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Legal Review

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SPECIAL REPORT **SPECIAL REPORT**

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THE SECOND CIRCUIT'S *AEREO* RULING: WHAT IT MEANS FOR BROADCASTERS

As noted in our earlier memorandum this week, the U.S. Court of Appeals for the Second Circuit affirmed, by vote of 2 to 1, a District Court ruling denying the motion of New York City television stations and other content owners for a preliminary injunction to terminate Aereo's Internet-based retransmission of local television signals pending trial on the merits of the plaintiffs' copyright infringement claims. Although the decision is a setback for the broadcast industry, it involves only a "preliminary" injunction—*not a final* ruling on the merits. The case will now proceed to trial on the merits, but in the interim, Aereo will be free to continue the service in those states in the Second Circuit (New York, Connecticut, and Vermont) pending the trial. (The ruling is not binding in other states.) Whether the final outcome will be the same remains to be seen. Plainly, the stakes are high for the broadcast industry.

The ruling is at odds with an earlier, similar Los Angeles case, as we previously reported. There, the District Court Judge granted a preliminary injunction and shut down an Aereo-like service pending a trial.

Because the ruling was a 2-1 split decision, we fully expect the plaintiffs, within the next two weeks, to petition the full Second Circuit for an *en banc* review. In any event, the final chapter is yet to be written, and if Aereo follows through on its stated plans to expand to 22 other cities, litigation in other courts is highly likely. There is no question, however, that the Second Circuit's refusal to prohibit Aereo's service pending

trial is troubling, especially when viewed against reports (as we predicted months ago) that Aereo is in talks with various MVPDs (most recently DISH and AT&T) about some form of sale, merger, or partnership for the ostensible purpose of circumventing the payment of retrans fees. As the dissenting judge observed, the Court's majority decision "provides a blueprint for others to avoid" the copyright law.

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As explained in detail in earlier memos, Aereo claims it receives, through an array of thousands of dime-size, *individual* antennas, the signals of local area New York City television stations. The signals are received at these antennas located in a local "data center," where the signals are recorded and immediately retransmitted over the Internet to the Internet-receiving devices of Aereo subscribers. Aereo contends its service provides each of its subscribers an *individual*, *private* antenna and an *individual*, *private* Internet retransmission to the subscriber's receiving device. The media plaintiffs disputed the notion that this is a "private" performance of their intellectual property and have contended, instead, the service is a "public performance" in express violation of their copyrights.

In its analysis, the Court compared the service to the "performances" at issue in an earlier *Cablevision* case, a cable TV case. There, the Second Circuit had held that performances facilitated by Cablevision's "remote DVR service"—a service that enabled each individual subscriber to choose to record and playback a broadcast program for later viewing from a portion of a hard drive dedicated to that subscriber located at the cable system's headend—were "private" performances and, thus, did not violate the copyright law. Relying on *Cablevision*, the Second Circuit concluded "Aereo's transmissions of unique copies of broadcast television programs created at its users' requests and transmitted while the programs are still airing on broadcast television are not 'public performances' of the Plaintiffs' copyrighted works under *Cablevision*." The Court reasoned, like the *Cablevision* remote DVR service, that the Aereo service generates a unique copy created at a specific user's request and is available only to that specific user. This made the performance "private" in the Court's view. Since the Copyright Act does not prohibit private performances of copyrighted works, the Second Circuit ruled that the District Court did not abuse its discretion in concluding that plaintiffs were unlikely to succeed on the merits of their copyright infringement claim.

Importantly, the Second Circuit's ruling does not address other important copyright issues that may be determined later in the case, *e.g.*, whether Aereo has lawfully exercised a right to reproduce or a right to create derivative works of the plaintiffs' copyrighted content. To illustrate, Aereo's service works by creating a *copy* of the broadcast content, regardless of whether the subscriber is watching that content live or delayed. Thus, a legal issue yet to be decided is whether Aereo's copy infringes the content owner's right to control the reproduction of a protected work. In addition, in order to retransmit the signals over the Internet, Aereo must translate ("transcode") each

station's broadcast signal from its ATSC digital format into an Internet Protocol format, which raises the question whether this process infringes the content owner's right to control the creation of derivative works. These issues, presumably, will be considered by the District Court when the case goes to trial.

It is noteworthy that the Second Circuit's opinion was based on a surprisingly limited set of facts in evidence. The technical/engineering expert witness testimony actually presented at the hearing consisted *solely* of Aereo's engineering experts. Astonishingly, *no* technical or engineering expert witnesses were offered at the hearing by the plaintiffs. Thus, the Court's ruling was based on one-sided technical testimony from Aereo that its dime-size antennas act as *individual* antennas and not as a *collective* array of antennas. As the case develops, additional engineering evidence that could favor the plaintiffs' arguments in this respect will presumably be introduced at trial.

Equally significant, the ruling does not address the critical issue of geographical limits on distribution. So far, Aereo has chosen to limit distribution of signals to subscribers in New York. But, the Court's rationale is not geographically limited. If, in fact, the performance is "private," Aereo might contend that it is permissible to distribute New York broadcast signals anywhere—outside of New York, outside the market, or even around the world—since non-local distribution, itself, would not convert the performance into a *public* performance. (Distribution outside of the United States could violate certain bilateral trade agreements, creating legal tensions not considered by the Court.)

Indeed, in his dissent, Judge Chin expressed skepticism of the motives behind Aereo's current decision to limit its service to New York, suggesting that Aereo knows its service could be found illegal in other judicial circuits not bound by the *Cablevision* decision. He observed, "It is telling that Aereo declines to offer its subscribers channels broadcast from New Jersey, even though its antennas are capable of receiving those signals, for fear of being subject to suit outside the Second Circuit."

Because Aereo previously announced plans to launch the service in 22 more cities this year, broadcasters and other content owners may soon get the opportunity to challenge the legality of the service in other jurisdictions. Judge Chin's dissent provides a framework for broadcaster challenges to Aereo in other parts of the country should Aereo expand the service.

Judge Chin went on to describe Aereo's use of thousands of individual dime-size antennas as a "sham," when the practical function of the array of antennas is no different than one central antenna; indeed, he characterized it as a "Rube Goldberg-like contrivance, over engineered in an attempt to avoid the reach of the Copyright Act." "In other words," he says, "this is a shared pool of antennas, not individually-designated antennas." (As a District Court Judge, Judge Chin earlier ruled against Cablevision, but his decision was reversed by the Second Circuit. He was subsequently appointed to the Second Circuit Court of Appeals and was the author of the opinion in the *ivi* case in

which the Second Circuit held that ivi's Internet retransmissions of broadcast signals were not subject to the statutory copyright license in Section 111 of the Copyright Act, a ruling that has effectively shut down ivi's service.)

Judge Chin strongly disagrees with the majority's analysis of the "public/private" performance issue, declaring that it "elevates form over substance." He reasoned that, "in [his] view, by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act." He examined the ordinary definitions of "public" and "private" and explained that because Aereo is "transmitting television signals to paying *strangers*" (emphasis added), the transmissions are, by the ordinary meaning of the terms, "to the public."

He also methodically distinguished Aereo's system from the facts in the *Cablevision* cable TV case. Among other things, he noted, unlike *Cablevision*, that no part of Aereo's system is authorized by content owners, no fee is paid to content owners, and the service is designed to provide a substitute for viewing live, over-the-air television broadcasts.

As noted at the outset, in a favorable decision for broadcasters in a similar case against "Aereokiller" (formerly known as BarryDriller.com), a nearly identical service to Aereo, a federal District Court in California recently ruled in favor of broadcasters and against the service similar to Aereo. There, the California Court reached the opposite conclusion regarding the application of the *Cablevision* case and granted an injunction to stop the Aereokiller service. The Court concluded that the transmission of individual copies to subscribers via the Internet amounted to a "public" performance, notwithstanding the fact that each copy is theoretically capable of being viewed only by a single subscriber. The case has been appealed to the U.S. Court of Appeals for the Ninth Circuit and remains pending.

Should the Ninth Circuit (or another appellate court) reach a decision contrary to the Second Circuit's decision, the "split" may mean that Internet-based retransmission services will eventually be reviewed by the United States Supreme Court.

In the meantime, we'll keep you updated on developments.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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