

# D.C. District Court Disagrees with Second Circuit *Aereo* Decision and Issues Near-Nationwide Injunction over FilmOn X Internet Television Service

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The U.S. District Court in Washington, DC, last week preliminarily enjoined FilmOn X, a service that uses the Internet to give consumers the ability to watch live, over-the-air television channels on computers and mobile devices, from operating everywhere in the United States except in the Second Circuit (New York, Connecticut, and Vermont). In so doing, the court agreed with the reasoning of a California district court considering the FilmOn X service (which was previously known as AereoKiller) and of Judge Denny Chin in his dissents in the *Aereo* case that the services are engaged in public performances in violation of the Copyright Act. See *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, No. CV 12-6921, 2012 WL 6784498, at \*1-6 (C.D. Cal. Dec. 27, 2012) (appeal pending) (*BarryDriller*); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (Chin, J., dissenting) (*Aereo I*); rehearing *en banc denied*, *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013) (Chin, J., and Wesley, J., dissenting) (*Aereo II*). See our discussions of the *Aereo* decisions [here](#) and [here](#).

The D.C. district court's decision expressly disagrees with the Second Circuit's decision in *Aereo*, which relied on *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (*Cablevision*) to hold that there is no public performance of a copyrighted work if there is a one-to-one relationship between the copy of the copyrighted work that is the source of a transmission, and the recipient of the transmission.

## Analysis

The Copyright Act, 17 U.S.C. § 101, *et seq.*, prohibits the public performance of a work: "To perform or display a work 'publicly' means . . . to transmit or otherwise communicate a performance . . . 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" (known as the Transmit Clause). In *Cablevision*, the Second Circuit found that the critical inquiry is "to discern who is 'capable of receiving' the performance being transmitted," 536 F.3d at 134 (quoting 17 U.S.C. § 101). If the particular performance is capable of being seen by only one person, the transmission is not "to the public." The *Aereo* court, following *Cablevision*, found that the potential audience of every transmission in the *Aereo* system was

to the single subscriber who created the copy; thus, the performance was not “public.”

The *FilmOn X* decision, authored by District Judge Rosemary Collyer, agreed with the arguments adopted in *BarryDriller* and Judge Chin's Aereo dissents that the defendants' reliance on Cablevision is misplaced. The court went a step further, agreeing with the *BarryDriller* court and Judge Chin's dissent in *Aereo II* that *Cablevision* was wrongly decided when it substituted the term “transmission” for the term “performance” in its analysis. *FilmOn X*, Slip Op. at n. 12; see *BarryDriller*, 915 F. Supp. 2d at 1144-45; *Aereo II*, 722 F.3d 500 at 501 (Chin, J., dissenting).

Notably, the court departed from the *BarryDriller* court's cautious injunction, which extended only to the Ninth Circuit in deference to the *Aereo* court's conflicting ruling and principles of comity. The *FilmOn X* court, after finding that no circuit other than the Second has conflicting law, entered a broad injunction that covers all of the United States with the exception of the Second Circuit. This effectively prevents FilmOn from operating anywhere in the country except for New York, Connecticut, and Vermont.

### **Impact of the Decision**

This decision calls into question expansion of Internet-TV services designed in the wake of the *Cablevision* decision, but these issues are very much in play. FilmOn has already announced that it will appeal the decision to the D.C. Circuit, claiming in an email to *Variety* that “The judge is clearly in [the broadcasters'] pockets” (and a few other choice remarks). See <http://variety.com/2013/biz/news/fox-wins-preliminary-injunction-against-internet-video-streamer-film-on-x-1200600254/>.

The D.C. district court decision adds to the disagreement among the courts. The appeal in the California case involving FilmOn/Aereokiller was argued before the Ninth Circuit on August 27, and a decision may be expected in a few months. If the Ninth Circuit upholds the lower court ruling, it will create a split between the two federal circuits, which is likely to lead to a request for U.S. Supreme Court review. Further complicating matters is another lawsuit filed against Aereo in federal district court in Boston, which is expected to be heard later this week, potentially throwing the First Circuit courts into the mix of conflicting decisions.