ARE Copyright Law Alert:
Aereo Raises A New Defense Following the Supreme Court Decision

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After our article on the Supreme Court decision in *Aereo* posted, Aereo voluntarily suspended service on June 28, 2014.

Then, on July 9, 2014, following the orders of the District Judge, a joint statement of dispute was filed by plaintiff broadcasters and defendant Aereo with the U.S. District Court of the Southern District of New York.

In the joint letter to U.S. District Judge Nathan, Aereo argues, in effect, that although the Supreme Court may have said it cannot keep doing what it is doing without payment to the broadcasters, it may not be enjoined because the Supreme Court ruling classified the company as "a cable system with respect to [the] transmissions" at issue. Joint Letter, *ABC v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012), ECF No. 313 at 3. Thus, Aereo argues that, as a cable system, "it is eligible for a statutory license [under Section 111 of the Copyright Act], and its transmissions may not be enjoined (preliminary or otherwise)." *Id.*

This argument is similar to the failed argument made by ivi, Inc., which sought to transmit live TV over the internet, but ivi lost and the company shut down. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012). Aereo claims that *ivi* has since been overturned by the Supreme Court decision in *Aereo*, and additionally distinguishes the services of ivi ("distant" transmissions) from its own services ("local" transmissions). Joint Letter, ECF No. 313 at 3. Further, after the *Aereo* Supreme Court decision, but prior to the joint letter, FilmOn X filed with the U.S. Copyright Office for a compulsory license under Section 111, arguing the same position that Aereo took in the joint letter. No decision has yet been made on FilmOn X's request. Aereo, which originally did not have a back-up plan, now argues in the letter that this matter "must be decided on an immediate basis or [its] survival as a company will be in jeopardy." *Id.*

In the same joint letter, the broadcasters argue that in light of the Supreme Court's ruling, Aereo's argument to reinstate its service should be dismissed. According to the broadcasters, "it is astonishing for Aereo to contend the Supreme Court's decision automatically transformed Aereo into a 'cable system' under Section 111 given its prior statements [that it is not a cable company] to this Court and the Supreme Court." *Id.* at 1-2.

However, Aereo has now faced a serious setback to its new defense. On July 16, 2014, the U.S. Copyright Office, in a letter to Aereo, indicated that they do not consider the company to be a "cable system" under the terms of the Copyright Act. The Copyright Office wrote that

"internet retransmissions of broadcast television fall outside the scope of the Section 111 license." The Copyright Office has accepted Aereo's filing for the compulsory license on a provisional basis, recognizing that the company has raised this issue before the courts.

This matter is now before Judge Nathan to consider in enforcing the Supreme Court's decision in *Aereo*.

We will continue to follow this development.

In the meantime, please feel free to contact our attorneys regarding issues raised by this case.

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