Did Aereo Open The Door To Compulsory Licenses?

Law360, New York (June 17, 2016, 12:51 PM ET) --

After the U.S. Supreme Court's ruling in ABC v. Aereo Inc., 134 S.Ct. 2498 (2014), that Aereo's internet retransmission service was "substantially similar" to cable, and therefore violated the Transmit Clause of the Copyright Act, another similar internet retransmission service has succeeded in using the analogy to cable to obtain a ruling that it is eligible for a compulsory license for cable systems adopted as part of the 1976 Copyright Act amendments under 17 U.S.C. § 111.

Andrea Weiss Jeffries

Elaine Zhong

On July 16, 2015, U.S. District Judge George Wu of the Central District of California held that FilmOn's internet retransmission service is entitled to a compulsory license under a plain reading of the language of Section 111,[1] notwithstanding the rejection of this legal theory by numerous district courts and the U.S. Court of Appeals for the Second Circuit.[2] His decision in Fox Television Stations Inc. et al. v. AereoKiller et al., is now on appeal before the U.S. Court of Appeals for the Ninth Circuit. Whoever wins in the Ninth Circuit, an appeal seems likely, and thus the issue of online streaming services may again wind up before the Supreme Court.

At issue in AereoKiller is a service provided by FilmOn[3] that collects over-the-air television broadcast signals, converts the signals into digital packets, and streams those packets through the internet to paying subscribers. FilmOn's service operates similarly to the one offered by its competitor, Aereo, which used dime-sized antennae to capture television broadcasts that it would record and retransmit to viewers over the internet. One of FilmOn's systems, called a "trailer system," operates using an "array of small antennas on the roof of a trailer."[4] The other involves a "Lanner system" which uses "a single master antenna on the roof of a commercial data center [that routes] signals to an antenna box where the signals [are] amplified and captured by small antennas."[5] Subscribers of FilmOn's service access and stream television programming through FilmOn's website. According to FilmOn, it restricts the availability of television programming based on the subscriber's geographical location.

In 2012, the plaintiffs in AereoKiller, several broadcasting companies that include Fox, NBC and CBS, obtained a preliminary injunction based on the legal theory upheld by the Supreme Court in Aereo two years later, i.e., that FilmOn publicly performed copyrighted works without authorization in violation of the Transmit Clause of the Copyright Act. In finding Aereo liable for infringing the Copyright Act under this theory, the Supreme Court drew a close comparison between Aereo's services and those of "the CATV companies that Congress amended the Act to reach."[6] The court characterized the two types of services as "substantially similar," and described Aereo's system as having an "overwhelming likeness to the cable companies targeted by the 1976 amendments," and "for all practical purposes a traditional cable system."[7]

Although the Supreme Court did not delve into the applicability to Aereo of Section 111's compulsory license, FilmOn used the court's "just like cable" language to pivot to a new legal theory — it is a "cable system" as defined under Section 111, and is therefore entitled to a compulsory license.

After some discovery, the parties filed cross motions for summary judgment on this legal theory. Judge Wu granted the defendants' motion and denied the plaintiffs' motion, finding that FilmOn is indeed entitled to a compulsory license.

Though Judge Wu discussed the legislative history of the 1976 Copyright Act and Section 111, his reasoning focused on the plain language of Section 111's definition of a cable system as "a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service."[8]

Judge Wu found this language to be unambiguous: FilmOn's system was a "facility" because its "antennas, located in particular buildings wholly within particular states" receive public broadcast signals, which "are then retransmitted out of those facilities on 'wires, cables, microwave, or other communications channels'" (i.e., through the Internet).[9]

In so holding, the district court explicitly rejected as unpersuasive the Second Circuit's ruling in WPIX Inc. v. ivi Inc.[10] that an internet retransmission service was not entitled to the compulsory license for cable systems under Section 111. The Second Circuit had found Section 111's text ambiguous, as it was "unclear whether the Internet itself is a facility, as it is neither a physical nor a tangible entity; rather it is 'a global network of millions of interconnected computers,'"[11] and thus deferred to the copyright office, which has long taken a narrow view of Section 111.[12] Judge Wu found error in this approach because, in his view, the statutory "facility" language reads directly on the machinery used for retransmission, which precedes the internet in FilmOn's retransmission scheme, not on the internet itself.[13] Moreover, Judge Wu found deference to the copyright office unwarranted because its views belie the clear intent of Congress in enacting the 1976 Copyright Act.[14] More persuasive to the district court were the Supreme Court's statements regarding the "overwhelming likeness" of Aereo's service to cable systems: "[Aereo] is ... about as close a statement directly in Defendants' favor as could be made."[15]

Other district courts have since declined to adopt Judge Wu's approach. For example, in FilmOn X LLC v. Window to the World Communications Inc, the district court for the Northern District of Illinois held that Section 111's definition of "cable system" requires "the same 'facility' that 'receives' the signals or programs to make 'secondary transmission of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public.'"[16] The district court concluded that FilmOn makes secondary transmissions to the internet, not to subscribers, and therefore, does not qualify for a compulsory license. Similarly, in Fox Television Stations Inc. v. FilmOn X LLC, the district court for the District of Columbia held that the "subscriber's device receives the retransmission, not from the 'facility,' but from interconnected computers through cyberspace."[17] Both decisions found support for their interpretations in the copyright office's view that internet retransmission services fall outside of Section 111.

Recognizing that the "legal issues are close and of significant commercial importance," Judge Wu authorized immediate appeal to the Ninth Circuit.[18] The key questions for the Ninth Circuit to decide are whether Section 111 is unambiguous and if so, whether FilmOn's "facility" "makes secondary transmissions" of broadcast signals or programs. If Section 111 is ambiguous, then the Ninth Circuit will need to determine whether any deference is owed to the copyright office's interpretation of Section 111.

The Ninth Circuit's decision may have important implications for broadcast companies, online streaming services and the TV-consuming public. Courts have recognized that when Congress adopted Section 111, its goal was to widen public access to television programming, while also balancing the rights of copyright holders. Courts have also explained that Congress has revised the Copyright Act to accommodate technological change.[19] These considerations may play some role in the Ninth Circuit's ruling; several amici curiae have filed briefs addressing these policy questions.

For example, some have argued in support of the plaintiffs-appellants that compulsory licenses diminish their incentive to invest in and produce new works because they are not receiving fair market rates. Some amici have also argued that FilmOn X will derive an unfair advantage against licensed streaming companies such as Hulu LLC and Netflix Inc., who face certain restrictions based on their licensing agreements that FilmOn will not. Others have claimed, to the contrary, that compulsory licenses will promote competition and reduce costs for the consumer because the transaction costs involved with negotiating licenses are reduced. These lowered transaction costs will in turn enable more entrants into the market at a time when more and more consumers are relying upon the Internet, rather than traditional antennae or cable systems, for copyrighted content.

Given these implications, the issue of internet retransmission services may continue to be the subject of federal court litigation after the Ninth Circuit decides AereoKiller, absent clear direction by Congress or the Supreme Court.

—By Andrea Weiss Jeffries and Elaine Zhong, WilmerHale

Andrea Weiss Jeffries is a litigation partner and Elaine Zhong is a senior associate in WilmerHale's Los Angeles office.

[1] 115 F.Supp.3d 1152, 1154 (C.D. Cal. 2015).

[2] See, e.g., WPIX, Inc. v. ivi, Inc., 765 F.Supp.2d 594 (S.D.N.Y. 2011), aff'd, 691 F.3d 275 (2d Cir. 2012); ABC v. Aereo, Inc., 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); CBS v. FilmOn.com, Inc., 2014 WL 3702568 (S.D.N.Y. July 24, 2014), aff'd, 814 F.3d 91 (2d Cir. Feb. 16, 2016); see also Fox Television Stations, Inc. v. FilmOn X LLC, 2015 WL 7761052 (D.D.C. Dec. 2, 2015); Filmon X, LLC v. Window to the World Commc'ns, Inc., 2016 WL 1161276 (N.D. Ill. Mar. 23, 2016).

[3] The defendants in the matter are FilmOn X LLC, Alkiviades "Alki" David, FilmOn.TV Networks Inc., Filmon.TV, Inc., and FilmOn.com, Inc. (collectively referred to as, "FilmOn"). Defendant AereoKiller LLC changed its name to FilmOn X, LLC after plaintiffs filed their complaint.

[4] AereoKiller, 115 F.Supp.3d at 1156.

[5] Id.

[6] 134 S.Ct. at 2506.

[7] Id. at 2506-07.

[8] 17 U.S.C. §111 (emphasis added).

[9] AereoKiller, 115 F.Supp.3d at 1167-68.

[10] 765 F.Supp.2d 594 (S.D.N.Y. 2011), aff'd, 691 F.3d 275 (2d Cir. 2012).

[11] WPIX, 691 F.3d at 280 (internal quotations and citations omitted).

[12] The Copyright Office has long maintained that the compulsory licensing scheme of Section 111 is intended only for localized retransmission services and has long interpreted Section 111's reference to "other communications channels" to exclude "future unknown services." Id. at 283-85. Accord CBS v. FilmOn.com, Inc., 2014 WL 3702568 (S.D.N.Y. July 24, 2014), aff'd, 814 F.3d 91 (2d Cir. 2016); ABC v. Aereo Inc., 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).

[13] AereoKiller, 115 F. Supp. 3d at 1168.

[14] Id. at 1165-66.

[15] Id. at 1163.

[16] 2016 WL 1161276 at *5.

[17] 2015 WL 7761052 at *13.

[18] AereoKiller, 115 F.Supp.3d at 1171.

[19] See, e.g., id. at 1159-62.