Court Enjoins Internet Streaming Service

DC Becomes Second Court To Reject Technology-Based Exception To The Copyright Act

By Amy M. Gallegos

On September 5, Judge Rosemary Collyer of the District of Columbia issued a preliminary injunction barring billionaire Alki David's FilmOnX service from streaming copyrighted broadcast television programs over the Internet without authorization from the copyright owners. *Fox Television Stations, Inc. et al. v. FilmOn X LLC,*, No. 13-758 (D.D.C. Sept. 5, 2013). The opinion marks a significant victory for copyright owners in their fight against unlicensed streaming services. FilmOnX's defense was that its system was technologically the same as Aereo, another unlicensed streaming service that was nonetheless found to be legal by the Second Circuit earlier this year. Because Aereo uses mini-antennas and digital copies to send each viewer watching live television on Aereo an individualized transmission from a purportedly "unique" copy, the Second Circuit held that Aereo's transmissions are not a "public performance" under the Copyright Act. *WNET Thirteen v. Aereo, Inc*., 712 F.3d 676 (2d Cir. 2013). *FilmOnX* is important not only because it halted a service that was infringing copyrights on a massive scale, but also because the Court explicitly rejected *Aereo*, holding that under the Copyright Act's plain language, Aereo-like systems publicly perform the programs they transmit to subscribers over the Internet and are therefore committing copyright infringement if they operate without permission from the copyright owners.

The Court made its disagreement with the Second Circuit explicit, noting that the Aereo court had misinterpreted the Copyright Act by wrongly focusing on the individual transmissions instead of whether the transmitter was publicly performing the copyrighted work.

FilmOn and Aereo

FilmOnX originated in 2010 as FilmOn, a streaming service that allowed viewers to watch live and recorded television over the Internet, including local broadcast channels. FilmOn did not have license to transmit copyrighted broadcast programming to its customers, and was quickly enjoined. The case settled in 2012, with FilmOn stipulating to a consent judgment and permanent injunction.

The original FilmOn case was barely a blip on the radar of copyright law. However, in another courtroom in New York, the networks were battling Aereo, an unlicensed Internet streaming service backed by media mogul Barry Diller. Events in the Aereo case would eventually give the FilmOn service a new life.

Aereo claimed it had developed a technological workaround allowing it to retransmit live television broadcasts to subscribers without having to pay for a license from the owners of copyrights in the programs. This argument – and the design of Aereo's system – was based on the Second Circuit's holding in *Cartoon Network LP LLLP v. CSC Holdings, Inc*., 536 F.3 121 (2d Cir. 2008) ("*Cablevision*"). In that case, the Second Circuit held that a cable provider could offer a remote DVR service (i.e., where the programs recorded by viewers were stored on a shared, remote server instead of on individual set-top boxes) without having to take a second license to cover the transmissions from the remote server that occurred when the subscribers played back the recorded programs. The analysis was that these playback transmissions were private, because they emanated from unique copies made by subscribers, and each transmission could only be received by the subscriber who had copied the program. Thus, according to the Second Circuit, these one-to-one transmissions from the recordings to the viewers were not a public performance under the Copyright Act.

To fit within *Cablevision*, Aereo built a system that uses a collection of dime-sized antennas to capture over-the-air broadcasts. Every time a subscriber logs onto Aereo to watch television, Aereo's computers randomly assign one of the antennas to capture the broadcast channel she selected. The

(Continued on page 28)

RETURN TO TABLE OF CONTENTS

(Continued from page 27)

signal is then routed through Aereo's computer system and copied before it is streamed to the subscriber. This all occurs "under the hood" and is invisible to the subscriber, who simply logs on, selects a program currently being broadcast from a program guide, and then watches it live on her computer. Yet it allowed Aereo to argue that, when subscribers watch television on Aereo, there is no public performance because the transmissions are "one-to-one" just like in *Cablevision* – after all, each Aereo transmission emanates from a "unique" copy and can only be received by a single subscriber.

Aereo's argument would not work without *Cablevision* as precedent. Under the Copyright Act, "to perform a work publicly" means, among other things, "to transmit or otherwise communicate a performance or display of the work . . . 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." This language is commonly known as the "Transmit Clause." Notably, the Transmit Clause states that it is a public performance to transmit a performance (i.e., an audiovisual rendering) of the work to the public, by means of *any device or process*. And "device" and "process" are defined in the statute as including devices and processes "now known or later invented." There is no exception for systems constructed of mini-antennas and digital copies.

Judge Collyer's thorough, well-reasoned opinion is expected to be very influential as these issues wind their way through the courts.

Aereo initially launched only in New York, so that if it were sued *Cablevision* would be controlling. On April 1, 2013, the Second Circuit held in a split decision that under *Cablevision*, Aereo could legally retransmit broadcast programming over the Internet without a license. Judge Denny Chin filed a blistering dissent, characterizing Aereo's system as a "sham" and a "Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." Newspapers reported that cable and satellite companies were considering converting to Aereo-like systems so they could operate unlicensed like Aereo and avoid paying retransmission fees.

FilmOn was paying attention to the Aereo case. Just weeks after the preliminary injunction was denied in Aereo, FilmOn resumed its live streaming service, announcing that it was now using an Aereo-like system of miniature antennas and digital copies to "legally" retransmit broadcast television signals without a license. To capitalize on the publicity garnered by its competitor Aereo, FilmOn renamed its service "Aereokiller" and its website "BarryDriller.com."

The California Lawsuit And Injunction

The networks sued FilmOn again in the Central District of California. This case presented the first opportunity for the networks to challenge an Aereo-like system in a circuit where *Cablevision* was not controlling. (The *Aereo* appeal was pending when the California action was filed.) The California Court declined to follow the Second Circuit, holding that using an Aereo-like system to retransmit copyrighted programs to the public is a public performance. *Fox Television Systems, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012). The court issued a preliminary injunction against FilmOn, but limited the scope of the injunction to the Ninth Circuit.

The District of Columbia Lawsuit and Injunction

Because the *BarryDriller* injunction was geographically limited, the networks had to sue FilmOn again, this time in the District of Columbia. As in California, FilmOn urged the court to adopt the Second Circuit's interpretation of the Transmit Clause, and the networks argued the Court should reject it because it was inconsistent with the statute.

The District of Columbia agreed with networks and the California Court, and issued a preliminary injunction against FilmOn's streaming service (which had by then been renamed FilmOnX after being sued by Barry Diller). In a 35-page opinion, the *FilmOnX* court joined *BarryDriller* in rejecting the Second Circuit's interpretation of the Transmit Clause, holding that "[t]he provisions [of the Copyright Act] that protect Plaintiffs' work are clear: FilmOn X's service

(Continued on page 29)

RETURN TO TABLE OF CONTENTS

(Continued from page 28)

violates Plaintiffs' exclusive right to perform the copyrighted work publicly."

The *FilmOnX* Court declined to follow *Cablevision* and *Aereo* because it concluded that these cases misread the statute and produced results contrary to what Congress intended when it enacted the 1976 Copyright Act. The Court explained that by making copyrighted broadcast television programs available to any member of the public who goes on the FilmOnX website, FilmOn X transmits a performance the work to the public, by means of any device or process, and therefore falls squarely within the Copyright Act's definition of public performance. The Court further explained that the definitions of "device" and "process" are "facially broad" (i.e., any device or process now known or later developed) and "encompass FilmOnX's convoluted process for relaying television signals." The Court concluded that "nothing about the 1976 Act or its legislative history suggests that Congress intended a commercial entity that rebroadcasts copyrighted material for consumption to the public . . . to avoid liability for infringement of the copyright holders' exclusive right of public performance."

The Court made its disagreement with the Second Circuit explicit, noting that the *Aereo* court had misinterpreted the Copyright Act by wrongly focusing on the individual transmissions instead of whether the transmitter was publicly performing the copyrighted work. "When the analysis shifts to whether FilmOnX permits multiple persons to watch a single performance, i.e., the same television show," the Court wrote, "it is immediately clear that the artifice of one-to-one is baldly wrong."

The Court preliminary enjoined FilmOn from, among other things, streaming copyrighted broadcast programming over the Internet via the FilmOnX service or by means of any other device or process. The injunction applies nationwide except for within the geographic boundaries of the Second Circuit.

Stay Tuned

FilmOnX is likely not the final installment in the battle against internet streaming services that attempt to free-ride on copyrighted content. Appeals are pending in both *FilmOnX* and *BarryDriller*, lawsuits against Aereo are being litigated in New York and Boston, and commentators have predicted that these cases are on a course for the Supreme Court. Judge Collyer's thorough, well-reasoned opinion is expected to be very influential as these issues wind their way through the courts.

Amy M. Gallegos is a partner in the Los Angeles office of Jenner & Block LLP. She represented Fox Broadcasting and related companies together with Paul Smith, Julie Ann Shepard, and Richard Stone with Jenner & Block. FilmOnX was represented by Ryan G. Baker, Baker Marquet LLP, Los Angeles, CA; and Kerry J. Davidson, Silver Spring, MD.

Recent Publications

MLRC Bulletin 2013: International Media Law Developments: Reform, Regulation and Rebalancing
The New Defamation Act 2013: What Difference Will It Really Make? • Australian Media Law Round-Up • The Supreme Court of Canada and Free Expression 2008-13: Tidal Wave or Tidal Wash? • Liability in Germany for Foreign Web Hosts and Content Providers: Summary of Recent German Supreme Court and European Court of Justice Decisions • Media Defence in Ireland: An Update • Canada's Copyright Modernization Act: A Delicate Rebalancing of Interests • Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates • Use of Unmanned Aerial Vehicles in Newsgathering: The Sky's the Limit – Or Is It? • A Guide For American Lawyers to Prepublication Review of European-Based Publications

MLRC Practically Pocket-Sized Guide to Internet Law
Updated July 2013 by the Internet Law Committee. Contains 25 concise articles on a wide-range of Internet law questions that come up in day-to-day media law practice.

Publishing Photos, Images, or Other Illustrations
A presentation from the Pre-Publication/Pre-Broadcast Committee on the legal issues arising from the use of photos.

RETURN TO TABLE OF CONTENTS