Dish Hopper Case: A Narrow Reading Of Aereo

Law360, New York (February 04, 2015, 10:56 AM ET) --


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U.S. Supreme Court Justice Stephen Breyer promised that the high court's holding in Aereo was limited. And at least one federal judge seems to agree.

In one of the first opinions to apply Aereo, U.S. District Judge Dolly M. Gee of the Central District of California – in the case Fox Broadcasting Company et al. v. Dish Network LLC et al. – rejected Fox's claim that Aereo applies to the Dish Network's Hopper technology. The Jan. 20 decision is one of several that may ultimately confine the impact of Aereo.

Last year, after the Supreme Court issued its opinion, legal observers warned that Aereo threatened the legal status of online cloud computing and streaming services. Concerned commentators echoed Justice Antonin Scalia's dissent, where he signaled frustration with the majority's apparent disregard for the volitional conduct requirement for direct copyright infringement — a test that had been applied by all of the courts of appeals. He concluded that the majority created a "two-tier" version of the Copyright Act, "one part of which applies to 'cable companies and their equivalents' while the other governs everyone else."[1] One commentator wrote that the "uncertainty created by the court seems bound to chill innovation."[2]

While the court's ruling disrupted Aereo's business — Aereo filed for Chapter 11 bankruptcy protection just five months after the Supreme Court's decision — Judge Gee in Fox rejected the notion that Aereo was "gamechanging" with respect to Dish's Hopper products.

In May 2012, Fox sued the Dish Network, claiming, inter alia, that Dish's Hopper and Hopper with Sling products violated the Copyright Act. The Hopper products, along with application software called "Dish Anywhere" loaded on a tablet, smartphone, laptop or personal computer, allow Dish Network customers to record television content on their home set top boxes or digital video recorders and send that content to themselves to watch in another location. Dish's Hopper products also include a functionality called PrimeTime Anytime (PTAT) with AutoHop, which allows customers to automatically record primetime programming and skip any recorded commercials. Fox contended that Dish publicly performed its copyrighted works by streaming them over the Internet to Dish subscribers using Dish Anywhere. Fox also alleged that Dish infringed Fox's right of reproduction and distribution by enabling DISH customers to make copies of Fox's programming with PTAT and AutoHop.

At first glance, it looked like Aereo might doom Dish's Hopper products. Like the Hopper, Aereo allowed subscribers to stream television broadcasts over the Internet, though its technology differed from the Hopper in some respects.[3] When an Aereo user wanted to watch TV, a dedicated antennae picked up the over-the-air broadcast, and Aereo's servers saved

the broadcast in digital format in the user's folder.[4] Aereo then streamed the saved broadcast from the user's folder to the user over the Internet.[5]

The Supreme Court found that Aereo "publicly performed" the copyrighted broadcasts in violation of the Copyright Act because Aereo had an "overwhelming likeness" to traditional cable systems, which were brought into the scope of the Copyright Act by Congress's 1976 amendments.[6] The Supreme Court found that it did not matter that Aereo's service was "inert" until a user selected the content to be streamed.[7] Nor did it matter that Aereo transmitted broadcasts to one subscriber at the subscriber's request because Aereo "communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other," which constitutes "public performance."[8]

Thus the questions in Fox appeared to be: Were the Hopper services like cable? And, did it matter whether it is the customer who initiates the transmission of copyrighted works?

The parties in Fox filed cross motions for summary judgment on the copyright claims. Judge Gee ruled that neither Dish Anywhere nor PTAT with AutoHop infringed. The most interesting aspect of Judge Gee's opinion is her finding that Aereo did not dispense with the volitional conduct requirement for direct infringement: "The [Aereo] Court held that a sufficient likeness to a cable company amounts to a presumption of direct performance, but the distinction between active and passive participation remains a central part of the analysis of an alleged infringement."[9] Thus, according to Judge Gee, whether a service "looks like cable" is not the dispositive inquiry — the service provider still needs to do something beyond merely providing equipment.

As to Fox's claims against Dish Anywhere, the district court first found that Dish Anywhere was not like cable. Although Dish Anywhere — like Aereo — allows subscribers to watch television programs almost as they are being broadcast, and depends on equipment both inside and outside of the user's home, Dish does not "receive programs that have been released to the public and then carry them by private channels to additional viewers in the same sense that Aereo did."[10] This distinction hinged on one critical fact: Dish has a license for the initial transmission of programming to users via satellite.[11] "Aereo streamed a subscriber-specific copy of its programming from Aereo's hard drive to the subscriber's screen via individual satellite when the subscriber requested it," whereas Dish Anywhere can only be used by a subscriber to gain access to content she already had authorization to access by virtue of Dish's license for the initial transmission of that content.[12] Aereo transmitted content it did not have the right to transmit; Dish Anywhere merely facilitates the transfer of legitimately possessed programs.[13]

The district court then addressed the volitional conduct requirement. Judge Gee found that Dish subscribers, not Dish itself, engage in the volitional conduct necessary for direct infringement.[14] Subscribers initiate the transmission using Dish Anywhere by logging onto the application and selecting the television show to be sent from their home devices to their computers or mobile devices.[15] Although Dish provides equipment to facilitate this transmission, Dish does not actively intervene in this process, and thus could not be found liable for direct infringement.[16] The district court found that Dish was not subject to secondary liability either, because there were no direct infringers — although Dish subscribers

transmit, they do not publicly perform.[17] Judge Gee held that when "an individual DISH subscriber transmits programming rightfully in her possession to another device, that transmission does not travel to a large number of people who are unknown to each other."[18]

The court similarly found no liability for Dish's PTAT offering. Judge Gee held that DISH does not engage in volitional conduct necessary for direct infringement because the Dish user, not Dish, chooses whether to enable PTAT, designates when to copy programming and copies the programming.[19] The court rejected Fox's argument that Aereo "altered the test for direct infringement" when the Supreme Court apparently dismissed the fact that Aereo users (and not Aereo itself) initiated the infringing process — the PTAT, unlike Aereo, was nothing more than a "more targeted version of a DVR."[20] (And, again, there was no secondary liability because there is no public performance by the subscribers).

Thus, despite the potential for courts to interpret Aereo broadly, the district court here applied the teachings of Aereo narrowly, engaging in a volitional conduct analysis to find that Dish was not liable for direct copyright infringement. The district court's fact-intensive reasoning suggests that unless a service matches closely with how Aereo operated, it may not be deemed "like cable." Indeed, subsequent courts may well use this analysis to limit the scope of Aereo. And, ultimately, it may be that, based on this test, few services will act like cable in the way Aereo did.

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[1] 134 S. Ct. 2498, 2516; see also id. at 2517 ("It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances).)."

[2] Julian Sanchez, The supreme court's Aereo effect might evaporate Silicon Valley's cloud, The Guardian (Jun. 25, 2014), http://www.theguardian.com/commentisfree/2014/jun/25/supreme-court-aereo-ruling-cloud-computing

[3] 134 S. Ct. 2498, 2503.

[4] Id.

[5] Id.

[6] Id. at 2507.

[7] Id.

[8] Id. at 2509.

[9] No. CV-12-4529 DMG (SHx) (C.D. Cal. Jan. 20, 2015), slip. op. at 22.

[10] Id. at 23.

[11] Id.

[12] Id.

[13] Id.

[14] Id. at 24.

[15] Id.

[16] Id.

[17] Id. at 25-26.

[18] Id. at 26.

[19] Id. at 38-39.

[20] Id. at 39.