



# Virginia Association of Broadcasters Legal Review



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## SPECIAL REPORT

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### **BROADCASTERS WIN INJUNCTION IN LAWSUIT AGAINST AEREOKILLER SERVICE**

In a recent “win” for broadcasters, a California federal court awarded an injunction against the Aereokiller service (also known as “Barry Driller”) in a lawsuit by the Fox network and its affiliated entities against the service for copyright infringement. Aereokiller is technologically similar to the Aereo service. Both services use tiny antennas to capture broadcast signals, record those signals, and retransmit the captured programming to individual subscribers over the Internet. The California decision will shut down the Aereokiller service while the case moves forward and may signal future success in the case for the broadcast network.

As we previously reported, a New York court denied broadcasters’ request for an injunction in a nearly identical case against Aereo, and an appeal is pending in that case in the U.S. Court of Appeals for the Second Circuit. In the meantime, the California decision against Aereokiller is an encouraging development for broadcasters.

The key difference in the California court’s analysis, as compared to the New York court that reached the opposite result, is the theory of unique-copy transmission. In the New York case against Aereo, the district court was persuaded that the retransmissions were unique to each subscriber, and likely permissible under the law, because each subscriber was assigned his or her own tiny antenna. The court interpreted the law to mean, essentially, that if an individual could lawfully receive a broadcast signal via a private antenna (no matter how small), record the programming (even

remotely), distribute the programming from the recorder to the playback device (even over the Internet), and privately perform the material, then it would be permissible for the service to replicate that process on the subscriber's behalf.

The California court disagreed. In the *Aereokiller* case, the California court explained that the Copyright Act was intended to protect against the retransmission of copyrighted program material by commercial enterprises. The California court was not persuaded that the commercial service's use of individual antennas for its subscribers would get around that legal problem. Thus, the California court held the broadcasters were likely to succeed on the merits as the case progressed.

In order to award the injunction, the court also had to find irreparable harm posed to broadcasters by the service. The California court acknowledged that revenues from retransmission consent licensing are "increasingly important to the broadcast industry, and are used to fund the development and acquisition of broadcast programming." The California court recognized that the Aereokiller service would damage the Fox network entities' ability to negotiate favorable retransmission consent agreements, to earn royalties, and to control the distribution of their program material. The court went a step further to recognize that because the service would "divert users who would otherwise access [broadcaster] content in a way that includes the users in the measurement of the audience for purposes of advertising revenue calculation, [the] service also harms [broadcasters'] position in their negotiations with advertisers."

Ultimately, the California court enjoined the Aereokiller service, requiring that, until a final resolution of the case, the service may not retransmit, stream, or otherwise publicly perform or display the Fox network entities' broadcast television programming work. The order expressly mentions retransmission over the Internet, via web applications, or via portable devices, as examples of prohibited means of distribution.

We will continue to keep you apprised of important developments in this case.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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