

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

FOX TELEVISION STATIONS, INC., et al.

Plaintiffs,

v.

AEREOKILLER LLC, et al.

Defendants.

Civil Action No. 1:13-cv-00758-RMC
Hon. Rosemary M. Collyer

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' JOINT MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs¹ respectfully submit this memorandum of points and authorities in support of their motion for a preliminary injunction prohibiting Defendants FilmOnX LLC (f/k/a Aereokiller LLC), FilmOn.TV Networks, Inc., FilmOn.TV, Inc., and FilmOn.com, Inc. (collectively “FilmOnX”) from retransmitting Plaintiffs’ copyrighted programming without authorization in violation of the Copyright Act.

INTRODUCTION

FilmOnX operates a commercial service that streams over the Internet, 24 hours per day, seven days per week, the copyrighted programming broadcast by multiple television stations, including stations located in Washington, D.C. FilmOnX makes this programming available for viewers to watch live on its websites, www.FilmOn.com and www.FilmOnX.com, and via its mobile applications. FilmOnX does so without the consent of the program owners, the broadcast stations, or anyone else.

The Copyright Act affords owners of “motion pictures and other audiovisual works” the exclusive right “to perform the copyrighted work[s] publicly.” 17 U.S.C. § 106(4). Under the Transmit Clause, anyone who transmits a “performance . . . of [a] work” “to the public” by “means of any device or process” engages in public performance and must therefore obtain a license from the copyright owner of that work. *Id.* § 101. In the context of broadcast television, this language means that owners of the copyrights in broadcast programming have the exclusive right to transmit that programming to the public. *See infra*, pp. 12-14. Courts have repeatedly enjoined unlicensed commercial services that stream copyrighted broadcast television

¹ Plaintiffs are Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, Fox Broadcasting Company, NBC Subsidiary (WRC-TV) LLC, NBC Studios LLC, Universal Network Television, LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., Allbritton Communications Company, and Gannett Co., Inc.

programming over the Internet. This is because, while an individual can receive broadcast television over the airwaves for free, a commercial enterprise such as FilmOnX that retransmits broadcast television programs over the Internet publicly performs those television programs and therefore requires the necessary copyright licenses.

This has been the case since at least 1976 when Congress, in its comprehensive revision of the Copyright Act, expressly determined that the retransmission of broadcast television constitutes public performance — thereby legislatively overruling two Supreme Court decisions that had reached the contrary result under the 1909 Copyright Act. *See* H.R. Rep. No. 94-1476, at 88-89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703-04 (the “1976 Report”) (discussing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974)). The United States Court of Appeals for the D.C. Circuit has explained that Congress

as part of its revision of the copyright laws, addressed in particular this problem of “secondary transmissions.” When a cable system takes a broadcast signal (“primary transmission”) and delivers it to the system’s subscribers (“secondary transmission”), the system is earning money by selling to its customers the copyrighted material licensed only for the primary broadcast transmission. Under *Fortnightly* and *Teleprompter*, the copyright owner was unable to share directly in those revenues. Congress was of the view that the copyright holders should receive direct compensation for the use of their rights.

Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc., 836 F.2d 599, 602 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988); *see* 1976 Report at 89 (concluding that cable systems should pay royalties when they retransmit broadcast programming to paying subscribers). FilmOnX provides the same type of broadcast retransmission service as cable systems (*e.g.*, Comcast) and satellite carriers (*e.g.*, DirecTV) — retransmitting broadcasts of copyrighted television programs to unlimited numbers of subscribers. Like cable and satellite television

providers, FilmOnX is publicly performing broadcast programming, and it must therefore obtain copyright licenses “on pain of liability for copyright infringement.” *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984).

For exactly these reasons, a district court in California (the “California Court”) preliminarily enjoined FilmOnX from operating its service within the Ninth Circuit. *See Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (“*BarryDriller*”), *appeal docketed sub nom. Fox Television Stations, Inc. v. Aereokiller, LLC*, Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013) (the “California Action”). In the California Action, FilmOnX argued that because its system was designed such that each viewer who watches television on FilmOnX receives a separate transmission, its service makes only “private,” not “public,” performances and is therefore not infringing. *Id.* at 1143. In other words, according to FilmOnX, if one thousand or one million people log onto FilmOnX at the same time to watch a live broadcast of the Super Bowl, this is somehow not a public performance of the Super Bowl by FilmOnX. Instead, according to FilmOnX’s logic, it is actually just one thousand or one million “private” performances of the Super Bowl, for which FilmOnX cannot be liable.

FilmOnX predicated its argument on the Second Circuit’s decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”) and the Southern District of New York’s decision in *American Broadcasting Companies, Inc. v. Aereo*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012), *aff’d*, 712 F.3d 676 (2d Cir. 2013) (“*Aereo*”). In *Cablevision*, the court reasoned that a service which transmits copyrighted programming to numerous subscribers using a device or process that sends each viewer an individual transmission from an individual copy does not publicly perform the programming. This is because the Second Circuit viewed

each transmission as a separate performance and held on the facts before it that there could be no public performance unless a single transmission was capable of being received by multiple recipients. In *Aereo*, the Second Circuit extended its prior interpretation of the Transmit Clause in *Cablevision* to an unlicensed Internet service retransmitting live broadcasts of copyrighted programming. As recognized by copyright scholars, the Second Circuit’s interpretation of the Transmit Clause contradicts the statute’s plain language and Congress’s intent, and leads to absurd results. *See WNET, Thirteen v. Aereo, Inc.*, --- F.3d ---, 2013 WL 3657978, at *5 n.13 (2d Cir. July 16, 2013) (Chin, J., dissenting from the denial of rehearing *en banc*) (cataloguing commentary); Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists In Poor (Cable)Vision* (The Media Institute, April 23, 2013) (“Ginsburg, *Poor (Cable)Vision*”);² *infra* at 20-23.

The California Court agreed and rejected the Second Circuit’s interpretation of the statute. *BarryDriller*, 915 F. Supp. 2d at 1143-44, 1146. Based on a detailed analysis of the Copyright Act and its legislative history, the California Court correctly held that FilmOnX publicly performs copyrighted programs when it retransmits the broadcasts of those programs to numerous subscribers over the Internet. That is true regardless of whether it uses a system that makes separate transmissions to individual subscribers because Congress made clear in the Transmit Clause that retransmitting the same broadcast of a program to multiple viewers using “any device or process” constitutes public performance no matter what technology a service uses. *See generally id.*

The California Court further concluded that FilmOnX’s infringing service causes irreparable injury to Plaintiffs, including to their ability to negotiate with licensees and

² For the Court’s convenience, Plaintiffs have included the articles on which they rely in an Appendix to this brief.

advertisers and develop their own Internet distribution channels, and to their goodwill with licensees. *Id.* at 1147. Every other court to have considered the issue has likewise held that the unauthorized streaming of broadcast programming over the Internet irreparably harms Plaintiffs' and other owners of copyrights in broadcast programming. *See infra* at 24-25.

Although it enjoined FilmOnX, the California Court limited the geographic scope of its injunction to the Ninth Circuit because of misplaced concerns about comity, given the possibility that other circuits "might adopt" the Second Circuit's construction of the Transmit Clause in *Cablevision*, although none has done so.³ *See Barry Driller*, 915 F. Supp. 2d at 1148. FilmOnX therefore has continued streaming Plaintiffs' copyrighted programming to viewers outside of the Ninth Circuit, including in the District of Columbia. Accordingly, Plaintiffs were required to file this action to stop FilmOnX's ongoing infringement.

Shortly after this action was filed, FilmOnX's founder and majority-owner, Alkiviades David, published an "open letter," in which he stated, in response to the lawsuit, that FilmOnX "ha[d] decided to take down [network broadcasts] in Washington, D.C."⁴ And FilmOnX did, in fact, briefly discontinue retransmission of Washington, D.C. broadcasts of Plaintiffs' programming. When Plaintiffs contacted FilmOnX, however, and asked if it would agree to stipulate to a preliminary injunction and to discontinue its infringing retransmission of their programming in Washington, D.C. and elsewhere, pending the resolution of the Ninth Circuit appeal in the California Action, FilmOnX refused. FilmOnX subsequently restarted its retransmission of Plaintiffs' Washington, D.C. network broadcasts and, on June 25, filed a

³ FilmOnX appealed the California Court's granting of an injunction and Plaintiffs appealed the limited scope of the injunction. The Ninth Circuit has set oral argument for August 27, 2013.

⁴ Available at <http://news.cision.com/filmon-live-tv/r/open-letter-to-broadcasters-from-filmon-s-alki-david,c9421596>.

counterclaim in this action, asking the Court to declare that it does not infringe Plaintiffs' copyrights by doing so. Accordingly, Plaintiffs have filed this motion to protect their copyrighted programming against infringement that FilmOnX has now made clear it does not intend to stop. Plaintiffs respectfully request that this Court preliminarily enjoin FilmOnX's infringing service *nationwide*, as required by Section 502(b) of the Copyright Act, which provides that copyright injunctions "shall be operative throughout the United States" and "enforceable" by any court with personal jurisdiction over the infringer.

BACKGROUND

A. Plaintiffs And Their Programming.

Plaintiffs are the major broadcast television networks and the owners of local broadcast stations WRC-TV, WJLA-TV, WTTG, and WUSA. The network Plaintiffs produce and license television programs that appear on over-the-air broadcast stations in Washington, D.C. and across the country, many of which are affiliated with the FOX, NBC, ABC, and CBS broadcast television networks. They invest significant resources in the development, acquisition, and production of this programming, which includes such popular shows as *Glee* (FOX), *The Office* (NBC), *Grey's Anatomy* (ABC), and *The Good Wife* (CBS). The network Plaintiffs own the copyrights in these and other television programs. Declaration of Sherry Brennan ("Brennan Decl."), ¶ 2, Ex. A; Declaration of Marsha Reed ("Reed Decl."), ¶¶ 4-5, Exs. 1, 2; Declaration of Carly Seabrook ("Seabrook Decl."), ¶ 2, Exs. 1, 2; Declaration of Rebecca Borden ("Borden Decl."), ¶¶ 4-5, Exs. 1, 2; Declaration of Daniel M. Kummer ("Kummer Decl."), ¶¶ 4-6, Exs. 1-3. The local broadcaster Plaintiffs operate Washington, D.C.-area stations that air both programs owned by other copyright owners, such as network programs and Washington Nationals baseball telecasts, and other programming, such as the ABC 7 News at 6 and WUSA 9 News at 6 p.m., in

which they own the copyrights. *See* Declaration of William H. Lord (“Lord Decl.”), ¶¶ 3-7, Exs. 1-3; Declaration of Barbara W. Wall (“Wall Decl.”), ¶¶ 3-7, Exs. 1-3.

B. FilmOnX’s Unlicensed Broadcast Retransmission Service.

FilmOnX captures and transcodes live, over-the-air broadcast television signals and streams those signals over the Internet to viewers. Simply by clicking on a particular broadcast station listed on the program guide that FilmOnX provides on the www.filmox.com website, a visitor to that site is able to view on her laptop or personal computer the programming airing live on that station at that time, just like a subscriber to a cable system can view the same program by turning on her television set. Declaration of Julie A. Shepard (“Shepard Decl.”), ¶ 13, Ex. E. FilmOnX viewers can watch the programming by visiting www.filmox.com, or by using one of FilmOnX’s “apps,” which are compatible with iPhones, Android phones, Facebook and Microsoft’s Windows 8. *Id.*, ¶¶ 7, 10-11, 19, Ex. K. Just like cable and satellite providers, FilmOnX retransmits Plaintiffs’ broadcast programming 24 hours a day, 7 days a week. FilmOnX viewers in Washington, D.C. are able to watch not only telecasts by stations licensed to the Washington, D.C. market, but also stations licensed to distant markets (*e.g.*, New York), stations they would not otherwise be able to view off-air. *Id.*, ¶ 13, Ex. E.

FilmOnX is a commercial enterprise that profits from its retransmissions of Plaintiffs’ programming. It charges fees to subscribers to receive High Definition signals and to copy programming for later viewing. *Id.*, ¶ 14, Ex. F. While FilmOnX does not currently charge subscribers to watch retransmitted broadcast programming live in standard definition, it derives advertising revenue from those retransmissions. It sells advertising spots — commercials — that viewers see immediately after selecting a broadcast channel and before they can view the selected channel. *Id.*, ¶ 16, Ex. G; Brennan Decl., ¶ 31. FilmOnX also advertises its own

programs and affiliated services through banner ads displayed directly above the unauthorized displays of Plaintiffs' broadcasts. Shepard Decl., ¶ 17, Exs. H & I.

FilmOnX launched its service in August 2012 by streaming the signals of broadcast television stations from the Los Angeles, Chicago, New York, and Minneapolis markets.⁵ *Id.*, ¶¶ 2-3. After Plaintiffs filed the California Action, FilmOnX (then known as "Aereokiller")⁶ expanded its service to stream broadcast stations from Washington, D.C., Dallas, San Francisco, Miami, and Las Vegas. *Id.*, ¶ 5.

C. FilmOnX's Technology.

According to FilmOnX, it houses thousands of "mini-antennas" and digital recording devices at central locations in several cities across the country. When a subscriber selects a particular broadcast station on FilmOnX's website or one of its apps, the FilmOnX system assigns that subscriber a mini-antenna. These are not dedicated antennas. Instead, FilmOnX alleges that it assigns a different mini-antenna each time a subscriber logs on. The antenna receives the signal of the broadcast station chosen by the subscriber. FilmOnX's technology, which it describes as "routers, servers, adapters, tuners, transcoders and other equipment," then streams a transcoded version of that signal purportedly from individualized subscriber-associated

⁵ Only days earlier, one of FilmOnX's affiliated companies had agreed to a consent judgment that permanently enjoined its unauthorized streaming of Plaintiffs' programming over the Internet. Shepard Decl., Ex. N (*CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10-7532, Dkt. No. 49 (S.D.N.Y. Aug. 9, 2012)).

⁶ FilmOnX originally made its service available at www.barrydriller.com. Barry Diller (a principal investor in the Aereo service that FilmOnX seeks to mimic) obtained an injunction preventing FilmOnX's use of his name. *See Diller v. Barry Driller, Inc.*, No. 12-7200, 2012 WL 4044732 (C.D. Cal. Sept. 10, 2012). FilmOnX then began calling its service "Aereokiller," but redirected its viewers to www.filmox.com. Following a subsequent trademark suit, FilmOnX agreed to a consent injunction against further use of the name "Aereokiller." *See Aereo, Inc. v. FilmOn.com, Inc.*, No. 13-01612, Dkt. No. 47 (C.D. Cal. May 20, 2013).

copies over the Internet to the subscribers' Internet-connected devices, such as smartphones, tablets, laptops, and personal computers.

D. The California Action.

In August 2012, certain Plaintiffs sued FilmOnX for copyright infringement in the Central District of California and sought a preliminary injunction.⁷ Shepard Decl., ¶ 3. In finding that Plaintiffs were likely to succeed on the merits of their infringement claims against FilmOnX, the California Court noted there is no dispute that FilmOnX retransmits the broadcasts of programming in which Plaintiffs own the copyrights to “thousands, and potentially millions of people.” The only issue was whether FilmOnX engages in public performances of that programming. *BarryDriller*, 915 F. Supp. 2d at 1143, 1145 n.12. The California Court concluded that FilmOnX’s retransmissions are “public performances, and therefore infringe Plaintiffs’ exclusive right of public performance.” *Id.* at 1143.

Based on FilmOnX’s representations, the California Court assumed that its technology was as described in Section C, above. *See id.* at 1140-41. After the California Court concluded that FilmOnX makes public performances under the plain language of the Transmit Clause, the court turned to the question of whether it should follow the Second Circuit’s interpretation of the Transmit Clause and hold that FilmOnX’s transmissions were “private” instead of “public.” *Id.* at 1143.

The California Court carefully considered whether the courts in *Cablevision* and *Aereo* had properly interpreted the Transmit Clause. After reviewing the statutory language and legislative history, the California Court concluded that those courts had misconstrued the statute and reached results contrary to congressional intent. *Id.* at 1143-46. As the California Court

⁷ The local broadcaster Plaintiffs (Gannett and Allbritton), which do not operate television stations in Los Angeles, were not plaintiffs in the California Action.

explained, under the Transmit Clause, anyone who transmits the “performance . . . of [a] work” “to the public” by “means of any device or process” publicly performs that work. *Id.* at 1143 (citing 17 U.S.C. § 101). The California Court therefore found that the *Cablevision* and *Aereo* courts misread the statute as equating “transmission” with “performance.” *Id.* at 1143-45 & n.10. In other words, the Second Circuit mistakenly viewed the statute as requiring that each *transmission* of a performance must itself be “to the public” and focused incorrectly on the potential audience for each *transmission*, instead of the fact that the services at issue were retransmitting broadcasts of copyrighted programming (*i.e.*, *performances of works*) to “thousands, and potentially millions, of people.” *Id.* at 1146 & n.12.

The California Court recognized the Transmit Clause “does not by its express terms require that two members of the public receive the performance from the same transmission.” *Id.* at 1144. Accordingly, the California Court found that “*Cablevision*’s focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.” *Id.* at 1145. Instead, under the language and legislative history of the Transmit Clause, “the concern is with the performance of the copyrighted *work*, irrespective of which copy of the work the transmission is made from.” *Id.* at 1144. The California Court found that because FilmOnX retransmitted broadcasts of Plaintiffs’ programs to the public, it engaged in public performance and Plaintiffs were therefore likely to succeed on the merits of their copyright infringement claims. *Id.* at 1143-46.

The California Court also found that Plaintiffs had demonstrated that FilmOnX threatened to cause Plaintiffs multiple irreparable harms, including damage to Plaintiffs’ ability to (i) negotiate retransmission agreements with cable, satellite, and other telecommunications providers; (ii) develop their own Internet distribution channels; (iii) negotiate with advertisers;

and (iv) preserve their goodwill with licensees. *Id.* at 1147. The California Court further noted that these harms are irreparable because they are difficult to calculate and not easily compensable, and also because FilmOnX was unlikely to be able to satisfy a statutory damages award for what could well amount to unlawfully retransmitting literally thousands of copyrighted television programs. *Id.*; *see* 17 U.S.C. § 504(c). And it concluded that: (a) the harm to Plaintiffs outweighed any harm to FilmOnX which has “no equitable interest in continuing an infringing activity,” *BarryDriller*, 915 F. Supp. 2d at 1147-48; and (b) the public interest would be served by an injunction that “uphold[s] copyright protections and correspondingly, prevent[s] the misappropriation of skill, creative energies and creative resources which are invested in the protected work[s].” *Id.* at 1148.

While the California Court entered a preliminary injunction against FilmOnX, it found that “principles of comity prevent the entry of an injunction that would apply” in the Second Circuit, where the courts in *Cablevision* and *Aereo* had interpreted the Transmit Clause differently from the California Court. *Id.* The California Court also suggested that courts in other circuits “might adopt” the *Cablevision* and *Aereo* construction, even though none has done so. *See id.* Accordingly, the California Court limited the geographic scope of its injunction to the geographic boundaries of the Ninth Circuit. *Id.* As a result, FilmOnX has continued offering its infringing service outside the Ninth Circuit, including in Washington, D.C. and other cities. Plaintiffs filed this action to prevent FilmOnX’s ongoing infringement and the irreparable harm it is causing them outside the Ninth Circuit.

ARGUMENT

Plaintiffs may obtain a preliminary injunction by establishing that they are “likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of

preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); accord *Aamer v. Obama*, --- F. Supp. 2d ---, 2013 WL 3651393, at *3 (D.D.C. July 16, 2013) (Collyer, J.). All four factors support a preliminary injunction against FilmOnX’s unauthorized broadcast retransmission service.

I. Plaintiffs Are Likely To Succeed On The Merits Of Their Copyright Infringement Claim.

To establish copyright infringement, a plaintiff must show (1) ownership of a valid copyright, and (2) violation by the defendant of any of one of the six exclusive rights granted to copyright owners under 17 U.S.C. § 106. *AF Holdings LLC v. Does 1-1,058*, 286 F.R.D. 39, 53 (D.D.C. 2012); accord *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). There is no dispute that Plaintiffs own the copyrights to programs that FilmOnX streams to the public. See Brennan Decl., Ex. A; Reed Decl., Ex. 2; Borden Decl., Ex. 2; Seabrook Decl., ¶ 2, Ex. 2; Kummer Decl., Exs. 2-3; Lord Decl., Exs. 2-3; Wall Decl., Exs. 2-3. There is also no dispute that Plaintiffs have the exclusive rights to license the retransmission of broadcasts of those programs. See *EchoStar Satellite L.L.C. v. F.C.C.*, 457 F.3d 31, 33 (D.C. Cir. 2006) (“A network television broadcaster generally has ‘exclusive rights,’ pursuant to the Copyright Act . . . to authorize the public display of its copyrighted content, including the retransmission of its broadcast signal.”). As in the California Action, Plaintiffs’ likelihood of success therefore turns on whether FilmOnX publicly performs, as defined by the Transmit Clause, when it retransmits the same broadcast of a television program to “thousands, and potentially millions” of subscribers — each of whom allegedly receives a separate retransmission of that broadcast by virtue of FilmOnX’s use of individually-assigned “mini-antennas” and unique copies. As the California Court correctly held, FilmOnX’s retransmissions are public performances.

A. The Language And History Of The 1976 Copyright Act Make Clear That FilmOnX Publicly Performs Copyrighted Programming.

1. Because It Retransmits The Same Broadcast Of A Television Program To Multiple Subscribers, FilmOnX Falls Squarely Within The Transmit Clause.

The analysis of FilmOnX’s liability begins with the language of the Copyright Act. *See Henke v. U.S. Dep’t of Commerce*, 83 F.3d 1453, 1459 (D.C. Cir. 1996) (“[S]tatutory interpretation begins with the language of the statute itself.”) (quoting *Penn. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990)). Section 106(4) of the Copyright Act, 17 U.S.C. § 106(4), affords copyright owners the exclusive right to “perform the copyrighted work publicly.” Section 101 states that “[t]o 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.**

Id. § 101 (emphasis added). Clause (2) is the “Transmit Clause.” “To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.* “A ‘device’ . . . or ‘process’ is one now known or later developed.” *Id.*

FilmOnX satisfies each element of the Transmit Clause. It (1) “transmits” (communicates beyond the place from which it sends); (2) “to the public” (any number of viewers who visit its website or use its apps); (3) by “means of any device or process” “now known or later developed” (mini-antennas, routers, servers, tuners, transcoders and other equipment); (4) a “performance . . . of [a] work” (a particular broadcast of a television program).

See 1976 Report (under the definition of “perform,” “a local broadcaster is performing when it transmits the network broadcast”); *BarryDriller*, 915 F. Supp. 2d at 1145-47.

Under the plain language of the Transmit Clause, FilmOnX thus publicly performs Plaintiffs’ copyrighted programs by retransmitting broadcasts of those programs to the public by means of its system of miniature antennas, copies, and the Internet. Because it has no license to do so, that is copyright infringement.

2. Congress Did Not Provide A Technology Exception To The Transmit Clause.

In the California Action, FilmOnX asserted that the “device and process” it purportedly uses — *i.e.*, miniature antennas and individual copies — allows it to avoid the Transmit Clause and liability because it makes separate retransmissions of the same broadcast to each of its viewers. See *id.* at 1143. In other words, according to FilmOnX, it may, for example, stream the season finale of *American Idol* “live” to 50,000 subscribers without a license and yet, because each subscriber is assigned an individual antenna and a unique copy of the broadcast, FilmOnX has not publicly performed *American Idol* and these are all “private” performances that do not give rise to copyright liability. This argument is foreclosed by the plain language of the Copyright Act. 17 U.S.C. § 101; *BarryDriller*, 915 F. Supp. 2d at 1144-45 & n.10.

The Transmit Clause applies regardless of “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.” 17 U.S.C. § 101. “The phrase ‘members of the public capable of receiving the performance’ is not intended to narrow the universe of ‘the public.’ On the contrary, its role is to clarify that a transmission is still ‘to the public’ even if its receipt is individualized.” Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, 26 (Columbia Law Sch. Pub. Law & Legal Theory

Working Paper Grp., Paper No. 08158, Dec. 1, 2008) (published in 218 *Revue Internationale du Droit d'Auteur* (2008) (Fr.)) (“Ginsburg, *Recent Developments*”). In addition, that separate transmissions can be to the public is made clear by the statutory language covering reception at different times. *Id.* at 26-27. The statutory text thus reflects Congress’s intent that the Transmit Clause would apply even where a service makes separate transmissions, as FilmOnX claims to do.

Moreover, the Transmit Clause is expressly technology-neutral. It plainly states that transmitting a performance of a work to the public “by means of *any* device or process” “now known or later developed” is a public performance. 17 U.S.C. § 101 (emphasis added). As Judge Green of this Court has held, “the term ‘public performance’ was meant to be read broadly” and “‘it would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public.’” *Nat’l Cable Television Ass’n, Inc. v. Broad. Music, Inc.*, 772 F. Supp. 614, 650-51 (D.D.C. 1991) (internal citations omitted) (concluding that cable networks publicly perform a program when they retransmit that program to subscribers).

Congress repeated the same “any device or process” language in the statutory definition of the term “transmit.” To “transmit” a performance of a work under the Act means to “communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” *See* 17 U.S.C. § 101. The definition of “device or process,” which includes those “now known or later developed” (*id.*), further underscores the fact that Congress intended the Transmit Clause to capture all possible technologies, even those not in existence when the statute was enacted.

The legislative history confirms Congress’s intent to embrace all types of technologies within the Transmit Clause:

The definition of “transmit” . . . is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a “transmission,” and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106.

1976 Report at 64; *see also id.* at 63 (noting that a “performance may be accomplished ‘either directly or by means of any device or process,’ including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques *and systems not yet in use or even invented*”) (emphasis added).

Further, Congress expressly noted, the “approach of the [1976 Act] is to set forth the copyright owner’s exclusive rights *in broad terms* in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow.” *Id.* at 61 (emphasis added). Congress likewise “state[d] the public performance right in broad terms[.]” *Id.* at 62. And it “enacted the transmit clause to make the performance right as broad as possible[.]” Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 Or. L. Rev. 505, 541 (2010) (“Malkan”). In doing so, Congress followed the advice of the Register of Copyrights:

Obviously no one can foresee accurately and in detail the evolving patterns in the ways author’s works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright A real danger to be guarded against is that of confining the scope of an author’s rights on the basis of the present technology so that, as the

years go by, his copyright loses much of its value because of unforeseen technical advances.

11 Comm. on the Judiciary, 89th Congress, 1st Sess., *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill* at 13-14 (Comm. Print 1965). Congress “conceived of the exclusive rights broadly [and] encouraged courts to interpret them so as to avoid their erosion as a result of unforeseen technological changes[.]” Peter Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 2012 J. Copyright Soc’y of the U.S.A., at 57-58 (Aug. 26, 2011).

Thus, FilmOnX’s argument that the “device or process” it uses to retransmit programs to the public somehow only makes “private” performances is contrary to the plain language of the Copyright Act and its legislative history and would require an interpretation at odds with the law of this Circuit. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (explaining that a court must first “determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case”) (internal quotation marks omitted); *accord BarryDriller*, 915 F. Supp. 2d at 1144-45. The Transmit Clause’s “any device or process” language is unambiguous; it cannot be read as exempting FilmOnX or any other broadcast retransmission devices and processes from public performance liability. *See BarryDriller*, 915 F. Supp. 2d at 1143-44; *accord Aereo*, 712 F.3d at 698-99 (Chin, J., dissenting).

3. Congress Intended To Include Broadcast Retransmission Services Such As FilmOnX Within The Scope Of The Transmit Clause.

In the California Action, FilmOnX argued that because members of the public have the right to receive over-the-air broadcast television, FilmOnX does not need a license to retransmit live broadcasts of Plaintiffs’ programs to its customers. This is the exact reasoning that Congress

rejected in the 1976 Copyright Act when it legislatively overturned the Supreme Court’s *Fortnightly* and *Teleprompter* decisions. *BarryDriller*, 915 F. Supp. 2d at 1146.

In *Fortnightly* and *Teleprompter*, the Supreme Court held that cable systems were not subject to public performance liability under the 1909 Copyright Act because they merely allowed viewers to do what they could do on their own, *i.e.*, receive broadcast television signals with an antenna. *See Fortnightly*, 392 U.S. at 399-400 (cable systems “[e]ssentially” do “no more than enhance[] the viewer’s capacity to receive the broadcaster’s signals” by “provid[ing] a well-located antenna with an efficient connection to the viewer’s television set The only difference in the case of [cable] is that the antenna system is erected and owned not by its users but by an entrepreneur.”); *Teleprompter*, 415 U.S. at 408 (“The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. . . . [Thus,] [t]he reception and rechanneling of [broadcast television] signals for simultaneous viewing is essentially a viewer function” not subject to copyright liability).

In enacting the Transmit Clause as part of the 1976 Copyright Act, Congress rejected that equivalency, reasoning that unlike individual viewers, “cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . [thus] copyright royalties should be paid by cable operators to the creators of such programs.” *BarryDriller*, 915 F. Supp. 2d at 1146 (citing 1976 Report at 88-89). Accordingly, Congress determined that retransmission services publicly perform copyrighted programming and therefore must be licensed. *See Capital Cities Cable*, 467 U.S. at 709-10 (“Prior to the 1976 revision, the [Supreme] Court had determined that the retransmission of distant broadcast signals by cable systems did not subject cable operators to copyright infringement liability because such

retransmissions were not ‘performances’ within the meaning of the 1909 Act. In revising the Copyright Act, however, Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement.”) (internal citations omitted).

FilmOnX is no different from other broadcast retransmission services such as cable or satellite television providers. It is a commercial enterprise whose operation is based upon the exploitation of copyrighted programming. Pursuant to the Transmit Clause, all of these services must secure licenses to retransmit over-the-air broadcasts to subscribers. Any argument that FilmOnX is somehow exempt from this requirement because it does what viewers could have done for themselves ignores the changes Congress made to copyright law more than 35 years ago.

B. *Cablevision* And *Aereo* Misread The Transmit Clause And Thus Provide No Defense To FilmOnX.

FilmOnX’s principal argument against public performance liability has been that its service comes within a perceived loophole in the law created by two non-controlling decisions from the Second Circuit, *Cablevision* and *Aereo*. This Court should reject FilmOnX’s argument and the misreading of the Transmit Clause in those decisions on which it is based.

Cablevision involved a traditional cable system (Cablevision Systems Corporation (“Cablevision”)) that had obtained, and paid for, licenses to retransmit copyrighted programming. The dispute concerned Cablevision’s unlicensed remote-storage digital video recorder (“RS-DVR”) service. This service operated in a manner similar to a regular stand-alone DVR, except that copies of the programs that a subscriber requested to be recorded were stored on a remote server instead of on the subscriber’s in-home set-top box. 536 F.3d at 124-25. When a subscriber used her remote control to play back a program, Cablevision’s system

transmitted the program from the remote server to her television, using the copy that the subscriber previously requested. *Id.* The question in *Cablevision* was whether these time-shifted transmissions from recorded copies constituted public performances requiring a second set of licenses. *Id.* at 134. The *Cablevision* court answered that question in the negative. *Id.* at 136-40.

In reaching this conclusion, the Second Circuit misconstrued the Transmit Clause. The *Cablevision* court mistakenly reasoned that “[t]he fact that the statute says ‘capable of receiving the performance,’ instead of ‘capable of receiving the transmission,’ underscores the fact that transmission of a performance is itself a performance.” *Id.* at 134 (citations omitted); *BarryDriller*, 915 F. Supp. 2d at 1143-46 (criticizing *Cablevision*’s reasoning). The fundamental flaw in the court’s analysis was its erroneous focus on the potential audience for *each individual transmission* of a recorded broadcast — rather than, as required by the plain language of the Transmit Clause, whether a “*performance of a work*” is being transmitted to the public. *Id.* at 136-39. By concentrating only upon the potential audience for *each transmission*, the court improperly replaced the term “performance” in the Transmit Clause with the term “transmission,” thereby effectively rewriting the clause to read:

to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the ~~performance~~ **transmission** or display receive ~~it~~ **the transmission** in the same place or in separate places and at the same time or at different times.

BarryDriller, 915 F. Supp. 2d at 1144 n.10; *see Aereo*, 2013 WL 3657978, at *6 (Chin, J., dissenting from the denial of rehearing *en banc*) (criticizing the Second Circuit’s analysis and noting that “unless a contrary result is readily apparent, we generally presume Congress intends different terms in the same statute to have different meanings”). Indeed, several commentators

have recognized the Second Circuit’s error.⁸

Applying its revised version of the Transmit Clause, the Second Circuit reasoned that unless a *single* transmission is capable of being received by multiple people, the transmitter has not infringed the public performance right. *Cablevision*, 536 F.3d at 134-40; *see also Aereo*, 712 F.3d at 689-90. This reasoning was wrong and conflicts with the statute.

As an initial matter, the Transmit Clause does not say that a performance is public only if it is delivered to multiple people in a single transmission. The Transmit Clause says it is a public performance to “transmit” a “performance” of the work “to the public.” *See* 17 U.S.C. § 101. This does not require a single transmission to the public. Rather, one can transmit a copyrighted program to the public *either* by transmitting a performance of it at one time to many people (like a television broadcast) *or* by transmitting the same performance at different times to many different people (like video-on-demand). As the California Court noted, the statute “does not by its express terms require that two members of the public receive the performance from the same transmission.” *BarryDriller*, 915 F. Supp. 2d at 1144.

To the contrary, the Transmit Clause expressly provides that it does not matter whether a performance of a work is received “at the same time or at different times.” By focusing on the individual transmissions in isolation, the Second Circuit effectively and improperly read the “different times” language out of the statute:

⁸ *See* 2 Paul Goldstein, *Goldstein on Copyright* § 7.7.2 at 7:168 (3d ed. 2012 Supp.) (“The error in the Second Circuit’s construction of the transmit clause was to treat ‘transmissions’ and ‘performance’ as synonymous, where the Act clearly treats them as distinct — and different — operative terms. . . . There can be little doubt that the . . . word *it* in the definition refers to ‘performance or display,’ not transmission[.]”); Ginsburg, *Recent Developments, supra*, at 26 (“the court confused ‘performance’ and ‘transmission’”); Malkan, *supra*, at 536 (the court “thought that the words ‘performance’ and ‘transmission’ were interchangeable . . . [but] a transmission and a performance remain, technically and legally, two distinct things”); *id.* at 553 (“The principal error in the court’s application of the transmit clause was that it substituted the word ‘transmission’ for the word ‘performance’ in the phrase ‘capable of receiving the performance[.]’”).

The court's construction clashes with the text of the Act in another important way as well: it is not possible to transmit a performance "created by *the* act of transmission" to members of the public "at different times." While such a "performance" could be transmitted simultaneously to differently located recipients, recipients differently situated in time cannot receive the same transmission. The court's interpretation thus reads non simultaneous receipt out of the statute.

Ginsburg, *Recent Developments, supra*, at 26; *see id.* at 26-27 ("Because the Act explicitly covers performances that are transmitted to members of the public who are separated in time, however, the Second Circuit's statutory construction cannot be correct."). By reading the "different times" language out of the statute, the Second Circuit violated a fundamental rule of statutory construction. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotation marks and alterations omitted)); *Am. Petrol. Inst. v. S.E.C.*, 714 F.3d 1329, 1334 (D.C. Cir. 2013) (same).

The Second Circuit attempted to square its interpretation of the Transmit Clause with the "different times" language in the statute by explaining that there is a public performance if a service transmits copyrighted programs from a master copy, but not a public performance if the service transmits the programs from separate, subscriber-associated copies. *Aereo*, 712 F.3d at 688-89 & n.11. This ruling compounded the court's error since the Transmit Clause does not say anything about separate copies or master copies — it says "*any device or process.*" 17 U.S.C. § 101 (emphasis added). The legislative history likewise says nothing about separate copies or master copies. Copyright law protects *the copyrighted work*, not any particular copy of that work. The California Court was plainly correct when it rejected this aspect of *Cablevision*, holding that "the concern [under the Copyright Act] is with the performance of the copyrighted

work, *irrespective of which copy of the work the transmission is made from.*” *BarryDriller*, 915 F. Supp. 2d at 1144 (emphasis added).⁹

Finally, the Second Circuit’s belief that any other interpretation would “obviate[] any possibility of a purely private transmission” was clearly wrong. *See* 536 F.3d at 136. The court believed that if each transmission were not viewed as a separate performance, then “a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public.” *Id.* But it is not necessary to rewrite the statute to avoid this result. The “hapless customer” in the Second Circuit’s hypothetical has not publicly performed the program because he did not transmit it to the public, he transmitted it *to himself in his bedroom*. *See* 17 U.S.C. § 101 (to perform a work publicly is to “transmit a performance or display of the work . . . to the public[.]”); *see also BarryDriller*, 915 F. Supp. 2d at 1145 & n.12 (referring to the Second Circuit’s “hapless customer” hypothetical and noting that “[t]here is nothing public about such a performance”).¹⁰

⁹ The idea that transmissions to the public from a master copy are public performances, while transmissions from individual copies are not, originated in the Nimmer copyright treatise. *See Cablevision*, 536 F.3d at 138 (citing 2 Neville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][3], at 8-142 (2007)). As the *Cablevision* court noted, however, Nimmer never explained “why the use of a distinct copy affects the transmit clause analysis.” *Id.* Professor Nimmer, for his part, acknowledges that distinguishing between public and private performances based on whether they emanate from a master copy or multiple copies produces absurd results. *See 2 Nimmer*, § 8.14[C][3], at 8-142 (recognizing that, under the author’s theory, a person who rents a movie from a video store engages in public performance because DVDs containing the same copy of the movie are rented and watched by others). Of course, a person sitting in his living room watching a rented DVD of *Bravehart* is neither playing the movie in a public place nor transmitting it to anyone and therefore is not engaged in public performance. *See* 17 U.S.C. § 101.

¹⁰ While it is true that a court should not aggregate the transmissions of a particular performance by multiple entities to determine if there is a public performance, that is not the case where there is a single commercial retransmission service like FilmOnX. Moreover, *Cablevision* held only that there is no aggregation with *another* entity’s transmissions. 536 F.3d at 136-37. Plaintiffs are not arguing to the contrary here.

Although the *Cablevision* court was careful to “emphasize” that its holding did “not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving subscribers the capacity to make their own individual copies,” 536 F.3d at 139, the Second Circuit ignored its own admonition in *Aereo*. *Aereo* involved an Internet retransmission service that designed its system around the perceived loophole in the Transmit Clause created by *Cablevision*. Instead of using a single antenna to capture broadcast signals, Aereo uses thousands of miniature antennas, which it rotates among its subscribers as they log in to watch broadcast programming. 712 F.3d at 682. When a subscriber watches live television on Aereo, the signal from the antenna temporarily assigned to her is routed to Aereo’s server, which starts copying the program. *Id.* Aereo then streams the program over the Internet in real time to the subscriber from this copy. *Id.* On April 1, 2013, a divided panel of the Second Circuit concluded that, under *Cablevision*’s interpretation of the Transmit Clause (which it was bound to follow as a matter of *stare decisis* (*id.* at 695)), Aereo does not publicly perform copyrighted broadcast programming by streaming it live over the Internet to subscribers because every Aereo subscriber receives an individual transmission from a “unique copy” of the program. *Id.* at 689-90.

Aereo now stands as the lone exception in a line of cases, both within and outside the United States, where courts have enjoined services from retransmitting live broadcast television programming over the Internet without copyright owner consent. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 288 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013); *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10-7532, Dkt. No. 49 (S.D.N.Y. Aug. 9, 2012) (consent judgment); *Am. Broad. Cos., Inc. v. Hang 10 Techs., Inc.*, No. 09-6216, Dkt. No. 9 (D.N.J. Jan. 4, 2010) (consent

judgment); *Twentieth Century Fox Film Corp. v. iCraveTV*, Nos. 00-120, 00-121, 2000 WL 255989, at *1 (W.D. Pa. Feb. 8, 2000); *ITV Broad. Ltd. v. TVCatchup Ltd.*, Case C-607/11 (E.C.J. Mar. 7, 2013). By extending *Cablevision* to exempt a broadcast retransmission service from public performance liability, the *Aereo* court ignored Congress's refusal to make copyright protection under the Transmit Clause turn on the specific technology used to transmit performances to the public. 17 U.S.C. § 101 (broadly encompassing "any device or process . . . [whether] now known or later developed"); *Aereo*, 2013 WL 3657978, at *10 (Chin, J., dissenting from the denial of rehearing *en banc*). The "inquiry should be a functional one, as set forth in the statute: does the device or process transmit a copyrighted performance or display to the public? In *Aereo*'s case, the answer is clearly yes." *Id.* The same is true for *FilmOnX*.

II. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction.

Every court that has considered the question of whether unauthorized Internet streaming of television and other video programming causes irreparable harm to the copyright owners has concluded unequivocally that it does. *See BarryDriller*, 915 F. Supp. 2d at 1147; *Aereo*, 874 F. Supp. 2d at 396-400; *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 617-20 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275 (2d Cir. 2012); *CBS Broad. Inc. v. FilmOn.com*, No. 10-7532, Dkt. No. 8 (S.D.N.Y. Nov. 22, 2010); *iCraveTV*, 2000 WL 255989, at *8; *accord Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1012-13 (C.D. Cal. 2011). Irreparable harm is established where an infringing defendant's activities threaten to impair a copyright owner's control over its copyrighted works, threaten the goodwill and business reputation of the plaintiff, or threaten to cause loss of business or business opportunities. *See, e.g., BarryDriller*, 915 F. Supp. 2d at 1147; *ivi*, 691 F.3d at 285-87; *WTV Sys.*, 824 F. Supp. 2d at 1012-13; *Bayer HealthCare, LLC v. U.S. F.D.A.*, --- F. Supp. 2d ---, 2013 WL 1777481, at *7 (D.D.C. Apr. 17,

2013) (Collyer, J.) (“decline in market share” and “loss of customer good will” constitute irreparable harm). Like other unlicensed retransmission services, FilmOnX threatens to harm Plaintiffs in each of these ways:

- **Harm to Value in Network and Local Advertising.** FilmOnX threatens to undermine Plaintiffs’ positions in negotiations with advertisers by diverting viewers from distribution channels measured by Nielsen ratings, which are by far the most significant viewership measurements relied upon by advertisers in determining what to pay. Brennan Decl., ¶¶ 9-15. Nielsen does not measure FilmOnX. Given the significance of advertising to network and local station business models, this harm is irreparable. *BarryDriller*, 915 F. Supp. 2d at 1147; *Aereo*, 874 F. Supp. 2d at 397-98.
- **Damaging Plaintiffs’ Ability to Negotiate Retransmission Consent Agreements.** FilmOnX’s unauthorized streaming of copyrighted television programming over the Internet, if left unabated, has the potential to impede Plaintiffs’ ability to negotiate retransmission consent agreements with cable, satellite, and telecommunications providers, who legitimately retransmit the copyrighted broadcasts. *BarryDriller*, 915 F. Supp. 2d at 1147; *ivi*, 691 F.3d at 285; *see* Brennan Decl., ¶¶ 17-19. “If [FilmOnX] can transmit Plaintiffs’ content without paying a fee, Plaintiffs’ existing and prospective licensees will demand concessions to make up the loss of viewership to non-paying alternatives” and may move “away from license-fee paying technologies and toward free technologies” like FilmOnX. *BarryDriller*, 915 F. Supp. 2d at 1147; *accord Aereo*, 2013 WL 3657978, at *2 (Chin, J., dissenting from the denial of rehearing *en banc*); *ivi*, 691 F.3d at 285; *WTV Sys.*, 824 F. Supp. 2d at 1013; *see* Brennan Decl., ¶¶ 15-17. Moreover, “[t]he availability of Plaintiffs’ content from sources other than Plaintiffs also damages Plaintiffs’ goodwill with their licensees.” *BarryDriller*, 915 F. Supp. 2d at 1147; Brennan Decl., ¶ 19; *cf. Bayer HealthCare*, 2013 WL 1777481, at *7.
- **Interference With Lawful Internet Television Distribution.** FilmOnX also threatens to interfere with Plaintiffs’ ability to develop a lawful market for Internet distribution of television programming — whether through licensed entities, such as Hulu (which licenses content from the network Plaintiffs for distribution over Hulu.com) and Apple (which licenses content from the network Plaintiffs for distribution through iTunes), Brennan Decl., ¶¶ 18-20, or over their own websites and other Internet and mobile offerings, such as Fox and NBCU’s “Dyle.TV,” ABC’s “Watch” or Fox’s “Fox Now” services. *Id.* ¶¶ 20-25. FilmOnX competes directly with these services, thereby threatening to damage Plaintiffs’ goodwill with their Internet distribution licensees and to undermine their decisions about how and when to show their programming on the Internet and their substantial investments in the development of this emerging market. *BarryDriller*, 915 F. Supp. 2d at 1147; *WTV Sys.*, 824 F. Supp. 2d at 1014; *ivi*, 691 F.3d at 285-86; *cf. Bayer HealthCare*, 2013 WL 1777481, at *7.
- **Loss of Control Over Content and Threat of Viral Infringement.** Once digital copies of Plaintiffs’ programs are available and released on the Internet, vast viral infringement routinely follows. For this reason, when Plaintiffs license their broadcasts for digital

distribution they contractually require distributors to adopt security measures to prevent piracy. Plaintiffs also impose quality control measures to assure the quality of the viewing experience. Brennan Decl., ¶ 28. By contrast, Plaintiffs have no ability to ensure that FilmOnX or those who copy network programming from FilmOnX are doing anything to prevent further piracy or to assure the quality of retransmissions. *See WTV Sys.*, 824 F. Supp. 2d at 1013-14.

- ***Loss of Program Exclusivity.*** FilmOnX’s retransmission of programming from one market into another destroys the contractual right of local broadcasters to be the exclusive providers of those programs in their own markets, fractionalizing viewership and diminishing ratings that support advertising. Television viewers in Washington, D.C. cannot receive over-the-air broadcast signals from New York stations that are 250 miles away. FilmOnX’s retransmission of New York broadcasts over the Internet into the Washington market thus both belies FilmOnX’s basic premise — that it is simply providing a signal that the viewer could otherwise receive himself — and devalues the exclusive rights of local Washington stations to be the exclusive broadcasters of the copyrighted programs in their separately licensed areas. Brennan Decl., ¶ 19; *ivi*, 765 F. Supp. 2d at 618 (“[B]ecause viewers will be able to watch stations outside of their geographic area, the amount that local advertisers would be willing to pay to advertise during plaintiffs’ broadcasts would fall.”).

The courts have recognized several additional considerations that support a finding of irreparable harm here. *First*, injunctive relief is necessary because the irreparable harms that FilmOnX’s service threatens are “neither easily calculable, nor easily compensable.” *BarryDriller*, 915 F. Supp. 2d at 1147 (quoting *WTV Sys.*, 824 F. Supp. 2d at 1013); *Aereo*, 874 F. Supp. 2d at 398 (finding “[h]arm of this sort has been accepted as irreparable based, at least in part, on the difficulty of . . . quantifying such damages”).

Second, FilmOnX’s likely inability to fully compensate Plaintiffs for the damage accruing further underscores the need for injunctive relief. *See Nalco Co. v. U.S. E.P.A.*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011) (Collyer, J.) (“Where a plaintiff ‘cannot recover damages from the defendant . . . any loss of income suffered by plaintiff is irreparable per se.’”) (citation omitted); *accord Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (the “loss of profits which could never be recaptured” constitute irreparable harm sufficient for equitable relief). Plaintiffs are entitled to recover statutory damages of up to \$150,000 per copyrighted work willfully infringed. *See* 17 U.S.C. § 504(c)(2). FilmOnX, which streams dozens of Plaintiffs’ copyrighted programs every day, is a start-up company and, as such, unlikely to be

able to pay the sizeable statutory damages award that may result if it is held liable for such massive infringement. Accordingly, monetary damages are likely to be insufficient and an injunction should issue. *BarryDriller*, 915 F. Supp. 2d at 1147; *Nalco*, 786 F. Supp. 2d at 188; *Armour*, 304 F.2d at 406.

Finally, all evidence indicates that FilmOnX plans to continue providing, and in fact to expand, its infringing services. According to FilmOnX's owner Alki David, FilmOnX's service is currently available in "35 markets and 14 major cities across the USA" — providing FilmOnX the opportunity to distribute its unauthorized retransmissions to well over 15 million viewers. Shepard Decl., Ex. O. FilmOnX also has developed a FilmOnX app compatible with multiple platforms. *Id.* ¶¶ 7, 10-11, Ex. K. According to Mr. David, the Windows 8 version of the FilmOnX app is "in the top 10 of every single world market." April 10, 2013 Bloomberg interview of A. David at 7:13-7:23, *available at* <http://www.youtube.com/watch?v=6Ps0fpJChic>. The iPhone, iPod, and Facebook apps are currently available for download, and provide the opportunity to view streaming broadcast television content to an unlimited audience. Shepard Decl., ¶¶ 7, 19. The potential harm posed by a service like FilmOnX, if it is allowed to continue unabated, is thus only likely to increase. *See WTV Sys.*, 824 F. Supp. 2d at 1013 (finding irreparable harm because the service was scalable to support millions of customers). In addition, FilmOnX's distribution model could be copied by others, just as FilmOnX itself copied earlier unauthorized retransmission services. *See ibi*, 691 F.3d at 286. The potential increase in unauthorized streaming websites constitutes another serious threat of irreparable harm. *Id.*

III. The Balance Of Harms Tips Decidedly In Favor Of An Injunction.

"[T]he balance of harms cannot favor a defendant whose injury results from the knowing infringement on the plaintiff's [copyright]." *Malarkey-Taylor Assocs., Inc. v. Cellular Telecomms. Indus. Ass'n*, 929 F. Supp. 473, 478 (D.D.C. 1996); *accord Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 829-30 (9th Cir. 1997) ("In this circuit, as well as in other circuits, a defendant who knowingly infringes another's copyright 'cannot complain of the harm that will befall it when properly forced to desist from its infringing activities.'") (citation

omitted). Because a copyright infringer's complaint that ceasing its infringing conduct will harm its business is insufficient to defeat a request for a preliminary injunction, and because FilmOnX's business is built upon copyright infringement, the harms tip decidedly in Plaintiffs' favor. *BarryDriller*, 915 F. Supp. 2d at 1148.

Moreover, FilmOnX has publicly professed that Plaintiffs' programming is unimportant to the FilmOnX service. Shepard Decl., Ex. M. Thus, FilmOnX's own position is that enjoining its unauthorized retransmission of Plaintiffs' programming will not cause it meaningful harm.

IV. The Public Interest Favors An Injunction.

Upholding copyright protection is in the public interest. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003); *Hanley-Wood LLC v. Hanley Wood LLC*, 783 F. Supp. 2d 147, 151 (D.D.C. 2011) ("the public interest favors protecting against further violation of federal copyright and trademark laws"). As the California Court held, "it is virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work." *BarryDriller*, 915 F. Supp. 2d at 1148 (quoting *WTV Sys.*, 824 F. Supp. 2d at 1015); *accord in part*, 691 F.3d at 288 (the "public has a compelling interest in protecting copyright owners' marketable rights . . . and the economic incentive to continue creating television programming" because, without these protections, the "store of knowledge" may be diminished, and "encouraging the production of creative work . . . ultimately serves the public's interest in promoting the accessibility of such works.").

V. The Preliminary Injunction Should Prohibit FilmOnX's Infringement Nationwide.

Section 502(a) of the Copyright Act, 17 U.S.C. § 502(a), provides that a court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." Section 502(b) of the Act provides that any such injunction "shall be operative throughout the United States" and "shall be enforceable" by any U.S. court with personal jurisdiction. 17 U.S.C. § 502(b) (emphasis added). Congress intended that "a copyright owner who has obtained an injunction in one State will be able to enforce it

against a defendant located *anywhere else in the United States.*” 1976 Report at 160 (emphasis added); *accord* S. Rep. No. 94-473 at 142 (1975).

The California Court limited the scope of its injunction to the geographic boundaries of the Ninth Circuit based on comity concerns. *BarryDriller*, 915 F. Supp. 2d at 1148. The limited injunction was inconsistent with both Section 502(a) (because it did not prevent or restrain FilmOnX’s admitted infringement in almost every judicial circuit in the country and provide Plaintiffs complete relief) and Section 502(b) (because it does not extend nationwide). Plaintiffs have appealed the scope of the injunction to the Ninth Circuit. In the meantime, Plaintiffs have been left in the position of having to file this action to prevent the irreparable harm that the California Court found Plaintiffs were likely to suffer as a result of FilmOnX’s ongoing infringement outside the Ninth Circuit. Plaintiffs respectfully submit that this Court should preliminarily enjoin FilmOnX’s infringing service nationwide, as required by 17 U.S.C. § 502(b), so that they do not have to continue to suffer irreparable harm as they wait to see whether the Ninth Circuit will reverse the California Court’s erroneous decision to limit the scope of its injunction.

CONCLUSION

For the reasons stated above, Plaintiffs’ motion for preliminary injunction should be granted.

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Respectfully submitted,

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**Pro hac vice* admission to be sought