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Panelists Discuss if High Court Can Find 'Middle Ground' Between TV and the Cloud

■ ***Development***: A panel discussion at Fordham's IP Conference offered stakeholders an opportunity to make their closing arguments in *Aereo*, three days after the Supreme Court heard the case.

An April 25 panel discussion at the Fordham IP Conference in New York featured six speakers who were nominally involved in the *Aereo* case, either through the submission of amici briefs or by directly representing the parties involved in that copyright infringement dispute, and for the most part the speakers reiterated points that were made three days earlier during oral argument at the Supreme Court. *Am. Broad. Cos., Inc. v. Aereo, Inc.*, (U.S., No. 13-461, argued 4/22/14) (87 PTCJ 1517, 4/25/14).

''The correct interpretation is that there is an underlying performance and when you transmit that to the public you are making a public performance,'' the Copyright Office's General Counsel, Jacqueline Charlesworth, said, underscoring the position taken by the government—in its brief and during oral argument—with respect to what constitutes a public performance under the Copyright Act's transmit clause (87 PTCJ 1082, 3/14/14).

On the opposite end of the spectrum was Joseph C. Gratz of Durie Tangri, San Francisco, who is representing Aereo in the company's litigation at the U.S. District Court for the District of Utah. Gratz, like many others who supported Aereo, (87 PTCJ 1365, 4/11/14), argued that a reversal of the Second Circuit's finding that Aereo does not infringe would have unintended consequences, namely with respect to the cloud computing industry.

''There seemed be a lot of skepticism [during oral argument] about Aereo's service.''

—Jacqueline Charlesworth, Copyright Office

''Even if you don't like Aereo, even if you think it is some kind of dodge [of copyright liability], if you care about the development of technology neutral copyright doctrine you should want them to win,'' Gratz said.

Robert Kry of MoloLamken LLP, Washington, D.C., submitted a brief on behalf Cablevision, the company whose 2008 victory at the Second Circuit (76 PTCJ 511, 8/8/08) resulted in the legal precedent that Aereo relied on to build its service. Kry said he was surprised to notice that Aereo was invoking the same arguments that Cablevision had championed during the earlier litigation and so he said Cablevision thought it was important to offer the court ''a sensible middle ground'' that would find Aereo infringing but would not result in liability for Cablevision and other companies that legitimately rely on cloud technologies (87 PTCJ 1488, 4/18/14).

Length of Cord Should Not Matter. *Cablevision* upheld the lawfulness of Cablevision's Remote-Storage DVR (RS-DVR), which allows subscribers to record and play back television programs they receive through their cable subscription, just as with an ordinary DVR or VCR, except that the recordings are stored remotely in the cloud. The Second Circuit held that the RS-DVR did not infringe the ''public performance'' right because the only person capable of receiving a playback transmission was the subscriber who made the recording. By facilitating the transmission of a single copy to a single subscriber, the RS-DVR results in a private, not public, performance, the Second Circuit held.

Aereo took advantage of *Cablevision*'s single subscriber single copy holding and designed a system that results in the capturing of over-the-air television broadcasts by dime-sized antennas. Each antenna is controlled by a single subscriber, only records what that subscriber wants it to record, and later transmits—over the Internet—the resulting copy of the program to just the subscriber that authorized the recording in the first place.

We are moving to a world where the location of data and the location of computation on one end or another is decreasing in importance from the user's point of view.''

—Joseph C. Gratz, Durie Tangri

''We are moving to a world where the location of data and the location of computation on one end or another is decreasing in importance from the user's point of view,'' Gratz said. He noted that consumers are free to use personal antennas to capture over-the-air broad-

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casts, and he also pointed out that the Supreme Court recognized 30 years ago in *Betamax* that consumers can use a VCR to make personal recordings of broadcast programs in order to view them at a later date. That process is called time shifting. Aereo, Gratz said, merely allows a consumer to ''use a longer cord'' to do the type of time shifting that is allowable under *Betamax*.

''The only technologically neutral way that the statute can be interpreted is a way that does not place reliance on how long the cord is between the device that the user is operating and the location of the content,'' Gratz said.

'Follow the Electrons.' Kry, however, tried to draw a distinction based not on the length of the cord but on the audience that can view the content.

''What drives the wedge between Cablevision and Aereo is that you still ultimately have to make a decision about what is the transmission and how far back you follow the electrons,'' Kry said. By following the electrons, Kry said it becomes clear that Aereo operates like a normal cable system in that it captures broadcast content and then retransmits that content to anyone who will pay. Cablevision, on the other hand, transmits only to the subscriber that recorded the program.

Gratz took issue with Kry's attempt to distinguish the two systems.

''They operate in the exactly the same way,'' Gratz said. ''There is, technically speaking, no daylight between what is happening in the Cablevision system and what is happening in the Aereo system,'' he said.

''Technically or not, a common sense view of what the systems are matters,'' Kry said.

'Spurious Copies.' The panel's moderator, David Carson of the International Federation of the Phonographic Industry, which joined other foreign and international rights holding associations in filing a brief arguing that the Second Circuit's ruling placed the United States in violation of certain international obligations, sided with Charlesworth and the broadcasters. So did Terry Hart of the Copyright Alliance, another organization that filed a brief asking the Supreme Court to overturn the Second Circuit. (87 PTCJ 1084, 3/14/14).

Backing Gratz was Irene Calboli, professor at the Marquette University School of Law, Milwaukee, Wis., who joined 35 other IP professors in a brief filed on behalf of Aereo (87 PTCJ 1365, 4/11/14).

A seventh panelist, Professor Jane C. Ginsburg of Columbia Law School, New York , did not directly participate in any briefs. However, papers that Ginsburg had written that were critical of the Second Circuit's rulings in both *Aereo* and *Cablevision* were heavily quoted in some briefs filed on behalf of the broadcasters. Ginsburg did not back away from her criticism of either system.

''These two business models are built on the creation of spurious copies.''

—JANE C. GINSBURG, COLUMBIA LAW SCHOOL

''These two business models are built on the creation of spurious copies that are made in order to deviate the analysis from what is really going on,'' Ginsburg said. She argued that both Aereo and Cablevision ''are offering some form of video on demand.'' The fact that a single copy is made, rather than a master copy, does not alter the reality that video on demand services that don't secure licenses to publicly perform the content are liable for infringement, Ginsburg said.

''The government agrees,'' Charlesworth said. ''If you have a copyright law that says that if you make an intervening copy then you can't infringe the public performance right then it just makes no sense,'' she said.

''We take exception to the notion that moving the architecture [from the home to the cloud] can change what since *Betamax* has been legitimate consumer time shifting into 'spurious' time shifting,'' Kry said.

Court Appears Skeptical and Wary. ''There seemed be a lot of skepticism [during oral argument] about Aereo's service in terms of whether it was designed in order to be exempt from copyright liability,'' Charlesworth said. ''The court seemed more concerned with drawing the line between what Aereo was doing and what other cloud computing services were doing.''

Caboli said the Supreme Court was right to be wary of what its ruling could mean for innovative technologies. She said:

> Neither side has it completely right. It is not a pure public performance and maybe it is not a purely private performance. But maybe technology is just too far ahead of the law right now. That is why I and 35 other professors believe that a decision against Aereo would cause more damage than a decision against the broadcasters would. But Congress can always take up the issue and legislate around a possible victory for Aereo.

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