major League Baseball at 23, *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.*, No. 13-461 (March 3, 2014).
5. Brief of the National Association of Broadcasters, et al. at 23, *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.*, No. 13-461 (March 3, 2014).
6. Brief of the Computer & Communications Industry Association, et al. at 3, *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.*, No. 13-461 (April 2, 2014).
7. Brief of 36 Intellectual Property and Copyright Law Professors at 1, *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.,* No. 13-461 (April 2, 2014).
8. Brief of the American Cable Association at 3, *American Broadcasting Companies, Inc., et al. v. Aereo, Inc.*, No. 13-461 (April 2, 2014).