

How the Aereo Dispute Could Affect Broadcasting Retransmission Revenues

In mid-July, Judge Alison Nathan of the U.S. District Court in New York refused to grant Fox, CBS, NBC, and 14 other broadcasters' request for a preliminary injunction to prevent Aereo from offering a service to viewers which allows them to watch live, as well as pre-recorded content, from 28 different New York area television stations on mobile media devices. Aereo assigns small antennas to paying subscribers to pick-up free over-the-air broadcasts and then stores the live or recorded programs for retrieval over high-speed Internet connections. Judge Nathan, in her denial of the plaintiff's motion for a preliminary injunction, agreed that allowing Aereo to continue with its streaming television service rollout would cause broadcasters irreparable harm. However, she concluded that the plaintiff stations were "unlikely to succeed on the merits" of many of the key points of their copyright infringement suit.¹ In her decision, Judge Nathan relied upon precedent from the U.S. Court of Appeals for the Second Circuit ruling which affirmed that Cablevision's remote DVR service was not in violation of copyright laws.²

Judge Nathan supported Aereo's claim that by providing each paying customer with individual antennas, the company is merely assisting the consumer in obtaining a product which is already commercially free. Judge Nathan noted, "the overall factual similarity of Aereo's service to Cablevision...suggests that Aereo's service falls within the core of what Cablevision held lawful... indeed in light of this Court's factual determination that each antennae functions independently, in at least one respect the Aereo system is a stronger case than Cablevision."³

While this one ruling against a small company currently offering service only in New York City may not seem like a big deal, if broadcasters were to ultimately lose their lawsuit, the result could seriously impact their ability to demand retransmission consent revenues. Retransmission consent revenues have been one of the fastest growing revenue streams for local broadcasters in recent years.

Time Warner Cable's Chairman and CEO Glenn Britt stated in a Q1 2012 earnings conference call in April, "Aereo, I think, is a very interesting idea. I have no idea whether the courts will find it to be legal or not, but it is certainly something we're looking at. Obviously we have been quite interested in the whole retransmission front. So if it's found to be legal, not paying retransmission consent, it's a very interesting thing."⁴

During the court proceedings, a Fox executive commented, “It is my understanding that cable companies have already referenced Aereo when discussing lowering their retransmission fees.”⁵ While the Aereo subscriber base is currently just under 40,000, cable MSO’s may find it in their interest to roll out similar products to those offered by Aereo, assuming that it is eventually decided that the service does not violate copyright law. Time Warner Cable has already provided conventional antennas to subscribers in Corpus Christi and several other markets in which broadcasters pulled their signals in disputes over retransmission consent fees.⁶

The networks had a better outcome in their case against *ivi*, a company that bills itself as an “over-the-top” cable system providing a service which retransmits network broadcasting to an online subscriber base. On August 27, 2012 the U.S. Court of Appeals for the Second Circuit upheld the temporary injunction rendered by the district court against *ivi* and went on to note the district court was correct in its assertion that the networks were likely to succeed on the merits of their case.⁷

While the services offered by Aereo and *ivi* appear similar, there are a few key distinctions that helped inform the courts’ decisions. *ivi* argued that they were a cable system under the Copyright Act and allowed subscribers to watch over-the-air broadcasts live via the Internet by centrally collecting free over-the-air signals and then retransmitting broadcasters’ content. In contrast, Aereo assigns unique dime-sized antennae to each subscriber, allowing users to collect and view either live or time-shifted content from local broadcasters. Aereo argues that by dynamically assigning each subscriber a unique antenna to use the service, they are merely providing subscribers the convenience to view content on multiple devices that is already available to them free and is collected uniquely for each subscriber based upon their viewing choices and preferences, drawing parallels to the time-shifting services at the heart of the *Cablevision* decision.⁸

The distinctions between the two services seem to boil down to live (*ivi*) versus stored (Aereo) content, and user assigned antenna (Aereo) versus centrally received antenna (*ivi*). These seem to be minor distinctions given that the Aereo content is provided nearly live and that a dynamic antenna array is not that much different from a master antenna. It is almost inconceivable to think that such minor differences could lead to two extremely dissimilar copyright law decisions from the Federal Courts. The profound economic implications of these minor distinctions could devastate the over-the-air television industry.

Given the recently contentious retransmission consent fee negotiations, both cable MSOs and over-the-air broadcasters will be closely watching the appeal of Judge

Nathan's decision to not grant a temporary injunction against Aereo in the same U.S. Court of Appeals which recently upheld the injunction against ivi.

For more information on the potential effects of the Aereo decision on both the broadcast television and cable MSO industries, please feel free to contact any of the principals of Bond & Pecaro.

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- 1 "Aereo Court Ruling Impact Could be Swift (Analysis)", The Hollywood Reporter, July 12, 2012.
 - 2 "Aereo Wins First Legal Round Against Broadcasters", Los Angeles Times, July 11, 2012.
 - 3 "Barry Diller's Aereo May Prevail Against Broadcasters on a Legal Technicality", BetaBeat, July 12, 2012.
 - 4 "Time Warner Cable Inc Class A TWC Q1 2012 Earnings Call Transcript", Morningstar.com, April 26, 2012.
 - 5 "Aereo Wins First Legal Round Against Broadcasters", Los Angeles Times, July 11, 2012.
 - 6 "Aereo Wins Against Broadcasters, Can Continue Selling Access to Antennas", Fierce Cable, July 12, 2012.
 - 7 "Nets Win Legal Battle vs Web Rebroadcaster", Variety.com, August 27, 2012 .
 - 8 "Aereo, ivi, and the Public Interest in Protecting Copyright", Copyhype.com, August 29, 2012.