

Public Performance Rights in U.S. Copyright Law: Recent Decisions

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Public Performance Cases

- **WPIX, Inc. v. ivi, Inc.**

691 F.3d 275 (2d Cir. 2012)

- **WNET v. Aereo, Inc.**

____ F.3d ____ (2d Cir. April 1, 2013)

- **Fox Television Stations v. BarryDriller Content Systems, PLC**

____ F. Supp. 2d ____ (C.D. Cal. 2012)

WPIX, Inc. v. ivi, Inc.

- **“On September 13, 2010, ivi began streaming plaintiffs' copyrighted programming over the Internet, live, for profit, and without plaintiffs' consent.”**
 - ivi used an antenna to receive live broadcast signals in New York and Seattle (and later Los Angeles and Chicago), and retransmitted the signal over the Internet. ivi subscribers paid \$4.99 per month to receive broadcast signals over Internet.
- **“retransmission” is a “public performance” under Act**
- **ivi claimed it was a “cable system” entitled to a compulsory license under § 111 of the Copyright Act.**

WPIX, Inc. v. ivi, Inc.

- § 111(f)(3) defines a “cable system” as “a facility . . . [that] receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the [FCC], and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public”
- Statutory text alone is ambiguous; but intent was to support local retransmission. Congress amended Act to include “microwave” transmission and enacted compulsory license for “satellite” retransmission

WPIX, Inc. v. ivi, Inc.

- **“The Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for § 111 compulsory licenses.”**
 - Copyright Office points to several statutory hints that “cable systems” are local retransmissions only, and are limited to local networks regulated by the FCC.
- **Copyright Office’s position is reasonable and persuasive, and is consistent with the statute. It is therefore entitled to deference under [Chevron U.S.A., Inc. v. Natural Resources Defense Council](#) (1984)**

WNET v. Aereo, Inc.

- **In February 2012, Aereo began streaming plaintiffs' copyrighted programming over the Internet, live, for profit, and without plaintiffs' consent.**
 - Aereo uses thousands of tiny antennas embedded in circuit boards to receive live broadcast signals in New York. When a subscriber logs on, the user is assigned one of these antennas, and the signal is retransmitted to that user over the Internet.
 - Like ivi users, Aereo users can pause or rewind to watch later. Aereo also allows a user to “record” a program to watch later.
- **Aereo concedes “retransmission” is a “performance” under the Act; but contests whether it is “public”**

WNET v. Aereo, Inc.

- § 101: 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 a normal circle of a family and its social acquaintances are gathered; or
 - (2) to transmit or otherwise communicate a performance or display of a work to a place specified in 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 at the same place or in separate places and at the same time or at different times.*

Cartoon Network v. CSC Holdings, Inc.

- 536 F.3d 121 (2d Cir. 2008) (aka *Cablevision*)
- Cablevision (cable system, authorized retransmitter under statutory compulsory license) offered its subscribers a “remote storage digital video recorder” (RS-DVR)
- From user’s standpoint, functions like a regular DVR: enables user to record programs to view at later time.
- Assigned hard disk space at cable head-end to each user; when user records a program, it is stored on hard disk; on playback, transmitted to that user

Cartoon Network v. CSC Holdings, Inc.

- In *Cablevision*, Second Circuit held that cable system was NOT violating the “public performance” right
 - (2) 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 at the same place or in separate places and at the same time or at different times.*
- HELD: Each transmission is a private performance. The “members of the public capable of receiving the performance” are only the subscriber who recorded it (and members of the subscriber’s family).

WNET v. Aereo, Inc.

- Plaintiffs argue that *Cablevision* is distinguishable, because that case involved time-shifting, while this case involves people watching broadcasting “live”
 - REJECTED. Nothing in *Cablevision* turned on the fact that programs were being recorded for playback at a later time.
- HELD: Aereo’s system is materially identical to the RS-DVR system at issue in *Cablevision*.
 - Aereo’s system creates a unique copy for each subscriber who requests it.
 - Each transmission that Aereo makes to a subscriber is made from that subscriber’s unique copy.
 - Each unique copy is transmitted solely to the subscriber who requested that it be made.

Fox TV Stations v. BarryDriller Content Sys.

- Service enables users to access free over-the-air broadcast television over the Internet, via antennas and hard disks located at defendant's facilities, in which a user is assigned a particular antenna and data feed that is accessible only to that user
- HELD: Service is a “public” performance and is preliminarily enjoined within the Ninth Circuit
 - C.D. Cal. rejects the *Aereo* court's reliance on the Second Circuit's “unique copy” doctrine