

Inside Retransmission Consent - Aereo's Biggest Threat to Broadcasters

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I'm pleased to share Howard Homonoff's second piece on Aereo today. The first was "[Here Are Aereo's Legal, Policy and Business Paths Forward.](#)" Howard is Principal/Managing Director of Homonoff Media Group LLC, a management consulting firm focused on traditional and digital media content distribution, social media analytics and regulatory strategy. He is a frequent industry speaker and producer/host of Media Reporter, starting soon on cable systems throughout New York City.

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by Howard Homonoff

Technology startups, by definition, often challenge the status quo - striving to deliver products or services that are better, faster, and/or cheaper than existing approaches. Yet, given the long odds against startups' success, incumbents don't often go on the warpath against startups in their space until the startup has at least demonstrated some genuine traction or ability to disrupt that status quo.

In this context, the intense opposition to Aereo from the broadcast industry is unusual. Aereo has been deployed in just one market and hasn't disclosed any metrics about customer adoption (unattributed numbers suggest negligible penetration to date). Yet broadcasters have launched vigorous litigation (thus far unsuccessful) and executives have threatened to abandon their decades of traditional broadcast-based business models in favor of cable-based delivery if Aereo is ultimately deemed legal.

Why is it that broadcasters are so up in arms about Aereo? The answer, I believe, is that Aereo directly challenges a concept known as retransmission consent. As a close observer of Aereo's coverage, I've been struck by how little attention retransmission consent has received, and how little it seems to be understood. Below I address 3 questions: What is retransmission consent? Why was retransmission

consent originally created? Why is it viewed as so vital by the broadcast industry?

What is retransmission consent?

Congress enacted retransmission consent in the 1992 Cable Act, and it is derived from copyright, the “exclusive legal right, given to an originator [of a work] or an assignee, to print, publish, perform, film, or record [that work].” Copyright is so fundamental to our democratic system that in the midst of granting (and limiting) the powers of three distinct branches of government and carving out specific rights for individuals, the U.S. Constitution (Article 1, Clause 8) confers on Congress the right to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

It’s important to note a couple of key distinctions between retransmission consent and copyright. The first is that the right is linked not to the creation of works themselves (the programs being aired), but to the mode of transmission of those works – via the broadcast spectrum. And the second key distinction is that this transmission mode is not created or owned by the broadcaster. The broadcast spectrum is owned by the public and the broadcaster operates pursuant to a government license to use its spectrum in accord with “the public interest.”

Aereo does not challenge the rights of broadcasters to control how, when, or in what fashion they produce or license original works to air exclusively on their own owned and operated stations or those of stations affiliated through a network (ABC, CBS, etc.) and according to the schedule, placement and other terms and conditions of their choice. Rather, the tricky part here is the extent of the broadcasters’ control of the transmission signal itself.

Why was retransmission consent originally created?

If we peel the onion a layer further, why was the right of retransmission consent created for broadcasters in the first place? Well, remember that the cable TV business, originally known as “community antenna television,” began in “white areas” where broadcast signals didn’t reach, such as rural Pennsylvania or Tupelo, MS (founding home of Comcast).

Cable entrepreneurs raised money, put up towers, and retransmitted broadcast signals to homes for a fee. There were no “cable networks”

as we have come to know them, so the only content came from broadcast stations. Broadcasters certainly benefitted by having their programming (and commercials) distributed to more homes, but they were never an explicit part of the bargain to make that happen.

This all changed in 1992, when the cable industry found itself in the cross-hairs of a “perfect storm” of public frustration and anger. All of the main complainants against cable got something in the 1992 Cable Act. The public interest community got rate regulation and customer service standards. Multichannel video competitors got program access rules that limited cable’s ability to keep popular cable networks away from new entrants. And broadcasters - who increasingly saw the alphabet soup of cable networks as powerful competitors for ratings and advertising dollars - pleaded with Congress to save “free” broadcasting.

Ironically, the means of doing this were anything but free, as the most powerful broadcasters could now force cable operators to provide compensation for the right to retransmit these signals.

Why is retransmission consent viewed as so vital by the broadcast industry?

If Congress sought to save broadcasters (if not necessarily the “free” part), they actually did a pretty good job. Retransmission consent has evolved in two distinct eras. In the first, from the 1992 Cable Act’s passage through the early to mid-2000s, broadcasters rarely, if ever, received cash payments from pay-TV operators in return for retransmission consent, but they were able to launch broadcaster-owned cable networks (e.g. ABC’s ESPN2, FOX’s FX, NBC’s America’s Talking/MSNBC). Broadcasters received above-market subscriber fees for these networks and perhaps more importantly, created highly valuable media assets.

Direct cash payment for retransmission consent has been the hallmark of the second and current era. This emerged from the combination of a diminishing value for launching new digital, as opposed to analog, cable networks, feistier independent station owners taking charge of their retransmission consent destiny, and transactions such as CBS’s spin-off from Viacom and Comcast’s purchase of NBCUniversal that made cash an attractive target for the biggest broadcasters.

Importantly, broadcasters have also asserted that to stay competitive with cable networks’ dual revenue stream of subscriber fees and

advertising, they must have the additional revenue that retransmission consent represents.

More broadly, cash compensation is obviously critical to broadcasters (and the investment community) because it mostly flows straight to their bottom line. SNL Kagan (prior to the Aereo decision) has estimated that these fees paid by pay-TV operators to broadcasters will rise to over \$5 billion by 2017. While small relative to broadcasters' ad revenues, retransmission consent revenue has now been essentially "baked into" broadcasters' P&Ls, so any threats to it will bring on a fight.

In sum, it isn't Aereo itself, or whether it has a successful value proposition, that alarms broadcasters (if Aereo were offering broadcasters retransmission consent payments, they'd be lining up in support). Rather, it's the prospect of Aereo being permitted to retransmit broadcasters' signals without involving them in that decision that spooks them.

If and when Aereo's legal status is more definitively decided, it blows open the door for pay-TV operators themselves to partner with Aereo, or create a similar technology, which could obviate the need to pay retransmission consent fees. Given all of this, it's not hard to understand broadcasters' deep consternation here. In a follow up to this piece I will sort through the complex web of public policy and business considerations that will come into play in any battle over retransmission consent.

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