



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

SPECIAL REPORT

SPECIAL REPORT

September 11, 2013

THE LATEST FILMON X INJUNCTION: WHAT IT MEANS FOR BROADCASTERS' FIGHT AGAINST INTERNET RETRANSMISSION SERVICES

Last week, broadcasters scored a significant victory in one of several lawsuits against competing Internet retransmission services Aereo and FilmOn X (formerly known as "Aereokiller").

On September 5, the United States District Court for the District of Columbia issued a *nationwide* injunction prohibiting FilmOn X from operating anywhere in the country other than in those states within the Second Circuit (that is, New York, Vermont, and Connecticut) pending trial. The court concluded that broadcasters are likely to prevail on their copyright infringement claims against FilmOn X, which transmits copyrighted television programming to subscribers over the Internet without a license.

The decision is an important step forward in ongoing efforts to protect broadcasters' copyright interests and their ability to control distribution of their content. It is also significant in that, unlike the earlier injunction involving this technology, the D.C. injunction is *nationwide* in its scope (except for the Second Circuit).

I.
The Aereo And FilmOn X Services

As previously reported, FilmOn X and Aereo operate technologically similar services: Both use banks of dime-size antennas to capture over-the-air broadcast signals, make copies of the broadcasts, and transmit the programming to subscribers' Internet-capable devices. The nature of the copies has become an important issue in the lawsuits: Both services record unique copies of selected television programs in files dedicated to individual users, then transmit the recorded programs from each unique copy to the associated subscriber's computer, smart phone, or tablet.

II.
The Litigation Against Aereo And FilmOn X

At present, cases are pending against Aereo in federal courts in New York and Boston and against FilmOn X in California and Washington, D.C. To date, the results have been mixed: Broadcasters obtained a preliminary injunction against FilmOn X in California, but the New York federal courts refused to enjoin Aereo's service. The federal court in Boston has not yet ruled on a request for injunctive relief against Aereo, where a hearing is scheduled for September 18, 2013.

As you will recall from earlier reports, in the New York litigation against Aereo, broadcasters faced a significant hurdle in the form of the Second Circuit's prior decision in *Cablevision*. In that case, the Second Circuit found that a cable operator's "Remote Storage DVR System" (or RS-DVR) did not infringe copyright holders' exclusive public performance rights because the system made only "private" performances from unique, subscriber-associated copies.

The district court in the New York *Aereo* litigation refused to enjoin Aereo, finding that it similarly transmits copyrighted programs over the Internet from unique, individual copies captured by individual antennas. In April 2013, the Second Circuit Court of Appeals affirmed that decision in a two-to-one vote, over a strongly-worded dissent that described Aereo's system as a "sham" designed "to avoid the reach of the Copyright Act." The case is now continuing in the district court on the merits of the media plaintiffs' copyright infringement claims.

A California district court, however, reached a contrary conclusion in favor of broadcasters in litigation against Aereo's competitor, now known as FilmOn X. The court refused to follow the New York court decision in *Aereo*, concluding that FilmOn X "publicly" performs copyrighted television programs notwithstanding the fact that the service transmits programs from individual, subscriber-associated copies. The California court enjoined FilmOn X from transmitting broadcasters' copyrighted programming

within the boundaries of the Ninth Circuit, which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

FilmOn X appealed the district court's injunction decision (and broadcasters appealed the limited geographic scope of the injunction) to the Ninth Circuit Court of Appeals, which heard oral argument on August 27, 2013. The Ninth Circuit has not yet issued a decision.

III.

The D.C. Court's Favorable Decision For Broadcasters

Against the backdrop of these opposing decisions, the D.C. district court last week ruled that broadcasters are likely to prevail on their claim that FilmOn X violates the Copyright Act when it transmits copyrighted television programs to subscribers over the Internet without a license. FilmOn X urged the court to side with the New York court in finding that the unique-copy transmission feature of its service avoided copyright infringement under the reasoning in *Cablevision*. Instead, the district court found "more persuasive" the reasoning of the California district court and the dissenting Second Circuit judges.

The D.C. court agreed with broadcasters that FilmOn X "rebroadcasts copyrighted material for consumption by the public" in violation of the Copyright Act. The service's "convoluted process for relaying television signals" could not avoid liability for copyright infringement because the service ultimately "permits multiple persons to watch a single performance" of a copyrighted program. The court found FilmOn X to be "in no meaningful way different from cable television companies," which must have a license to transmit copyrighted television programming.

The D.C. court also found that an injunction was necessary to avoid irreparable harm to broadcasters. Like the California court, the D.C. district court recognized that permitting FilmOn X's service to continue would damage broadcasters' ability to negotiate favorable retransmission consent agreements, to negotiate with advertisers, and to control the distribution of their program material over the Internet. The court therefore enjoined FilmOn X from streaming, transmitting, retransmitting, or otherwise publicly performing or displaying the copyrighted television programming.

In a departure from the reasoning of the California court and a significant win for broadcasters, the D.C. court made its injunction reach nationwide except for the states that make up the Second Circuit, where the federal courts already have ruled that Aereo's "substantially identical" Internet transmission service is lawful.

IV.
What Lies Ahead For Broadcasters

The D.C. *FilmOn X* decision raises a host of interesting issues for the still-pending litigation against Aereo in New York and Boston. The D.C. district court observed that Aereo offers a “substantially identical Internet service” with “no legally meaningful differences” from FilmOn X’s service. The question, then, is what effect the *FilmOn X* injunction will have on the “substantially identical”—and thus presumably infringing—activities of Aereo in markets outside the Second Circuit. Courts in other markets might consider the nationwide injunction against FilmOn X to be significant or persuasive when considering requests for similar injunctive relief against Aereo’s substantially identical operations. That issue will be addressed later this month, when a federal district court in Boston will consider television station WCVB’s request for preliminary injunctive relief against Aereo’s operations in Boston.

Meanwhile, the industry awaits the Ninth Circuit Court of Appeals’ decision in the California case against FilmOn X. Depending on its outcome, broadcasters may also ask the United States Supreme Court to review the growing body of decisions in these related cases.

We will keep you informed of developments in these important cases.

* * * * *

If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Mary F. Peña
Dorrian H. Horsey
Laura S. Chipman
Timothy G. Nelson

* * * * *

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

* * * * *

© 2013 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.