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Brandon Sherman
Cardozo Arts & Entertainment Law Journal

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Brandon Sherman, Benjamin N. Cardozo School of Law, J.D. 2013

Since February 2012, online live TV service "Aereo" has given its subscribers the ability to watch, record and replay over-the-air ("OTA") broadcast television on any Internet-connected device. Since Aereo's technology is precariously styled to avoid making public performances or infringing upon reproductions under the Copyright Act, it has so far avoided paying any license fees to broadcasters or content owners for its retransmissions. In July 2012, broadcasters sued Aereo for copyright infringement, but their motion for a preliminary injunction against the service was denied, and on April 1, 2013, the Second Circuit affirmed.

The Aereo service assigns an individual miniature antenna to each of its subscribers and streams a unique copy of each program to each subscriber, ostensibly avoiding a "public" performance. Each user-assigned miniature digital antenna is owned and maintained by Aereo in a single remote facility, and by logging into Aereo's service to view live TV, each subscriber effectively "rents" one of these antennae.

In California, however, an Aereo-like service has not been as successful in federal court. A Central California District Court granted television broadcasters' motion for a preliminary injunction, finding that similarly structured retransmissions caused infringing public performances. The potential for a split between the Second and Ninth Circuits raises the possibility that the Supreme Court may ultimately decide the issue. For now, however, Aereo is expanding to 22 U.S. cities this year, and increasing the footprint of copyright owners' lost compensation along its path.

While the *Aereo* case has raised significant concerns among broadcasters and audiovisual content owners, musical copyright owners should also be watching closely. At a minimum, the definition of a "public performance" promulgated in *Aereo* impacts a slew of licensing schemes pertaining to musical compositions. Assuming *Aereo*'s holding would similarly inform a court's understanding of a "public performance by means of digital audio transmission," *Aereo* likewise impacts the rights of sound recording owners.

The holding in the *Aereo* case, and indeed the Aereo service itself, is rooted in the Second Circuit's 2008 decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc. ("Cablevision")*. At issue in *Cablevision* was the cable operator's Remote Storage Digital Video Recorder ("RS-DVR") system, which allowed cable subscribers to record and play back cable programming on their home televisions from central hard drives housed and maintained by Cablevision at a remote

location. Since the RS-DVR utilized a unique "playback copy" for each individual subscriber who requested a recording of a program, the resulting playback was not deemed a public performance under the Copyright Act.

Taken together, *Cablevision* and *Aereo* represent a blueprint for Internet streaming services to avoid creating public performances. First, each user must view a unique copy of the relevant work. Second, each unique copy must only be made at the request of a specific subscriber. Third, only that user which requested a copy of the work may access his or her individually-assigned copy.

By exploiting these three requirements, music streaming services may be able to avoid compensating rights holders for publically performing copyrighted works. A music service may: (1) facilitate borderless digital retransmissions of terrestrial radio signals; or (2) enable interactive digital streaming and cloud-based services to reduce their licensing obligations. Additionally, the *Aereo* decision may inject enough uncertainty to weaken the bargaining position of performers and copyright holders in the ongoing negotiations surrounding Internet radio royalty legislation.

Aereo's most intuitive application to music streaming would enable the capture and nationwide retransmission of local terrestrial radio broadcasts. Radio services could also originate their own local stations and achieve nationwide reach with only a weak terrestrial signal at the front-end of their Internet retransmissions. Those terrestrial signals would only require a comparatively negligible public performance license for the songs, and no fee for the use of the sound recordings.

Currently, terrestrial and Internet radio stations pay blanket license fees to ASCAP, BMI and SESAC, ("PROs") to publically perform musical compositions. Internet radio stations, like Pandora or iHeartRadio further make compulsory license payments to performers and owners of sound recordings (usually record labels) through SoundExchange.

Pandora alone paid $149 million in royalties in 2011,[43] and with numerous interactive streaming services also incorporating radio functionality, others leveraging existing terrestrial radio signals and many more major players following suit, the revenue owed to copyright owners through these services represents a growing and indispensible percentage of overall music income. If non-paying services co-opt a share of the Internet radio market, the resulting loss in revenue to copyright holders would be substantial.

Interactive digital streaming services operating under negotiated licenses like Spotify, Rdio and Rhapsody could also exploit the *Aereo* loophole to reduce or otherwise manipulate streaming data when calculating payments owed to copyright holders. Many of these interactive services compensate holders on a "per stream" basis, and "streams" may be tied to the statutory definition of a public performance. *Aereo* suggests that certain

transmissions, for example, those played back from a user's "offline" playlist, may be outside the scope of copyright protection. Each copy of a musical work on an offline playlist is unique to the user, is stored at the user's direction, and only that user may access it. Accordingly, streaming services may simply stop accounting and paying for these "private performance" streams, and some services may further alter their technological processes to expand the category of exempted streams and reduce their payments.

One lingering question is whether the "unique copies" created at the user's request and stored on Aereo's hard drives constitute infringing reproductions. The issue has not been decisively litigated, and of course, the outcome in *Aereo* might not be perfectly instructive in the context of musical works. The answer hinges, in part, on where the line is drawn between direct and secondary liability, whether the reproductions constitute fair use, and whether the DMCA's safe harbor provisions would apply.

But even the perception that public performance rights are narrowing could become a bargaining chip for webcasters in the Internet Radio Fairness Act ("IRFA") debate. Retransmission negotiations in the television industry have already seen cable companies invoke *Aereo*, arguing that the existence of competing services operating at a lower cost justifies lower licensing fees. Pandora has already made a functionally similar argument in comparing itself to terrestrial and satellite radio. Both competing platforms pay a smaller share of their revenue in royalties, and the introduction of free or unlicensed content to the Internet streaming marketplace would corroborate Pandora's argument based on inequity. *Aereo* further gives webcasters the leverage to force concessions from copyright owners if those webcasters plausibly have the option to simply avoid paying for content altogether.

Although copyright holders will, in many cases, be unable to stop certain unauthorized uses, those entering negotiated license agreements may take prophylactic steps to stop licensee manipulation of public performance data. As an initial matter, the Central California District Court's indication that *Cablevision* and *Aereo* are contrary to the Ninth Circuit's holdings suggests that music licensors should opt for California state and federal law to govern their streaming licenses.

Licensors should further define the term "stream" to occur each time a musical work is embodied in a communication to one or more users, and that the definition shall apply regardless of whether such communications would be deemed public performances under the Copyright Act. Finally, for the avoidance of doubt, licensors should insist that copyrighted works not be electronically processed to deliver separate and discrete signals to individual listeners or subscribers.

Aereo's strange outcome is the product of the space between the rights of public performance and reproduction. Like a fly ball hit directly between two outfielders, *Aereo* is an instance of the

ball dropping in the ensuing confusion. As Congress begins to consider the "next great Copyright Act," it could remedy this discord by adopting a blanket right of digital communication, with almost all variations thereof to be sorted out through private negotiations and digital rights management ("DRM") technology. We have moved farther in this direction than one might realize, in spite of the law. Consider, for example, that a license to stream a song on-demand through Spotify confers substantially the same rights as does purchasing a download of the same song through iTunes. As Internet content delivery continues to progress, the gradations in rights available to consumers will further develop in unpredictable ways. The creative, technology and entrepreneurial communities will be best served by minimizing unpredictable judicial decisions and letting the market define and value new 21st century copyright rights.
