Television Broadcasters vs. Aereo, a Case Study

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To my mother, little brother and friends.
Acknowledgments

I appreciate the help of my advisor, Professor Philip Salas, as well as my program director, Albert Tedesco.
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Abstract

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This thesis is a case study of a controversial technology company by the name of Aereo, Inc. Aereo was a technology company based in New York that created a dime-sized antenna that allowed subscribers to view over-the-air television on internet-connected devices. The technology used by Aereo potentially affected the broadcast business model because the antennas could pick up broadcast signals and retransmit broadcasters’ programs to its subscribers without payment of a retransmission fee. Thus, broadcasters decided to file suit against Aereo, Inc.

Through a timeline analysis, this thesis examines the reasons and facts that led to Aereo's loss in court, as well as the significance of the Aereo cases to the major networks such as ABC, Fox, NBC and CBS who were potentially affected by the outcome of the courts’ decisions. After proceeding through various local and federal lawsuits against Aereo, broadcasters weren’t satisfied with the decisions and brought the case to the Supreme Court of the United States. The Supreme Court eventually ruled in a 6-3 decision that Aereo's business model was no different than a cable television provider, despite the differences in technology, and that Aereo was violating US copyright law (McKenna, 2014).
Aereo filed for bankruptcy protection in November, 2014. As a result, Aereo received $2 million by selling its assets to TiVo and other companies. Aereo, the now-defunct provider of internet TV, cloud DVR services, and ABC, Fox, CBS, NBC and other broadcasters reached a $950,000 settlement. As of April 22, 2015, this settlement was awaiting approval by the U.S. Bankruptcy Court for the Southern District of New York (Baumgartner, 2015).
CHAPTER 1: INTRODUCTION

1.1 Introduction

Television is a major mass medium in most developing, developed and even the least developed countries. In today’s society, owning a television set is no longer out of reach for most families. By 1957, Americans were already able to watch 450 stations across the U.S. on 37 million TV sets; by 1960, nearly 90% of households had a TV (n.d. 2005). According to Stelter (2011), household ownership of television sets in the United States in 2011 was 96.7%. Nielsen’s 2015 Advance National TV Household Universe Estimate (UE) reported that there were 116.3 million TV homes in the U.S., up 0.4% from the 2013-2014 estimate of 115.6 million. Nielsen also estimates that nearly 296 million persons age 2 and older live in these TV homes, an increase of 0.5% from 2013 (Nielsen, 2014). However, with the introduction of cable television, internet and Over the Top content (video, television and other services provided over the internet rather than via a service provider’s own network), the broadcast television networks started facing unprecedented competition (Syrkin, 2015).

In 2011, 96.7% of American households owned television sets, down from 98.9% in 2010. (Stelter, 2011). Moreover, the decrease is happening not only in the US, but also in countries like China. Nielsen attempted to provide an answer to this phenomenon, theorizing that as more and more content was not available until a household purchased a new digital television and antenna, thus, people tended to find other means to watch, for instance, on the internet or through mobile phones and
tablets (Nielsen”, 2014). A growing number of consumers were willing to become subscribers of Over the Top (OTT) networks such as Hulu, Netflix and internet protocol television (IPTV) such as U-verse (AT&T). Globally, subscription television is contributing to countries' GDP (Callen, 2012). With more consumer choices, the entertainment markets experience increased revenue (Metalitz, Schlesinger, Schwartz, Denton, 2013). However, low income consumers must accept that they have to pay for programs instead of watching everything on broadcast television for free (Lieberman, 2011). This raises some issues like the existence of pirate websites. Pirate websites such as BitTorrent provide free content to internet users and therefore, make profits illegally (Bilton, 2012). Additionally, pirate websites distribute new television series’ and movies to make money from online games and unauthorized pornographic advertisements, which leads to a loss of revenue for both production companies and pay TV services such as cable and Netflix. This trend in providing free movies and episodes of television shows can increase the chances for computer viruses to spread (Mulberry, 2009). Competition also lead to a decline in TV households, to 96.7% in 2011, down from 98.9 % in 2010 (Stelter, 2011).

When competition becomes fierce, it is very important for broadcasters to protect their content and fight for their rights. Copyright protection and retransmission fees are two very important concepts for broadcasters. The retransmission of broadcast television is divided into two types- private or public (Polka, 2015). If for the public, the retransmitting company would have to have permission or legal rights to retransmit the content. Otherwise, this action would be considered to be a copyright law violation. To protect broadcaster’s rights, The Cable
Television Consumer Protection and Competition Act of 1992 (also known as the 1992 Cable Act) is a United States federal law requiring cable systems to carry most local broadcast channels and prohibiting cable operators from charging local broadcasters to carry their signal. Retransmission Consent is a provision of the 1992 Cable Act that requires cable operators and other multichannel video programming distributors (MVPDs) to obtain permission from broadcasters before carrying their programming. (FCC, 2011) Cable companies are required by 1992 Cable Act to negotiate for retransmission consent, usually paying broadcasters for the right to carry their signals. Broadcasters argued that Aereo was a threat both to their business model, by undermining cable retransmission fees, and to the size of their audience (Rajghatta, 2014). There were multiple lawsuits on copyright issues and one of the biggest was the case of American Broadcasting Cos., Inc., et al. v. Aereo, Inc. The case officially began on March 1, 2012 when several major networks, including ABC, CBS, and NBC, filed suit against Aereo, claiming that the company infringed on their broadcasts by retransmitting them to subscribers (Mcadam, 2013).

Aereo, a technology company, set up an array of its dime-sized antennas in a particular DMA (Designated Market Area). When subscribers sign up for the service, they are assigned one or two of those antennas. Customers get two antennas so that they can watch live TV while also recording a show or, alternately, to watch live TV on two different devices at the same time. Those antennas pick up off the air signals which are then retransmitted via internet back to subscribers. In March, 2012, Aereo launched its service to customers in New York, (Vaughan-Nichols, 2013). The founder and CEO of Aereo was Chet Kanojia; his first company, Navic Networks, developed
technology that allowed cable companies to collect subscriber data, and was sold to Microsoft in 2008 for a reported $250 million (Vaughan-Nichols, 2013). Barry Diller, former chief executive of both Paramount Pictures and Fox helped to launch Aereo, when his company, IAC led with $20.5 million in funding in 2012. His current company, IAC, owns digital properties such as CollegeHumor, Vimeo and OkCupid. IAC was also involved in later funding rounds of $38 million and $34 million for Aereo, according to Crunchbase (Luckerson, 2014).

On Wednesday, June 25, 2013, the Supreme Court of the United States ruled against Aereo in a case brought by several broadcast networks, and reversed a lower court decision in favor of Aereo. With regard to this lawsuit, the Supreme Court found that Aereo infringed upon the rights of copyright holders. The final decision was based upon whether Aereo’s business model was considered as a "public performance", which would legally require it to pay a retransmission fee to the content providers. The court ruled in a 6-3 decision that Aereo’s business model was no different than that of a cable television provider, despite the differences in technology. As a result of that decision, the case was returned to the lower Court, and the company announced on June 28, 2014 that it would immediately suspend its services while arranging its next steps. The failure of Aereo was significant to the television industry. Aereo claimed that they were just renting antennas to their subscribers. However, broadcasters claimed that Aereo infringed upon their public performance rights, specifically under the “transmit clause,” which treats transmissions of a work to “the public” as public performances (McKenna, 2014).

1.2 Statement of the Problem
Aereo’s Supreme Court loss was due to many reasons. Aereo’s claim was that it was an antenna rental service, and as such, was not retransmitting copyrighted material, just allowing its customers to access what they could for free, legally over the air. This technology was not convincing enough to broadcasters and judges. Aereo’s services eventually fell into the category of “public performance”. There were also other problems as described below.

1.21 Aereo was Unable to Predict Its Future

 Companies take calculated risks with new technology. Aereo couldn’t predict what the court decisions would be. Broadcasters v. Aereo is a case about a specific clause of the Copyright Act, a legal interpretation of the notion of public vs. private performance. “Copyright cases have a way of being unpredictable,” says Blair Levin, a former FCC official and fellow at the Aspen Institute (Johnson, 2014).

1.22. The Risk in Introducing New Technology

There is always a risk in bringing new technology to the market. The television market offers many opportunities to operate more efficiently, develop completely new services or business models, and to serve new customers (Bolgar, 2014). It also presents risks that connect every aspect of the business, from supplier relationships to delivery of products and services, to customer relationships (Bolgar, 2014). In addition to its basic service allowing customers to watch over the air broadcast channels, Aereo charged its customers $8/month for 20 hours and $12/month for 60 hours of DVR storage, which was less than purchasing traditional cable service. This
price was very competitive, compared to that offered by cable companies and other online streaming companies such as Hulu and Amazon Fire TV. Broadcasters fought for retransmission fees because they claimed that part of the revenues belonged to them. If more and more customers started using Aereo, broadcast networks such as ABC, NBC, CBS, and FOX would face an immediate loss in revenue. Therefore, broadcasters decided to file suit against Aereo.

The majority opinion of the US Supreme Court found that Aereo’s service fell under the Copyright Act because it is similar to a cable company. However, one of the reasons that Aereo continued to expand was because Aereo had won in a federal appeals court in New York in April, 2013. “We always thought our Aereo platform was permissible and I’m glad the court has denied the injunction. Now we’ll build out the rest of the U.S.” said Barry Diller (Stelter, 2013). This court decision gave them confidence to continue the fight.

In short, there are many conflicts existing in the television industry. Three areas of conflict have been mentioned above. There was always a risk to bring new technology to the market. Aereo was unable to predict the court’s decision. Additionally, preliminary court decisions in their favor provided Chet Kanojia and investor Barry Diller optimism and a reason to continue expanding the company.

1.3 Background and Need

After Aereo ceased operations, the big winners were the broadcasters. However, this situation wasn’t the end of the story. There were some related issues,
such as concerns within the cloud storage industry. Cloud storage allows application software to be operated using internet-enabled devices. Clouds can be classified as public, private, and hybrid (Sandu, 2014). One of the existing problems with Cloud storage was the problem of legal ownership of the data; for example, if a user stores data in the cloud, can the cloud provider profit from it? Many Terms of Service agreements were silent on the question of ownership in the cloud storage industry (Morrill, 2013). To better understand those controversial issues, the Aereo court cases will be analyzed.

Details of Aereo’s operation are depicted in Figures 1 to 3.

Figure 1: From antenna to delivery, here’s how the service works (Patten, 2014).
Figure 2: Aereo’s dime-sized antenna (Smith, 2013)
Before Aereo’s expansion, broadcast television networks had already taken notice of Aereo’s business model. As soon as the technology was unveiled, the broadcasters were against it (Stelter, 2013). As a result of that, broadcasters such as CBS Corp, Comcast Corp’s NBC Universal, Walt Disney’s ABC and Twenty-First Century Fox Inc’s Fox network decided to sue Aereo. The website *TV Technology* reported that “The broadcasters say Aereo’s infringement will undermine their ability to do business with cable, satellite and telco TV providers, from whom they generally receive retransmission fees; and with over-the-top providers such as...
iTunes and Hulu” (Deborah, 2013). Aereo responded to the contrary. In October, 2013, the Supreme Court interpreted the law and made the final decision against Aereo based upon copyright infringement. In short, if Aereo had considered itself as a cable company and paid retransmission fees, it would not have had to go this far and lose everything in the end.

1.4 Purpose of the Study

The purpose of this study was to analyze the various cases brought against Aereo so that technology entrepreneurs could potentially avoid problems such as the one that doomed Aereo.

1.5 Research Questions

1.51. What does the Aereo case mean to the broadcasters who were potentially affected by the outcome of the Supreme Court decision and why?

1.52. What were the reasons leading to Aereo’s loss at the US Supreme Court?

1.53. How can copyright infringement cases be avoided in the future?

1.6 Significance to the Field

This thesis, as a case study, follows the path of Aereo from its inception to its end, including major court cases, ultimately leading to the US Supreme Court. Also included is a detailed timeline of news and major events concerning Aereo.

In the short term, this study provides students of television management with material to interpret their thoughts and ideas about future television technologies. Additionally, the Aereo case raised significant attention and discussion in the
television industry. Based on the Aereo experience, entrepreneurs would have better knowledge of the media laws and cases. In the long run, the Aereo case study would give people who have special interests or work in the fields of copyright, media laws and broadcast television industry a detailed, historical analysis.

1.7 Definitions

OTT: OTT stands for over-the-top and refers to the delivery of audio, video, and other media over the internet without the involvement of a multiple-system operators in the control or distribution of the content, such as Crackle, Hulu, MyTV, Netflix, Now TV, RPI TV, Wherever TV, or WWE Network (Ott, n.d.).

IPTV: IPTV (Internet Protocol Television) is a method of distributing television content over internet protocol (IP) that enables a more customized and interactive user experience (Rouse, n.d).

Internet Protocol (IP): The Internet Protocol is the principal communications protocol in the internet protocol suite for relaying datagrams across network boundaries. Its routing function enables internetworking, and essentially establishes the internet (Rouse, n.d).

Aereo: Aereo was a technology company that allowed subscribers to view live and time-shifted streams of over-the-air television on internet-connected devices (Vaughan-Nichols, 2013).

Antenna: An antenna is an electrical device which converts electric power into radio waves, and vice versa. A television antenna, or TV aerial, is an
antenna specifically designed for the reception of over-the-air broadcast television signals, which are transmitted at frequencies from about 41 to 250 MHz in the VHF band, and 470 to 960 MHz in the UHF band in different countries (Antenna, n.d.).

UHF: UHF television broadcasting is the use of ultra-high frequency (UHF) radio for over the air transmission of television signals (UHF, n.d.).

Supreme Court: The highest federal court in the United States (Supreme Court, n.d.).

Broadcasters: In this study, it means Broadcast networks ABC, NBC, CBS, FOX and PBS (Carter, 2012).

1.8 Limitations

A limitation of this thesis was that, although there are hundreds of news pieces and articles related to this case, as of 2015, no books were available to the author.

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction
There are many conflicts existing in the television industry. In this chapter, the literature review will address the issues related to the controversy between Aereo and broadcasters. The first section will examine existing literature to address the research questions. The second section provides a timeline of Aereo's existence.

2.2 Current Literature

There are many successful existing broadcast networks and OTT or cable companies such as ABC, Hulu and Dish. There are also countless articles about how to manage a cable or OTT company (if that is the business model Aereo wanted to emulate). William Covington raised a valuable point in his book *Creativity in TV & Cable Managing & Producing*, “Creativity Changing the System.” The purpose of his study was to investigate the effects of creativity in media management. Covington presented his study based on his experience in a number of positions in media work over the years, and his research at academic conferences throughout the United States, Ireland, and Canada. “In analyzing an organization, sometimes an outside consultant can see what has been overlooked by even the most reflective and well-intentioned of insiders” (p. 29). In Aereo's case, Covington's suggestion is especially useful in examining the business model. Aereo was unable to predict its future before its launch. The CEO of Aereo chose to take the risk and did not expect his business to violate existing copyright laws, resulting in a Supreme Court decision that would force the closing of his business.

“News Corp is threatening to take Fox off the airwaves if a little company called Aereo gets its way. What that means is that, in an unprecedented move, Fox
would stop broadcasting over the air and become a cable network. If such a move were made, it is entirely possible that ABC, NBC, and CBS would follow suit, completely dismantling the concept of a broadcast TV networks as we understand it today. (Rushe, 2013) Even though broadcast networks won the battle with Aereo, this could be the beginning of another war. For example, Dish Network is allowing commercials from broadcast network programs to be automatically eliminated upon playback, which angered broadcast networks (Ramachandran, 2012).

From the standpoint of the Aereo case, it is important to see how network-affiliate relationships worked when situations were different. The DuMont Television Network was one of the world’s pioneer commercial television networks. It began operation in the United States in 1946 (McDowell, 2006). Where the DuMont and Fox networks and their affiliated stations essentially pulled together to sustain a new, struggling enterprise, today’s station-network relationship is under increasing stress. Although DuMont ultimately failed, the case demonstrated how television stations and networks worked together. “The DuMont versus Fox case study showed how the broadcasting system changes over time” (McDowell, 2006). Looking back, McDowell, who spent over two decades in commercial television wrote that broadcasting networks’ relationships with their affiliated stations was considered to be a troubled one by the 1990s. Not only did the television networks and their affiliated stations’ relationships become more independent, but also the competition between each television network became very intensive. Additionally, with the existence of cable companies and OTT, broadcast networks started facing more challenges than ever. A broadcast network needs to stay competitive with other
broadcast networks and compete with cable companies and OTT companies (McDowell, 2006).

Terms and definitions are very important aspects to discuss in the Aereo lawsuit. Definitions such as “public” and “private” were considered very differently by each party in this lawsuit. According to Drexel University Professor Mary Cavallaro, “We can say a shopping mall is private but it has public access” (personal communication, 10/11/2014). The problem was that Aereo considered their technology to be an antenna service, so that their customers could watch a “private” performance, not subject to copyright or retransmission fees. The broadcasters considered Aereo’s use of their copyrighted material to be a public performance, subject to copyright and retransmission fees. “If Aereo is successful, it will be only because it found a strange loophole in the legal thicket surrounding how we treat content...Loopholes aren’t a technology, just because a company has found a legal loophole does not make it a sound business idea, a sound technical idea, or a good deal for consumers” (Manjoo, 2012). This article was just one of the perspectives on Aereo’s antenna. Aereo also argued that “Aereo sets up clusters of miniature antennas in an area. When you sign up for the service, you are assigned two of those antennas. One is for watching live shows and the other is for recording programs. Your local OTA (Over the air) shows are then streamed to a cloud-based digital video recorder (DVR)-like service.” (Vaughan-Nichols, 2013) Aereo claimed to only rent the small antennas to clients, which would provide private service to its customers.
Supreme Court justice, Stephen G. Breyer, writing for the majority, said Aereo’s service was not simply an equipment provider but acted like a cable system. This made it clear that Aereo transmitted copyrighted content (Liptak, Steel, 2014).

2.3 Aereo Timeline

In 2008, Chet Kanojia, the founder and CEO of Aereo, started his first company, Navic Networks, developed technology that allowed cable providers to collect data on subscribers’ viewing, and use that information to program targeted advertisements. He finalized the sale of Navic to Microsoft in 2008 for a reported $250 million (Chafkin, 2014). This gave him a solid foundation to move on with his next project, which was Aereo.

After he sold his company, Chet Kanojia remained as CEO and General Manager of Navic Networks from June, 2008 to September, 2010.

On February, 14, 2012, Aereo launched its service and filed for patents on its television streaming service on February 17th. Soon after, broadcasters WNET, Fox, Univision, Tribune’s CW affiliate WPIX, PBS and others filed suit in U.S. District Court in Manhattan to stop Aereo because they felt that Aereo was illegally retransmitting copyrighted material. On March 14th, Aereo was charging $12 a month for 20 channels, and 40 hours of remote storage, with access for up to five devices, including the iPhone, iPad, Apple TV and MacBook with a 90-day free trial promotion. Five months later, Aereo offered a new pricing plan either free to $1 a day or $80 a year.

At the meantime, Alki David, the Founder and CEO of FilmOn, an online video
site, had started a new service in competition with Aereo. FilmOn’s new site was
called Barrydriller.com. Barry Charles Diller, an American businessman, who serves
as the media executive responsible for the creation of Fox Broadcasting Company and
USA Broadcasting in 2015 sued BarryDriller on August 22th, 2012. (Ramachandran,
2012) Diller claimed to The Wall Street Journal, “I had hoped that if they steal my
name they’d do it for something more provocative”.

AereoKiller and BarryDriller were two services similar to Aereo, which
retransmitted copyrighted works that appeared on free, over-the-air broadcast
television. Aereokiller was a company that used dime-sized antennas to capture over-
the-air TV transmissions and then streams them to subscribers by way of the internet.
Aereokiller began by using BarryDriller.com as the website from which it streamed
TV shows, though since Mr. Diller sued, that Web address was redirecting to a number
of other Web pages (Ramachandran, 2012). BarryDriller was a streaming video
service that also offers subscribers online streams of over-the-air programming.

BarryDriller and Aereokiller’s service purportedly operated by transmitting
broadcast content, captured by miniature antennas, to customers’ computers and
mobile devices. Thus, Fox Television Stations Inc. and other producers of copyrighted
works that appear on free, over-the-air broadcast television networks sued
BarryDriller Content Systems PLC, Aereokiller LLC, and others on August 10th, 2012 in
United States District Court in California, for infringing upon their copyrights by
offering their content through internet and mobile device streaming (Ramachandran,
2012).
On September 20th, 2012, Cablevision Systems Corporation, the fifth-largest cable provider and ninth-largest television provider in the United States, with most customers residing in New York, New Jersey, Connecticut, and parts of Pennsylvania, decided to support the broadcasters (Brown, 2014). Cablevision said the broadcasters have "more persuasive legal grounds for invalidating Aereo" that do not threaten new technology. "If Aereo ends up prevailing, it will serve the broadcasters right" (Flint, 2013). The company said "The critical legal difference is that Cablevision pays statutory licensing and retransmission consent fees for the content it retransmits, while Aereo does not," in an amicus brief filed with the U.S. Court of Appeals for the Second Circuit in Lower Manhattan (McAdams, 2013).

Aereo started streaming TV to all Mac and Windows personal computer web browsers. This provided consumers with more choice on how and where they used Aereo. The software was previously released for iOS, along with the Apple TV and Roku set top boxes. This service was just for New York City residents, but Aereo offered customers in that city a way to watch 29 local broadcast TV channels online. Aereo also received help from the Consumer Electronics Association (CEA), who filed an amicus brief for Aereo with the Second Circuit in Lower Manhattan (Callaham, 2012).

On December 20th, 2012, a California judge granted an injunction in a case where Fox sued AereoKiller and BarryDriller due to copyright infringement. The Cablevision case was used as precedent in the Aereo case. The Second Circuit’s decision in Cartoon Network v. CSC Holdings, 536 F.3d 121 (2008) – known as the “Cablevision” case – stands as the leading federal court decision to address
copyright issues in the context of cloud-based content storage systems. The decision validated Cablevision’s proposed “Remote Storage” DVR system, which allowed cable subscribers to record TV programs to centralize digital video recorders (Hosp, 2010). California Judge George Wu who presided over the case was not in agreement with the Cablevision decision and stated that “Cablevision’s focus on the uniqueness of the individual copy from which a transmission is made is misplaced,” Wu wrote. Wu’s decision created a “circuit split,” in which federal circuit courts issue disparate rulings. (McAdams, 2014)

As Aereo continued to expand, News Corp.’s Chase Carey said in April, 2013 that the 27 Fox owned-and-operated television stations may go off the air if Aereo prevailed (Fixmer, 2013). “One option could be converting the Fox broadcast network to a pay channel,” (Mcadams, 2014) Carey made his remarks at the NAB Show in April, 2013 (Wasserman, 2013). In May, 2013, Fox and NBC sued to stop FilmOn and AereoKiller in D.C. District court claiming copyright infringement. The broadcast networks were seeking an injunction in U.S. District Court for the District of Columbia. The Federal District Court for the District of Columbia had issued a preliminary injunction against Film On. Aereo, launched its service in Boston on May 15th, 2013. On July 9th, 2013, Hearst Television, Inc. (formerly Hearst-Argyle Television) a broadcasting company owned by the New York City-based Hearst Corporation sued Aereo in Boston (Johnson, 2013). Hearst-owned ABC affiliate WCVB sought an injunction from the U.S. District Court for the District of Massachusetts. Several days later, a federal appeals court denied a request by the broadcasters. The ruling was issued by the U.S. Court of Appeals for the Second Circuit in Lower Manhattan to consider their request for an injunction
against Aereo. This also gave Aereo the chance to launch in Atlanta, Salt Lake City and Chicago. In October 2013, Boston judges ruled in favor of Aereo. Aereo then added Android service and launched in Detroit and Denver.

In January 2014, Diller invested another $34 million in Aereo, and Aereo had run out of capacity in New York (Spangler, 2014). In February 2014, Utah Broadcasters won an injunction against Aereo. Judge Dale Kimball of the U.S. District Court for the Southern District of Utah ruled in favor of broadcasters, granting a preliminary injunction against Aereo, enjoining the service in Colorado, Kansas, New Mexico, Utah, Wyoming and most of Oklahoma. In March 2014, Aereo launched in San Antonio, Texas and Austin, Texas. As Aereo continued to expand, CEO Kanojia said there’s no "plan B" as Aereo had no strategy for a loss (Stahl & Hagey, 2014). The close battle culminated on June 25, 2014 when the Supreme Court of the United States ruled against Aereo in a case brought by several broadcast networks and reversed a lower court decision in favor of Aereo.

On June 25, 2014, according to New York Times, “Aereo had previously said it had ‘no plan B’ if it lost in court. However, Mr. Kanojia said that ‘Our work is not done’ and that Aereo would continue to fight to create innovative technologies” (Liptak, Steel, 2014).

On July 9, 2014, Aereo CEO Chet Kanojia said that the company filed a letter with a New York district court that detailed Aereo’s potential Plan C, transforming itself into a traditional cable company. The company said it was "pausing" its service and then later called on customers to contact their lawmakers (Harris, 2014). In the end, Aereo faced bankruptcy and sold its assets to TiVo and other companies for $2
million. At that point, plaintiffs had stopped Aereo and prevented further copyright infringement.

CHAPTER 3: METHODOLOGY

3.1 Introduction
Case study methodology is utilized in this thesis. By analyzing the local courts and the Supreme Court’s judgments and decisions, the research questions listed above are answered.

As mentioned in Chapter 1, the problem is that Aereo considered their technology to be an antenna service, so that their customers could watch a “private” performance, not subject to copyright or retransmission fees, while the broadcasters considered Aereo’s use of their copyrighted material to be a public performance, subject to copyright and retransmission fees.

The following research questions were addressed in this study. First, what does the Aereo case mean to the major broadcasters (CBS, ABC, NBC, FOX, CW) who are potentially affected by the outcome of the Supreme Court decision and why? Second, what are the implications of a loss for cloud computing industries as well as other similar companies? Third, is it practical for Aereo to become a cable company?

This study followed a timeline. The opinions and attitudes toward Aereo and the broadcasters were measured through related court cases. This case study evaluated the relationship between broadcast television networks, stations, cable and satellite companies, and companies like Aereo.

3.2 Timeline of the Aereo court cases
3.21 March 1st, 2012: District Court in Manhattan.

Plaintiffs: WNET, Fox, Univision, Tribune’s CW affiliate, WPIX, and the Public Broadcasting Service

Defendant: Aereo, Inc.

Description of the case: WNET, Fox, Univision, Tribune’s CW affiliate, WPIX, and the Public Broadcasting Service filed suit in U.S. District Court in Manhattan to stop Aereo (McAdams, 2013).


Discussion: Judge Alison Nathan of the U.S. District Court for the Southern District of New York ruled that Aereo is materially similar to Cablevision’s remote digital video recorders, deemed legal in 2008 in Cartoon Network v. Cablevision, decided in the U.S. Court of Appeals for the Second Circuit. However, the plaintiffs appealed this decision (McAdams, 2013).

3.22 August 10, 2012: The U.S. District Court for the Central District of California

Plaintiff: Fox

Defendants: AereoKiller and BarryDriller

Description of the case: Alki David, founder of FilmOn, an online streaming site, resurrected streaming TV service FilmOn as an homage to Diller, who was not amused. He continued streaming TV through FilmOn, AereoKiller, and mobile apps. Fox sued for an injunction with the U.S. District Court for the Central District of California.
Decision on December 20, 2012: California judge grants injunction against AereoKiller and Barry Driller.

Discussion: Judge George Wu is not bound by the Cablevision decision and takes it to task. “Cablevision’s focus on the uniqueness of the individual copy from which a transmission is made is misplaced,” he wrote. Wu’s decision creates a “circuit split,” where federal circuit courts issue disparate rulings’ (McAdams, 2013).

3.23 August, 2012: United States Court of Appeals for the Second Circuit


Defendants: Aereo, Inc. and Bamboom Labs, Inc.


Defendant: Aereo, Inc.

Description of the case: This appeal was from an order of the United States District Court for the Southern District of New York which argued on November 30, 2012. Two groups of plaintiffs filed separate copyright infringement actions against Aereo in the Southern District of New York. They asserted multiple theories, including infringement of the public performance right, infringement of the right of reproduction, and contributory infringement. ABC and its co-plaintiffs moved for a
preliminary injunction barring Aereo from transmitting television programs to its subscribers while the programs were still being broadcast. The two sets of plaintiffs agreed to proceed before the district court in tandem, and the motion for preliminary injunction was pursued in both actions simultaneously. It concluded that Aereo’s transmissions of unique copies of broadcast television programs created at its users’ requests and transmitted while the programs are still airing on broadcast television are not “public performances” of the Plaintiffs’ copyrighted works referred to the Cablevision case (Horten, 2014).

Decision: April 1, 2013, Judge affirmed the order of the district court denying the Plaintiffs’ motion.


Defendants: Aereokiller LLC, FilmOn.TV Networks, Inc., Filmon.TV, Inc., and FilmOn.com

Description of the case: This copyright infringement action arose out of Defendants ‘unauthorized retransmission over the internet of the copyrighted programming broadcast on numerous broadcast television stations, including the programming of stations licensed by the Federal Communications Commission to serve the
Washington, D.C. market. Fox and NBC sue to stop FilmOn and AereoKiller in D.C. District court. (Gardner, 2013).

Decision on September 5, 2013: The Court granted Plaintiffs’ motion for a Preliminary injunction.

3.25 July 9, 2013: Boston District Court

Plaintiff: WCVB-TV

Defendant: Aereo, Inc.

Description of the case: Boston became Aereo’s second market on May 15, 2013, delivering 28 channels (Mcadams, 2013). WCVB-TV, the Hearst-owned ABC affiliate in Boston, filed suit against Aereo for copyright infringement.

Decision: A federal judge in Boston denied a motion from the Hearst station group to impose a preliminary injunction against Aereo; in effect, allowing the service to continue operating (Butts, 2013).


Plaintiff: HearstTV, owner of WCVB-TV, the ABC affiliate in Boston

Defendant: Aereo Inc.

Description of the case: Judge Alison Nathan wrote of the litigious broadcasters that, “although the plaintiffs have demonstrated that they face irreparable harm, they have not demonstrated that the balance of hardships decidedly tips in their favor.” (Fitzpatrick, 2012, para.3)
Decision on October 10, 2013: A federal judge ruled in favor of Aereo, denying Hearst its request for an injunction against the company (Price, 2013).

3.27 February 7, 2014: In the United States District Court for the District of Utah Central Division

Plaintiff: Community Television of Utah, LLC dba KSTU Fox 13, KUTV Licensee, LLC dba KMYU, KUTV and Fox Broadcasting Company.

Defendant: Aereo, Inc.

Plaintiff brought this lawsuit against Aereo for copyright infringement. Aereo, however, does not obtain retransmission consent or copyright licenses from Plaintiffs because it does not believe that its technology is subject to the same laws (In The United States District Court for the District of Utah Central Division, 2014, pp. 1-3).

Decision on February 19, 2014: U.S. District Judge Dale A. Kimball in Salt Lake City granted the request by Fox Broadcasting Co. to block the service while the Supreme Court in ABC v. Aereo case was pending (Abbruzzese, 2014).

3.28 October, 2013: Supreme Court of the United States

Plaintiff: American Broadcasting Company Inc.

Defendant: Aereo Inc.

Description of the case: ABC argued that Aereo was violating copyright by retransmitting their signals over the Internet. Typically, networks receive retransmission fees from cable and satellite companies that carry network TV, even
though users can get those channels for free over the air. The networks claimed that Aereo should pay the retransmission fee.

Decision: The United States Supreme Court decided 6-3 in favor of the broadcast companies, in the matter of American Broadcasting Companies, Inc. v. Aereo, Inc.

3.3 Process Analysis

Throughout the Aereo cases there were several focal points that led to the final decision. On Aereo’s side, it should be ascertained as to whether Aereo can be considered to be a cable company. The Supreme Court recognized one particular difference between Aereo’s system and the cable systems at issue; Aereo’s system remains inert until a subscriber indicates that they want to watch a program. Given Aereo’s overwhelming likeness to the cable companies targeted by the Copyright Act of 1976, a United States copyright law that remains the primary basis of copyright law in the United States. This sole technological difference between Aereo and traditional cable companies does not make a critical difference here (Supreme Court of The United States, 2013, pp. 8–10). However, Aereo neither owns the copyright to those programs from broadcast television nor holds a license from the copyright owners to perform those works publicly. This means Aereo is not a legal cable company but its operation was very similar to a cable company.

Moreover, Aereo’s activities are substantially similar to those of the community antenna television companies that Congress amended the Copyright Act to apply to. (Supreme Court of the United States, 2013, p. 2).
In the late 1940s and early 1950s, a new industry of community antenna television (CATV) exploded.

Fortnightly Corporation owned and operated CATV systems in Clarksburg and Fairmont, West Virginia. In 1960, the Fortnightly systems provided customers with signals of five television broadcasting stations, three located in Pittsburgh, Pennsylvania; one in Steubenville, Ohio; and one in Wheeling, West Virginia (Gray, 2015). The systems carried all the programming of each of the five stations, and a customer could choose any of the five programs he wished to view by simply turning the knob on his own television set. United Artists Television, Inc., held copyrights on several motion pictures. United Artists Television sued the Fortnightly Corporation for copyright infringement in the United States Court of Appeals on March 13th, 1968. United Artists Television lost the case because the judges decided since Fortnightly's CATV systems basically did no more than enhance the viewers' capacity to receive the broadcast signals, the CATV systems fell within the category of viewers, and Fortnightly did not "perform" the programs that its systems received and carried (Gray, 2015).

Teleprompter Corporation was a media company that existed from approximately 1950 until 1981. The company was named for its primary product, a display device which scrolled text to people on video or giving speeches, replacing cue cards or scripts. Teleprompter grew to become the largest cable television provider in the United States by 1973 (Fortnightly & Teleprompter, 1976, pp. 86-87). In 1974, Columbia Broadcasting System's creators and producers of copyrighted television programs filed a lawsuit in the Federal District Court for the Southern
District of New York for copyright infringement against Teleprompter Corporation and its subsidiary Conley Electronics Corporation, major participants in CATV, claiming that Teleprompter had infringed on their copyrights by intercepting broadcast transmissions of copyrighted material and rechanneling these programs through various CATV systems to paying subscribers. In 1968, in Fortnightly Corp. v. United Artists Television, Inc., the Court held that a CATV operator is more analogous to a "viewer" than a "performer," and thus could not face liability under the Copyright Act. The Court affirmed Fortnightly in Teleprompter Corp. v. Columbia Broadcasting System, Inc., and called on Congress to revise the copyright law if it wished to cover such activity. In 1976, Congress reformed copyright law, which included adding the Transmit Clause to broaden the definition of what it meant to "publicly perform." According to the Transmit Clause, a work is performed publicly when the performance is transmitted to the public "by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." (Fortnightly & Teleprompter, 1976, pp. 86-87).

According to the Fortnightly and Teleprompter cases, it is clear that Aereo is not simply an equipment provider. In 1976, the Supreme Court amended the Copyright Act in large part to reject the district court and court of appeals' holdings in Fortnightly and Teleprompter (Fortnightly & Teleprompter, 1976, pp. 86-87). The 1976 amendments completely overturned this Court's narrow construction of the Act in Fortnightly and Teleprompter. Therefore, the Supreme Court enacted new language that erased the Court's line between the broadcaster and its viewer, with
respect to performing a work. The amended statute clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible" (Supreme Court of the United States, 2013, pp. 3-4). Under this new language, both the broadcaster and the viewer of a television program "perform," because they both show the program's images and make audible the program's sounds (Supreme Court of the United States, 2013, pp. 2-3).

The second question is whether or not Aereo performed "publicly" according to the transmit clause. Justice Breyer delivered the opinion of the Court. Justice Breyer upheld the Copyright Act of 1976 which gives a copyright owner the "exclusive right" to "perform the copyrighted work publicly" (Supreme Court of the United States, 2013, p.4). The Transmit Clause of the Copyright Act of 1976 defines the exclusive right as including the right to "transmit or otherwise communicate a performance [. . .] of the copyrighted work [. . .] to the public, by means of any device or process, whether the members of the public capable of receiving the performance [. . .] receive it in the same place or in separate places and at the same time or at different times" (The Copyright Act of 1976, 1976, §101). Therefore, it matters when an entity communicates the same images and sounds to multiple people, it "transmits a performance" to them, irrespective of the number of discrete communications it makes and irrespective of whether it transmits using a single copy of the work or, as Aereo does, using an individual personal copy for each viewer (Scalia, 2014).

Relating to the copyright issue, there was an argument related to a similar lawsuit involving Cablevision. In April 2013, a federal appeals court in New York ruled that Aereo's service didn't violate copyright law based on a Second Circuit ruling "that
found Cablevision’s remote DVR’s to be legal because they involved one copy of a show being transmitted to one subscriber. (Stelter, 2013) While Aereo said its operation is "one antenna for one subscriber," the broadcasters argued that Aereo’s system was built specifically to circumvent copyright law and was different from the Cablevision case because Aereo offered live TV without a license (Palmer, 2014).

CHAPTER 4: RESULTS

On June 25, 2014, the US Supreme Court, in a 6 to 3 decision, handed a major victory to the broadcast networks. The decision of the US Supreme Court is considered to be the result of this case study.

The many similarities between Aereo and cable companies, considered in light of Congress’ basic purposes in amending the Copyright Act, convinced the court
that this difference is not critical here. The Court concluded that Aereo is not just an equipment supplier and that Aereo “performs.” Also, Aereo performed petitioners’ works “publicly,” within the meaning of the Transmit Clause.

If broadcasters don’t have control of their programming ahead of independent video streaming companies like Aereo, this would cut their revenue to an unacceptable degree, the TV networks argued. And should the broadcast networks suffer, the public will end up suffering even more, as broadcasters like to say the public is the "ultimate beneficiary" of their programming (Pachico, 2014).

4.1 Supreme Court Decision

The United States Supreme Court decided in favor of the broadcast companies, in the matter of American Broadcasting Companies, Inc. v. Aereo, Inc. The Court’s finding hinged on the Court’s rejection of the premise that “re-transmission” via the internet to a single user constituted no significant difference from the existent regulations in place for cable broadcasts of copyrighted material to a single end-user. From this perspective, the Court upheld a conservative and literal reading of the Copyright Act.

4.2 Chet Kanojia’s letter to Aereo’s consumers.

Figure 4: Aereo founder Chet Kanojia’s letter to Aereo’s consumers 1.
A LETTER TO OUR CONSUMERS

The Next Chapter

A little over three years ago, the team at Aereo set out to build a better television experience for the consumer. We began this journey because we were frustrated with a system that we believed was broken and no longer served the consumer. When it came to watching live television, the options were few, the products available were cumbersome and didn’t fit our increasingly mobile lifestyle, and costs were unreasonably high and rising.

With that in mind, we put our collective engineering power to work to create an online technology that was simple, useful, and compelling, and provided consumers with a true alternative to how they watch local live TV. That’s how Aereo came to life.

Our engineering team created the first cloud-based, individual antenna and DVR that enabled you to record and watch live television on the device of your choice, all via the Internet. In less than two years, we went from drawings on a napkin to launching Aereo’s technology in more than a dozen cities across the country.

The enthusiasm we encountered was overwhelming. The sense of frustration consumers expressed reinforced our mission. We knew we had touched a nerve, had created something special, and had built something meaningful for consumers.

But we encountered significant challenges from the incumbent media companies.
But we encountered significant challenges from the incumbent media companies.

While we had significant victories in the federal district courts in New York and Boston and the Second Circuit Court of Appeals, the reversal of the Second Circuit decision in June by the U.S. Supreme Court has proven difficult to overcome. The U.S. Supreme Court decision effectively changed the laws that had governed Aereo’s technology, creating regulatory and legal uncertainty. And while our team has focused its energies on exploring every path forward available to us, without that clarity, the challenges have proven too difficult to overcome.

Accordingly, today, we filed for Chapter 11 reorganization proceedings. We also appointed Lawton Bloom of Argus to serve as Aereo’s Chief Restructuring Officer during this period.

Chapter 11 will permit Aereo to maximize the value of its business and assets without the extensive cost and distraction of defending drawn out litigation in several courts.

We have traveled a long and challenging road. We stayed true to our mission and we believe that we have played a significant part in pushing the conversation forward, helping force positive change in the industry for consumers.

We feel incredibly lucky to have had the opportunity to build something as meaningful and special as Aereo. With so many shifts and advances in technology, there has never been a more perfect time to take risks, challenge the status quo and build something special.

Thank you for all of your support. Your emails, tweets, Facebook posts and letters have meant the world to us. We are incredibly grateful to have gone on this journey together.

CHET KANOJIA

CHET KANOJIA
During a Yahoo interview, Kanojia vehemently disagrees, calling the Justice Department's position "incorrect and misguided." He maintains that Aereo is selling technology, not content, a key distinction for the company’s case (Couric, 2015).

Some customers have also raised questions as to how well Aereo works. A subscriber in Atlanta complained on pcmag.com about streaming video during prime-time hours, while another customer in New York wrote on gadgeteer.com that they couldn’t watch the Academy Awards due to picture quality, and fears Aereo will struggle to showcase big events (Couric, 2015). Kanojia readily admits the company has had its share of struggles, and said "We've run out of capacity, we've had a couple of outages, so yes, there are issues." Many of those issues have been caused by the internet, according to Kanojia. "If you have a very poor internet provider, it's congested"(Couric, 2015, para. 15).

Kanojia may have a point, but in a case with far-reaching implications for the entertainment and technology industry, the United States Supreme Court ruled that Aereo had violated copyright laws by transmitting broadcast signals on their antennas to subscribers for a fee. Broadcasters applauded the ruling, “For two years they have been in existence, trying to hurt our business,” Leslie Moonves, Chief executive of CBS, said in a telephone interview. “They fought the good fight. They lost. Time to move on” (Liptak & Steel, 2014, para. 7).

The Supreme Court case was closely watched by the media and technology industries. Some questions that have been raised include: Are broadcasters navigating the vast technological changes and rapid shifts in viewer habits, or can we see this case as how broadcasters embraced the television industry laws in the
circumstances that more and more viewers are canceling traditional paid-television subscriptions in favor of cheaper streaming alternatives?

Initially, one judge in Los Angeles suggested that there should be two standards by which an online "performance" should be defined as "public" or not. One of the standards is it shouldn't be considered "public" if viewers already have to pay a subscription fee or a downloading charge in order to watch a video online (Pachico, 2014). However, the problem with Aereo existed in the process of the transition. These unauthorized antennas were purchased by consumers but Aereo didn’t have any contracts with broadcasters to retransmit network programs.

Finally, judges noted that Aereo’s subscribers may receive the same programs at different times and locations (Figure 4). For the Transmit Clause expressly provides that an entity may perform publicly “whether the members of the public capable of receiving the performance […] receive it in the same place or in separate places and at the same time or at different times” (The Copyright Act of 1976, 1976, §101). In other words, “the public" need not be situated together, spatially or temporally. For these reasons, Aereo transmits a performance of petitioners' copyrighted works to the public, within the meaning of the Transmit Clause.

As a result, Aereo filed for bankruptcy protection in November, 2014 due to the long process of having to reclassify itself as a cable company. Aereo was scheduled to sell off its assets in an auction at the end of February, 2015. As a result, Aereo received only $2 million from selling its assets to TiVo and other companies, which was much lower than the $4 to $31 million value that Aereo had expected (Moon, 2015).
CHAPTER 5: DISCUSSION
5.1 Introduction

According to multiple online journals, a number of consumers claimed that they felt surprised by Aereo’s technology and were disappointed in the broadcasters’ reaction against this new technology. The U.S. Supreme Court’s decision to consider a lawsuit brought by the nation’s largest TV broadcasters against Aereo, the upstart streaming video service, lays the foundation for a landmark verdict that could have important implications for internet streaming, cloud computing, and the future of the TV industry itself (Gustin, 2014).

5.2 Impact on the Television Industry

If Aereo had succeeded, broadcasters claimed that they certainly would not settle for this situation. “The broadcasters are saying that they would become cable providers, but they may also start a subscription-based service that would compete with Aereo,” said Orly Lobel, professor of law at the University of San Diego (Pachico, 2014). Many changes would have to have been made if Aereo’s business was considered to be legal. Are viewers or leaders of broadcast television companies ready for these major shifts in the broadcast television industry? The answer is probably no because this would speed up the rising tide of viewers switching to other streaming services and the television industry would lose balance between broadcasters, cable companies and other streaming companies. Leslie Moonves, CEO of CBS, said “Aereo’s demise ensures that broadcasters can stay
in business”. "We will continue to do the same high-quality, premium programming that we’ve done and we will deliver it” Moonves said. “So this is a pro-consumer thing. And frankly, for Aereo to say that it isn’t is a little bit of sour grapes.” (Pepitone, 2014) David Bank, media analyst at RBC Capital Markets, agreed with Moonves. “Had Aereo been victorious, the risk would have been the broadcasters would have been forced to become cable channels to prevent Aereo and other technologies from monetizing its content without being paid,” Bank said (Little, 2014, para. 4). If Aereo were to not pay a retransmission fee, then why would cable companies pay? However, this would go against retransmission consent legislation. In this case, is the law still applicable? If not, broadcast television would be facing net loss, run into debt, stop making new episodes, and eventually stop making TV series. In the long run, Aereo would have more issues in offering subscribers’ favorite TV shows which would eventually lead to a decrease in customers.

“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” (Carr, 2014, para. 2). “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” (Carr, 2014, para. 2). Since 2012, Aereo built a business by selling antennas and this company didn’t pay a penny for what its subscribers got from broadcast television. Cable companies pay broadcasters billions in retransmission fees while Aereo paid them nothing (Carr, 2014). This would create a situation that would affect the relationship between cable companies and broadcasters.
By deciding in favor of the broadcasters, the decision prevented broadcasters from becoming cable distributed networks. The vast majority of consumers 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, there would then be paid programming fees” (Carr, 2014, para.17). In that case, each network’s over 200 local affiliates would depend on their network for a share of revenue. In addition, local news, mandated as public broadcasters, might suffer as existing contracts expired. Companies like the Tribune Company and the Sinclair Broadcast Group would suddenly find themselves in possession of a reduced collection of assets (Matsa, 2014).

Additionally, the Supreme Court’s final decision avoided the increase in companies that have copyright infringement issues, as this case set a precedent which would protect broadcasters and copyright owners from future loss.

5.3 The impact of the Supreme Court decision on the technology industry

After the decision, Kanojia said it "sends a chilling message to the technology industry," one that could move the country toward "a permission-based system" of copyright without more clarity on what is new and what is not (Joan, 2014). During this case, the Supreme Court carefully avoided commenting on video on demand or cloud DVR functionality, which it was not asked to address directly.

There were many opinions on whether or not Kanojia’s statements were true. According to the research, the court didn’t discourage innovative technologies
besides examining an individual’s relationship with the content as an owner or possessor. Amazon didn’t provide a reaction to the decision, nor did Google, Apple, or Dropbox. Even though Aereo lost the case, television technology is still developing rapidly. As Justice Stephen G. Breyer said “Congress [...] did not intend to discourage or to control the emergence or use of different kinds of technologies” (Joan, 2014, para.2). The failure of Aereo provided some new aspects to the television copyright laws and this could became an important reference for the future development of television.

As of this writing, Aereo, the now-defunct provider of internet TV, and cloud DVR services, and ABC, Fox, CBS, NBC and other broadcasters reached a $950,000 settlement. As of April 22, 2015, this settlement was waiting for the approval by the U.S. Bankruptcy Court for the Southern District of New York (Baumgartner, 2015). Aereo’s case reflects the relationships and competition between broadcast television and new streaming technology companies like Aereo. It is also important to know how copyright laws and significant cases of litigation in television history lead to the Supreme Court decision in Aereo’s case.

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