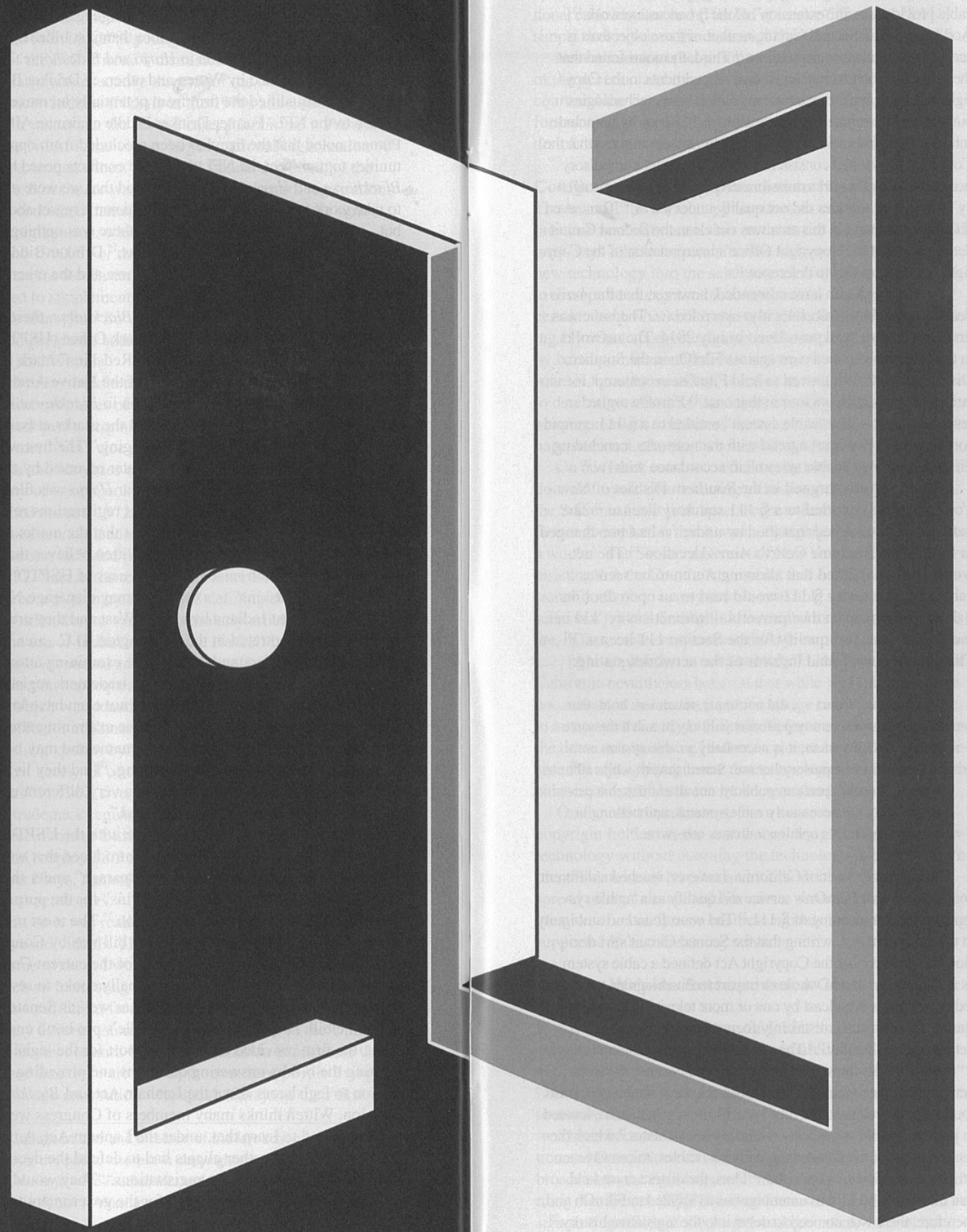
When the Supreme Court Closes a Door, It Opens a Window

OVER ONE YEAR LATER, *AEREO* MAY HELP PUT THE CLOUD BACK ON THE COURT'S HORIZON



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The full impact of *Aereo* has, not surprisingly, yet to be determined. In June 2014, the Supreme Court ruled in *American Broadcasting Cos. v. Aereo, Inc.*[1] that Aereo's cloud-based service, which allowed users to stream unlicensed broadcast television programming over the Internet to their computers and mobile devices, was an unauthorized public performance and therefore violated the U.S. Copyright Act. We examined last spring whether *Aereo* lived up to the hype—and handwringing—from those who feared a sweeping decision might hamper innovation by other cloud-based businesses in the tech industry.[2] The more dire predictions have thus far proved unwarranted, but the full extent of the consequences is still being uncovered.

One of those consequences is the revival of the argument that streaming broadcast television programming over the Internet is a "cable service" licensed under § 111 of the Copyright Act.[3] Courts in the Second Circuit have thus far maintained, even following *Aereo*, that such services are not entitled to a § 111 compulsory license, although the issue is once again being considered by the Second Circuit.[4] A federal district court in California reached the opposite conclusion—and then immediately certified the issue for appeal to the Ninth Circuit.[5] A D.C. district court just ruled against granting a § 111 compulsory license to a cloud-based streaming service (the sealed opinion to be made public in early December) and, as of the date of this article's publication, the same question was pending before the Northern District of Illinois.[6]

If the courts cannot agree, the Supreme Court may be called on once again to weigh the potentially competing interests of encouraging technological innovation and protecting copyright owners from infringement. At issue this time would be whether cloud-based, Aereo-esque services should again be treated like traditional cable companies under the Copyright Act—but now for compulsory license purposes rather than infringement. And if the language of § 111 is broad enough to encompass cloud-based retransmission services, the next question may be

"[N]o matter how strong the policy arguments for treating traditional cable services and [FilmOn's] service differently, [§ 111] simply does not draw the distinction that [the networks] urge."[30]

Nevertheless, in recognition of the commercial importance of the decision and the split between the California district court and the Second Circuit, the court certified the decision for immediate appeal to the Ninth Circuit, stayed the remainder of the case, and continued to enjoin FilmOn's services.[31]

Conflicting Judicial Approaches to New Technology

The heart of the current split is whether courts should presume new retransmission methods are excluded until Congress says otherwise or, under the language of § 111, allow new technology into the scheme even if they seemed poised to disrupt the current market equilibrium. Nobody can be certain about what will happen to the market either by allowing FilmOn to compete against cable network providers or by barring unlicensed Internet retransmission services. This issue is, broadly speaking, another iteration of the struggle to determine what role the courts should play in protecting existing markets and actors from new technologies that perhaps were not contemplated under existing law.

On one hand, courts are often hesitant to make determinations that would risk thwarting technological change. In *Aereo*, the Supreme Court took special care to limit its holding to the facts and emphasize that it was not judging cloud technology as a whole.[32] The Southern District of New York seized on this by insisting that the Court's "statements that Aereo (and, by extension, FilmOn) . . . is very similar to a cable system is not the same as a judicial finding that Aereo and its technological peers are, in fact, cable companies entitled to retransmission licenses . . . . [A]n implication is not a holding."[33] The Central District of California nevertheless believed that while § 111 licenses were not at issue in *Aereo*, the Court's analogy came "about as close to a statement directly in [FilmOn's] favor as could be made, and the decision's reasoning" reflects a pattern in which "courts consistently reject the argument that technological changes affect the balance of rights" between broadcasters and retransmitters.[34]

On the other hand, courts have successfully protected copyright holders in the past from infringers employing new technology without dooming the technology itself. For example, the demise of Napster and its ilk did little to stop the spread of legal downloadable music services or prevent the creation of entirely new business models, such as advertising-supported music streaming services.

Another Wrinkle: Retransmission Consent Agreements

Beyond the immediate issues of § 111, the FilmOn cases may raise the question of whether cloud-based retransmitters—even if entitled to a compulsory license—may nevertheless have to negotiate with the broadcast networks for permission to stream their programming.

This is because the Cable Television Consumer Protection and Competition Act (Cable Act), enacted in 1992, grants broadcasters the right to prevent multichannel video programming distributors (MVPDs) from retransmitting television *signals* (regardless of the programming content) without the broadcaster's consent.[35] The Cable Act provisions thus result in negotiations between broadcasters and cable providers every few years for retransmission consent agreements, notwithstanding that cable providers are entitled to a compulsory license under § 111 of the Copyright Act. If FilmOn were found to be a cable system under § 111, the next question may be whether it is also regarded as an MVPD and thus required to obtain a retransmission consent agreement under the Cable Act. Ultimately the entire system of seemingly contradictory mandatory licenses and retransmission consent agreements may be called into question.

Conclusion

These cases highlight how emerging technology can create uncertainty in the law. Innovators and entrepreneurs should heed the warning from the *Aereo* and *FilmOn* cases: clever use of technology to avoid running afoul of rights holders may prove unsuccessful. Similarly, rights holders can look at the same cases—and the current fallout regarding § 111 compulsory licensing—and conclude that the law may not always protect their interests either. Given this uncertainty, the sensible approach for all sides remains negotiating a mutually acceptable license. Securing a license is likely to remain the most dependable way to ensure a positive result for both the innovator and the rights holder—because the current state of copyright law may not block innovation, but it may not pave the road either. ■

Endnotes

1. 134 S. Ct. 2498 (2014).
2. Craig B. Whitney, Aereo *Post-Mortem: Was It Ever Really About the Cloud?*, 7 LANDSLIDE, no. 5, May/June 2015, at 8.
3. 17 U.S.C. § 111.
4. *See* Memorandum and Order, CBS Broad. Inc. v. FilmOn.com, Inc., No. 1:10-cv-07532-NRB (S.D.N.Y. July 24, 2014), ECF No. 102 [hereinafter *CBS Broad.* July 2014 Order]. FilmOn has appealed the decision. *See* Notice of Appeal, *CBS Broad.* (S.D.N.Y. Aug. 25, 2014), ECF No. 114.
5. *See* Order, Fox Television Stations, Inc. v. Aereokiller LLC, No. CV 12-6921-GW (C.D. Cal. July 16, 2015), ECF No. 204 [hereinafter *Aereokiller* July 2015 Order].
6. *See* Order, Fox Television Stations, Inc. v. FilmOn X LLC, No. 1:13-cv-00758-RMC (D.D.C. Nov. 12, 2015), ECF No. 128; Plaintiff and Counterclaim Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Adjudication of First Cause of Action for Declaratory Relief and Section 111 Affirmative Defense, FilmOn X LLC v. Window to the World Commcn's, Inc. (*WTTW*), No. 1:13-cv-08451 (N.D. Ill. Sept. 18, 2015), ECF No. 59.
7. The networks had sued FilmOn in the Southern District of New York in October 2010 based on an earlier version of FilmOn's service. That case settled with a consent injunction in August 2012. *See CBS Broad.* July 2014 Order, *supra* note 4, at 1. FilmOn also filed for a declaratory judgment of noninfringement in the Northern District of Illinois. *See* Complaint for Declaratory Judgment, *WTTW* (N.D. Ill. Nov. 22, 2013), ECF No. 1.
8. *Aereokiller* July 2015 Order, *supra* note 5, at 6.
9. 17 U.S.C. § 111(f)(3).
10. 691 F.3d 275, 279 (2d Cir. 2012).
11. *Id.* at 282.

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12. *Id.* at 280.

13. *Id.* at 281–82.

14. *Id.* at 282.

15. In 1988, Congress added § 119 to the Copyright Act to separately license retransmissions by satellite carriers, and in 1994, amended § 111 to include facilities that transmitted via "microwaves" within the definition of qualifying cable systems. *See ivi*, 691 F.3d at 281–82.

16. *ivi*, 691 F.3d at 283.

17. *Id.* at 283–85.

18. *CBS Broad.* July 2014 Order, *supra* note 4, at 1–2.

19. *Id.* at 9–10.

20. *Id.* at 10–11.

21. Aereo, Inc.'s Opposition to Plaintiffs' Memorandum in Support of Preliminary Injunction at 6–7, Am. Broad. Cos., Inc. v. Aereo, Inc., No. 1:12-cv-01540 (S.D.N.Y. Aug. 29, 2014), ECF No. 325.

22. Memorandum on Remand in Support of a Preliminary Injunction at 2–3, *Aereo*, No. 1:12-cv-01540 (S.D.N.Y. Aug. 15, 2014), ECF No. 323.

23. *Id.* at 3.

24. *Aereo*, No. 1:12-cv-01540, slip op. at 6 (S.D.N.Y. Oct. 23, 2014), ECF No. 341 (citation omitted).

25. *Aereokiller* July 2015 Order, *supra* note 5, at 11–13, 15.

26. *Id.* at 11 (citing 17 U.S.C. § 111).

27. *Id.*

28. *Id.* at 12.

29. *Id.*

30. *Id.*

31. *Id.* at 16.

32. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2510–11 (2014).

33. *CBS Broad.* July 2014 Order, *supra* note 4, at 9–10.

34. *Aereokiller* July 2015 Order, *supra* note 5, at 10.

35. *See* 47 C.F.R. § 76.64.