

MEDIA

## *Aereo Case Will Shape TV's Future*

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Throughout America's business history, the victories and spoils went to the visionaries who made all manner of things — actual things like cars, pharmaceuticals and entertainment.

But more and more, many of the splashy business victories are going to companies that find a way to put a new skin on things that already exist. Uber does not own a single cab, yet it has upended the taxi industry. Airbnb doesn't possess real estate, yet it has become a huge player in the lodging market. WhatsApp remapped texting on existing telecommunications infrastructure and — thanks to its acquisition by Facebook — has as much as \$19 billion to show for it. The list goes on, but you get the idea.

Since 2012, [Chet Kanojia](#) has been building a business, backed by the media mogul Barry Diller, with ambitions to join that cohort. His start-up, Aereo, uses [tiny remote antennas to capture](#) broadcast TV signals and store them in the cloud, where consumers can watch them on a device of their choosing — no cable box, no cable bundle and most important, no expensive cable bill.

Instead, consumers pay \$8 to \$12 a month to watch almost live — there is a delay of a few seconds — and recorded programs from the major broadcast networks and public television. It's a threat to both the lucrative cable bundle and the networks that receive rich fees for being part of that cable package. Aereo would give so-called cord cutters the means to assemble a more affordable package of online streaming options like Amazon Prime, Apple TV or Netflix, and still spend a Sunday afternoon watching the N.F.L. and "60 Minutes" immediately afterward. As antenna-driven viewing has dropped and digital consumption has surged, Aereo is a way to put old wine in a new bottle.

It is a crafty workaround to existing regulations, which rides on the Cablevision court ruling in 2008, which held that consumers had the right, through their cable boxes, to record programming. But then, cable companies pay broadcasters billions in so-called retransmission fees while Aereo pays them exactly nothing. (And the case is not just about Aereo — it opens the gate for cable companies or others to build a similar service and skip the billions in payments to the networks.)

The broadcast networks have a technical legal term for this particular innovation — theft — and they have been trying to shut down Aereo from the start.

It all collides on Tuesday, when the [Supreme Court](#) will hear [the case](#) American Broadcasting Companies v. Aereo. It will be up to the court to decide whether the service is a consumer-friendly reskinning of the broadcast universe or just one more example of an Internet pirate trying to loot copyrighted content. In some senses, the case is as big of a deal as [the Betamax ruling](#) in 1984, which allowed consumers to record programming.

“This is the Sony Betamax of this century,” Mr. Kanojia said on the phone last week, citing a case that is likely to come up a lot on Tuesday.

The entertainment industry hated the Betamax decision and said it would lead to ruin — it didn’t — and the networks are just as opposed to a federal appeals court ruling last year to let what they see as Aereo’s chronic, classic infringement continue. In the broadcasters’ brief asking the Supreme Court to reverse that decision, Aereo was described as “an entire business model premised on massive and unauthorized commercial exploitation of copyrighted works.”

As a matter of copyright law, television programs can be shown only by those who have that right or a license to do so. That’s why bars and hotels must pay a fee for the programming they show on their televisions. And broadcasters say that Aereo is similarly a middleman that should pay for what they consider a public performance.

Aereo was conceived in the belief that because the consumer is the one who is pushing the button to watch live or recorded programming, that transaction is one-to-one and not a public performance. That the DVR is in the cloud and the antenna is remote is, in Aereo’s view, beside the point. In its arguments, Aereo embraces both the past (consumers have been using VCRs and then DVRs to record programming for decades) and the future (everything from Dropbox to Google Drive lets the consumer store what he wishes without any liability on the provider’s part).

Speaking on the phone on Thursday, Mr. Kanojia said he liked his facts but had no idea how things would play out.

“It’s a bit of a coin flip,” he said.

A lot of people will be watching to see how that coin lands, less because of what it means for Aereo specifically than what it portends for the broader media ecosystem. A decision is expected this summer.

I spent time in Hollywood last week chatting with various executives, and Aereo was described variously as “a fencing operation peddling stolen goods” and “thieves masquerading as innovators.” That’s about as friendly as it got: Aereo may be small — Mr. Diller called it “a pimple” — but it represents something mighty important. If Aereo is allowed to store and transmit signals without payment, the television industry will be profoundly reconfigured.

Should Aereo win, the \$3.3 billion in [retransmission fees](#) broadcasters now receive from cable companies will be in doubt, and in response, broadcasters might just stop broadcasting and become cable networks. Right now, broadcast signals reach about 117 million American homes, but cable penetration is so mature that approximately 102 million homes are now wired.

The vast majority of people already get their television, including the broadcast networks, through their cable or satellite service. If Aereo wins, networks could let the antennas go dark and tuck themselves inside the cable and satellite universe, where, like AMC or ESPN, they would then be paid programming fees.

That would be bloody. There are over 200 local broadcast affiliates, all of which depend on networks for a share of revenue and much of their programming. Local news, which is part of their mandate as public broadcasters, might wither, and as existing contracts expired, there would be a brawl for lucrative local advertising. Companies that own large groups of local stations like the Tribune Company and the Sinclair Broadcast Group would suddenly find themselves in possession of a much diminished collection of assets.

When Aereo began operating two years ago, Mr. Diller, who built a fourth broadcast network at Fox before joining the insurgency, [told me](#) he knew he was kicking the hornet's nest.

"I understand that any existing business tries to protect its borders from any and all incursions," he said.

Mr. Kanojia said that if Aereo loses, "There is no plan B." Regardless of the outcome, he says he believes that the television business is built on unsustainable margins and that many consumers will eventually use Internet services to build their own menu of shows. He's right about that.

Don't take my word for it. [A report](#) released last week by Experian suggested a firm link between the use of streaming services and cord-cutting. Last year, 18.1 percent of households with a Netflix or Hulu account cut the cord, while in 2010, that number was just 12.7 percent. The report indicated that the percentage of cord-cutting households in the United States increased to 6.5 percent in 2013 from 4.5 percent in 2010. And the rise of mobile devices is not driving the cord-cutting, but the availability of a wide range of shows on the good old television set without the need for a cable subscription — through services like Aereo.

No business is immune to disruption, but the television space is particularly ripe. Some of the players have looked down the road and realized they can't stop what's coming, which is partly why Comcast is so eager to merge its way beyond cable and dominate broadband.

Aereo, like the Sony Betamax, might end up as a footnote to television history. Once consumers decide — be they cord cutters or so-called cord nevers — it doesn't really matter what programmers, broadcasters or even the Supreme Court decides.