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

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Summary

Aereo and FilmOn X were created to stream television programming over the Internet for a monthly subscription fee. Aereo and FilmOn's technology permitted subscribers to watch both live broadcast television in addition to already-aired programming. Their use of this development in technology triggered multiple lawsuits from broadcasting companies alleging copyright violations. These cases revealed 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 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 several 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. District courts in the District of Columbia (*Fox Television Stations v. FilmOn X)* and California (*Fox Television Stations v. BarryDriller Content Systems*) held that FilmOn's retransmissions did violate the 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, the U.S. Supreme Court in its 2014 decision in *ABC v. Aereo* overturned the Second Circuit's ruling and held that Aereo's transmissions served as a public performance of the plaintiffs' works within the meaning of the transmit clause, violating the plaintiffs' exclusive rights to control such performances. A few months after the Supreme Court ruling, Aereo, having already suspended its service, filed for bankruptcy.

Contemporaneous to these decisions, two bills in the 113th Congress addressed 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 have enhanced consumer choice regarding online television programming, a service marketed by both Aereo and FilmOn. As of the date of this report, it remains to be seen whether these or similar bills will be introduced in the 114th Congress.

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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 were also created to stream television programming over the Internet for a monthly subscription fee. Unlike the other companies, however, the technology of Aereo and FilmOn permitted subscribers to watch both live broadcast television and already-aired programming without licenses. This development in technology triggered multiple lawsuits alleging copyright violations by these companies. The litigation revealed 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 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 initial endorsement by the courts. However, FilmOn did not enjoy the same initial 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]

In a 2014 decision in *ABC v. Aereo*, the U.S. Supreme Court overturned the Second Circuit ruling in *WNET v. Aereo* and held that Aereo infringed upon the broadcasters' exclusive right of public

[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).

performance when it retransmitted a broadcast of a program to paid subscribers over the Internet.[7] The Court found that Aereo's similarity to cable television providers, which Congress specifically targeted with the 1976 Copyright Act, supported the conclusion that Aereo publicly performs under copyright law.

Following the Supreme Court's decision, Aereo suspended its service, and in November 2014, filed for bankruptcy.[8] Aereo states that it is currently reconsidering other business and technology options.[9] Relying on licensed content from media sources, FilmOn has adapted its business model and is continuing to defend litigation in the district courts.[10]

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 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, including the U.S. Supreme Court. The report concludes with a brief overview of related legislative proposals in the 113th Congress.

Aereo and FilmOn Technology

Competitors Aereo and FilmOn X used similar technology, with only minor distinctions but no legally meaningful differences, to retransmit broadcast television to their subscribers.[11] Both companies allowed subscribers to view and/or record live broadcast programming.[12] Unlike most other digital video recorders (DVR) that require a television, Aereo and FilmOn allowed users to view programming on their computers or mobile devices, similar to services offered by Hulu and Netflix.[13] However, Aereo, unlike Hulu and Netflix, did not negotiate any licensing agreements with the content providers. Content providers even accused Aereo of "stealing content" while Aereo defended its service as a new player in the media market.[14]

In order to watch a program, the Aereo subscriber would first log into an account on the website. The subscriber then either would select to watch a program as it is aired or would choose to record a program that would be aired later.[15] When a subscriber would select to watch a currently

[7] ABC v. Aereo, 134 S.Ct. 2498, 2503 (2014).

[8] Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy,* N.Y. TIMES, Nov. 21, 2014, http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0.

[9] Aereo, "A Letter to Our Consumers: The Next Chapter," https://www.aereo.com/.

[10] Lisa Shuchman, *FilmOn Fights On After Aereo Bankruptcy,* THE LITIGATION DAILY, Nov. 24, 2014.

[11] 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."

[12] Aereo has currently suspended its services as of June, 2014. FilmOn continues to use this technology but is transmitting licensed material.

[13] 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.

[14] *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.

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

airing program, Aereo would transmit to the subscriber a webpage from which he/she could watch the television program at roughly the same time as the current broadcast. While viewing this program, the subscriber could pause, rewind, and record the program with the system retaining a copy until the subscriber watched it later. These features would allow the subscriber to watch a program even after the over-the-air broadcast has ended. The Aereo system, therefore, provided the functionality of both a television antenna and a DVR.[16]

When a subscriber selected to watch or record a program, the web browser would send a request to the Aereo application server.[17] The application server then sent information about the subscriber and the selected program to the antenna server. The antenna server allocated a specific antenna to that subscriber. These antennas received the broadcast television channels, from which the subscriber selected the programming. Depending on the type of subscription, most of the subscribers were assigned a different antenna each time they selected a program. However, no two subscribers were using a single antenna at the same time.[18]

The selected antenna then received the incoming broadcast signal. The antenna server received the data from the antenna and then sent it to another server where a copy of the program was saved to a large hard drive in a directory reserved for that particular subscriber.[19] Regardless of whether the subscriber had selected to watch or to record a program, the system streamed the program from the hard drive copy of the program in the user's directory on the server.[20] The difference between the two viewing modes was when the streaming occured: 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.[21] First, Aereo assigned individual antennas to each subscriber even if two or more subscribers were watching or recording the same program. Second, the system created a separate copy of the program, stored in the subscriber's personal directory. Third, each subscriber could only access and watch the copy specifically made for his/her account. No other subscriber could 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.[22] 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.[23]

The Copyright Act defines "public performance or display" as

[16] *Id.* at 682.

[17] *Id.*

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

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

[20] *Id.*

[21] *Id.* at 683.

[22] 17 U.S.C. §106.

[23] 17 U.S.C. §106(4).

> (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.[24]

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 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.[25]

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."[26] 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."[27] 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."[28]

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."[29]

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.[30] However, such a

[24] 17 U.S.C. §101.

[25] 17 U.S.C. §101.

[26] *Id.*

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

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

[29] 17 U.S.C. §101.

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

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).[31] 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.[32] 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 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.[33]

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"),[34] 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.[35] 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.[36] 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.[37] 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.[38]

[31] *Id.*

[32] *See* 17 U.S.C. §101.

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

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

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

[36] *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.

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

[38] *Id.* at 136.

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.[39] 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.[40]

Second Circuit's Interpretation of the Transmit Clause in *WNET v. Aereo*

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.[41] In *WNET v. Aereo,* the plaintiffs appealed the district court's denial to the U.S. Court of Appeals for the Second Circuit.[42] 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.[43] The following discussion will examine the Second Circuit's interpretation of the transmit clause in reaching this decision. The courts 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"[44] as specific actions such as reciting, rendering, playing, or showing of images. However, for broadcasts and retransmissions, courts must

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

[40] *Id.* at 159.

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

[42] 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.

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

[44] 17 U.S.C. §101.

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.[45]

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.[46] Each of Aereo's transmissions was an independent performance because each transmission is a unique copy by Aereo's system.[47] 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 decision in *Cablevision*, which held that individual copies made by an RS-DVR system were the performances at issue.[48]

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.[49] 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."[50] 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.[51]

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.[52] 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

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

[46] *Id.* at 691.

[47] *Id.* at 690.

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

[49] *See id.* at 690.

[50] *Id.* at 691.

[51] *Id.*

[52] *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.

transmitting a specific copy of the program only to that user.[53] 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.[54]

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.[55]

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 the public performance right encompass a broad scope.[56] 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.[57]

The dissent also found Aereo's system distinct from the RS-DVR technology at issue in *Cablevision*.[58] 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.[59]

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.[60] 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.[61]

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

[54] *Id.* at 690.

[55] *Id.* at 698.

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

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

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

[59] *Id.* at 703.

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

[61] *Id.* at 1148.

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.[62] 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.[63]

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.[64] 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 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.[65] 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.[66] 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.[67] The court cited legislative history of the Copyright Act, specifically the House report's explanation of "public performance."[68] 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."[69]

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

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

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

[64] 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.

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

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

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

[68] *Id.* at *26.

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

the FilmOn service."[70] 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.[71] 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."[72] 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.

Supreme Court's Interpretation of the Transmit Clause in *ABC v. Aereo*

In January 2014, the U.S. Supreme Court granted a petition for writ of certiorari filed by the plaintiffs (petitioners) in *WNET v. Aereo*.[73] In the petition, the petitioners argued that the Second Circuit decision, *WNET v. Aereo*, is "a fundamentally flawed reading of the Transmit Clause."[74] 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.[75] 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."[76] 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."[77] Aereo also argued that the Copyright Act distinguishes between those "capable of receiving" a transmission and those actually "receiving it" to support their conclusion that the unique copy received only by a specific user is a private performance.[78]

The Supreme Court denied FilmOn's motion to intervene in support of Aereo.[79] Several entertainment industry groups and legal copyright practitioners filed amicus briefs in favor of the broadcasters. The National Football League and Major League Baseball stated in their brief that they would consider moving major league sports broadcasts away from the public airwaves and

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

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

[72] *Id.* at *27.

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

[74] 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.

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

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

[77] 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.

[78] *Id.* at 15.

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

place them exclusively on cable to avoid "hijacking" by Aereo-like services.[80] 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.[81] 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.[82]

In a 6-3 decision, the U.S. Supreme Court held that Aereo performs the petitioners' copyrighted works publicly, as defined by the transmit clause.[83] Writing for the majority, Justice Breyer's analysis focused on two questions: (1) does Aereo "perform" within the context of this definition and if so, (2) does Aereo do so "publicly"? The most important factor for the Court's analysis is the similarity of Aereo's technology to cable television providers, specifically those in previous Supreme Court cases: *Fortnightly* and *Teleprompter*.[84] While the Court in those earlier cases found cable television providers did not qualify as "public performers" under the Copyright Act, Congress, in response to these decisions, amended the Copyright Act in 1976 to include these technologies specifically within the scope of public performance.[85] The following sections will examine the Supreme Court's interpretation of the transmit clause and its analysis leading to its decision that Aereo violates the public performance right of the plaintiffs.

Performance of the Work

In order to determine whether Aereo is performing under the Copyright Act, the Court first considered what constitutes a "performance" under the Copyright Act. The Court conceded that the "language of the Act does not clearly indicate when an entity 'perform[s]' ... and when it merely supplies equipment that allows others to do so" and thus turned to the legislative history to discern a more precise definition.[86] According to the Court, Congress amended the Copyright Act in 1976 to include the transmit clause and the definition of a performance of an audiovisual work in direct response to the Supreme Court's earlier decisions in *Fortnightly Corp. v. United Artists Television, Inc*. (1968)[87] and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.* (1974).[88] In these cases, the Court had found that cable television providers, whose equipment provided viewers with broadcast television, did not "perform" under the Copyright Act because it "simply carr[ied]" the programming to viewers.[89] The Court in *Aereo* pointed out that Congress's 1976 Copyright Act amendments deliberately overruled these decisions, by defining performance as "to show ... images in any sequence" and enacting the transmit clause to capture specifically cable

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

[81] 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.

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

[83] ABC, 134 S.Ct. at 2511.

[84] *Id.*

[85] ABC, 134 S.Ct. at 2511 (referring to P.L. 94-553, §110).

[86] ABC, 134 S.Ct. at 2504.

[87] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400 (1968).

[88] Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

[89] ABC, 134 S.Ct. at 2505 (quoting Fortnightly, 392 U.S. at 400).

television companies as performers.[90] According to the Court, Aereo's technology is similar to that of the cable television providers in *Fortnightly* and *Teleprompter* in that Aereo receives programs and then offers all the programming it has received to subscribers.[91] Specifically, through the use of its technology, including antennas, transcoders, and servers, Aereo, like a cable television provider, received programs and then offered all the programming it has received to subscribers.[92] Therefore, because of Aereo's similarities to cable television providers that were targeted by the 1976 amendment, the Court concluded that Aereo "performs" under the Copyright Act.[93]

Members of the Public Capable of Receiving the Performance

After the Court determined that Aereo, "performs," the Court then tackled the question of whether Aereo performs "publicly." The most important factor for the Court in this part of the analysis was Aereo's similarity to the cable television providers, which, the Court emphasized, Congress had concluded performed "publicly" when transmitting television broadcasts.[94] The Court acknowledged that while the Copyright Act does not define "the public," it does specify that an entity performs publicly "where a substantial number of persons outside of a normal circle of a family and its social acquaintances [are] gathered." From this definition, the Court further extrapolated that whether an audience constitutes "the public" depends on the relationship of the audience to the underlying work.[95] Therefore, because Aereo transmits programming to a large number of paying subscribers "who lack any prior relationship to the works" performed, Aereo is transmitting this programming to the public.[96] For the Court, Aereo's argument (also relied upon by the Second Circuit in *WNET v. Aereo*)[97] that Aereo was transmitting different copies to specific subscribers does not affect the analysis in this case as Aereo was transmitting the same underlying work to these subscribers.[98]

Dissent

The dissent, written by Justice Scalia, criticized the majority's reasoning, accusing the opinion of adopting an "improvised standard ('looks-like-cable-TV') that will sow confusion for years to

[90] ABC, 134 S.Ct. at 2505-06.

[91] *Id.* at 2506.

[92] *Id.*

[93] *Id.* at 2507.

[94] *Id.* at 2508.

[95] *Id.* at 2510.

[96] *Id.*

[97] WNET, 712 F.3d at 693-94. For this argument, the Second Circuit relied upon an earlier case, Cartoon Network LP v. CSC Holdings, Inc., where the Second Circuit had 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. 536 F.3d 121, 139 (2d Cir. 2008).

[98] ABC, 134 S.Ct. at 2509.

come."[99] The dissent agreed with the majority that Aereo's technology should not be permitted, noting it could violate, nevertheless, the Copyright Act under a different standard of liability.[100]

First, the dissent concluded that Aereo does not "perform" at all as the proper inquiry under this provision is who selects the copyrighted content that is performed.[101] According to the dissent, Aereo is like a "copy shop that provides its patrons with a library card," leaving the ability to choose content to the subscriber.[102] The dissent continued by arguing that the majority's reasoning "of guilt by resemblance" rested on faulty logic that Aereo "performs" merely because it is similar to the cable television providers in the earlier decisions.[103] The dissent further critiqued the majority's analysis by arguing that it ignores a critical difference in technology between Aereo and cable television providers in that Aereo transmits only specific programs selected by specific users at specific times.[104]

The dissent concluded its analysis by stating that a "loophole" in the law may exist regarding Aereo's liability for performance infringement. However, the dissent pointed out that "[i]t is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes."[105] The dissent then tasked Congress to decide "whether the Copyright Act needs an upgrade."[106]

Lower Court's Interpretation of *Aereo*

In a January 2015 decision, the U.S. District Court for the Central District of California declined to apply the *Aereo* holding to an online streaming service in *Fox Broadcasting Company v. Dish Network, LLC*.[107] Fox Broadcasting Company claimed that Dish Network's "Dish Anywhere" and other Dish services violated its public performance rights under the Copyright Act.[108] Dish Anywhere permits subscribers to watch network programming from any device with an Internet connection, such as an iPad, iPhone, or web browser by transmitting the programming from their set-top box. In 2012, the U.S. District Court for the Central District of California initially denied Fox Broadcasting's request for preliminary injunctive relief, finding that Fox failed to show that Dish Network's services would cause irreparable harm before the final adjudication of the case.[109] The Ninth Circuit affirmed the district court's ruling shortly after the U.S. Supreme Court issued its decision in *ABC v. Aereo*.[110] On remand, the district court refused to extend *Aereo's* holding that technology "bearing an 'overwhelming likeness' to cable companies publicly perform within

[99] ABC, 134 S.Ct. at 2512 (Scalia, J., dissenting).

[100] *Id.* at 2517.

[101] *Id.* at 2513.

[102] *Id.*

[103] *Id.* at 2515.

[104] ABC, 134 S.Ct. at 2515 (Scalia, J., dissenting).

[105] *Id.* at 2517.

[106] *Id.* at 2518.

[107] Fox Broad. Co. v. Dish Network LLC, No CV 12-4529 DMG (C.D. Cal. 2015).

[108] For more discussion about Dish's technologies, see CRS WSLG1029, Dish Network Lives to Fight Another Day: Ninth Circuit Refuses To Block Dish's Streaming Services, by Emily M. Lanza.

[109] Fox Broad. Co. v. Dish Network, LLC, 905 F.Supp.2d 1088 (C.D. Cal. 2012).

[110] Fox Broad. Co. v. Dish Network, LLC, 747 F.3d 1060 (9th Cir. 2013).

the meaning of the Transmit Clause" to Dish Anywhere. According to the court, Dish Anywhere does not publicly perform under the transmit clause as Dish's technology is transmitting licensed programming legitimately on the user's in-home hardware to a user's mobile device, unlike Aereo, which transmitted unlicensed programming to users directly.[111] For the court, Dish's license to transmit the programming to the subscriber initially significantly differentiates the Dish Anywhere technology from Aereo.

Related Legislation in the 113th Congress

Both the Supreme Court in *ABC v. Aereo* and the Second Circuit in *WNET v. Aereo* alluded to the opportunity for congressional action. Justice Scalia, writing for the dissent in *ABC v. Aereo*, anticipated that "Congress will take a fresh look at this new technology."[112] The Second Circuit in its analysis discussed differences in technology in 1976 and 2013 and the resulting difficulty in distinguishing between private and public transmissions.[113] 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."[114] 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.[115]

Several bills introduced during the 113th Congress would have implicated the various parties in the *Aereo* and *FilmOn* cases. The Television Consumer Freedom Act of 2013,[116] introduced by Senator John McCain, would have impacted the market in which companies such as Aereo, FilmOn, and the broadcasters are competing. The act would have allowed cable providers to offer to subscribers "a la carte" programming: programming on a per-channel basis rather than as part of a package.[117] The bill would have also denied broadcasters their spectrum licenses if they moved big event programming from broadcast television to cable.[118] Many of the *Aereo* plaintiffs threatened this action in response to Aereo's success in the courts.[119]

The Consumer Choice in Online Video Act,[120] introduced by Senator Jay Rockefeller, sought to increase consumer choice and competition in the online video programming marketplace. The bill

[111] Fox Broad. Co. v. Dish Network LLC, No CV 12-4529 DMG, *24 (C.D. Cal. 2015).

[112] ABC, 134 S.Ct. at 2518 (quoting Sony Corp of America v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

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

[114] *Id.* at 695.

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

[116] S. 912.

[117] S. 912, §3.

[118] S. 912, §4.

[119] *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.

[120] S. 1680.

would have prohibited content distributors from engaging in unfair or deceptive practices.[121] The bill also contained provisions that would address antenna rental services, such as Aereo, specifically. These provisions would have exempted these services from paying certain retransmission fees.[122] However, these provisions assumed 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. As of the date of this report, it remains to be seen whether these or similar bills will be introduced in the 114th Congress.

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[121] S. 1680, §201.
[122] *Id.*