

Intellectual Property Rights and Access to Bandwidth

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Introduction

Intellectual property rights protect the rights of the author, inventor, or creator concerning the sale, publication, public performance, preparation of derivatives and other benefits arising from their creative efforts. They prevent innovative people and companies from losing the benefits derived from their ideas or solutions. In other words, intellectual property rights help protect individuals from issues of infringement and abuse of their creations and ideas. Laws that seek to protect intellectual property were created, enacted, and enforced to ensure that people who come up with creative solutions or expressions have their ideas secured and protected by the law from those who might take such ideas and use them for their own benefits. Some of the creations protected by intellectual property laws include symbols, company names and logos, images, art work, music, videos, movies and literary work. Intellectual property may be protected as a patent, trademark or copyright.

The legal protections make sure that the creators of the protected work derive associated financial benefits. The underlying public policy purpose for the laws requires balancing the rights of the general public against the property-rights of the owner of the creative expressions. The law also enables innovation by protecting the creators' rights so that they are incentivized to make the effort to create. In this article, the access to bandwidth in relation to intellectual property rights will be analyzed using *The American Broadcasting Companies, Inc., et.al. v. Aereo, Inc., FKA*

*Bamboom Labs, Inc.*¹ In this case, the U.S. Supreme Court dealt with the issue of the right of the copyright holder to control performances as defined by the Copyright Act.²

Is it Possible to Infringe on a Broadcast Made Available to the Public?

The respondent, Aereo, Inc. (hereinafter Aereo), according to the case heard on 15th June, 2014, enables its customers to view TV programs through the internet in a way that allows people to access programs that they could not have otherwise accessed during a time that is convenient for them. If a customer wants to watch a show at a particular time, they have several choices on Aereo's website. This is because Aereo transmitted their content online, which made watching their TV programs at their own leisure possible, although this was done without the permission of the true owners of the programs.³

Aereo's business model was centered around a subscription system that gave users access to lease personal antennas that were stored at the firm's headquarters. For a fee of approximately \$8, subscribers were able to access and stream various television programs from major broadcasting corporations. But because Aereo had not been authorized to distribute such content by the broadcasters, its subscribers would not be able to access the contents until moments after it had been aired by the broadcasters. This resulted in several broadcasters suing Aereo for transmitting

¹ *The American Broadcasting Companies, Inc., et.al. v. Aereo, Inc., FKA Bamboom Labs, Inc.*, No. 13-461 (S.Ct., June 25, 2014).

² Copyright Act, 17 USC 101 (1976).

³ Pizzi, Peter J., *Litigation Proliferates Over the Streaming of Broadcast Television: American Broadcasting Companies, Inc. v. Aereo, Inc. and Fox Television Stations, Inc. v. Barry Driller Content Systems, PLC*, 18 NY Litigator 2, (Winter 2013).

their content without their permission. The broadcasters believed that this was infringement of the copyright laws and regulations.⁴

TV broadcasters were the petitioners, marketers, and entrepreneurs. The copyright lawyers of the individual groups and programs providers all sued Aereo for encroaching upon their copyrights. An injunction was sought by the people who did not believe that Aereo was violating intellectual property rights by showing the programs publicly.⁵

Interpreting Transmission as Public Performance

U.S. copyright law encourages the creation of the art through rewarding the true owners of the copyright with some exclusive rights. Copyright law grants the authors and creators of copyrights the sole right to distribute, sell and make such content. The rights have a time limit of 70 years plus the life of the author for individual owners and for 95 years from the date of publication or 120 years from the date of creation (whichever expires first) for works-made-for-hire.⁶ The Copyright Act of 1976 defines the rights attached to copyright ownership and defines the concept of infringement in Article I, Section 8, Clause 8. The court relied on this definition to determine whether Aereo had infringed upon the rights of the broadcasters. The broadcasters' content was transmitted by Aereo without the consent of the plaintiffs, American Broadcasters (hereinafter ABC). The plaintiffs, ABC,

⁴ Ian Hargreaves, *Digital opportunity: a review of intellectual property and growth: an independent report*,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf 2011. (last visited March 17, 2015).

⁵ Andrew Tutt, *Textualism and the Equity of the Copyright Act: Reflections Inspired by American Broadcasting Companies, Inc. v. Aereo, Inc.*, 89 N.Y.U. L. Rev. Online 1 (2014).

⁶ 17 USC 101.

claimed they had the exclusive right to transmit and make available such content and therefore what Aereo was doing was infringing on their copyrights.⁷

The main decision for the Supreme Court was to determine whether Aereo infringed upon the copyright of the plaintiffs or whether Aereo distributed the content in a legal manner. Aereo argued that they were primarily an equipment distributor. The equipment that the firm distributed allowed subscribers to access the content from other broadcasters. This argument was rejected by the court based on the provisions of the Copyright Act. According to the Court, activities of cable television distributors such as Aereo when transmitting images, audio files and videos from other broadcasters without their consent amounts to copyright infringement.⁸ Although Aereo argued that there was a major difference between its technologies and those of a cable distributor, the court held that Aereo's services and operations were similar to those of a cable distributor, therefore qualifying Aereo to be guilty of acts of copyright infringement.⁹ The court equated the description of "transmission" as found in the 17 U.S.C. 111 with public performance.¹⁰

Furthermore, the court also dismissed Aereo's argument that its transmissions were for user-specific groups and not for the public. This was based on the fact that subscribers paid a subscription fee and as such the transmissions were on a user-specific basis. This was the main loophole that Aereo relied on to

⁷ Brief for Respondent, Amici Curiae Small and Independent Broadcasters in support of Respondent," *The American Broadcasting Companies, Inc., et.al. v. Aereo, Inc., FKA Bamboom Labs, Inc.*, (U.S., June 25, 2014), No. 13-461.

⁸ *The American Broadcasting Companies, Inc., et.al. v. Aereo, Inc., FKA Bamboom Labs, Inc. .*, (U.S., June 25, 2014), No. 13-461.

⁹ Id.

¹⁰ 17 USC 111.

transmit the copyrighted content and earn revenue without rewarding the true owners of such content. The court held that the Transmit Clause found in the Copyright Act clearly states that transmissions made to the public were never user-specific even if the recording and access times of the users differed. As such, the court found the Aereo Company guilty of copyright infringement, and ordered the company to refund its subscribers as well as stop its operations. Notably, the court also ruled that all cable transmissions companies were to pay for retransmission licenses when transmitting information and programs from broadcasters.¹¹

Public Policy Applications

ABC argues that Aereo disregards the public policy basis of the Copyright Act, which provides people protection for the creativity of the authors. ABC further argues that part of Aereo's business model uses illegal exploitation of the copyrighted broadcast by charging subscribers to use the illegally acquired programs. The possibility for subscribers to access the illegal content at a later time further violates the copyright laws through copying and storing such information for access at a later time.

ABC's concern is that the transmission clause will eventually become an ineffective protection should Aereo and other corporations discover direct strategies of defending themselves against the law.¹² They would use these strategies to transmit copyrighted content without securing licenses, and avoid facing the wrath of the law. This would result in further cases of copyright infringement. If Aereo were to succeed in their argument, the copyright rules relating to the broadcasting of

¹¹ *The American Broadcasting Companies, Inc., et al. v. Aereo, Inc., FKA Bamboom Labs, Inc.*, (U.S., June 25, 2014), No. 13-461.

¹² Pizzi, *supra* note 3.

information would have been rendered redundant and many other firms with similar operations would have come forward.¹³

According to Aereo, public retransmission of information is easy because it uses the antennas rented to their subscribers to capture the broadcasts. This enables the public to access various media content in their homes. The Aereo equipment requires a subscriber to connect his rented antenna to a DVR, which enables a program to be recorded when the subscriber selects the watch and record buttons. The subscribers later access the information they recorded, which is unauthorized.¹⁴

Conclusion

In *The American Broadcasting Companies, Inc., et.al. v. Aereo, Inc.*, it is clear that the content that Aereo was transmitting was not authorized by the copyright owners. Aereo failed to consider the rights of the program provider companies to secure commercial benefits by licensing their works and generating income from their efforts. This was a breach of the exclusive rights conveyed upon the copyright holders of the program providers and was contrary to the public policy purposes of the Copyright Act. Therefore, Aereo is responsible for the infringement of the copyright because of the unauthorized transmissions. Aereo ignored the fact that the programs are considered the intellectual property of the program providers. The petitioners used the law defensively to ensure their rights and their opportunities to commercialize their intellectual property rights.

¹³ Id.

¹⁴ Hargreaves, *supra* note 4.