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September 15, 2013

## TESLAW E-Newsletter September 15, 2013 Issue No.5

Dear TESLAW Members,

How the year has flown! Fall is one of my favorite times of the year. Not just for the cooler temperatures, but because it's time for the [23rd Annual Entertainment Law Institute](#). It is one of the most consistently engaging entertainment law CLE presentations around. If you have not made plans to attend – you should! This year it's happening on September 26 – 27 in Austin, Texas.

Remember, as a TESLAW member you are eligible for a discount on the registration fee! Please come and introduce yourself. See everyone in late September.

Very truly yours,  
[Catherine Hough](#), Chair  
Entertainment and Sports Law Section

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### TESLAW Member Spotlight



Amy E. Mitchell has practiced entertainment law in Austin since 2004 and represents musicians, independent filmmakers, television producers, and authors, among other creative types. Prior to focusing on her solo practice, Amy worked with Christian L. Castle, Attorneys on music industry talent representation, digital distribution, content licensing, and public policy matters.

Ever active in the Texas entertainment law community, Amy currently serves on the TESLAW Council, the ELI planning committee, and the Entertainment & Sports Law Section of the Austin Bar Association (a section that she founded). In addition, Amy writes frequently on entertainment law topics and maintains

the educational site "[Ask a Music Lawyer](#)", which receives thousands of visitors each month.

When Amy is not practicing law, she performs with several Austin ensembles and continues to explore her indie rocker side as both a vocalist and keyboardist. To date, she has performed on more than a dozen albums from a cappella to jazz to rock to folk to classical. As a performer, she respects the creative process, and this ultimately led her to become an entertainment lawyer. She believes that her ability to relate to her clients on this level makes her a better advocate for them.

Amy spends her free time traveling with her husband, David Pooley, and fixing up their mid-century home. For more information visit [Amy's website](#).

*To be considered for the TESLAW Member Spotlight please submit a short bio (no more than 200 words) and photograph to [Victoria Helling](#).*

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## ***The Battle for Broadcast to Mobile Devices: WNET et al. v. Aereo, Inc. Case Note by Tom Kulik***

By directing over-the-air broadcasts to mobile devices such as smartphones or tablets, technology startup Aereo, Inc. has drawn the ire of broadcasters seeking retransmission fees for content redirected over its service; however, the courts have been reluctant to support the broadcasters' arguments. The underlying basis for the dispute between the broadcasters and Aereo stems from Aereo's unique redirection of over-the-air broadcasts, and whether such use constitutes infringement under the Copyright Act.

The U.S. copyright law grants certain exclusive rights to authors of original works that are fixed in a tangible medium of expression. One of these exclusive rights is the right to distribute the work, including the primary transmission of such works over the airwaves. Essentially, broadcasters secure these rights to transmit such copyrighted content to one's television, which consumers watch for free because the advertising revenue generated from commercials aired during the programming. Since changes to the Copyright Act of 1976, cable and satellite TV providers have been required to pay a nominal cable compulsory license (17 U.S.C. 111(c)) or satellite compulsory license (17 U.S.C. 119) for the retransmission of over-the-air broadcasts to their subscribers. Aereo argues, however, that it is not subject to such compulsory license because it uses thousands of antennae in a subscription area where they roll out the service, pairing each antenna to a specific subscriber and, therefore, resulting in no public performance of copyrighted programming. Aereo asserts that its service is the same as a consumer using their TV to receive over-the-air broadcast signals...just without the direct local connection to an antenna.

Following 11 weeks of expedited discovery and a two-day evidentiary hearing, Aereo's arguments prevailed in the United States District Court for the Southern District of New York. See *WNET, Thirteen v. Aereo, Inc.*, 12-cv-01543, (S.D.N.Y.) and *American Broadcasting Cos. v. Aereo*, 12-cv-01540 (S.D.N.Y.) (denial of preliminary injunction; holding that Aereo's retransmissions constitute a private performance of copyrighted works and is "materially identical" to the system presented in *Cartoon Network LP v. CSC Holdings Inc.*, 536 F.3d 121, 87 U.S.P.Q.2d 1641 (2d Cir. 2008) (commonly referred to as "Cablevision")). CBS Broadcasting, Inc. and other broadcasters fared no better in the United States Court of Appeals for the Second Circuit, which affirmed the District Court's order. See *WNET et al. v. Aereo, Inc.*, 712 F. 3d 676 (2d Cir. 2013) (holding Aereo's transmissions are not public performances, and refusing to overturn Cablevision due to stare decisis). More recently, the broadcasters were unsuccessful in obtaining a rehearing en banc, although two of the twelve Second Circuit judges strongly dissented. *WNET v. Aereo Inc.*, 2d Cir., No. 12-2786, 7/16/13 (JJ. Chin and Wesley, dissenting in a 31-page dissent premised in part on their disagreement with the holding in Cablevision). As a result, the court battles between broadcasters and Aereo, Inc. appear headed for an inevitable showdown in the United States Supreme Court.

Aereo has had the upper hand so far, but the battle is far from over. The litigation in the Second Circuit continues unabated. Aereo has moved for summary judgment arguing that it has committed no infringement of the broadcasters' rights, while the broadcasters have moved for partial summary judgment claiming direct infringement of the broadcasters' rights under copyright law to reproduce the works. Based in part upon certain representations made by CBS executives, Aereo has also filed its own federal action in the Southern District of New York seeking a declaratory judgment on non-infringement and a preliminary injunction against CBS and other broadcasters. See *Aereo, Inc. v. CBS Broadcasting Inc., et al*, No 13-cv-

3013(AJN) (S.D.N.Y.). Aereo continued its expansion into Boston, Atlanta, Utah, and Chicago, and is scheduled to launch Dallas on September 23, 2013. WCVB-TV of Boston (a CBS affiliate) has already filed suit seeking a preliminary injunction against Aereo for copyright infringement in a suit similar in nature to the Second Circuit litigation, but seeking a more favorable ruling in the First Circuit. See *Hearst Stations, Inc. d/b/a WCVB-TV v. Aereo, Inc.*, No.13-cv-11649-MBB (D. Mass.). Whether Aereo will continue to successfully protect its legal position remains to be seen, but with billions of dollars of retransmission fees and the broadcasters' business model on the line, this "cliffhanger" is just beginning.

*Tom Kulik is a partner at Scheef & Stone, L.L.P. His practice focuses on intellectual property, media and entertainment law matters as outside general counsel for business enterprises. He is the current chair of the Dallas Bar Association Computer Law Section.*

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## Practice Document

Please find attached to our September E-Newsletter an article on [Backup Options for your Office Computers](#) provided by Stephen Summer of Stephen Owen Summer, P.C. in Austin, Texas.

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*Send questions, comments, and submissions for the TESLAW E-Newsletter to [Victoria Helling](#).*

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