

## Aereo Supreme Court Case Could Change How Americans Watch TV

By Pema Levy

**Filed:** 4/21/14 at 10:50 AM | **Updated:** 4/21/14 at 6:00 PM



*The exterior of the U.S. Supreme Court is seen in Washington March 5, 2014. Gary Cameron/Reuters*

Nearly 30 years ago, Barry Diller and Rupert Murdoch founded the Fox TV network. Today, the two billionaires are on opposite sides of a legal battle between a television streaming startup and America's major broadcasting networks.

On Tuesday, their fight will go before the Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, and it is not an exaggeration to say that the verdict could determine the future of television.

In an age where Americans are already starting to abandon their pricey cable TV services for content streaming from Hulu, Amazon and Netflix, a two-year-old company called Aereo is hastening that trend by allowing customers to stream broadcast TV over the internet. To broadcasters, Aereo is not just another threat to their business model, it strikes at the heart of the broadcasters' revenue stream by cutting out the cable companies, which pay broadcasters billions of dollars in fees to retransmit broadcast content to their subscribers.

So the major broadcasters are suing Aereo for stealing their content. A decision for either side could change how Americans access content both on television and over the internet.

If Aereo wins, broadcasters like Murdoch's Chase Carey, President and COO of 21st Century Fox, have threatened to take their content off the public airwaves. "We can't sit idly by and let an entity steal our signal," Carey said last year. "We will move to a subscription model if that's our only recourse."

The National Football League and Major League Baseball have echoed that threat, warning in an amicus brief that a win for Aereo "may deprive viewers of popular programming that is now freely available on over-the-air broadcast television."

Diller, the media mogul and current chairman of IAC and Expedia Inc., is on the side of Aereo. He is also one of Aereo's initial investors and IAC has a minority interest in the company.

In a recent op-ed in the *Wall Street Journal* Diller slammed the broadcast companies for reneging on "everything the broadcast industry has agreed to over the past 100 years."

The argument goes like this. For decades, America's broadcasters have benefited from a lucrative deal with the U.S. government: They can use the scarce, publicly owned airwaves to transmit their content for free as long as they allow consumers to access the material for free too. The broadcasters use advertising rather than subscriptions to make an enormous profit, while individual Americans put rabbit ear antennas on top of their TV sets and enjoy local programming free of charge.

As technology has advanced, so has the way Americans watched television. Instead of an antenna and a Betamax to record content, today we have cable TV subscriptions with digital recording devices or DVRs.

When Aereo goes before the Supreme Court Tuesday it will argue it has simply taken this paradigm to the next level. The inventive startup uses "antenna farms" with thousands of dime-sized antennas linked to cloud storage to provide broadcast television to subscribers' over the internet for just \$8 - \$12 per month. By providing the technology to view free television, Aereo believes it should be no more liable for copyright infringement than RadioShack was for selling an antenna to an American family 20 years ago.

"This case simply concerns the next technological step: allowing a consumer to access broadcast programming using an internet-connected device coupled with a remotely-located, individually assigned antenna and segregated storage space," Aereo's brief to the court argues.

"It's a very good argument," said David G. Post, an expert in copyright law at Temple University Beasley School of Law. "It may carry the day." But, he added, "the broadcasters have a good argument too."

Comcast-owned NBC, Disney-owned ABC, News Corp's Fox, and CBS argue that because Congress has already mandated in the Copyright Act of 1976 that companies that pull content off the air and retransmit it to individuals for money -- like cable companies -- must pay broadcasters a retransmission fee, Aereo should too. Post says the question the Supreme Court must decide is: "Is Aereo like a rooftop antenna of individuals, or is it like a cable company?"

But it's not the future of Aereo that keeps copyright experts up at night. Post, who submitted a pro-Aereo amicus brief on behalf of dozens of law professors, says the case could change copyright law overall -- with potentially disastrous implications for internet technologies. "The possibilities for upsetting the apple cart considerably with respect to those other services I think is pretty high," he said.

A decision by the Supreme Court against Aereo could redefine the copyright landscape that cloud-based services like Dropbox and Amazon rely on, putting in jeopardy a whole generation of new technologies Americans now use daily.

The threat comes from one of the more complicated minutiae of copyright law at stake in the case: Whether Aereo's streaming service is a public or private performance of the broadcasters' content. Under the Copyright Act, private performances are A-OK, but a public performance is an infringement. The broadcasters say Aereo is transmitting their copyrighted shows to the public, making it a public performance. Aereo argues that with individual antennas and individual cloud storage, it is simply facilitating thousands of private performances.

If cloud storage was deemed a public performance and all of a sudden became liable for the copyright infringement of the content users store in and access through cloud-based services, that would threaten services that transmit content to individual users like Dropbox.

The stakes are so high that a number of internet rights groups filed an amicus brief that doesn't take a position in favor of either Aereo or the broadcasters but simply warns the court that their decision could implicate "the entire internet economy."

How will the court rule? No one can even guess because the case is like few others. While the nine justices are famously divided along political lines over issues like abortion, those distinctions do not apply when it comes to copyright law. Post worries a lack of copyright expertise on the court could lead to a bad decision in a case this technically complex.

With so much up in the air, the fact that the Obama administration has sided with the broadcasters could tip the scales in their favor. The administration's brief offers the court a compromise which would allow the broadcaster to extract fees from Aereo just like the cable companies without wading into the murky copyright issues at stake for cloud-based companies—a sort of cable system carve-out for copyright law.

Deputy Solicitor General Edwin S. Kneedler's brief argues that Aereo provides "the same service that cable companies have traditionally provided" and should therefore pay retransmission fees just like cable companies. But the brief warns repeatedly that a decision in favor of the broadcasters "need not call into question the legitimacy of innovative technologies that allow consumers to use the internet to store, hear, and view their own lawfully acquired copies of copyrighted works."

In short, the government seems to be trying to minimize the potential fallout from the case by signaling to the justices that if they aren't comfortable with what Aereo is doing, they can treat it like a cable company without throwing internet-based technologies into chaos. Post quibbles with the government's legal reasoning but appreciates the federal government's between-the-lines warning to the court to, as he put it, "watch out" and "do as little harm as you can."

Diller, on the other hand, is furious that the government has sided with the broadcasters. "Why, given this administration's oft-stated support for innovation, would it take such a position?" he asked in his op-ed last week. "In siding with the broadcasters, the administration has signaled that the preservation of legacy business models takes precedence over lawful technological innovation." With all concerned armed with news divisions at their disposal, how the justices decide could set off a heated debate whichever way the justices decide.