AEREO: Copyright law and cloud TV

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The ongoing legal battle between the major American TV companies and Aereo, a two year old start-up that delivers TV programmes over the internet, has finally reached a conclusion, causing Aereo to cease operations.

Although this decision addresses the interpretation of a particular service in light of US copyright law, the Aereo case is the latest in a line of significant test cases from across the globe which address copyright issues in the context of cloud-based television services. The decision has immediate implications in the US for content owners and broadcasters on the one hand, and Aereo-type streaming services on the other, whose models essentially rely on primary broadcast transmissions without payment of licence fees for the underlying content or re-transmission rights.

The illegal reception of television signals is an issue which pervades the Middle East region, and is an ongoing headache for broadcasters and content owners in the UAE. In many cases, the nature of the infringement is blatant, with no apparent attempt to operate within the confines of the applicable copyright regime (and in many cases the relevant media regulations and telecommunications laws). Nevertheless, the Aereo decision remains of interest in the Middle East market where interested parties continue to grapple with television piracy, coupled with the establishment of legitimate services. We consider the implications for this region later in the article.

The decision may also have wider implications for cloud storage and streaming services, despite the Court attempting to limit the application of its decision specifically to TV services.

Aereo's model

Aereo's business model was to sell subscriptions to a service which allows users to watch TV programmes over the internet at almost the same time as the primary broadcast of the relevant show.

The behind-the-scenes technology involved a system of tiny antennas housed in a centralised warehouse. At the point a subscriber selected a show from Aereo's website, an antenna, dedicated to that subscriber alone, would be tuned to receive the relevant signal. The data would be stored in a cloud-based DVR (Digital Video Recorder) personal to the subscriber and would then be streamed to the subscriber's screen within a few seconds of the original over-the-air broadcast.

The Court's decision

The question that the Court had to address was whether by using such a model, Aereo was in effect enabling a public performance of copyright works (falling within the scope of the public performance right under the US Copyright Act of 1976, as amended).

With regard to the question as to whether Aereo performed content, Aereo argued that it was merely acting in the capacity of an equipment supplier, where its equipment reacted to subscriber selections in

the same way that a home antenna and DVR would. Whereas with cable networks, the signal is always live, Aereo emphasised that under its model the system would lay dormant until the subscriber selected a programme to watch, triggering the delivery of the show. For this reason, Aereo argued subscribers, rather than Aereo, carried out the performance element. The Court rejected this argument, looking to previous amendments to the Copyright Act designed to establish the principle that both the broadcaster and the viewer of a television programme perform the programme because they both show the programme's images and make the sounds audible. The Court did not accept any practical distinction between turning on a television to access a signal being transmitted constantly and selecting a show online, triggering the stream of the show.

On the issue of performance to the public, Aereo essentially argued that its system facilitated the transmission of thousands of private performances, via individually assigned antennas. Aereo argued that for this reason it was not transmitting to the public. On this point, the Court took the view that, regardless of the technology employed by Aereo behind-the-scenes, Aereo's commercial objectives were essentially the same as those of the cable networks, i.e. to make content available publicly (albeit by way of multiple one-to-one transmissions).

The Supreme Court therefore found in favour of the broadcasters and overturned an earlier New York Court of Appeal decision.

Analysis

The Aereo decision is clearly a good result for content owners and broadcasters, particularly in the US. However, the 6-3 ruling and elaborated dissenting opinion of Justice Scalia clearly demonstrate that the decision is far from straightforward.

One of the main criticisms of the Court's majority opinion is the unclear standard applied by the Court to reach the conclusion that Aereo's service was "for all practical purposes" like that of the US cable networks, requiring the consent of copyright owners. As the dissenting judge highlighted, even if one shares the feeling of the Court as to the existence of justified concerns to prohibit Aereo's conduct, the analytical track in which the Court channeled its decision, and the "looks-like-cable-TV" test adopted, are vague and could lead to confusion in the future.

Importantly, the Court rejected Aereo's argument that it does not perform the content because each user creates a personal stream using their own personal antenna. Aereo, also unlike broadcasters, does not deliberately select and import distant signals, nor does it originate programmes and sell commercials. The dissenting judge focused on this issue, drawing a comparison with a "copy shop that provides its patrons with a library card". Justice Scalia argued that Aereo does not perform because it does not choose the content. For this reason it cannot be held directly liable for infringing public performance rights (although the judge acknowledged that Aereo might have been found liable on different grounds under the Copyright Act, had the Court been asked to consider different arguments).

This is not the first time principles of copyright law have been confronted with technological revolutions. The US Supreme Court faced a similar debate in the pre-digital era when the 1980s witnessed the emergence of VCRs (Video Cassette Recorders) and the movie studios sued to block the sale of Sony's Betamax VCRs. In Sony Corp. of America v. Universal City Studios, Inc., also known as the "Betamax case", the US Supreme Court ruled that the making of individual copies of complete television shows for purposes of time-shifting is "'fair-use', and does not constitute copyright infringement". The Court found consistently with the traditionally settled requirement that the defendant's conduct be directed to the claimant's copyright material, and therefore excluded liability for direct infringement by a defendant who solely provides an automated, user-controlled system – like the manufacturers of home video recording devices, such as Betamax and other VCRs. Back then, the case helped to create a legal safe haven for the technology sector, which ultimately benefited the entertainment industry through the sale of pre-recorded movies.

Justice Scalia makes a strong argument that by failing to set defined criteria to determine when an automated system is considered similar to a cable-system, the Court disrupts a long time settled jurisprudence that has up to this day consistently applied the test of volitional conduct directed at the copyright work.

Implications for the cloud computing sector

The Aereo decision ought to be appreciated for its wider implications. In today's digital era, with its flourishing content and cloud service providers, many commentators believe that the ruling is likely to have a chilling effect on the cloud computing sector by creating uncertainty as to when a cloud service is operating within the scope of US copyright law.

On the face of it, the US Supreme Court goes some way to alleviating this concern by expressly and narrowly tailoring its decision to the context of TV broadcasting. In his supporting judgment Justice Breyer stated "We have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content".

However, there are perceptible shortcomings in the Court's reasoning which commentators fear could be relied on to attack other cloud streaming models. On the one hand, the Court refrained from focusing on technical considerations when it came to drawing practical distinctions between the behind-the-scenes cloud operations of Aereo compared to the cable networks' operations. However, confusingly, the Court stated that the cloud technologies behind other services "should await a case in which they are clearly presented", suggesting subtle technical differences could, in fact, be key.

By failing to provide clear guidance as to when a cloud-streaming service is like a cable company, the US's highest court has left businesses in the cloud storage and streaming sector with a degree of uncertainty as to when their operations will fall on the right side of the law, although this decision is not the major setback to the cloud industry which some are claiming.

Cloud TV in the Middle East?

The copyright battle over the delivery of television programming is not unique to the US. Courts in other jurisdictions around the world from the UK to Australia have been faced with similar questions to those raised in the Aereo case.

Broadcasters and content owners in the Middle East are acutely aware of the threat that pirated television services pose to their businesses. In this region, rather than seeking to develop sophisticated systems to take advantage of loopholes in the relevant legislation, illegitimate services seek to exploit the difficulties of enforcement in particular jurisdictions.

The UAE courts, for example, have not yet had the opportunity to hear similar cases under the Federal Copyright Law No 7 of 2002. It will be interesting to see if UAE judges hearing infringement cases in the future will be inspired by the US Supreme Court's approach in their search for some interpretation guidelines in the context of these new technologies.

It is also worth noting that that the Gulf States, with high levels of connectivity and a demand for media consumption, provide an excellent market for digital content solutions and we are seeing a spike in legitimate digital content services, not only from the incumbent broadcasters, but also from innovative start-ups, both working in conjunction with the major content owners.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises on copyright issues, including in the context of broadcasting and online media. For further information about these matters, please contact Rachael Hammond r.hammond@tamimi.com, or Dania Fahs d.fahs@tamimi.com.