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Aereo and *FilmOn X*: Internet Television Streaming and Copyright Law

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Summary

Aereo and FilmOn X stream television programming over the Internet for a monthly subscription fee. Aereo and FilmOn's technology permits subscribers to watch both live broadcast television in addition to already-aired programming. Their use of this development in technology has triggered multiple lawsuits from broadcasting companies alleging copyright violations. These cases reveal not only multiple interpretations of copyright law and its application to new and developing technologies but also a possible "loophole" in the law, which some have accused Aereo and FilmOn of exploiting.

The Copyright Act of 1976 provides copyright holders with the exclusive right to control how certain creative content is publicly performed. Of particular interest to courts in recent cases against Aereo and FilmOn was the meaning of the Copyright Act's "transmit clause" that determines whether a performance is private or public and within the scope of the public performance right. Specifically, the courts have been divided as to what constitutes a "performance to members of the public" for the purposes of the transmit clause.

During the past two years, groups of broadcasters have filed lawsuits against Aereo and FilmOn alleging that the retransmissions of their programs by these companies have violated their right of public performance. While both FilmOn and Aereo use similar technology, the courts have disagreed about whether this technology infringes upon the copyright holder's right of public performance. In 2013, the U.S Court of Appeals for the Second Circuit in *WNET v. Aereo* affirmed the lower court decision ruling that the transmissions by Aereo did not infringe the plaintiffs' public performance right. However, district courts in the District of Columbia (*Fox Television Stations v. FilmOn X)* and California (*Fox Television Stations v. BarryDriller Content Systems*) have held that FilmOn's retransmissions did violate the right of public performance.

The Second Circuit held that Aereo's transmission of broadcast programs is not a public performance because Aereo is transmitting a copy of the program made by Aereo available not to the public at large but only to a specific subscriber. However, the D.C. and California district courts have disagreed with this interpretation. These courts have held that the retransmission by FilmOn of the broadcasters' copyrighted material is a public performance and therefore violates the broadcasters' copyright. For the D.C. and California district courts, the one-copy-per-subscriber technology of FilmOn does not exclude the company from the public performance right when the service is transmitting the same underlying program to various subscribers.

These decisions, however, do not mark the end of litigation over these issues. The parties have filed appeals in the circuit courts, and in January 2014, the U.S. Supreme Court granted a petition for writ of certiorari filed by the plaintiffs (petitioners) in *WNET v. Aereo*. Additionally, two bills in the 113th Congress address issues related to Internet television streaming. These bills, the Television Consumer Freedom Act of 2013 (S. 912) and the Consumer Choice in Online Video Act (S. 1680), would enhance consumer choice regarding online television programming, a service marketed by both Aereo and FilmOn.

c11173008

Contents

Aereo and FilmOn Technology 2
1976 Copyright Act & Public Performance Right 3
Transmit Clause 3
Transmission or Other Communication 4
Performance of the Work 4
Members of the Public Capable of Receiving the Performance 4
Separated Geographically or Temporally 5
Aereo's Interpretation of the Transmit Clause 6
Performance of the Work 6
Members of the Public Capable of Receiving the Performance 7
Dissent 7
FilmOn X's Interpretation of the Transmit Clause 8
Performance of the Work 8
Members of the Public Capable of Receiving the Performance 9
Future Litigation 9
Related Legislation in the 113th Congress 11

Contacts

Author Contact Information 12

c11173008

Companies such as Hulu, Netflix, and Amazon have changed how many people watch television programming by offering on-demand, online streaming to their computers, mobile devices, and gaming consoles.[1] Aereo and FilmOn X also stream television programming over the Internet for a monthly subscription fee. Unlike the other companies, however, the technology of Aereo and FilmOn permits subscribers to watch both live broadcast television and already-aired programming without licenses. This development in technology has triggered multiple lawsuits alleging copyright violations by these companies. The litigation reveals not only multiple interpretations of copyright law and its application to new and developing technologies, but also a possible "loophole" in the law, which some have accused Aereo and FilmOn of exploiting.[2]

The Copyright Act of 1976 provides copyright holders with the exclusive right to control how their work is reproduced, adapted, distributed, publicly displayed, or publicly performed.[3] The issue before the courts in the lawsuits against Aereo and FilmOn X is whether a retransmission of copyrighted broadcasts over the Internet without a prior agreement with the copyright holder violated the copyright holder's right of public performance.

In 2012, the U.S. District Court for the Southern District of New York, in *ABC v. Aereo,* denied certain broadcasters' request for a preliminary injunction against Aereo.[4] The plaintiffs argued that Aereo's service of transmitting copyrighted television programs contemporaneously with over-the-air broadcasts violated their right of public performance. The defendant, Aereo, in turn argued that the performances were not public but private because each user could access only his/her specially made copy of the program. The district court agreed with Aereo's argument. That same year, the plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit in *WNET v. Aereo.* The Second Circuit, in a split appellate panel, affirmed the district court decision ruling that the transmissions by Aereo did not infringe the plaintiffs' public performance right.

FilmOn X modeled its system on Aereo and its recent endorsement by the courts. However, FilmOn has not enjoyed the same legal success as Aereo, despite the similar arguments made by both the plaintiffs and defendant in the *Aereo* cases. In the 2012 case *Fox Television Stations v. BarryDriller Content Systems*, the U.S. District Court for the Central District of California found that FilmOn's retransmission of certain television programs violated the copyrights of several broadcasters.[5] In 2013, the U.S. District Court for the District of Columbia found, in *Fox Television Stations v. FilmOn X*, that FilmOn's retransmission of the plaintiffs' copyrighted programs over the Internet violated their right of public performance because FilmOn retransmitted copyrighted works to members of the public without the plaintiffs' prior permission.[6]

This report will examine the courts' interpretation of the public performance right in the context of the *Aereo* and *FilmOn* cases. The report begins with a discussion of the technology used by

[1] *See, e.g.,* Jeff Bercovici, *How Amazon and Netflix Are, and Aren't, Changing TV,* FORBES, November 14, 2013, http://www.forbes.com/sites/jeffbercovici/2013/11/04/how-amazon-and-netflix-are-and-arent-changing-tv/.

[2] *See* George Winslow, *Diller: Aereo Is 'Not a Loophole; It is a Right,'* BROADCASTING & CABLE, April 29, 2013, http://www.broadcastingcable.com/news/technology/diller-aereo-not-loophole-it-right/49951.

[3] 17 U.S.C. §106.

[4] ABC v. Aereo, 874 F.Supp. 2d 373 (S.D.N.Y. 2012).

[5] Fox Television Stations, Inc. v. BarryDriller Content Systems PLC, 915 F. Supp.2d 1138 (C.D. Cal. 2013).

[6] Fox Televisions Stations Inc. v. FilmOn X LLC, No. 13-758 (D.D.C. 2013).

c11173008

Aereo and FilmOn. The report then examines the public performance right, specifically the "transmit clause," in the Copyright Act. Next, the report discusses the interpretation of the transmit clause and public performance right by the courts in the *Aereo* and *FilmOn* cases. The report concludes with a brief overview of future litigation by these parties and related legislative proposals in the 113th Congress.

Aereo and FilmOn Technology

Competitors Aereo and FilmOn X use similar technology, with only minor distinctions but no legally meaningful differences, to retransmit broadcast television to their subscribers.[7] Both companies allow subscribers to view and/or record live broadcast programming. Unlike most other digital video recorders (DVR) that require a television, Aereo and FilmOn allow users to view programming on their computers or mobile devices, similar to services offered by Hulu and Netflix.[8] However, Aereo and FilmOn, unlike Hulu and Netflix, have not negotiated any licensing agreements with the content providers. Content providers have even accused Aereo of "stealing content" while Aereo has defended its service as a new player in the media market.[9]

In order to watch a program, the Aereo/FilmOn subscriber first logs into an account on the website. The subscriber then either selects to watch a program as it is aired or chooses to record a program that will be aired later.[10] When a subscriber selects to watch a currently airing program, Aereo/FilmOn transmits to the subscriber a webpage from which he/she can watch the television program at roughly the same time as the current broadcast. While viewing this program, the subscriber can pause, rewind, and record the program with the system retaining a copy until the subscriber watches it later. These features allow the subscriber to watch a program even after the over-the-air broadcast has ended. The Aereo and FilmOn systems, therefore, provide the functionality of both a television antenna and a DVR.[11]

When a subscriber selects to watch or record a program, the web browser sends a request to the Aereo/FilmOn application server.[12] The application server then sends information about the subscriber and the selected program to the antenna server. The antenna server allocates a specific antenna to that subscriber. These antennas receive the broadcast television channels, from which the subscriber selects the programming. Depending on the type of subscription, most of the subscribers are assigned a different antenna each time they select a program. However, no two subscribers are using a single antenna at the same time.[13]

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[7] FilmOn X, No. 13-758 at FN 4. The differences between FilmOn and Aereo systems are "minor distinctions in the sequence in which signals are processed." However, "the systems are essentially the same, and the parties agree that there are no legally meaningful differences."

[8] ABC, 874 F.Supp. 2d at 377. For more information about DVR technology, see CRS Report RL34719, *Cartoon Network LP v. CSC Holdings, Inc.: Remote-Storage Digital Video Recorders and Copyright Law*, by Kate M. Manuel.

[9] *The Future of TV: How Do Networks Plan to Stay Competitive?* PBS NEWSHOUR, September 25, 2013, http://www.pbs.org/newshour/bb/media/july-dec13/comcast_09-25.html.

[10] WNET v. Aereo, 712 F.3d 676, 681-82 (2d Cir. 2013).

[11] *Id.* at 682.

[12] *Id.*

[13] FilmOn X, No. 13-758 at *5.

c11173008

The selected antenna then receives the incoming broadcast signal. The antenna server receives the data from the antenna and then sends it to another server where a copy of the program is saved to a large hard drive in a directory reserved for that particular subscriber.[14] Regardless of whether the subscriber has selected to watch or to record a program, the system streams the program from the hard drive copy of the program in the user's directory on the server.[15] The difference between the two viewing modes is when the streaming occurs: after six-seven seconds of programming has been saved on the hard drive for the "watch" option or when the subscriber chooses to view the program.

The courts have highlighted three technical details of significance.[16] First, Aereo and FilmOn assign individual antennas to each subscriber even if two or more subscribers are watching or recording the same program. Second, the system creates a separate copy of the program, stored in the subscriber's personal directory. Third, each subscriber can only access and watch the copy specifically made for his/her account. No other subscriber can view that particular copy.

1976 Copyright Act & Public Performance Right

The 1976 Copyright Act provides copyright holders with exclusive rights to control certain uses of their works.[17] These exclusive rights include "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" the right to do and to authorize the public performance of the copyrighted work.[18]

The Copyright Act defines "public performance or display" as

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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.[19]

The second part of the above definition, known as the "transmit clause," is the focus of the courts' legal analysis in the *Aereo* and *FilmOn* cases.

Transmit Clause

Congress added the "Transmit Clause" during the 1976 revisions of the previous copyright laws in order to accommodate developing technologies. The transmit clause identifies four elements that trigger a public performance: (1) a transmission or other communication, (2) of a performance of the work, (3) to members of the public who are capable of receiving the

[14] WNET, 712 F.3d at 682.

[15] *Id.*

[16] *Id.* at 683.

[17] 17 U.S.C. §106.

[18] 17 U.S.C. §106(4).

[19] 17 U.S.C. §101.

c11173008

performance, and (4) where the transmission either is to a public or semi-public place, or is to members of the public who may be separated geographically or temporally or both.[20]

Transmission or Other Communication

The first element incorporates the Copyright Act's definition of "transmit." Under the Copyright Act, a transmission of a performance or display is a "communicat[ion] by any device or process whereby images or sounds are received beyond the place from which they are sent."[21] Congress intended this broad definition "to include all conceivable forms and combination of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them."[22] Similarly, the U.S. Court of Appeals for the Ninth Circuit, in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, held that to transmit a public performance "at least involves sending out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent."[23]

Performance of the Work

The second element requires the transmission to involve a performance of the work. The Copyright Act defines "to perform" as "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequences or to make the sounds accompanying it audible."[24]

For certain mediums, such as literary works, courts distinguish between the transmission of the work itself and the transmission of a performance or recitation of the work.[25] However, such a distinction does not reasonably apply to audiovisual works. For example, television broadcasts may be characterized as performances transmitted by the studio of another performance of an underlying work (that particular television show).[26] In this context, courts may need to consider whether the broadcast or a retransmission of that broadcast is a separate performance itself compared to the performance of the underlying work.

Members of the Public Capable of Receiving the Performance

The third element addresses the basic nature of the public performance right. While the Copyright Act does not explicitly define "public," the definition of a "public performance" indicates that "public" includes spaces accessible to the public or places outside of the normal gatherings of the family.[27] However, courts have interpreted "public" to include a broader range of people in places that traditionally are considered nonpublic. The U.S. District Court for the Northern District of California held in *On Command Video Corp. v. Columbia Pictures Industries* that transmitting a

[20] 17 U.S.C. §101.

[21] *Id.*

[22] H.Rept. 94-1476, at 64.

[23] Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278, 282 (9th Cir. 1989).

[24] 17 U.S.C. §101.

[25] Kent D. Stuckey, INTERNET AND ONLINE LAW, §6.08(4).

[26] *Id.*

[27] *See* 17 U.S.C. §101.

c11173008

video rental to a guest in his hotel room constituted a transmission of a public performance because of the commercial nature of the rental even though the viewing itself occurred in a "non-public" place.[28]

Courts have relied upon the phrase "capable of receiving the performance" as the primary qualifier for determining whether a potential recipient is public or private. Interpretation of this phrase has been the primary issue in the cases leading up to the *Aereo* and *FilmOn* decisions. In *Cartoon Network LP v. CSC Holdings, Inc.* ("Cablevision")[29], the Second Circuit stated that "capable of receiving the performance" means "capable of receiving a particular transmission of a performance" because the transmission is itself a performance.[30] This case involved a remote storage digital video recorder (RS-DVR) service that streamed a unique playback copy of a television program stored on a subscriber's individual hard drive.[31] The Second Circuit held that because the "RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber" the playback transmissions were not public performances and, therefore, did not infringe upon the plaintiffs' exclusive right of public performance.[32] According to the court, this element of the "transmit clause" requires consideration of the potential audience of a particular *transmission* and not of the underlying work, as the potential audience for any copyrighted work is the general public. Cablevision's RS-DVR system enabled each subscriber to access that particular playback copy available only to that particular subscriber.[33]

Separated Geographically or Temporally

The development of technology triggered the last element: transmission either is to a public or semi-public place, or is to members of the public who may be separated geographically or temporally or both. Because of greater accessibility generated by developing technologies, a performance no longer needs to occur in a single place such as a theater but can often occur in a more private place such as a home or a car.

However, receiving a transmission at different times and/or different places does not diminish the public nature of the performance. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.,* a video store transmitted at different times the same copy of a film to multiple customers, who each viewed the film in a private room in the store.[34] The U.S. Court of Appeals for the Third Circuit held that these transmissions were public performances. Even though the customers viewed the film in traditionally private rooms at different times, the transmission of the single copy of the film still served as a public performance.[35]

[28] On Command Video Corp. v. Columbia Pictures Industries, 777 F.Supp. 787, 790 (N.D. Cal. 1991).

[29] *See* CRS Report RL34719, *Cartoon Network LP v. CSC Holdings, Inc.: Remote-Storage Digital Video Recorders and Copyright Law*, by Kate M. Manuel.

[30] Cartoon Network LP v. CSC Holdings, Inc. ("Cablevision"), 536 F.3d 121, 134-35 (2d Cir. 2008).

[31] *See* CRS Report RL34719, *Cartoon Network LP v. CSC Holdings, Inc.: Remote-Storage Digital Video Recorders and Copyright Law*, by Kate M. Manuel for a discussion about RS-DVR playback transmissions.

[32] Cablevision, 536 F.3d at 139.

[33] *Id.* at 136.

[34] Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984).

[35] *Id.* at 159.

c11173008

Aereo's Interpretation of the Transmit Clause

In 2012, a group of broadcasters filed copyright infringement actions against Aereo in the U.S. District Court for the Southern District of New York. In *American Broadcasting Companies v. Aereo,* the district court denied the plaintiffs' motion for a preliminary injunction barring Aereo from transmitting television programs.[36] In *WNET v. Aereo,* the plaintiffs appealed the district court's denial to the U.S. Court of Appeals for the Second Circuit.[37] On April 1, 2013, the Second Circuit affirmed the district court's ruling that refused to grant the injunction against Aereo. The court held that Aereo's transmissions of broadcast television programs were not public performances under the Copyright Act because the transmissions are of unique copies created at the user's request.[38] The following discussion will examine the Second Circuit's interpretation of the transmit clause in reaching this decision. The court focused on two out of the four elements of the transmit clause discussed above: "performance of the work" and "members of the public capable of receiving the performance." These factors contribute to the alleged "loophole" used by Aereo's one-antenna-per-subscriber service to avoid infringing the public performance right.

Performance of the Work

The Copyright Act defines "performance"[39] as specific actions such as reciting, rendering, playing, or showing of images. However, for broadcasts and retransmissions, courts must determine which "performance" is at issue when considering whether the transmission violated the copyright holder's public performance right.

The specific issue before the Second Circuit in *Aereo* was what performance triggers the analysis in the Copyright Act's transmit clause: the broadcast of the program or the specific transmission created by Aereo. The plaintiffs in *Aereo* argued that the court should consider each of Aereo's transmissions in the aggregate in order to determine whether they are public performances because the transmissions are of the same underlying program watched by many members of the public.[40]

The Second Circuit dismissed this interpretation, stating that the plaintiffs' argument misreads the transmit clause. For the Second Circuit, the performance at issue was the particular transmission created by the Aereo system for that specific user.[41] Each of Aereo's transmissions was an independent performance because each transmission is a unique copy by Aereo's system.[42] These transmissions were not equal to the original broadcast performance. Equating them as such, according to the court, would disregard the transmit clause's specific inquiry regarding a particular transmission. In reaching this conclusion, the Second Circuit relied upon its previous

[36] ABC, 874 F.Supp. 2d at 375.

[37] WNET, 712 F.3d at 680. The case name is different on appeal because two groups of plaintiffs initially filed separate copyright infringement actions against Aereo. They later proceeded before the district court in tandem before together seeking the appeal.

[38] WNET, 712 F.3d at 696.

[39] 17 U.S.C. §101.

[40] WNET, 712 F.3d at 690-91.

[41] *Id.* at 691.

[42] *Id.* at 690.

c11173008

decision in *Cablevision*, which held that individual copies made by an RS-DVR system were the performances at issue.[43]

Members of the Public Capable of Receiving the Performance

This analysis led to the Second Circuit's next point concerning the transmit clause and the composition of the audience to trigger a public performance. Similar to their argument concerning performance, the plaintiffs argued that "members of the public" includes the potential audience for the broadcast and not the individual transmission.[44] According to the court, however, the relevant inquiry under the transmit clause concerning the definition of "public" is "the potential audience of a particular transmission, not the potential audience for the underlying work or the particular performance of that work being transmitted."[45] The Second Circuit supported this interpretation of the transmit clause by stating that the potential audience for the underlying work could include anyone, making the differentiation between public and nonpublic performances irrelevant.[46]

Reiterating a similar argument in *Cablevision*, the court referred to the presence of "to the public" in the transmit clause to support the supposition that not all transmissions are automatically public performances.[47] The court further acknowledged that Aereo has designed its retransmission system to accommodate this distinction in the Copyright Act. Each user has a specific antenna transmitting a specific copy of the program only to that user.[48] When an Aereo subscriber selects to watch or record a program, Aereo's system creates a unique copy of that program that is accessible on the hard drive only by that subscriber. Therefore, the Second Circuit concluded that the potential audience of that particular transmission is only one subscriber who is capable of receiving that particular transmission/performance.[49]

Dissent

The dissent in *WNET v. Aereo* focused on criticizing the majority's understanding and analysis of the transmit clause. First, the dissent stated that Aereo's transmissions are public performances within the plain meaning of the statute. Using a dictionary definition of "public," the dissent maintained that anything not transmitted to oneself is a communication to a member of the public and, therefore, Aereo is engaging in a public performance for each of its transmissions.[50]

The dissent also referred to the legislative history of the transmit clause to show that Congress anticipated developing technology such as Aereo's system. For the dissent, the addition of the "different times/places" phrasing to the transmit clause demonstrated Congressional intent that

[43] WNET, 712 F.3d at 689-90.

[44] *See id.* at 690.

[45] *Id.* at 691.

[46] *Id.*

[47] *Id.* at 694. The Second Circuit in *Cablevision* argued that because only one person could access the specific copy made by the RS-DVR, the potential audience for that particular performance consisted of that single person.

[48] *Id.* at 693-94.

[49] *Id.* at 690.

[50] *Id.* at 698.

c11173008

the public performance right encompass a broad scope.[51] Specifically, for the dissent, the House Report's explanation that "if the transmission reaches the public in [any] form" the transmission comes within the scope of the public performance right verified his interpretation.[52]

The dissent also found Aereo's system distinct from the RS-DVR technology at issue in *Cablevision*.[53] Cablevision's RS-DVR system produced copies of material that Cablevision already had a license to retransmit while Aereo's system enables it to transmit material to subscribers without a license. Thus, according to the dissent, the *Cablevision* analysis of the transmit clause should not even apply to Aereo.[54]

FilmOn X's Interpretation of the Transmit Clause

In the 2012 case *Fox Television Stations, Inc. v. BarryDriller Content Systems PLC,* the plaintiffs, several broadcast television networks, brought an action against FilmOn in the U.S. District Court for the Central District of California.[55] The plaintiffs alleged that FilmOn's retransmission of their broadcasts infringed their copyright, specifically the right of public performance. Unlike in *Aereo*, the district court granted a partial injunction against the defendant from offering its content in that particular area of the country.[56]

A year later, the same plaintiffs brought another suit against FilmOn in the U.S. District Court for the District of Columbia, in *Fox Television Stations, Inc. v. FilmOn X LLC,* alleging the same violation of rights.[57] While FilmOn's arguments relied upon the *Aereo* decision in the Second Circuit, the district court granted the injunction for the plaintiffs, citing FilmOn's violation of the plaintiffs' public performance right of their copyrighted works.[58]

In both cases, the courts found that the retransmissions of broadcast content over the Internet were public performances and therefore infringed the plaintiffs' exclusive rights. The following sections will examine the district courts' interpretation of the transmit clause and why they found violations of the transmit clause in these cases, despite the similarities in technology with Aereo.[59] Again the courts' analysis focused on the same two elements of the transmit clause: "performance of the work" and "members of the public capable of receiving the performance."

Performance of the Work

Both the D.C. and California district courts emphasized the scope of "performance" in the transmit clause in finding that FilmOn violated the plaintiffs' right to public performance. For the

[51] WNET, 712 F.3d at 700.

[52] WNET, 712 F.3d at 701 (citing H. Rept. 94-1476, at 64).

[53] WNET, 712 F.3d at 701-02.

[54] *Id.* at 703.

[55] BarryDriller, 915 F. Supp.2d at 1140.

[56] *Id.* at 1148.

[57] FilmOn X, No. 13-758 at *1.

[58] *Id.* The geographic scope of the injunction is limited to the Ninth Circuit.

[59] The D.C. and California district courts are not bound by the decision issued in the Second Circuit because they are located in different circuits.

c11173008

California district court in *BarryDriller,* the performance that triggers the transmit clause is that of the copyrighted work itself and not the retransmission of its performance.[60] According to the California district court, the Copyright Act does not justify the Second Circuit's focus in *Aereo* on the uniqueness of the individual copy from which the transmission is made.[61] Instead, the court stated that the Copyright Act directs the court to look at the performance of the underlying copyrighted work.

The D.C. district court further clarified in its opinion that "performance" refers to a communication of the original over-the-air broadcast of a copyrighted work and not just the retransmission itself.[62] The court cited legislative history of the Copyright Act, specifically the House Report's explanation of "public performance."[63] According to the Report, Congress intended "public performance" to include "not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public," supporting the court's broad interpretation of "performance."[64]

Members of the Public Capable of Receiving the Performance

In addition to defining the scope of "performance" in the transmit clause, the D.C. district court considered the definition of "public," dismissing the Second Circuit's interpretation. For the D.C. district court, "public" in the transmit clause includes "any member of the public who accesses the FilmOn service."[65] The court stated that the determination of whether an audience is public should not depend on technological access and development, including how television signals are transmitted and received. The Second Circuit's emphasis of the one-antenna per subscriber aspect of the system in *Aereo* ignored, according to the D.C. district court, the single tuner server, router, and encoder that communicate with all of the antennas.[66] Additionally, the D.C. district court found that Congress did not intend the development of new technologies to circumvent the public aspect of the transmit clause when it enacted this provision to include communication "by any device or process."[67] Moreover, because the relationship between FilmOn and the subscribers was commercial, the court reasoned that the transmission/performance is public regardless of where or how the consumption takes place.

Future Litigation

The contrasting outcomes of these lawsuits demonstrate two different interpretations of the transmit clause in the Copyright Act, specifically the meaning of "performance" and "members of the public capable of receiving the performance." The Second Circuit in the *Aereo* cases interpreted "performance" in the transmit clause as the specific transmission created by Aereo for that user and not the transmission of the underlying work. For the Second Circuit, if the

[60] BarryDriller, 915 F. Supp.2d at 1144.

[61] *Id.* at 1144-46.

[62] FilmOn X., No. 13-758 at *26-28.

[63] *Id.* at *26.

[64] FilmOn X., No. 13-758 at *26 (citing H.Rept. 94-1476, at 5676-77).

[65] FilmOn X., No. 13-758 at *25.

[66] *Id.* at *26-27.

[67] *Id.* at *27.

c11173008

transmission of the underlying work triggered the public performance right, then every performance would be public and not private. However, the D.C. and California district courts dismissed this reasoning and used legislative history to interpret "performance" to mean that of the underlying work.

Likewise, the courts disagreed as to the scope of "members of the public capable of receiving the performance." Similar to its reasoning regarding "performance," the Second Circuit held that "members of the public" includes only those capable of receiving the particular transmission copy created by Aereo. Because each subscriber receives a unique copy, the transmission is not a public performance. The D.C. district court, however, did not use technological access to define "members of the public" but looked at the potential audience for the service. The D.C. district court supported this interpretation by stating that Congress did not intend the development of technology, including this method of Internet television streaming, to bypass copyright protections.

These different interpretations foreshadow further litigation on this subject and possible issues for appeal. The Second Circuit in *WNET v. Aereo* acknowledged that its decision that Aereo's service is a private transmission was prompted primarily by stare decisis and the earlier holding in *Cablevision*. The court emphasized that it is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court."[68] Here, the court has acknowledged the prospect of future litigation.[69] However, the Second Circuit denied the plaintiffs' petition for rehearing en banc.[70]

In January 2014, the U.S. Supreme Court granted a petition for writ of certiorari filed by the plaintiffs (petitioners) in *WNET v. Aereo*.[71] In the petition, the petitioners argued that the Second Circuit decision, *WNET v. Aereo*, is "a fundamentally flawed reading of the Transmit Clause."[72] According to the petitioners, the transmit clause requires the inquiry to focus on whether the public "is capable of receiving the *performance*" and not "whether it is capable of receiving the *transmission*" as interpreted by the Second Circuit.[73] The petitioners also argued that the Second Circuit decision raises questions as to the viability of the current broadcast programming model and harms the broadcast television industry, specifically restricting their ability "to control how their programming is used by others."[74] In its answer, Aereo reiterated the arguments made in *WNET v. Aereo* that its transmissions are not public performances because each transmission is a "unique copy of a performance of a work, created at the direction of the user, [and] is transmitted only by and to that user."[75] Aereo also argued that the Copyright Act distinguishes between those

[68] WNET, 712 F.3d at 695 (citing U.S. v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004)).

[69] Barry Werbin, *WNET v. Aereo,* THE ENTERTAINMENT, ARTS AND SPORTS LAW BLOG (April 1, 2013 1:110 PM), (http://nysbar.com/blogs/EASL/2013/04/wnet_v_aereo.html).

[70] WNET v. Aereo, 722 F.3d 500 (2d Cir. 2013).

[71] Docket for 13-461 ABC v. Aereo, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-461.htm.

[72] Petition for Writ of Certiorari, *ABC v. Aereo,* No. 13-461 at 25, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/ABCvAereo_11Oct13.pdf.

[73] *Id.* at 26 (emphasis in original).

[74] *Id.* at 32, 34.

[75] Response to Petition for Writ of Certiorari, *ABC v. Aereo,* No. 13-461 at 14 http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/13-461-Aereo-response-brief.pdf.

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"capable of receiving" a transmission and actually "receiving it" to support their conclusion that the unique copy received only by a specific user is a private performance.[76]

The Supreme Court has denied FilmOn's motion to intervene in support of Aereo.[77] Several entertainment industry groups and legal copyright practitioners have filed amicus briefs in favor of the broadcasters. The National Football League and Major League Baseball have stated in their brief that they would consider moving major league sports broadcasts away from the public airwaves and place them exclusively on cable to avoid "hijacking" by Aereo-like services.[78] The brief filed by the Screen Actors Guild declared that Congress specifically adopted the transmit clause to capture secondary transmissions of primary transmissions like Aereo's retransmissions of broadcasts and argued that widespread implementation of such a service would harm the entertainment industry.[79] The U.S. government also filed a brief in support of the broadcasters, in which it argued that Aereo's transmissions fall within the Copyright Act's public performance definition.[80]

FilmOn has filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit to lift the injunction issued by the D.C. district court in *Fox Television Stations v. FilmOn X.*[81] FilmOn has argued that the near-nationwide injunction set by the D.C. district court places the company at an "unfair competitive disadvantage" with Aereo, which is expanding its service throughout the country.[82]

Related Legislation in the 113th Congress

In its analysis of *WNET v. Aereo,* the Second Circuit alluded to the opportunity for congressional action. Specifically, the court discussed differences in technology in 1976 and 2013 and the resulting difficulty in distinguishing between private and public transmissions.[83] In deciding that Aereo's service is a private transmission, the court concluded that "unanticipated technological developments have created tension between Congress's view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private."[84] By emphasizing this conflict between the law and developing technology, the court has highlighted an opportunity for congressional action and clarification of the Copyright Act.[85]

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[76] *Id.* at 15.

[77] Docket for 13-461 ABC v. Aereo, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-461.htm.

[78] Brief for National Football League and Major League Baseball as Amici Curiae Supporting Petitioners, ABC v. Aereo, (No. 13-461), at 23.

[79] Brief for Screen Actors Guild-American Federation of Television and Radio Artists, et al. as Amici Curiae Supporting Petitioners, ABC v. Aereo, (No. 13-461), at 19, 32.

[80] Brief for the United States as Amicus Curiae Supporting Petitioners, ABC v. Aereo, (No. 13-461), at 12.

[81] Wendy Davis, *FilmOn X Asks Appeals Court to Lift Ban,* ONLINE MEDIA DAILY, December 6, 2013, http://www.mediapost.com/publications/article/214993/filmon-x-asks-appeals-court-to-lift-ban.html.

[82] *Id.*

[83] WNET, 712 F.3d at 695.

[84] *Id.* at 695.

[85] For further discussion on the current statutory framework for online distributors, see CRS Report R42722, *Online Video Distributors and the Current Statutory and Regulatory Framework: Issues for Congress*, by Charles B. Goldfarb, Kathleen Ann Ruane, and Patricia Moloney Figliola and CRS Report R43248, *Updating the Statutory Framework for* (continued...)

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Several bills introduced during the 113th Congress would implicate the various parties in the *Aereo* and *FilmOn* cases. The Television Consumer Freedom Act of 2013,[86] introduced by Senator John McCain, would impact the market in which companies such as Aereo, FilmOn, and the broadcasters are competing. The act would allow cable providers to offer to subscribers "a la carte" programming: programming on a per-channel basis rather than as part of a package.[87] The bill would also deny broadcasters their spectrum licenses if they moved big event programming from broadcast television to cable.[88] Many of the *Aereo* plaintiffs have threatened this action in response to Aereo's success in the courts.[89]

The Consumer Choice in Online Video Act,[90] introduced by Senator Jay Rockefeller, seeks to increase consumer choice and competition in the online video programming marketplace. The bill would prohibit content distributors from engaging in unfair or deceptive practices.[91] The bill also contains provisions that would address antenna rental services, such as Aereo, specifically. These provisions would exempt these services from paying certain retransmission fees.[92] However, these provisions assume that the online video provider is legally operating and obtaining content, stressing the need for further clarification from the courts concerning the legal status of companies such as Aereo and FilmOn X.

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Communications for the Digital Age: Issues for Congress, by Charles B. Goldfarb and Patricia Moloney Figliola.

[86] S. 912.

[87] S. 912, §3.

[88] S. 912, §4.

[89] *See* Joe Flint, John McCain introduces Television Consumer Freedom Act of 2013, L.A. TIMES, MAY 9, 2013, http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-mccain-cable-20130509,0,2224732.story#axzz2nIMEmfk9.

[90] S. 1680.

[91] S. 1680, §201.

[92] *Id.*

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