Comments of the Society of Composer & Lyricists

The Society of Composers & Lyricists ("SCL") respectfully submits the following in response to the U.S. Copyright Office's ("USCO") request for comments regarding the Supreme Court's decision on the Aereo case (*American Broadcasting Cos., Inc. v. Aereo, Inc.).*

Q1. To what extent does the Supreme Court's construction of the right of public performance in Aereo affect the scope of the United States' implementation of the rights of making available and communication to the public?

In the case of American Broadcasting Cos. v. Aereo, the SCL believes the Supreme Court ruled correctly. Since the court deemed Aereo's "transmission" or "re-transmission" a public performance, Aereo infringed on the copyrights of the networks, content owners and creators whose work it did not license and pay for, essentially in the manner of other internet companies deemed infringers (e.g. Napster).

If the court had ruled there was not a public performance in the transmission/retransmission, then Aereo would have been given free rein to cannibalize the broadcast and cable networks' programming as well as the production companies that create their content, potentially putting them out of business over the long-term. The networks and cable companies would not be able to compete with a company that charges a mere $8.00 per month. The networks and cable companies would not be able to sustain a business or be able to pay for and produce the content they create for the public. While it may well be argued whether the technology is new, it is the SCL's view that Aereo is, in no way, a new business model, but rather another source of copyright infringement that endangers the livelihoods of many people. Over time, Aereo would ultimately undermine its own business because of diminished availability and quality of programming to be re-transmitted.

2. How should courts consider the requirement of volitional conduct when assessing direct liability in the context of interactive transmissions of content over the Internet, especially in the wake of Aereo?

In the opinion of the dissenting judges, the end users are identified as the copyright infringers. However, it is plausible that most customers of Aereo were, in good faith, paying Aereo's fee assuming that Aereo had properly licensed the content it was re-transmitting. It is the SCL's view that Aereo's conduct was volitional.

3. To what extent do, or should, secondary theories of copyright liability affect the scope of the United States' implementation of the rights of making available and communication to the public?

Since Aereo intentionally re-transmitted the content of network and cable TV without license or permission, it cannot claim to be only the "pipeline" through which its customers accessed the copyrighted content or infringed on copyrights contained therein. Aereo intentionally charged an $8 per month fee to those who wanted to use its service thereby enticing its customers to infringe and, in so doing, set out to profit from infringed content. It is hard to define this as direct or secondary liability on Aereo's part, but it would help if secondary liability in copyright was defined and codified in law, so as to be not just theory being arbitrarily judged. Standard criteria should be established.

4. How does, or should, the language on "material objects" in the Section 101 definitions of "copy" and "phonorecord" interact with the exclusive right of distribution, and/or making available and communication to the public, in the online environment?

The comparison of digital music to "phonograph records" and "copies" of music can be made this way:

An mp3, AAC file, .wav file, and other digital audio file format is the equivalent of a phonorecord or CD. ITunes sells digital copies of music that can be downloaded and stored on the hard drive of a computer or other playback device. That same digital content can reside on a CD or DVD. There really is no difference between buying a download and storing it on your digital device and buying a phonorecord or a CD. Streaming is a delivery equivalent to a radiocast. You listen to it in real time via a transmission, but it does not reside on any physical medium such as a CD, a cassette tape, DVD, video cassette or in today's world a computer hard drive, iPod or iPhone, or other playback device.

Aereo, appeared to do both in that it transmitted content over the internet, but it also stored downloadable versions in its "cloud" which its customers could access and download on demand. In either instance, the SCL believes Aereo was engaging in copyright infringement, whether directly or secondarily.

5. What evidentiary showing should be required to prove a copyright infringement claim against an individual user or third-party service engaged in unauthorized file sharing? Should evidence that the defendant has placed a copyrighted work in a publicly accessible shared folder be sufficient to prove liability, or should courts require evidence that another party has downloaded a copy of the work? Can the latter showing be made through circumstantial evidence, or evidence that an investigator, acting on the plaintiff's behalf, has downloaded a copy of the work?

Evidence that the defendant placed copyrighted work in a publicly accessible or publicly shared file should be sufficient to prove liability, especially if the defendant cannot show proof of a license or permission to use the copyrighted work from the copyright owner(s). Evidence that third party users downloaded copyrighted content would strengthen the plaintiff's case against the defendant, and implicate the third party users. However, investigators acting on a plaintiff's behalf should be required to do more to prove their case than simply stating or demonstrating how they were able to download the content. Since Aereo directly advertised and charged a fee for both transmitting and sharing copyrighted content they had not licensed, the SCL contends Aereo's list of subscribers would be sufficient evidence.

6. Please provide any additional comments or suggestions regarding recommendations or proposals the Copyright Office might wish to consider as it concludes its study.

The SCL believes the Supreme Court rightly ruled that a retransmission by Aereo of a TV program broadcast from another source is a "public performance". It is absolutely vital that each and every performance of a copyrighted work be deemed a public performance requiring a license for transmission and retransmission, irrespective of the technology incorporated or the means of distribution employed. Only then will content creators, studios and networks be incentivized to continue to produce and distribute programming. As music creators for audiovisual content, the members of the SCL contribute a vital component to every film, TV program and videogame produced. They deserve and expect fair compensation for the music they create.

The entertainment industry is a business like any other and without revenue that flows to the creators it cannot survive.

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THE SOCIETY OF COMPOSERS & LYRICISTS