

## NOTES

### “A Million Little Antennas:” The Second Circuit’s Decision in *WNET, Thirteen v. Aereo, Inc.*, and the Next Great United States Supreme Court Copyright Battle

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#### I. INTRODUCTION

In this copyright infringement action, WNET, Thirteen, and their coappellants owned copyright in various television programs broadcast on network television.<sup>1</sup> Appellee Aereo, Inc. (Aereo), a New York City-based company, offers a service enabling its subscribers, for a monthly subscription fee, to watch network television broadcasts (CBS, NBC, FOX, ABC, PBS, etc.) over the Internet on their computers, tablets, and mobile devices with the appropriate application.<sup>2</sup> Aereo, whose service was limited to New York City subscribers and New York City broadcasts at the time of litigation, “does not have any license from copyright holders to record or transmit their programs.”<sup>3</sup>

The Aereo system functions like a television with an off-site Digital Video Recorder (DVR) and a Slingbox.<sup>4</sup> At Aereo’s physical location in Brooklyn, New York, Aereo uses an armada of dime-sized antennas to receive television broadcasts for its subscribers.<sup>5</sup> According to Aereo,

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1. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680 (2d Cir. 2013).

2. *Id.* at 680, 682.

3. *Id.* at 680. Aereo is distinguished from other companies that provide television programming streamed over the Internet like Hulu, Netflix, and Amazon because they, unlike Aereo, have licenses to retransmit the copyrighted broadcasts. *Id.* at 704 n.5 (Chin, J., dissenting). Further, these other companies typically delay their retransmissions of the broadcasts so as not to “divert the live broadcast audience to the Internet.” *Id.* (quoting *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012)).

4. *Id.* A Slingbox is a television-streaming device that enables a cable or satellite subscriber to view their DVR recorded broadcasts remotely over the Internet via an Internet-connected device such as a computer, mobile phone, or tablet. *Id.* at 680-81 n.2.

5. *Id.* at 682. When the unique Aereo subscriber selects a particular television broadcast either to watch or to record, Aereo’s antenna server assigns one antenna from its fleet of thousands of dime-sized antennas, along with one transcoder, to that subscriber and tunes that single antenna to the broadcast channel selected. *Id.*

each antenna services only one user.<sup>6</sup> The antennas are connected to hard drives “to create individual copies” of the television program for the subscriber to watch while the program is broadcast or for viewing in the future.<sup>7</sup> When Aereo subscribers log on to their accounts on Aereo’s Web site, they are presented with a program guide of presently and future airing broadcasts.<sup>8</sup> Most importantly, each copy of a television program stored on Aereo’s system is only accessible by that unique service subscriber who requests that the copy be made.<sup>9</sup> Further, regardless of whether the user selects “Record” or “Watch,” no other Aereo subscriber can access or view that particular copy.<sup>10</sup> Finally, if the individual user does not select “Record” before the program ends, Aereo’s system automatically deletes the copy of the broadcast program from the user’s system.<sup>11</sup>

The copyright holders initially filed separate copyright infringement actions in two groups against Aereo in the United States District Court for the Southern District of New York.<sup>12</sup> There, the coalition of copyright holders moved in tandem for the court to grant a preliminary injunction barring Aereo from transmitting programs to its paid subscribers while the television broadcasts are still airing.<sup>13</sup> The copyright holders argued that Aereo’s transmissions infringe their exclusive right to perform their copyrighted works publicly.<sup>14</sup> Finding their argument unpersuasive, the district court denied the motion for a preliminary injunction, concluding that the copyright holders were unlikely to prevail on the merits in light of current jurisprudence in the circuit.<sup>15</sup> The coalition of copyright holders swiftly filed an interlocutory appeal, and the case was briefed on an expedited schedule.<sup>16</sup> The United States Court of Appeals for the

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6. *Id.* at 682-83. Each server transcodes the data transmitted from the antenna, buffers it, and relays it to another Aereo server, where a hard drive saves the copied program in a directory reserved for that unique Aereo subscriber. *Id.*

7. *Id.* at 681. If the unique Aereo subscriber selects the “Record” feature, Aereo’s system creates a complete copy of the broadcast program for the user alone to watch later. When the unique subscriber decides to view the recorded program, Aereo’s servers stream that recording from its hard drive to the user. *Id.* at 682. When the subscriber selects the “Watch” feature, Aereo’s system performs the same functions as with the “Record” option, except that the program does not stream until the Aereo system has recorded six to eleven seconds of the program. Therefore, the user can watch the program practically live. *Id.*

8. *Id.* at 681.

9. *Id.* at 683.

10. *Id.*

11. *Id.* at 682.

12. *Id.* at 680.

13. *Id.* at 683.

14. *Id.*

15. *Id.*

16. *Id.* at 684.

Second Circuit *held* that transmissions of Aereo’s Internet broadcasts are not public performances, the copyright holders did not demonstrate that they were likely to prevail on the merits of their copyright infringement action, and the balance of hardships did not tip decidedly in the favor of the copyright holders. *WNET, Thirteen v. Aero, Inc.*, 712 F.3d 676, 696 (2d Cir. 2013).

## II. BACKGROUND

Federal copyright law in the United States has its basis in the United States Constitution.<sup>17</sup> Article I, Section 8 of the United States Constitution states, “[The] Congress shall have the Power . . . [t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>18</sup> Today, the Copyright Act of 1976 gives copyright holders several exclusive rights, while also providing statutory exceptions to those rights.<sup>19</sup> The fourth exclusive right of copyright holders in section 106, central to the noted case, is the right “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.”<sup>20</sup> The Copyright Act further defines “to ‘perform’” in a previous section as “to recite, render, play, dance, or act [a work], 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 sequence or to make the sounds accompanying it audible.”<sup>21</sup> Further, and importantly to the noted case, the Copyright Act also states:

To perform or display a work “publicly” means—

- (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.<sup>22</sup>

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17. *See* U.S. CONST. art. 1, § 8.

18. *Id.*

19. 17 U.S.C. §§ 106, 122 (2012).

20. *WNET, Thirteen*, 712 F.3d at 684-85; 17 U.S.C. § 106(4).

21. 17 U.S.C. § 101.

22. *Id.*

Two cases decided by the United States Supreme Court reveal the relevant history of the “Transmit Clause” from section 101 of the Copyright Act. The Court held in both *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, and *Fortnightly Corp. v. United Artists Television, Inc.*, that under the then-current Copyright Act of 1909, which lacked the Transmit Clause, a cable television system that received broadcast television signals by antenna and retransmitted these signals to its customers via coaxial cable did not “perform” the copyrighted works; therefore, the rebroadcasters did not infringe the copyright holders’ statutory public performance right.<sup>23</sup>

Following the advent of the Transmit Clause,<sup>24</sup> the United States Court of Appeals for the Third Circuit took up an appeal on the issue, in a copyright infringement action, of determining whether or not a performance was public.<sup>25</sup> In *Columbia Pictures Industries, Inc. v. Redd Horne*, a video rental store allowed patrons to watch films on VCR tapes, intended for private at-home consumption, in the store for a fee.<sup>26</sup> In that case, the court reasoned that video rental stores are essentially movie theaters with added privacy and without the required license to perform for the public.<sup>27</sup> The court also concluded that the fact that the VCR tapes were viewed in private did not mitigate the fact that the rental store was “unquestionably open to the public.”<sup>28</sup> Further, the court reasoned, “[I]f the same copy . . . of a given work is repeatedly played (i.e., ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.”<sup>29</sup> Therefore, the Third Circuit held that, although the video rental store had only one copy of the film, a single copy shown repeatedly to different customers constituted public performance.<sup>30</sup>

In *Fox TV Stations v. BarryDriller Content System*, a case similar to the noted case, the United States District Court for the Central District of California took up the issue of public performance.<sup>31</sup> In *BarryDriller*, the defendant offered the plaintiffs’ copyrighted content over the Internet,

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23. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-402 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974).

24. *See WNET, Thirteen*, 712 F.3d at 688.

25. *Columbia Pictures Indus., Inc. v. Redd Horne*, 749 F.2d 154, 156 (3d Cir. 1984).

26. *Id.* at 156-57.

27. *Id.* at 159.

28. *Id.*

29. *Id.* (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.14[C][3], at 8-142 (1983)).

30. *Columbia Pictures*, 749 F.2d at 159.

31. *Fox Television Stations, Inc. v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138, 1143 (C.D. Cal. 2012).

streamed to appropriately connected devices.<sup>32</sup> The plaintiffs alleged that the company infringed their copyrights when it retransmitted the broadcasts over the Internet to its subscribers.<sup>33</sup> The district court found the plaintiffs' argument under the public performance theory of liability persuasive and granted in part their motion for a preliminary injunction.<sup>34</sup>

The Second Circuit specifically discussed the new technology of remote storage digital video recorders (RS-DVR) as it pertained to copyright infringement in *Cartoon Network LP, LLLP v. CSC Holdings, Inc. (Cablevision)*.<sup>35</sup> In *Cablevision*, a cable provider, Cablevision, operated its RS-DVR system without licenses from the copyright holders of the broadcasts.<sup>36</sup> The court took up the issue of whether this action infringed the copyright holders' rights of reproduction and public performance as guaranteed to them in the Copyright Act of 1976.<sup>37</sup> The Second Circuit held that the buffering in the operation of the RS-DVR did not create a "copy" within the meaning of section 101 of the Copyright Act because the data resided in the buffer for no more than 1.2 seconds before it was automatically overwritten.<sup>38</sup> Therefore, because the data did not exist for more than a transitory period in the buffer, it did not violate copyright.<sup>39</sup> The *Cablevision* court also held that the Transmit Clause requires a court "to discern who is 'capable of receiving' the performance being transmitted" when "determining whether a transmission is made to the public."<sup>40</sup> Having established this premise, the Second Circuit then agreed with the cable company because "each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber's cable box, [and] only one subscriber is capable of receiving any given RS-DVR transmission."<sup>41</sup> The Second Circuit concluded that because each playback transmission was made to a single subscriber using a single "unique copy produced by that subscriber," such rebroadcasts were not performances "to the public."<sup>42</sup> Instead, the

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32. *Id.* at 1140.

33. *Id.* at 1143.

34. *Id.* at 1146, 1151.

35. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008).

36. *Id.* at 124. Cablevision's RS-DVRs permitted its customers who did not have a physical, personal DVR "to record cable programming on central hard drives housed and maintained by Cablevision at a 'remote' location." *Id.*

37. *Id.*

38. *Id.* at 129-30.

39. *Id.* at 130.

40. *Id.* at 134.

41. *Id.* at 135.

42. *Id.* at 139.

transmissions were private performances that did not infringe on “any exclusive right of public performance.”<sup>43</sup> Therefore, Cablevision’s novel system did not constitute copyright infringement, nor did it violate the Copyright Act.<sup>44</sup>

With regard to the granting of injunctions in the intellectual property context, the Supreme Court has articulated the elements to be met in the interest of equity in a patent infringement suit.<sup>45</sup> According to the Court in *eBay Inc. v. MercExchange, L.L.C.*, the plaintiffs must satisfy each factor of a four-factor test before the court may grant permanent injunctive relief.<sup>46</sup> The Court stated that the plaintiff must demonstrate (1) that it suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate the injury; (3) that, considering the balance of hardships between the parties, equitable remedy is appropriate; and (4) that the public interest would not be “disserved by a permanent injunction.”<sup>47</sup> The Court held that the elements for injunctive relief in a patent infringement suit are analogous to those in a copyright suit because, similar to a patent holder, a copyright holder possesses “the right to exclude others from using [their] property.”<sup>48</sup>

The Supreme Court further took up the issue of preliminary injunctions in another case.<sup>49</sup> In *Winter v. National Resources Defense Council, Inc.*, environmental organizations sought an injunction against United States Naval testing in California waters, citing injury to marine mammals in the area.<sup>50</sup> The Court held that a plaintiff seeking a preliminary injunction must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of” an injunction, that the “balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>51</sup>

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43. *Id.*

44. *See id.* at 140.

45. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

46. *Id.* at 392. The Second Circuit has held that *eBay* “applies with equal force . . . to preliminary injunctions . . . that are issued for alleged copyright infringement.” *Salinger v. Colting*, 607 F.3d 68, 77 (2d Cir. 2010).

47. *eBay Inc.*, 547 U.S. at 391.

48. *Id.* at 392.

49. *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

50. *See id.* at 12-14.

51. *Id.* at 20.

## III. THE COURT'S DECISION

In the noted case, the Second Circuit followed the analysis set out in their prior decision in *Cablevision* to resolve the issue of infringement of the copyright holders' public performance right.<sup>52</sup> The court set out its analysis in two parts.<sup>53</sup> First, the court held that Aereo's transmissions of copyrighted broadcasts did not qualify as public performances.<sup>54</sup> Therefore, the court concluded that the copyright holders were not likely to prevail on the merits of their copyright infringement action.<sup>55</sup> Second, the court held that the balance of hardships did not tip decidedly in favor of the copyright holders of the broadcasts.<sup>56</sup> The Second Circuit therefore affirmed the judgment of the district court, which had denied the copyright holders' motion for preliminary injunction.<sup>57</sup>

The court began by determining whether Aereo's broadcasts of the copyrighted works constituted public performances.<sup>58</sup> To address this issue, the court first examined the statutory language drafted by Congress in the 1976 Copyright Act, specifically as to its treatment of "publicly."<sup>59</sup> The Copyright Act of 1976 gives copyright holders several exclusive rights subject to statutory exceptions.<sup>60</sup> At issue in this appeal was 17 U.S.C. § 106(4), which states that a copyright holder has the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly."<sup>61</sup> The answer to the court's inquiry was based on the Transmit Clause of section 101's definition of "to perform . . . a work publicly."<sup>62</sup> Following *Cablevision*, the court used two essential facts to determine whether Aereo's transmissions of broadcasts were public performances.<sup>63</sup> First, the system created unique copies of the desired broadcast.<sup>64</sup> Second, the subscriber could only view a transmission from the recorded copy of the program that he requested and that was created by that specific request.<sup>65</sup>

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52. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680, 684-85 (2d Cir. 2013).

53. *See id.* at 696.

54. *Id.* at 689.

55. *Id.* at 695.

56. *Id.* at 696.

57. *Id.*

58. *Id.* at 684.

59. *Id.*

60. *Id.*

61. *Id.* at 684-85 (citing 17 U.S.C. § 106(4) (2012)).

62. *Id.* at 685; 17 U.S.C. § 101.

63. *WNET, Thirteen*, 712 F.3d at 689.

64. *Id.*

65. *Id.*

According to the court, Aereo's system fulfilled the two factors set out in *Cablevision*.<sup>66</sup> Also, according to the court, the potential audience for each Aereo transmission was a single subscriber, and therefore the transmission was not a public performance as defined in section 101.<sup>67</sup> The court also concluded that because the transmissions were private rather than public in nature, no license was required for transmission of the copyrighted material.<sup>68</sup> Therefore, the Second Circuit held that the transmissions of broadcast television over the Internet were likely not public performances and did not qualify as copyright infringement.<sup>69</sup> The court held that, because Aereo's service did not infringe the appellants' public performance right, the coalition of copyright holders did not "demonstrat[e] . . . sufficiently serious questions going to the merits to make them a fair ground for litigation."<sup>70</sup>

The court then looked at the two factors used by the district court to reach its conclusion that the balance of hardships did not weigh decidedly in favor of the copyright holders.<sup>71</sup> The court reasoned that while the appellants could certainly face harm absent an injunction, the potential harm to Aereo would be greater if an injunction should issue.<sup>72</sup> The appellants argued that the potential harm to Aereo should be discounted because the company engaged in illegal activity.<sup>73</sup> The Circuit Court was not swayed by this argument because the argument was based on Aereo violating copyright.<sup>74</sup> Because the court had held earlier in the opinion that Aereo did not violate copyright laws, it followed that Aereo engaged in no illegal activity.<sup>75</sup> Further, the court reasoned that an injunction would ultimately destroy Aereo's business, and therefore Aereo faced "legally cognizable and significant" hardships.<sup>76</sup> Therefore, the Second Circuit held that the balance of hardships did "not tip decidedly" in the copyright holders' favor.<sup>77</sup>

In his dissenting opinion, Judge Chin strongly disagreed with the majority's opinion.<sup>78</sup> In the dissent, Chin stated that both *Cablevision* and

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66. *Id.* at 690.

67. *Id.*; 17 U.S.C. § 101.

68. *WNET, Thirteen*, 712 F.3d at 690-91.

69. *Id.* at 696.

70. *Id.* (internal quotation marks omitted).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (internal quotation marks omitted).

78. *See id.* at 696-705 (Chin, J., dissenting).



the noted case were factually distinguishable and that Aereo's technology was a "sham."<sup>79</sup> Chin focused on the fact that Cablevision's RS-DVR system was supplemental to the cable subscriber's service, and the RS-DVR allowed playback of broadcasts to which the subscriber already had access, given the cable company's license to the original "live" performances.<sup>80</sup> Chin further stated that Cablevision's system "existed only to produce a copy" of already licensed programs while Aereo's system produced copies to "enable it" to transmit the broadcast to Aereo's subscribers illegally without a license.<sup>81</sup> The dissent predicted that the majority ruling would "not merely deny the broadcasters a licensing fee for Aereo's activity; it [would] provide[] a blueprint for others to avoid the Copyright Act's licensing regime altogether."<sup>82</sup> In conclusion, Chin believed the majority opinion went against the intended result of the congressional statute protecting cable providers' public performance right.<sup>83</sup>

#### IV. ANALYSIS

As technology changes, U.S. law and jurisprudence often lag behind the technological advancements of society. This problem, however, is nothing new. The statute in contention in the noted case, the Copyright Act of 1976, was enacted to overhaul its predecessor, the Copyright Act of 1909.<sup>84</sup> With the Transmit Clause, the new act responded to the "emergence of cable television [and brought] cable television system's retransmissions of broadcast television programming within the scope of the public performance right."<sup>85</sup> Congress also added section 111 to the 1976 Copyright Act, which created a compulsory license for retransmissions by cable systems.<sup>86</sup> In the noted case, the Second Circuit took up what many consider to be the next great shift in television technology, the streaming of live television broadcasts over the Internet by an unlicensed provider.<sup>87</sup> In the Second Circuit's 2-1 decision, the court concluded that Aereo's system did not infringe on the broadcasters' copyright.<sup>88</sup> The court thoroughly analyzed the claims of both the

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79. *Id.* at 697, 702.

80. *Id.* at 702.

81. *Id.*

82. *Id.* at 705.

83. *Id.* at 704.

84. *Id.* at 685.

85. *Id.*

86. *See* 17 U.S.C. § 111(d) (2012).

87. *See WNET, Thirteen*, 712 F.3d at 680.

88. *See id.*

broadcasters and Aereo in relation to the Copyright Act as well as the present circuit precedent set out by the court in *Cablevision* a few years prior. While the court found for Aereo, the dissent's interpretation of the law and its distinguishing of the noted case from *Cablevision* appear to be more aligned with the law and congressional intent.

In the dissent, Judge Chin persuasively distinguished Aereo's system from the RS-DVR in *Cablevision*. Chin stated that Cablevision's RS-DVR existed only to record previously licensed content and was not a replacement for cable service, but merely an alternative to a "set-top DVR" in the paying customer's home.<sup>89</sup> Cablevision's "subscribers were already paying for the right to watch television programs, and the RS-DVR gave them the additional option to 'record' the programs."<sup>90</sup> Therefore, the RS-DVR did not amount to a replacement for watching live television broadcasts, but was instead a companion to it.<sup>91</sup> Aereo, however, possessed no licenses, and its system existed as an alternative to cable access because its business model consisted of "streaming broadcasts over the Internet in real-time" on an Internet connected device instead of a cable access television.<sup>92</sup> Judge Chin examined in depth the congressional record in his analysis of Congress's intent and stated, "A cable television system is performing when it retransmits the broadcast to its subscribers."<sup>93</sup> Judge Chin further cited the record, stating that "[a] public performance could be received in different places and at different times" and quoting that "[a] performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission."<sup>94</sup> Finally, he quoted the *Congressional Record* stating that it did not matter if "the potential recipients of the transmission represent a limited segment of the public."<sup>95</sup> The dissent concluded that Aereo's streaming of television broadcasts over the Internet to its paying subscribers constituted a public performance as Congress intended.<sup>96</sup>

Perhaps the most interesting and important aspect of the noted case is that it is far from signaling the end of this crucial legal battle between

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89. *Id.* at 702 (Chin, J., dissenting).

90. *Id.*

91. *Id.* at 702-03.

92. *Id.* at 702.

93. *See id.* at 700 (citing H.R. REP. No. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678).

94. *Id.*

95. *Id.*

96. *Id.*

mega-cable conglomerates and often-small start-up-like companies offering “live” television broadcasts over the Internet. Following the Second Circuit’s opinion in April 2013, subsequent sister circuits have taken up the issue, and a circuit split is developing in the nation.<sup>97</sup> Currently, cases are proceeding in four United States Court jurisdictions: the United States Courts of Appeals for the First, Second, Ninth, and D.C. Circuits.<sup>98</sup>

As previously discussed, the United States District Court for the Central District of California ruled against Aereo’s competitor, FilmOn X (formally known FilmOn, AereoKiller, and BarryDriller), in *Fox Television Stations, Inc. v. BarryDriller Content Systems* and issued an injunction to prevent the company from proceeding in California.<sup>99</sup> FilmOn X filed to appeal the district court’s decision, and the Ninth Circuit heard oral arguments in August 2013.<sup>100</sup> Experts in the online streaming industry regard this injunction as stalling Aereo and its competitors’ expansion into the Western states.<sup>101</sup>

The United States District Court for the District of Columbia held in *Fox Television Stations, Inc. v. FilmOn X LLC* that FilmOn X’s service, which was identical to Aereo’s, likely infringed on the broadcasters’ exclusive right to public performance according to the Copyright Act.<sup>102</sup> There, FilmOn X utilized the same defense that proved effective for Aereo in the Second Circuit: that they were not duplicating any content because each customer had their own antenna,<sup>103</sup> however, Judge Collyer was not swayed by the Second Circuit’s reasoning from the noted case and thus ruled against FilmOn X.<sup>104</sup> Perhaps the most significant part of the D.C. District Court’s ruling was that the court granted a nationwide preliminary injunction apart from the Second Circuit.<sup>105</sup> The court reasoned that because its decision conflicted with the Second Circuit’s, but did not conflict with any other circuits’,

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97. See Greg Sandoval, *Broadcasters’ Court Victories over FilmOn X Threaten Aereo’s Expansion*, VERGE (Sept. 9, 2013, 4:03 PM), <http://www.theverge.com/2013/9/9/4703256/broadcasters-court-victories-over-film-on-x-threaten-aereos-expansion>.

98. Ali Sternburg, *Infographic: Aereo and FilmOn X Litigation Update*, DISCO (Sept. 18, 2013), <http://www.project-disco.org/intellectual-property/091813-infographic-aereo-and-film-on-x-litigation-update/>.

99. *Fox Television Stations, Inc. v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138, 1148-49 (C.D. Cal. 2012).

100. *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2013 WL 4763414, at \*9 (D.D.C. Sept. 5, 2013).

101. See Sandoval, *supra* note 97.

102. *FilmOn X LLC*, 2013 WL 4763414, at \*15-16.

103. *Id.* at \*10, \*15-16.

104. *Id.*

105. *Id.* at \*18.

including the Ninth, where *BarryDriller's* preliminary injunction remains in place, such a wide-reaching preliminary injunction was justified.<sup>106</sup>

Finally, the most recent litigation is in the United States District Court for the District of Massachusetts, where Hearst Stations Inc. (Hearst) sued Aereo as it moved into Massachusetts to avoid the Second Circuit's ruling.<sup>107</sup> There, district Judge Nathaniel Gorton said he is "inclined at this point" to side with Aereo, and he is "not convinced that Hearst has made a sufficient showing that it is likely to succeed on the merits of its copyright infringement claims."<sup>108</sup> If Judge Gorton sides with Aereo over the broadcasters, Aereo looks poised to expand into New England, opening up the rest of the Northeastern states for business.<sup>109</sup>

If Aereo proves victorious in its suit against Hearst, and FilmOn X proves unsuccessful in its appeals in the Ninth and D.C. Circuits, a well-defined circuit split will likely develop. Legal scholars believe that the legal saga of unlicensed "live" retransmissions of television broadcasts over the Internet is destined for the United States Supreme Court.<sup>110</sup> The prospects of a Supreme Court battle increased this summer when, in July 2013, the Second Circuit declined to review its decision in the noted case en banc.<sup>111</sup>

Aereo continues to believe it is just in its crusade, because it feels that the "networks are trying to stifle innovation and seize more control of the public airways."<sup>112</sup> The only thing that is certain in this legal quagmire of "a million little antennas" is that the technology of how people receive and view their television programs is rapidly changing.

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106. *Id.*

107. Sandoval, *supra* note 97.

108. Greg Sandoval, *Federal Judge in Boston 'Inclined' To Rule for Aereo*, VERGE (Sept. 19, 2013, 12:40 PM), <http://www.theverge.com/2013/9/19/4748562/federal-judge-in-boston-inclined-to-rule-for-aereo>.

109. This Case Note was written prior to the District Court of Massachusetts' ruling on October 8, 2013, which denied a preliminary injunction request sought by Hearst against Aereo. *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284, at \*9 (D. Mass. Oct. 8, 2013).

110. *Id.*

111. *FilmOn X LLC*, 2013 WL 4763414, at \*8. This Case Note was written prior to major television broadcasters' petitioning the United States Supreme Court to hear their case against Aereo in early October 2013. While the Supreme Court only agrees to hear a fraction of the appeals filed, given the future implications for online video services, this case is worth taking if a well-defined circuit split develops. What could hold up the Supreme Court's decision to take the case is that the Ninth Circuit has yet to issue its decision on FilmOn X's appeal in *BarryDriller*. Until then, only one case has gone all the way to the appellate level, the noted case, and there the Second Circuit ruled in favor of Aereo. Amol Sharma & Shalini Ramachandran, *Broadcasters Ask Supreme Court To Intervene over Aereo*, WALL ST. J. (Oct. 11, 2013), <http://online.wsj.com/news/articles/SB10001424052702303382004579129752289337822>.

112. Sandoval, *supra* note 97.

No one can know for sure with whom either technology or the courts will side: unlicensed Internet streaming or traditional cable television. Nonetheless, nine United States Supreme Court Justices may have to make the ultimate decision on the issue.

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\* © 2013 Sebastian Wyatt Novak. Junior Member, Volume 16, *Tulane Journal of Technology and Intellectual Property*. J.D. candidate 2015, Tulane University Law School; A.B. 2012, History, Rollins College. The author would like to thank his friends and family for their encouragement in writing this Case Note. The author would also like to thank the members of Volume 16 for all their work and dedication to the Journal.