

In the
United States Court of Appeals
for the
District of Columbia Circuit

16-7013

FOX TELEVISION STATIONS, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, FOX BROADCASTING COMPANY, INC., 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., ALLBRITTON COMMUNICATIONS COMPANY, CBS BROADCASTING, INC., CBS STUDIOS, TEGNA INC.,

Plaintiffs-Appellees,

(For Continuation of Caption See Next Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA IN CIV. CASE NO. 13-CV-758
THE HONORABLE ROSEMARY M. COLLYER

**BRIEF OF *AMICUS CURIAE* THE COPYRIGHT ALLIANCE
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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v.

FILMON.TV NETWORKS INC., FILMON.TV, INC., FILMON.COM, INC.,
FILMON X, LLC,

Defendants-Appellants,

ALKIVIADES DAVID,

Defendant-Appellee.

ELECTRONIC FRONTIER FOUNDATION,

Amicus Curiae for Appellant,

WASHINGTON LEGAL FOUNDATION,

Amicus Curiae for Appellee,

PUBLIC KNOWLEDGE,

Amicus Curiae for Appellant.

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellees:

The Copyright Alliance is *amicus curiae* in this appeal.

B. Rulings under Review. References to rulings at issue appear in the brief for Plaintiffs-Appellees.

C. Related Cases. References to related cases appear in the Brief for Plaintiffs-Appellees.

Dated: September 7, 2016

s/ Eleanor M. Lackman _____

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Copyright Alliance states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of *amicus'* stock.

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF PARTIES, RULINGS and RELATED CASES	
CORPORATE DISCLOSURE STATEMENT	C-1
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS</i>	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT.....	7
I. LIKE ALL COMPULSORY COPYRIGHT LICENSES, THE SECTION 111 COMPULSORY LICENSE IS TO BE CONSTRUED NARROWLY UNLESS AND UNTIL CONGRESS EXPANDS IT	7
A. Compulsory Licenses in General Are to Be Construed as Narrowly as Possible	7
B. The Same Compelling Reasons that Apply to a Narrow Construction of Compulsory Licenses Mandate that the Section 111 License Is Not and Should Not Be Extended to Internet Retransmissions.....	12
II. THE COURT SHOULD GIVE DEFERENCE TO THE WELL-REASONED AND EXPERIENCED VIEWS OF THE U.S. COPYRIGHT OFFICE	14
A. The Copyright Office Is Deeply Experienced in the Scope and Construction of Section 111	15
B. Congress Has Tacitly Endorsed the Longstanding Practice of the Copyright Office	17

III. A ROBUST MARKETPLACE HAS DEVELOPED
BASED ON THE UNDERSTANDING THAT THE
SECTION 111 LICENSE DOES NOT APPLY TO
INTERNET RETRANSMISSIONS..... 22

IV. BASIC PRINCIPLES OF STATUTORY
CONSTRUCTION CONFIRM THAT SECTION 111 IS
LIMITED TO THE TYPES OF TECHNOLOGY THAT A
“CABLE SYSTEM” MIGHT USE..... 26

CONCLUSION..... 29

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.</i> , 747 F.3d 673 (9th Cir. 2014)	15, 25
* <i>American Broad. Cos. v. Aereo, Inc.</i> , 134 S. Ct. 2498 (2014).....	14
* <i>Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am.</i> 836 F.2d 599 (D.C. Cir. 1988).....	15, 16
<i>Fame Publ'g Co. v. Alabama Custom Tape, Inc.</i> , 507 F.2d 667 (5th Cir. 1975).....	11
<i>Fox Television Stations, Inc. v. FilmOn X LLC</i> , 150 F. Supp. 3d 1 (D.D.C. 2015).....	4, 5, 13, 15, 16, 17, 18, 19, 23
<i>Guardians Ass'n v. Civil Service Comm'n of City of N.Y.</i> , 463 U.S. 582 (1983).....	21
<i>Motion Picture Ass'n of Am., Inc. v. Oman</i> , 750 F. Supp. 3d (D.D.C. 1990).....	16
<i>Norwegian Nitrogen Prods. Co. v. U.S.</i> , 288 U.S. 294 (1933).....	21
<i>Tasini v. N.Y. Times Co.</i> , 206 F.3d 161 (2d Cir. 2000)	8
<i>Tuten v. United States</i> , 440 A.2d 1008 (D.C. 1982).....	26
<i>Washington State Dep't of Soc. & Health Servs. v. Estate of Keffeler</i> , 537 U.S. 371 (2003).....	27

*Authorities upon which we chiefly rely are marked with asterisks.

* <i>WPIX, Inc. v. ivi, Inc.</i> , 691 F. 3d 275 (2d Cir. 2012)	12, 15, 16, 17, 18
* <i>WPIX, Inc. v. ivi, Inc.</i> , 765 F. Supp. 2d 594 (S.D.N.Y. 2011)	12, 15, 16, 18
<i>Zenith Radio Corp. v. U.S.</i> , 437 U.S. 443 (1978).....	22, 25

Statutes

Except for the following, all applicable statutes are contained in the Brief for Appellants and Appellees

Regulations

<i>Cable Compulsory License; Definition of Cable Systems</i> , 56 Fed. Reg. 31,580-01 (July 11, 1991).....	12
<i>Compulsory License for Cable Systems</i> , 49 Fed. Reg. 14,944-01 (Apr. 16, 1984)	11, 13
<i>Compulsory License for Cable Systems</i> , 45 Fed. Reg. 45,270- 01, 45,272 (July 3, 1980).....	12

Legislative Materials

145 Cong. Rec. S14990-91 (daily ed. Nov. 19, 1999)	19
<i>Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the Comm. on the Judiciary</i> , 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights), available at http://www.copyright.gov/docs/regstat091009.html	10
<i>Compulsory Video Licenses of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary</i> , 113th Cong. (2014), available at http://judiciary.house.gov/_cache/files/8664e82b-7957-43af-b195-be71e0216ae2/113-89-87800.pdf ;	20

*Authorities upon which we chiefly rely are marked with asterisks.

H.R. Rep. No. 94-1476, at 61 (1976)..... 8

H.R. Rep. No. 108-660, at 8-9 (2004) 9

Innovation Versus Regulation in the Video Marketplace:

*Hearing Before the Subcomm. on Comm’n & Tech. of the H.
Comm. on Energy & Commerce, 113th Cong. (2013),
available at*

<http://energycommerce.house.gov/hearing/innovation-versus-regulation-video-marketplace> 20

S. Rep. No. 106-42, at 10 (1999)..... 9

Administrative Materials

U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report 188* (2008), *available at*

<http://www.copyright.gov/reports/section109-final-report.pdf>..... 17

U.S. Dep’t of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages*, at 25 (Jan. 28, 2016), *available at*

https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf..... 11

Other Authorities

Mihály Ficsor, *Guide to the Copyright and Related Rights*

Treaties Administered by WIPO, WIPO Pub. No. 891(E)

(2003)..... 22

*Authorities upon which we chiefly rely are marked with asterisks.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* the Copyright Alliance respectfully submits this brief in support of appellees Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; Fox Broadcasting Company, Inc.; NBC Subsidiary (WRC-TV), LLC; NBC Studios LLC; Universal Network Television LLC; Open 4 Business Productions LLC; Telemundo Network Group LLC; casting Companies, Inc.; Disney Enterprises, Inc.; Allbritton Communications Company; CBS Broadcasting Inc.; CBS Studios Inc.; and TEGNA Inc. (collectively, “Appellees”). This brief is submitted pursuant to the blanket consent granted by the parties.¹

INTEREST OF AMICUS CURIAE

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries – including, for example, writers, musical composers and recording artists,

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Copyright Alliance members are, or are affiliates of, Appellees in this matter. Some may join other *amicus* briefs in support of Appellees.

journalists, documentarians and filmmakers, graphic and visual artists, photographers and software developers – and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance’s membership encompasses these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them.

Those affected by the reach of copyright law, including the law that applies to television retransmission, extend far beyond the names of the parties involved in the present appeal. For example, even the lengthy credits displayed during a broadcast television program may not come close to fully capturing all of the names of those who provided writing, directing, design, recording, engineering, photography and editing contributions to make that program available for the public to enjoy.

The concept of innovation is of fundamental importance to the Copyright Alliance. The copyright laws spur the development and distribution of new creative works and innovations for the benefit of public consumption by ensuring that those who contribute to these works and innovations are entitled to determine how their efforts will be used. Accordingly, the Copyright Alliance encourages partnerships between creators and technology companies to develop and take advantage of new

technologies that bring works to the public in new and legal ways through agreements in the free market, regardless of whether those new ways might “disrupt” traditional business models.

Regardless of the ways in which new technologies and business models evolve, however, the desire to bring new technologies to market does not merit any extension of the narrowly crafted and tailored statutory compulsory licenses. These licenses were designed for particular technologies and distribution models, and it is not the role of the judicial system to extend the licenses to new distribution methods that clearly do not fall within the scope of those licenses. The Copyright Alliance submits this brief to help the Court understand the relationship between the Section 111 compulsory license and the policies of the Copyright Act, which are designed both to provide meaningful protections to authors whose works may be publicly performed and displayed, and to the investments made to make those works widely available to the public in legitimate ways. The Copyright Alliance also submits this brief to help the Court understand the importance of affirmance on the substantial reliance interests of creators and innovators who work with different technology companies in the development of innovative new ways to transmit their works through the

internet – none of which have been built upon the Section 111 compulsory license.

SUMMARY OF THE ARGUMENT

As the district court recognized, “[t]his case involves a clash between two important national policies and interests.” *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 5 (D.D.C. 2015). The enactment of the compulsory license in Section 111 of the Copyright Act of 1976 reflects a carefully crafted, “delicate balance” between those two interests: the need to protect and reward copyright owners for creating valuable copyrighted works, and the promotion of competition and access to those works. *Id.* Since the dawn of the ability to distribute television programming via the internet, the Copyright Office has consistently stated that the Section 111 license is limited to cable systems and does not apply to internet transmission, just as the license does not apply to satellite or other specified models for television delivery. Congress has not disputed the Copyright Office’s view, and all but one court addressing the question of whether the Section 111 license applies to the internet have found that it does not.

Judge Collyer’s ruling is fully consistent with, and supports, the delicate balance that Congress struck over thirty years ago. It falls in step with the longstanding view that the Section 111 compulsory license – by

letter and spirit – was designed to be a mechanism developed to help cable distribution, not a bargaining substitute that covers the entirely different business model applicable to the internet. *See Fox Television Stations*, 150 F. Supp. 3d at 25 n.20. Rather, the district court’s ruling gives deference to and due respect for the interests of creators, which Congress, the courts, and the Copyright Office always have considered when interpreting compulsory licenses of all types so as to stay consistent with the incentives underlying the Copyright Act.

Copyright policy, the text and application of the law, industry practice, and basic principles of statutory construction all compel the same conclusion: that Section 111 does not cover FilmOn X’s services. First, all compulsory licenses in the Copyright Act – which in essence are a carve-out of the broad rights the law provides – are intended to be construed narrowly. Second, any expansion of the licenses is for Congress, not the courts. In the case of Section 111, the views of the U.S. Copyright Office, which has deep experience with the compulsory license and its boundaries, are owed deference from this Court. Congress has deferred to the Copyright Office in this area for decades; indeed, Congress has tacitly endorsed the Office’s views on the meaning of the Section 111 license and in doing so has recognized that it does not apply to the internet. Third, the television

distribution industry has also built its business around the understanding that Section 111 does not apply to services like FilmOn X's and, contrary to what Appellees suggest, the industry has not needed the help: the ecosystem has grown and thrived through negotiated licenses. Finally, any suggestion that the statutory language provides a wide opening to expand to "other communications channels" to encompass the internet is unfounded. Basic principles of statutory construction confirm that "cable system" means "cable system," not "the internet."

Judge Collyer's well-reasoned, well-grounded ruling recognizes all of these factors, and in doing so helps ensure that all who participate in the creation and distribution of copyrighted works can continue to be compensated fairly for their efforts. Affirmance is consistent with the law and with the expectations of the industry; reversal, in contrast, would cut against everything that those operating their businesses pursuant to the law believed to be true, and would cause upheaval in an industry where none is warranted. This Court has several legally well-founded bases to affirm Judge Collyer's decision, and *amicus* respectfully requests that the Court does so.

ARGUMENT

I. LIKE ALL COMPULSORY COPYRIGHT LICENSES, THE SECTION 111 COMPULSORY LICENSE IS TO BE CONSTRUED NARROWLY UNLESS AND UNTIL CONGRESS EXPANDS IT

The Copyright Act, and the policies of promoting creativity and innovation underlying the Act, depend on a careful balance. Ultimately, the Copyright Act is designed to protect and reward copyright owners for creating valuable intellectual property. And, to the extent that there is a perceived need to promote competition and expand access to television programming that is not being met under the current state of the law, it is Congress that decides whether and how to craft exceptions to facilitate competition or expand the dissemination of television programming. The decision below was consistent with the elegant framework that the Copyright Act follows: setting forth rights broadly, and limitations, such as the compulsory license, narrowly.

A. Compulsory Licenses in General Are to Be Construed as Narrowly as Possible.

Certain *amici* have suggested that because Section 101 is broad, Section 111 should be interpreted broadly. But that suggestion fundamentally misunderstands the structure and instructions of the Copyright Act. The entire framework of the Copyright Act shows that to the

extent that an exception applies, the interpretation of that exception is narrow. Under the framework of the Copyright Act, the compulsory license is an exception, and the license is owed faithful adherence to the specific boundaries that merited the creation of the license in the first place.

As Congress explained in enacting the Copyright Act, the “approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106[.]” H.R. Rep. No. 94-1476, at 61 (1976). The sections that follow – *i.e.*, anything from Section 107 onward – contain “limitations, qualifications, or exemptions” as to those broad exclusive rights. *Id.* And the courts have confirmed that where the Copyright Act “sets forth exceptions to a general rule, we generally construe the exceptions ‘narrowly in order to preserve the primary operation of the [provision].’” *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (brackets in original)).

The situation is no different in the context of the compulsory licenses that follow Section 106. Whereas the broad public performance rights in Section 106(4) are applicable to “any device or process,” Congress also has carefully and narrowly delineated the types of “devices” and “processes” that are to be implicated in compulsory licenses relating to the public performance of works. Consistent with this framework under the Copyright

Act and the policies on which it is founded, the courts, if anything, need to take *additional* care in deferring to a narrow interpretation of these licenses in light of what they take away: the copyright owner's exclusive rights to both withhold a license, and bargain for the price at which any license will be set. Congress, the Copyright Office, and the courts consistently have underscored their recognition of what a compulsory license takes away from the copyright owner. And, accordingly, they have construed those licenses narrowly in deference to the letter and spirit of the Copyright Act and in acknowledgement of the highly specific situations that resulted in the creation of those licenses.

The principle that the compulsory license is narrow is longstanding and, with a sole exception of a district court decision *sub judice* at the Ninth Circuit, universally held. The Senate Judiciary Committee observed in conjunction with the Section 119 satellite carrier license that “in creating compulsory licenses, [Congress] is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders and . . . it therefore needs to act as narrowly as possible to minimize the effects of the Government's intrusion on the broader market in which the affected property rights and industries operate.” S. Rep. No. 106-42, at 10 (1999). *See also* H.R. Rep. No. 108-660, at 8-9 (2004) (noting that compulsory

licenses constitute an “abrogation of copyright owners’ exclusive rights” and are “crafted to represent a careful balance” between the interests of satellite carriers and copyright owners). In opining on the proposed Google Books settlement, the Register of Copyrights observed that “Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored.”² *Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the Comm. on the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights), *available at* <http://www.copyright.gov/docs/regstat091009.html>. The Register further observed that when compulsory licenses are adopted, they “are scrutinized very strictly because by their nature they impinge upon the exclusive rights of copyright holders[.]” *Id.*

The courts similarly have recognized the balance at play. In the context of the Section 115 compulsory license under the 1909 Copyright Act, the Fifth Circuit recognized that the license is “a limited exception to the copyright holder’s exclusive right to decide who shall make use of his

² As discussed in Part III, *infra*, no such marketplace failure exists here. To the contrary, a robust marketplace for television over the Internet has been developed and is thriving without the aid of the compulsory license.

composition . . . [and] must be construed narrowly, lest the exception destroy, rather than prove, the rule.” *Fame Publ’g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975). The Copyright Office has echoed the very same principle. *See Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944-01 (Apr. 16, 1984) (“In construing the compulsory license for mechanical reproduction of music under the former copyright law, the courts held that a compulsory license provision, because it derogates from the rights of copyright owners, should be narrowly construed.”). And so has the Department of Commerce: its Internet Policy Task Force, in opining on possible compulsory licenses for remixes, recently echoed the well-established tenet of the limited, specific nature of “the more drastic approach of a statutorily imposed license.” U.S. Dep’t of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages*, at 25 (Jan. 28, 2016), available at https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf. The Administration’s report stated what others have thought to be true: “[w]hile there are a handful of compulsory licenses in the Copyright Act, they have been enacted sparingly as exceptions to the normal structure of exclusive rights.” *Id.* (citing authorities at n.159).

B. The Same Compelling Reasons that Apply to a Narrow Construction of Compulsory Licenses Mandate that the Section 111 License Is Not and Should Not Be Extended to Internet Retransmissions.

Consistent with the above principles, the district court in *WPIX, Inc. v. ivi, Inc.* correctly observed that because the Section 111 compulsory license took away a “fundamentally exclusive and private [right] and propelled it into the public market,” courts should not expand the license beyond what Congress intended. 765 F. Supp. 2d 594, 603 (S.D.N.Y. 2011) (“*ivi I*”), *aff’d*, 691 F.3d 275 (2d Cir. 2012) (“*ivi II*”), *cert. denied*, 133 S. Ct. 1585 (2013). Arguments to the contrary – namely, that Section 111 should be construed broadly – inherently ignore the fact that a compulsory license is premised on a carve-out of the broad rights that Congress has granted to copyright owners. Such arguments “seem misplaced when it is recognized that this section [111] is itself an exception to the broad principle of the Copyright Act that authors and other owners of copyright have the exclusive right to control public performances of their works.” *Compulsory License for Cable Systems*, 45 Fed. Reg. 45,270-01, 45,272 (July 3, 1980). Therefore, because “[c]ompulsory licenses are limitations to the exclusive rights accorded to copyright owners, [such licenses] must be construed narrowly to comport with their specific legislative intention.” *Cable*

Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580-01 (July 11, 1991).

As with other compulsory licenses, the Copyright Office has long “assume[d] that courts will construe the compulsory license strictly, since the burden of responsibility is on cable systems to prove that they have satisfied the legislature’s conditions for a compulsory license in derogation of the otherwise recognized (in 17 U.S.C. § 106) proper rights of copyright owners.” *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944-01, 14,950-51 (Apr. 16, 1984). As Judge Collyer properly found, Congress has traditionally considered the unique characteristics of delivery systems and their business models that affect each industry, and Congress certainly did not consider the internet (and certainly not in the form in which it can serve as a means for transmission of copyrighted works today) when enacting Section 111 in 1976. *Fox Television Stations*, 150 F. Supp. 3d at 22. Nor has any action that Congress has taken since (including amending the license to include “microwave” as a channel for retransmissions that may be made by “cable systems” or enacting an entirely separate statutory license covering satellite retransmissions, 17 U.S.C. §§ 119, 122) indicated that the Section 111 license has been tacitly extended to encompass internet transmissions within its scope. *Id.* Indeed, in stark contrast to the “any

device or process” language in Section 101 that applies to the definition of “to perform ‘publicly’” in Section 106, Section 111 expressly discusses a technology-specific limitation, namely, a limitation to cable systems – merely a subset of the types of communications methods that may be used to retransmit programming.

Rather than recognizing the well-established and common-sense principles that apply here, certain parties appear to be advocating for a change in the law. This advocacy is misdirected. As the Supreme Court clearly expressed in the *Aereo* case, “to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of [new] technologies and the Copyright Act, they are of course free to seek action from Congress.” *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014) (citing Digital Millennium Copyright Act, 17 U.S.C. § 512). Accordingly, this Court is not the proper forum for disregarding the law in favor of a single private actor that seeks change to the statute for its own benefit.

II. THE COURT SHOULD GIVE DEFERENCE TO THE WELL-REASONED AND EXPERIENCED VIEWS OF THE U.S. COPYRIGHT OFFICE

As even FilmOn’s *amici* have recognized (Doc. No. 1626858 at 6 n.4), Congress has deferred to the Copyright Office’s views on the Section

111 license. This fact alone confirms that the Copyright Office's views are persuasive, and that Judge Collyer properly found them to be given due weight. Moreover, Congressional deference is not simply for convenience's sake: the Copyright Office's deep experience with Section 111 repeatedly has been recognized by the courts.

A. The Copyright Office Is Deeply Experienced in the Scope and Construction of Section 111.

Section 111 was drafted, at the request of Congress, by the Copyright Office staff. Moreover, for over 35 years, the Copyright Office has administered the Section 111 licensing regime, and its involvement with the cable copyright debate extends back further in time. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am.* 836 F.2d 599, 609 (D.C. Cir. 1988) ("The Copyright Office certainly has greater expertise in such matters than do the federal courts."); *ivi II*, 691 F.3d at 284 (recognizing Copyright Office's expertise); *Fox Television Stations*, 150 F. Supp. 3d at 24; *ivi I*, 765 F. Supp. 2d at 605 ("[The Copyright Office] has a great deal of relative expertise in this technical and esoteric area of the law"). *Compare Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 677-78, 685 (9th Cir. 2014) (noting government's urging to give deference to Copyright Office's interpretation on registration procedures, and finding Copyright Office's interpretation persuasive).

Congress has relied on the Copyright Office for its expertise, and such reliance is well-demonstrated throughout Section 111's history. *Cablevision Sys.*, 836 F.2d at 610 ("We think Congress saw a need for continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role."). Congress has repeatedly called on the Office to provide reports and testimony concerning the implementation of Section 111. *See, e.g., ivi I*, 765 F. Supp. 2d at 609-14. The Office also has engaged in notice-and-comment proceedings regarding the scope of Section 111 and its applicability to varying types of transmission services. *See id.* at 606-09.

The Copyright Office's interpretations of Section 111 are owed deference if reasonable. *Cablevision Sys.*, 836 F.2d at 609; *Motion Picture Ass'n of Am., Inc. v. Oman*, 750 F. Supp. 3, 8 (D.D.C. 1990) (giving deference to Copyright Office's interpretation of cable license). Given the Copyright Office's history in the cable licensing arena, a court should be hard-pressed to say that these interpretations are anything but entirely reasonable. Indeed, both the court below and the Second Circuit deferred to the Copyright Office's interpretation of Section 111 as being reasonable and persuasive on the question of whether internet retransmission services are eligible for the Section 111 compulsory license. *See Fox Television Stations*, 150 F. Supp. 3d at 29; *ivi II*, 691 F.3d at 284. Considering the

Copyright Office's history and experience in this area, as well as the way Congress has viewed the Copyright Office's role and expertise on the very types of questions at issue in this appeal, this Court likewise should give the type of deference to the Copyright Office that the Second Circuit and district court below gave.

B. Congress Has Tacitly Endorsed the Longstanding Practice of the Copyright Office.

The Copyright Office has consistently taken the same position that the district court did below: that internet-based retransmission services are not cable systems and do not fall within Section 111. *See, e.g., ivi II*, 691 F.3d at 283; *Fox Television Stations*, 150 F. Supp. 3d at 24. Citing the same concerns discussed in Part I, *supra*, the Copyright Office also has opposed an internet statutory license that would permit any website on the internet to retransmit television programming without the consent of the copyright owner: "Such a measure, if enacted, would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy." U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 188 (2008) ("SHVERA Report"), available at <http://www.copyright.gov/reports/section109-final-report.pdf>.

Congress has neither corrected nor rejected the Copyright Office's repeated statements that the Section 111 license does not cover internet retransmissions. *See ivi I*, 765 F. Supp. 2d at 616. Nor has Congress taken steps to expand the scope of the Section 111 license. *See id.* As Judge Collyer explained, "Congress was fully aware of the Copyright Office's longstanding interpretation" of Section 111, but "[d]espite this awareness, Congress has neither amended the text of § 111 nor enacted a separate compulsory-licensing scheme to include Internet-based retransmission services." *Fox Television Stations*, 150 F. Supp. 3d at 27. This was not for want of giving attention to the compulsory licensing provisions: Congress has amended certain relevant portions of the Copyright Act without rejecting or altering the Copyright Office's interpretation of the law. *See id.*; *see also ivi II*, 691 F.3d at 282 ("Congress did not . . . intend for § 111's compulsory license to extend to Internet transmissions. . . . [I]f Congress had intended to extend § 111's compulsory license to Internet retransmissions, it would have done so expressly . . .").

This history is consistent with the way Congress has addressed the application of compulsory licenses to new technology. "In enacting each license, Congress has traditionally considered the unique historical, technological, and regulatory circumstances that affect each industry."

Satellite Home Viewer Extension and Reauthorization Act of 2004, H.R. Rep. No. 108-660, at 9 (2004). To put it in the more illustrative terms that the district court used, “[i]f it were true that Congress intended the definition of cable system to embrace any and all new technologies, Congress . . . would not have enacted separate licensing schemes for satellite providers retransmitting distant signals, *see* 17 U.S.C. § 119, and local broadcast signals, *see id.* § 122.” *Fox Television Stations*, 150 F. Supp. 3d at 22. Indeed, in discussing the fact that at one point, in conjunction with the 1999 Satellite Home Viewer Act, an amendment was being considered that expressly would have made internet services ineligible for the statutory license, Senator Hatch opined that the removal of such an amendment did not mean that internet services *were* eligible for the license; rather, no such amendment was necessary. Citing a letter from the Register of Copyrights, Senator Hatch commented:

[C]ertainly under current law, Internet and similar digital online communications services are not, and have never been, eligible to claim the cable or satellite compulsory licenses created by sections 111 or 119 of the Copyright Act. To my knowledge, no court, administrative agency, or authoritative commentator has ever held or even intimated to the contrary.

145 Cong. Rec. S14990-91 (daily ed. Nov. 19, 1999) (statement of Sen. Orrin Hatch). This commentary made clear that the absence of any reference to the internet in the legislation should not be interpreted to mean

that internet services were eligible for the license under the amendments to the Section 111 and 119 licenses. *See id.*

Congress's position has not varied even with the development of more powerful and sophisticated digital television distribution models in recent years. Since *ivi*, there have been multiple hearings on these issues: one as part of the House Judiciary Committee's ongoing copyright review process, and the other in the House Energy and Commerce Committee. *See Compulsory Video Licenses of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014), available at http://judiciary.house.gov/_cache/files/8664e82b-7957-43af-b195-be71e0216ae2/113-89-87800.pdf; *Innovation Versus Regulation in the Video Marketplace: Hearing Before the Subcomm. on Comm'n & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. (2013), available at <http://energycommerce.house.gov/hearing/innovation-versus-regulation-video-marketplace>. During the former, the Committee even referred to Aereo. This shows that Congress was aware of the very model that FilmOn X employs while discussing cable compulsory licenses. Had Congress thought that the compulsory license applied to online video, logic dictates

that any member of the Committee would have expressly indicated as much at some point during these hearings.

That Congress has been silent in the face of the Copyright Office's affirmative statements does not mean that an open question remains: Congress does not need affirmatively to issue a statement on a particular interpretation of an agency for that interpretation to carry weight. It is well-established that "[a]cquiescence by Congress in an administrative practice may be an inference from silence during a period of years." *Norwegian Nitrogen Prods. Co. v. U.S.*, 288 U.S. 294, 313 (1933) (Cardozo, J.). As the Supreme Court made clear over 80 years ago:

True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. . . . The practice has particular weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.

Id. at 315-16 (citations omitted); *see also Guardians Ass'n v. Civil Service Comm'n of City of N.Y.*, 463 U.S. 582, 592 (1983) (interpretations of statute by agency charged with enforcement should not be rejected absent clear inconsistency with the face or structure of the statute or the mandate of legislative history, and particularly not where statute was consistently

administered for nearly two decades without interference by Congress); *see also Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 450 (1978) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”) (internal quotations and citation omitted).³

That Congress did not expressly take action to state that the Copyright Office’s position was correct does not mean that the position is incorrect. Rather, it means that nothing further needs to be said. In light of the Copyright Office’s depth in matters involving Section 111, it would be unreasonable to think that Congress’s near-silence on the issue was due to its desire to let *the courts* have the first word to the contrary. As black-letter law and common sense demonstrate, and as the decision below properly implies, the reason that Congress has not spoken is because the Copyright Office has never gotten the question wrong.

III. A ROBUST MARKETPLACE HAS DEVELOPED BASED ON THE UNDERSTANDING THAT THE SECTION 111 LICENSE DOES NOT APPLY TO INTERNET RETRANSMISSIONS

As much as Congress has relied on the Copyright Office’s interpretation of Section 111, so have the very industries that are implicated

³ As Appellees and other *amici* have noted, the cable compulsory license, and its narrow scope, is also part of the United States’ international obligations. *See Mihály Ficsor, Guide to the Copyright and Related Rights Treaties Administered by WIPO*, WIPO Pub. No. 891(E) (2003), at 78.

in this appeal. Tellingly, in mimicking Aereo right down to its legal strategy, FilmOn itself initially “expressly disclaimed” the argument that it was a cable system. *Fox Television Stations*, 150 F. Supp. 3d at 6.⁴ The stark truth is that the affected industries have understood Section 111 to be a specific license for a specific need at a specific time. And those innovating in the transmission of television over the internet have not resorted to contorting the contours of the license; they have founded and built their businesses using traditional negotiation, to the benefit of copyright owners, copyright licensees, and the general public.

Indeed, a broad and balanced ecosystem exists in the context of retransmission of broadcast television, and the license fees are well-understood. The fees include the statutory license fees that Congress implemented under Sections 111, 119, and 122, and the negotiated fees for video-on-demand and other television licenses, including licenses for retransmission over the internet. Licensed internet and mobile services such as Netflix, Hulu, iTunes, and ABC.com have flourished and thrived, consistent with the longstanding understanding that these services do not fall within the Section 111 compulsory license. The evolution of this ecosystem

⁴ In its Supreme Court brief, Aereo explained that it was not a cable system. *See* Brief for Respondent, *American Broad. Cos. Inc. v. Aereo, Inc.*, No. 13-461 (Mar. 26, 2014), at 34 n.17 (“Petitioners do not argue that Aereo is a ‘cable system’ under § 111, and *Aereo is not one.*) (emphasis added).

has been premised on the same understanding that the Copyright Office has had for several years: that Section 111 is limited to cable transmission and internet retransmissions of broadcasts require a marketplace-negotiated license.

The views of Appellants and those who support them cut against all of these understandings, threatening to upset all of these relationships and destabilize the industry overall. As the Copyright Office noted in its SHVERA Report, adding a government-mandated internet license “would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution of broadcast programming.” SHVERA Report at 188. Moreover, as the above-mentioned success of the distribution of television over the internet shows, “there is no proof that the Internet video market is failing to thrive and is in need of government assistance through a licensing system.” *Id.* By all accounts, the lack of a statutory license has been a good thing: it creates incentives and helps the market to grow. *Id.*

Any view that cuts against everything the market believed and understood about the applicability of the Section 111 license would be inherently unsustainable. As this Circuit has explained, “[a] longstanding administrative interpretation upon which private actors have relied aids in

construction of a statute precisely because private parties have long relied on it.” *Alaska Stock*, 747 F.3d at 685. Given these “substantial reliance interests” on the Copyright Office’s interpretation, the Office’s longstanding construction should “not be disturbed except for cogent reasons.” *Id.* at 686 (citation and internal quotations omitted); *see also Zenith Radio Corp.*, 437 U.S. at 457-58 (where Secretary of Treasury’s interpretation of statute was not modified by Congress, despite reenactment of statute without modification of the relevant language, and where Secretary’s position was incorporated into treaties and private expectations built thereon, Secretary’s construction would not be disturbed except for cogent reasons).

This principle has particular impact on *amicus*’s members, who are creators of all types, from all sides of the creative industries. The situation here is no more different than when this Court in *Alaska Stock* opined:

We are not performing a mere verbal, abstract task when we construe the Copyright Act. We are affecting the fortunes of people, many of whose fortunes are small. . . . Denying the fruits of reliance by citizens on a longstanding administrative practice reasonably construing a statute is unjust.

747 F.3d at 686. Similarly here, failing some particularly cogent reason – and there is none – to extend the cable license to internet retransmissions, this Court should affirm the district court’s ruling, which properly respects

copyright owners in the television industry, as well as their internet technology partners here and around the world.

IV. BASIC PRINCIPLES OF STATUTORY CONSTRUCTION CONFIRM THAT SECTION 111 IS LIMITED TO THE TYPES OF TECHNOLOGY THAT A “CABLE SYSTEM” MIGHT USE

Appellants and their *amici* have suggested that a three-word phrase buried in the definition of “cable system” makes any “system” a cable system. In particular, they claim that within the clause “and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public,” 17 U.S.C. § 111(f)(3), the term “other communications channels” means any and all possible methods or means of communication made by any retransmitter. Of course, this interpretation would mean that Sections 119 and 122 are superfluous. *See* Part I.B., *supra*; *see also, e.g., Tuten v. United States*, 440 A.2d 1008, 1010 (D.C. 1982) (“A statute should not be construed in such a way as to render certain provisions superfluous or insignificant” (citations omitted), *aff’d*, 460 U.S. 660, 103 S. Ct. 1412 (1983)). It would also mean that a compulsory license, which everyone understood to be limited to the types of technology that the cable industry uses under the control of the cable system, would then become essentially

limitless: anyone who wishes to retransmit broadcast television via any means conceivable would potentially qualify. *See* Part III, *supra*.

The well settled principle of *ejusdem generis* resolves any doubt that Section 111 is limited to the types of communications systems consistent with that offered by a traditional cable system. “[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words.” *Washington State Dep’t of Soc. & Health Servs. v. Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017 (2003) (internal quotations and citations omitted) (finding “other legal process” to mean only process that is much like the examples stated prior to that phrase). As the majority opinion in *Begay v. U.S.* described in determining what crimes are covered by the statutory phrase “any crime . . . that . . . is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another,” the Court stated that the “otherwise involves” provision covers “only *similar* crimes, rather than *every* crime that ‘presents a serious potential risk of physical injury to another.’” 553 U.S. 137, 142-44, 128 S. Ct. 1581 (2008). The opinion further noted that had Congress intended the

latter “all encompassing” meaning, “it is hard to see why it would have needed to include the examples at all.” *Id.* at 142.

The structure and interpretation of the language of Section 111(f)(3) is analogous. The phrase may say “wires, cables, microwave, or other communications channels,” but wires, cables, and microwave connote a very different sort of system than the entirely different communications method embodied within the internet. Accordingly, reading the internet as being one of the “other communications channels” is as unreasonable as a matter of law as it is as a matter of common sense, and any suggestion that the three-word phrase provides an open door to every means of communication should be rejected out of hand.

CONCLUSION

For the reasons set forth above, and for those set forth in Appellees' brief, *amicus curiae* respectfully requests that the decision below be affirmed.

Dated: New York, New York
September 7, 2016

s/ Eleanor M. Lackman

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,035 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2013, the word processing software used to prepare this brief.

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s/ Eleanor M. Lackman
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Dated: September 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2016, I caused the foregoing Brief of *Amicus Curiae* in Support of Plaintiffs-Appellees to be filed electronically with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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