

# Broadcasters battle purveyors of new technologies

At issue is control over distribution of TV shows.

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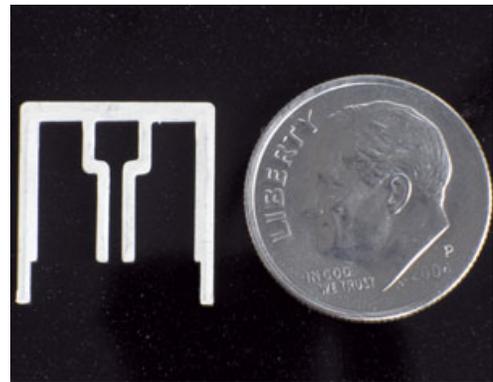
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Aereo Inc.'s pitch is this: With one of its tiny antennas, no bigger than a dime, you can watch television through the Internet. For couch potatoes, it may sound like a great deal, but it is erupting into a litigation nightmare for broadcasters.

Appeals are pending in two federal appeals courts over this type of technology, and at least one of the cases could well reach the U.S. Supreme Court.

Aereo's is not the only new way people watch TV in this age of Hulu, Netflix and multiple smartphone apps. Yet the law over how this works is unsettled, and other companies with similar streaming technology are facing suits from traditional media. In essence, the law over these issues hasn't changed that much since the U.S. Supreme Court addressed it almost 30 years ago. The fight boils down to whether the broadcasters' copyrights for their shows give them control over how the shows are distributed. "Whenever a new technology gets into the owner-to-reader-to-watcher stream, there's a question of how the copyright statute deals with it," said Jessica Litman, a University of Michigan Law School professor who teaches copyright law.

Aereo faces a coordinated attack in two cases filed by a broad swath of broadcasters. The broadcasters are disputing the legality of Aereo's system, which picks up over-the-air broadcasts through an array of thousands of tiny personalized antennas and transmits them to its users' Internet-connected devices. On November 30, 2012,



Aereo mini antenna  
Photo: Aereo



Covington's Robert Long  
Photo: Diego M. Radzinschi / NLJ



Baker Marquart's Ryan Baker

broadcasters asked the U.S. Court of Appeals for the Second Circuit for a preliminary injunction against Aereo.

Aereo, which announced \$38 million in venture-capital financing last month and plans to expand to 22 other cities beyond its New York base this year, claims it is distributing a private performance because each broadcast comes through an individual antenna. In other words, it claims its service is similar to rabbit-ear antennas, so that a unique individual copy of a broadcast is transmitted solely to one consumer. The companies claim that Aereo's service is a public performance under the copyright act, entitling them to compensation. In *American Broadcasting Cos. v. Aereo* and *WNET v. Aereo*, Judge Alison Nathan of the Southern District of New York agreed with Aereo. In July 2012, she denied the broadcasters' preliminary injunction motion.

David Hosp of [Fish & Richardson](#) represents Aereo. In the American Broadcasting case, the networks are represented by New York's [Debevoise & Plimpton](#), led by partner Bruce Keller. The lead lawyer for the broadcasters in the WNET case is Paul Smith, a Washington partner who heads the appellate and Supreme Court practice of [Jenner & Block](#). The lawyers declined to comment. The companies declined to comment or did not respond.

Meanwhile, the similarly named AereoKiller LLC filed two appeals in the U.S. Court of Appeals for the Ninth Circuit in late January. The company runs a service comparable to Aereo's. The appeals followed preliminary injunctions issued by Judge George Wu of the Central District of California that barred the company from retransmitting the broadcasters' copyrighted programs within the Ninth Circuit's boundaries.

"It's the networks trying to maintain a stranglehold using a paradigm that's outdated by technology," said Ryan Baker, a partner at Los Angeles-based Baker Marquart, who represents Aereokiller.

## **PRIME-TIME BROADCASTS**

Another case before the Ninth Circuit involves Fox Broadcasting Co.'s challenge to Dish Network Corp.'s PrimeTime Anytime service, which copies the four major broadcast networks' prime-time lineup each night and gives subscribers eight days of on-demand access to it.

Fox and two affiliates, including Twentieth Century Fox Film Corp., claim in their appeal that Dish's service is direct copyright infringement despite the fact that consumers push a button to sign up. That is, they dispute Dish's argument that it is a passive conduit and the lower court's holding that Dish's role in setting up and running the service was not the "most significant and important" cause of the copying.

In their brief to the Ninth Circuit they call an order by California federal judge Dolly Gee denying their preliminary injunction and absolving Dish of direct infringement "unfathomable." Fox also claims Dish is contractually barred from distributing Fox programming via video on-demand, unless it is done in a way that prevents users from fast-forwarding during commercials.

Robert Long, a Washington partner at [Covington & Burling](#) who represents a group of broadcaster amici in the Aereo and Dish cases, said, "live retransmission of copyrighted television programming over the Internet without consent is unlawful and will cause serious harm to television broadcasters." Long's clients in both cases include the ABC, CBS, NBC and Fox television networks. He also represents the National Association of Broadcasters in the Aereo cases.

## **BACK TO BETAMAX**

The last on-point Supreme Court case was the 1984 Sony Betamax dispute, said Litman of Michigan Law. The 5-4 opinion in *Sony Corp. of America v. Universal City Studios Inc.* by Justice John Paul Stevens held that Sony's sale of Betamax video tape recorders to the public was not contributory infringement of copyrighted public broadcasts.

People who represent television watchers and technology companies inventing new ways to watch TV say the same principal is at the heart of today's cases, Litman said.

They believe "it's not copyright infringement for them to do what they need to do to watch it at a time that's more convenient to them. In some sense what's at stake is your ability to have a DVR. On the other hand, program owners say, 'How are we going to make money for new uses unless you let us control the markets for them?' " Litman said.

Much like the Betamax case, the copyright law is also dated, she said. "Because of the fact that the copyright statute is 36 years old, courts are having to make these decisions without a lot of guidance from Congress."

The broadcasters in the Aereo cases say Nathan correctly held that they face irreparable harm from Aereo's action. But they fault her reliance on a 2008 Second Circuit decision, *Cartoon Network L.P. v. CSC Holdings Inc.* That ruling found that defendant Cablevision Systems Corp.'s transmission to a single subscriber, using a single unique copy created by the subscriber via DVR, is not a performance "to the public" for purposes of the Copyright Act.

The American Broadcasting group said in its brief that the Cablevision case did not involve unlicensed broadcast retransmission service, so the analogy to the videocassette recorder "simply does not apply to Aereo's very different business."

### **'A WORK AROUND'**

Aereo's technology is "kind of a work around" based on its misreading of the Cablevision decision, said Steven Metalitz, a Washington partner at Mitchell Silberberg & Knupp, who represents a group of music industry amici.

"Congress clearly intended to have a very expansive scope for the public-performance right no matter what type of technology is used. That's the issue we hope will be vindicated in this case," Metalitz said.

The public-performance right is critically important to many types of copyright owners, not just broadcasters, he said. "A lot is at stake in the case. It's an important case on what the scope of the public-performance right is."

The fight is about more than broadcasters' rights, agreed Electronic Frontier Foundation staff attorney Mitch Stoltz, whose organization filed an amicus brief for Aereo with Public Knowledge and the Consumer Electronics Association. "What's at stake is the ability to build and use home video services that aren't under the control of the TV networks. It's about whether the TV copyright owners have a veto over innovation in home video devices," Stoltz said.

Other groups of amici supporting the broadcasters include major league sports organizations and movie studios and related unions. Ralph Oman, the U.S. register of copyrights from 1985 to 1993, also stepped up to the plate for the broadcasters.

A group of intellectual property professors and several technology and consumer advocacy groups, including the Consumer Federation of America, are in Aereo's corner.

A wide range of plaintiffs joined the two New York suits.

ABC and its parent Disney Enterprises Inc., two CBS units, NBCUniversal Media LLC and four other NBC divisions including the Spanish language Telemundo Network Group LLC filed one case. The plaintiffs in the other case include Public Broadcasting Service and New York educational stations WNET; Fox Television Stations Inc.; Twentieth Century Fox Film Corp.; New York station WPIX Inc.; and two divisions of Spanish language broadcaster Univision Communications Inc.

Another streaming company, ivi Inc., hopes to turn around an August 2012 defeat at the Second Circuit. The appeals court's ruling in *WPIX Inc. v. ivi Inc.* affirmed a lower

court's injunction against ivi's live Internet streaming of plaintiffs' copyrighted television programming. The lower court found that ivi was not a "cable system" entitled to a compulsory license under the Copyright Act.

In December, ivi filed a petition for certiorari asking the Supreme Court to take up the question.

"Our view is that the statute defines a cable system in an absurdly broad way" so the court's ruling excluding Internet companies is frustrating, said ivi's lawyer, Larry Graham,,an attorney at Seattle intellectual property firm Lowe Graham Jones.

Arnold & Porter lawyers, who represented a large group of broadcasters at the Second Circuit, including Fox, NBCUniversal and Public Broadcasting, did not respond to requests for comment.

One of AereoKiller's lawyers, Jaime Marquart, a partner at Baker Marquart, sees common ground in the cases.

"The networks ultimately want to control what people watch, but they know they can't do that so they're trying to control how people watch," Marquart said.

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